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Would You Like More Salt with That Wound - Post-Sentence Victim Allocution in Texas Comment.

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COMMENTS

WOULD YOU LIKE MORE SALT WITH THAT WOUND? POST-SENTENCE VICTIM ALLOCUTION IN TEXAS

KEITH D. NICHOLSON

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"You are worse than spit. You belong in hell."[1]

I. INTRODUCTION

Three accused criminals stand trial in Houston, Texas for the brutal slaying of two teenage girls. The jury convicts the defendants after hearing testimony on the brutal raping, beating, and strangling of the victims, and the court sentences them to death. After the judge pronounces the sentences of the defendants, the court permits the families of the victims to lash out at the defendants as part of the courtroom proceedings. After the victims' families are afforded these parting shots, a melee ensues in the hallway outside the courtroom as the families of the defendants seek an outlet for their frustration from the remarks made in the courtroom.

At first glance, one might think such a scene would only occur during the early American days of "frontier justice," when the dignity of the courtroom was not a high priority of the criminal justice system.[2] The incident in Houston involving the father of one of the victims, Randy Ertman, and his comments in the Houston courtroom[3] occurred as a re-

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1. Jennifer Liebrum, *Heated Exchange Outside Court: "You Belong in Hell," Convicted Killers Told*, HOUS. CHRON., Oct. 12, 1994, at A1. Randy Ertman, the father of murder victim Jennifer Ertman, made this statement to his daughter's killers in a Houston, Texas courtroom. *Id.*

2. *See* Estes v. Texas, 381 U.S. 532, 571 (1965) (Warren, C.J., concurring) (claiming that lower court nearly returned "theater to the courtroom" as in frontier days); Campbell v. Wood, 18 F.3d 662, 701 (9th Cir.) (associating frontier justice with lynching and public punishment), *cert. denied*, 114 S. Ct. 2125 (1994); United States *ex rel.* Dugger v. Murphy, 219 F. Supp. 596, 597 (N.D.N.Y. 1963) (hesitating to apply procedural standards of frontier justice in Old West); People v. Medina, 799 P.2d 1282, 1293 (Cal. 1990) (equating quote, "bring the guilty S.O.B. in, we'll give him a trial, and then hang him," with era of frontier justice); *In re* Moss, 221 Cal. Rptr. 645, 655 (Ct. App. 1985) (describing frontier justice as "rough and tumble"); People v. Estes, 360 N.E.2d 1165, 1167 (Ill. App. Ct. 1977) (Stouder, J., concurring) (conveying common frontier justice saying that "we give horse thieves a fair trial before hanging them"); Barrios v. Bango, 52 So. 2d 579, 581 (La. Ct. App. 1951) (insisting that law should never approve of frontier justice); Economy Fire & Casualty Ins. Co. v. Meyer, 427 N.W.2d 742, 743 (Minn. Ct. App. 1988) (refusing to glamorize lawlessness of frontier justice as fiction has done).

3. *See Fathers Confront Killers in Court*, PHOENIX GAZETTE, Oct. 12, 1994, at A13 (listing comments made in courtroom to defendants). The comments of Adolf Pena were harsh, but apparently not as impassioned as Ertman's. *Compare Angry Dads Lash Out at Killers of Daughters: "I'll Watch You Die, Boy," Father Tells Gang Members*, ROCKY MTN. NEWS, Oct. 12, 1994, at A36 (relating Pena's statement that "I wish that these guys could get executed the way [our daughters] did and be left out there, just left there on the ground to die") *with Fathers Confront Killers in Court*, PHOENIX GAZETTE, Oct. 12, 1994, at A13 (describing Randy Ertman as "tearful" and "red-faced" when he presented his statements to court). Ertman chastised the defendants, stating that "[w]e live for the day that you die." *News: Survivors of Violent Crime Find Holidays Very Tough* (CNN television broadcast, Nov. 23, 1994) (transcript on file with the *St. Mary's Law Journal*). Ertman also la-

sult of the 1991 enactment of Article 42.03 of the Texas Code of Criminal Procedure (Article 42.03).[4] The Texas Legislature's enactment of Article 42.03 followed the relatively recent trend in American jurisprudence toward affording crime victims a greater sense of participation in the justice system.[5] Article 42.03 essentially permits a victim or relative of a victim to present a statement to the court concerning the effect of the crime on the victim, which the court reporter is not required to transcribe,[6] provided that the victim gives the statement only after the court has pronounced sentence.[7] The process is known as post-sentence victim allocution.

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beled the defendants "baby killers," and as the defendants were leaving the courtroom, he said, "I'll watch you die, boy." *Angry Dads Lash Out at Killers of Daughters: "I'll Watch You Die, Boy," Father Tells Gang Members*, ROCKY MTN. NEWS, Oct. 12, 1994, at A36.

4. *See* TEX. CODE CRIM. PROC. ANN. art. 42.03, § 1(b) (Vernon Supp. 1995) (detailing requirements for post-sentence victim allocution). Unless otherwise specified, all references to Article 42.03 in this Comment concern only Article 42.03, § 1(b).

5. *See* Payne v. Tennessee, 501 U.S. 808, 833 (1991) (Scalia, J., concurring) (observing that victims' rights movement arose from public's sense of justice); Booth v. Maryland, 482 U.S. 496, 509 n.12 (1987) (acknowledging that Congress enacted many laws to increase participation of victims in federal criminal cases); Susan E. Gegan & Nicholas E. Rodriguez, Note, *Victims' Roles in the Criminal Justice System: A Fallacy of Victim Empowerment*, 8 ST. JOHN'S J. LEGAL COMMENT. 225, 226–27 (1992) (noting that movement toward more victims' rights occurred recently as result of inequitable treatment of victims in deference to superior rights of defendant); Karyn E. Polito, Note, *The Rights of Crime Victims in the Criminal Justice System: Is Justice Blind to the Victims of Crime?*, 16 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 241, 241–42 (1990) (conceding great progress made by victims to participate in legal system, but insisting that constitutional guarantees are needed to ensure rights); Phillip A. Talbert, Comment, *The Relevance of Victim Impact Statements to the Criminal Sentencing Decision*, 36 UCLA L. REV. 199, 199 (1988) (reporting that many believe criminal system must give victims greater sense that system is cognizant of victims' rights issues); *cf.* Shirley S. Abrahamson, *Redefining Roles: The Victims' Rights Movement*, 1985 UTAH L. REV. 517, 521 (linking victims' rights movement to important historical role victims played in providing legal system with information).

6. TEX. CODE CRIM. PROC. ANN. art. 42.03, § 1(b)(3) (Vernon Supp. 1995). With the use of the word "may" instead of "shall," it is not mandatory that the court reporter transcribe the statement. Interview with Jeffrey Pokorak, Criminal Law Professor at St. Mary's University School of Law, in San Antonio, Tex. (Jan. 25, 1995). *Contra* Gary Taylor, *Texans Take It Out on the Defendant*, NAT'L L.J., Nov. 14, 1994, at A6 (insinuating that statements must be made off of official record).

7. TEX. CODE CRIM. PROC. ANN. art. 42.03, § 1(b)(3).

A majority of states permit victim allocution of some sort,[8] but Texas is currently the only state that permits victim allocution after sentencing.[9] Since 1991, no one has seriously challenged the Texas practice of allowing

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8. Gary Taylor, *Texans Take It Out on the Defendant*, NAT'L L.J., Nov. 14, 1994, at A6; *e.g.*, ALASKA STAT. § 12.55.022 (1994); ARIZ. REV. STAT. ANN. § 13-4424 (Supp. 1994); CAL. PENAL CODE § 1191.1 (Deering 1993); COLO. REV. STAT. ANN. § 24-4.1-302.5 (West Supp. 1994); CONN. GEN. STAT. ANN. § 54-91c (West 1994); DEL. CODE ANN. tit. 11, § 9415 (Supp. 1994); D.C. CODE ANN. § 23-103a (1989 & Supp. 1994); FLA. STAT. ANN. § 960.001 (West Supp. 1995); GA. CODE ANN. § 17-10-1.1 (1990); ILL. ANN. STAT. ch. 725, para 120/6 (Smith-Hurd 1992 & Supp. 1994); IND. CODE ANN. § 35-38-1-8.5 (Burns 1994); IOWA CODE ANN. § 910A.6 (West 1994); KY. REV. STAT. ANN. § 421.520 (Michie/Bobbs-Merrill 1992); LA. REV. STAT. ANN. § 46:1844 (West Supp. 1995); ME. REV. STAT. ANN. tit. 17-A, § 1257 (West Supp. 1994); MD. CODE ANN., CRIM. LAW 41 § 4-504 (1994); MASS. ANN. LAWS ch. 279, § 4B (Law. Co-op. 1992); MICH. STAT. ANN. § 28.1287 (765) (Callaghan 1986); MINN. STAT. ANN. § 611A.038 (West Supp. 1995); MISS. CODE ANN. § 99-19-161 (1993); MO. ANN. STAT. § 595.209 (Vernon 1994); NEV. REV. STAT. ANN. § 176.015 (Michie 1991); N.H. REV. STAT. ANN. § 21-M:8-k (Supp. 1994); N.J. STAT. ANN. § 52:4B-44 (West Supp. 1994); N.M. STAT. ANN. § 31-24-5 (Michie 1994); N.Y. CODE CRIM. PROC. § 440.50 (Consol. 1994); N.D. CENT. CODE § 12.1-34-02 (1993); OHIO REV. CODE ANN. § 2947.051 (Baldwin 1992); OKLA. STAT. ANN. tit. 22, § 984.1 (West Supp. 1995); OR. REV. STAT. § 144.790 (1993); PA. STAT. ANN. tit. 71, § 180-9.5 (1990); R.I. GEN. LAWS § 12-28-3 (1994); S.C. CODE ANN. § 16-3-1550 (Law. Co-op. 1993); S.D. CODIFIED LAWS ANN. § 23A-27-1.1 (1988); TENN. CODE ANN. § 40-38-202 (Supp. 1994); TEX. CODE CRIM. PROC. ANN. art. 56.02 (Vernon Supp. 1995); VT. STAT. ANN. tit. 13, § 7006 (Supp. 1994); VA. CODE ANN. § 19.2-299.1 (Michie 1990); WASH. REV. CODE ANN. § 7.69.030 (West 1992); W. VA. CODE § 61-11A-3 (1994); WIS. STAT. ANN. § 48.331 (West 1987).

9. *See* Gary Taylor, *Texans Take It Out on the Defendant*, NAT'L L.J., Nov. 14, 1994, at A6 (citing National Victim's Center in Arlington, Virginia as claiming that Texas is only state to allow victims to speak after sentencing). The Associate Director of Legislative Services for the National Victim's Center, Susan Howley, stated: "Texas is still unique in allowing victim allocution after punishment. I don't know of any other state that allows allocution for allocution's sake." *Id.* The term "allocution" is generally used to refer to the defendant's right to speak at trial. *See* FED. R. CRIM. PROC. 32(a)(1)(C) (providing that court "address the defendant personally and determine if the defendant wishes to make a statement and to present any information in mitigation of the sentence"); BLACK'S LAW DICTIONARY 76 (6th ed. 1990) (defining allocution as "[f]ormality of court's inquiry of defendant as to whether he has any legal cause to show why judgment should not be pronounced against him on verdict of conviction; or, whether he would like to make statement on his behalf and present any information in mitigation of sentence"). Recently, however, commentators have referred to the right of victims to speak during the trial as allocution. *See* Kevin F. Arthur et al., *Survey of Developments in Maryland Law, 1984-85: V. Criminal Law*, 45 MD. L. REV. 634, 739 (1986) (discussing legislature's rejection of bills that would permit victim allocution during sentencing); Thomas M. Kelly, Note, *Where Offenders Pay for Their Crimes: Victim Restitution and Its Constitutionality*, 59 NOTRE DAME L. REV. 685, 695 (1984) (mentioning victim allocution as method of increasing victims' voices in criminal trials); Karen L. Kennard, Comment, *The Victim's Veto: A Way to Increase Victim Impact on Criminal Case Dispositions*, 77 CAL. L. REV. 417, 427 & n.49 (1989) (commenting that 19 states allow victim allocution during sentencing portion of criminal trial).

such victim statements.[10] However, the recent incident in Houston, coupled with the tremendous amount of attention the media has given the Ertman case,[11] has ignited a movement to reassess the utility of allowing victims to address defendants who have already received their sentences.[12]

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10. A full search of all Westlaw and LEXIS databases revealed no articles discussing Article 42.03. A number of Texas cases mention the statute, but they merely discuss the law's effect on the availability of a victim impact statement during sentencing proceedings. *See, e.g.*, Blevins v. State, 884 S.W.2d 219, 231 (Tex. App.—Beaumont 1994, no pet.) (recognizing that Article 42.03 only permits victim statements after sentencing, but holding that victim impact statements during sentencing are admissible because of state and federal case law); Brown v. State, 875 S.W.2d 38, 39–40 (Tex. App.—Austin 1994, no pet.) (holding that failure of Article 42.03, § 1(b) to provide for victim impact evidence for sentencing purposes does not preclude introduction of such evidence during punishment phase); Mayo v. State, 861 S.W.2d 953, 954–55 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd) (asserting that Article 42.03 only allows victim statements after court pronounces sentence, but that defendant waived any error by failing to object when court allowed victim impact statement before punishment and parole determination); Tate v. State, 834 S.W.2d 566, 569 (Tex. App.—Houston [1st Dist.] 1992, pet. ref'd) (refusing appellant's claim that Article 42.03 amendments did not permit victim impact evidence prior to pronouncement of sentence because appellant did not properly preserve error).

11. *See* Felix Sanchez, *Top Ten Stories in Texas, Houston*, HOUS. POST, Jan. 1, 1995, at A26 (highlighting significance of Ertman case as one of most important news stories of past year). Even Geraldo Rivera picked up on this strange and tragic story. *Geraldo: When Private Pain Goes Public: Crimes Caught on Tape* (syndicated television broadcast, Oct. 24, 1994) (transcript on file with the *St. Mary's Law Journal*). Numerous other television shows and newspapers from around the country reported on the Ertman case and, in particular, Ertman's comments presented in open court. *See, e.g.*, *Angry Dads Lash Out at Killers of Daughters: "I'll Watch You Die, Boy," Father Tells Gang Member*, ROCKY MTN. NEWS, Oct. 12, 1994, at A36 (including widely circulated photograph of Randy Ertman being restrained outside of courtroom); *Fathers Confront Killers in Court*, PHOENIX GAZETTE, Oct. 12, 1994, at A13 (printing various comments of victims' families made during trial); *News: Survivors of Violent Crime Find Holidays Very Tough* (CNN television broadcast, Nov. 23, 1994) (transcript on file with the *St. Mary's Law Journal*) (televising Ertman's comments in court and showing grief suffered by Ertmans and Penas).

12. *See* Jennifer Liebrum, *Speaking Up over Speaking Out in Court: Tense Monologues in Ertman-Pena Cases Lead Many to Back More Controls*, HOUS. CHRON., Oct. 13, 1994, at A36 (documenting complaints of prosecutors, defense attorneys, judges, and professors about victim allocution after sentencing following Ertman case); *see also* Gary Taylor, *Texans Take It Out on the Defendant*, NAT'L L.J., Nov. 14, 1994, at A6 (quoting defense counsel Jerry Guerinot as stating: "It's way out of hand. It was almost a mass riot here"). Even the Deputy Director of the National Organization for Victim Assistance called the law "absurd." *Id.*; *see also* Jennifer Liebrum, *Speaking Up over Speaking Out in Court: Tense Monologues in Ertman-Pena Cases Lead Many to Back More Controls*, HOUS. CHRON., Oct. 13, 1994, at A36 (noting that prosecutor Kelly Siegler questioned purpose of allowing victims to give post-sentence statements despite support for law by some); *cf. News: Survivors of Violent Crime Find Holidays Very Tough* (CNN television broadcast, Nov. 23, 1994) (transcript on file with the *St. Mary's Law Journal*) (interviewing Ertmans, who favor even greater victims' rights laws such as granting victims right to wit-

This Comment examines the practice of victim allocution and calls into question its effectiveness. Part II of this Comment discusses the history of victims' rights and the relatively recent legislative efforts to give victims a greater sense of participation in the legal system. Part III analyzes the origins of House Bill 520, which eventually became Article 42.03 of the Texas Code of Criminal Procedure. Part IV addresses the effects of Article 42.03 on the criminal justice system and weighs the advantages and disadvantages of various aspects of the statute. Part V presents three options concerning the future of the law and suggests that Article 42.03 should be repealed in the interests of the victims, the criminals, and the dignity of criminal courts.

II. A BRIEF HISTORY OF VICTIMS' RIGHTS[13]

Prior to the nineteenth century, victims of crimes played a substantial role in the criminal justice system.[14] In early America, crime victims were often forced to pursue offenders virtually on their own because very few district attorneys or other prosecuting authorities held office.[15] Although the victims could benefit monetarily from bringing criminals to justice, simple revenge undoubtedly provided a significant motive to pursue the

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ness execution of offender). *But cf.* Jennifer Liebrum, *Group Pushes Right to View Executions: Victims Advocates Want Families to Have a Say*, HOUS. CHRON., Oct. 15, 1994, at A29 (citing head of Death Penalty Education Center, who is against permitting family of victim to view execution).

13. A comprehensive examination of the history of the role of victims in criminal law is certainly a Comment unto itself. Thus, this Comment strives to inform the reader of the history of victims' rights through a cursory discussion of general historical trends in this field. *See generally* STEPHEN W. HAWKING, A BRIEF HISTORY OF TIME (1988) (covering history of universe in relatively small text).

14. *See* William F. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AM. CRIM. L. REV. 649, 651–52 (1976) (discussing level of victim participation in colonial American justice system); Karen L. Kennard, Comment, *The Victim's Veto: A Way to Increase Victim Impact on Criminal Case Dispositions*, 77 CAL. L. REV. 417, 419 (1989) (mentioning that victims were once significant players in criminal justice system); R.P. Peerenboom, Note, *The Victim in Chinese Criminal Theory and Practice: A Historical Survey*, 7 J. CHINESE L. 63, 66 (1993) (conveying that victims were prominent in American criminal system until 19th century).

15. *See* William F. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AM. CRIM. L. REV. 649, 651–53 (1976) (pointing out that victims did most of criminal work because of distrust of state officers and fiscal concerns). Society at large often aided victims in pursuit of justice through vigilante movements. *See* MICHAEL S. HINDUS, PRISON AND PLANTATION: CRIME, JUSTICE, AND AUTHORITY IN MASSACHUSETTS AND SOUTH CAROLINA, 1767–1878, at 41–42 (1980) (contrasting vigilante movements in 1800s in Massachusetts, where movements were opposed, and South Carolina, which encouraged them); SAMUEL WALKER, POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE 31 (1980) (noting that absence of prosecutorial authority in colonial America led to development of vigilante groups).

lawbreakers.[16] Victims also constituted a major force in the legal systems of numerous other countries around the world.[17] As far back as 2000 years before the birth of Christ, nations made restitution and compensation available to victims of crime.[18]

In America, the justice system eventually became more professionalized,[19] and the legal world became concerned with lawyers, judges, and,

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16. *See* William F. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AM. CRIM. L. REV. 649, 652–53 (1976) (expressing opinion that revenge had to be significant motivating factor in victims' pursuits of criminals); Karen L. Kennard, Comment, *The Victim's Veto: A Way to Increase Victim Impact on Criminal Case Dispositions*, 77 CAL. L. REV. 417, 419–20 (1989) (explaining that, through private prosecutions, victims could obtain money damages or even "bind offenders into servitude" in colonial America).

17. *See* Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 938–42 (1985) (tracing history of victims' rights in Europe and England). In ancient England, following the demise of the Roman Empire, no defined governmental legal system existed, so the "blood feud" served as the primary method for a victim to achieve justice. *Id.* at 939; *see also* JULIUS GOEBEL, JR., FELONY AND MISDEMEANOR: A STUDY IN THE HISTORY OF CRIMINAL LAW 15–21 (1976) (presenting blood feud initiated by victim as most serious consequence of homicide or robbery); Shirley S. Abrahamson, *Redefining Roles: The Victims' Rights Movement*, 1985 UTAH L. REV. 517, 521 (mentioning blood feuds as primitive origin of private then public prosecutions); *cf.* ON THE LAWS AND CUSTOMS OF ENGLAND 168 (Morris S. Arnold et al. eds., 1981) (referring to law of Wessex that "homicides deserving vengeance were to be handed over to the relatives and lords of those whom they had slain"); James M. Dolliver, *Victims' Rights Constitutional Amendment: A Bad Idea Whose Time Should Not Come*, 34 WAYNE L. REV. 87, 89 (1987) (tracing modern criminal justice system back to primitive blood feud). In China, the ancient role of the victim is not well documented. R.P. Peerenboom, Note, *The Victim in Chinese Criminal Theory and Practice: A Historical Survey*, 7 J. CHINESE L. 63, 92 (1993). In addition, the available information does not clearly portray how great a role victims played in premodern China. *See id.* at 92–96 (crediting ancient Qing law as taking harm to victim into account, but stating that process as whole "is hardly the therapeutic one envisioned by many victims' rights advocates today"); *cf.* Zhonghua Renmin Gongheguo Xingshi Susongfa [Criminal Procedure Law of the People's Republic of China] art. 148 (1980) (continuing to grant rights to present day victims). The statute provides that "a party or a victim and his family or other citizens may present a petition to a people's court or people's procuratorate regarding a legally effective judgment or order, but the execution of the judgment or order cannot be suspended." *Id.*

18. *See* CLAUDE H. W. JOHNS, BABYLONIAN AND ASSYRIAN LAWS, CONTRACTS AND LETTERS 44–68 (1987) (documenting Code of Hammurabi that provided for restitution and compensation to victims); *cf.* Furman v. Georgia, 408 U.S. 238, 333 n.41 (1972) (Marshall, J., concurring) (commenting that Code of Hammurabi was one of first legal systems to use "eye for an eye" mentality).

19. *See* SAMUEL WALKER, POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE 113 (1980) (stating that members of public served decreasingly important role in criminal justice system as "specialized bureaucracies" assumed more duties); Shirley S. Abrahamson, *Redefining Roles: The Victims' Rights Movement*, 1985 UTAH L. REV. 517, 523 (discussing detrimental effect to victims of professionalization of legal system); Paul S. Hudson, *The Crime Victim and the Criminal Justice System*, 11 PEPP. L. REV. 23, 23–26

most of all, criminals.[20] As a result of this shift, victims of crimes were lost in the shuffle.[21] The judicial process effectively dehumanized the vic-

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(1984) (tracking transformation of criminal acts from private offenses in earlier times to public offenses with advent of modern legal system, resulting in victims being ignored by system).

20. *See* PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT at vi (1982) (lamenting that criminal justice system has lost sight of victims' rights, treating them with "institutionalized disinterest"). One of the main reasons for the "forgotten victim" effect is the substantial rights possessed by defendants in the criminal process. *See* U.S. CONST. amend. VI (affording accused right to speedy trial and assistance of counsel). The Sixth Amendment reads:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Id. The Warren Court (1953-1969) interpreted the Constitution to offer great protection for the rights of criminal defendants. *See* Christopher R. Goddu, *Victims' "Rights" or a Fair Trial Wronged?*, 41 BUFF. L. REV. 245, 252 (1993) (discussing Warren Court's emphasis on rehabilitation rather than punishment). The Warren Court displayed its dedication to the enlargement of defendants' rights through a number of major cases. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (asserting that constitutional right to jury trial applies to states through Fourteenth Amendment); Katz v. United States, 389 U.S. 347, 353 (1967) (extending Fourth Amendment right of protection from search and seizure to recording of oral statements); United States v. Wade, 388 U.S. 218, 221 (1967) (guaranteeing accused right to counsel at critical pretrial confrontation by prosecution); *In re* Gault, 387 U.S. 1, 4 (1967) (holding that due process right of Fourteenth Amendment applies to juvenile courts); Miranda v. Arizona, 384 U.S. 436, 467–79 (1966) (establishing reading of "Miranda rights" as required protection for accused against self-incrimination); Griffin v. California, 380 U.S. 609, 613 (1965) (prohibiting prosecution from commenting to jury on failure of defendant to testify because of protections from self-incrimination afforded by Fifth Amendment); Escobedo v. Illinois, 378 U.S. 478, 490–91 (1964) (deciding that authorities must apprise accused of right to remain silent once investigation escalates from general inquiry to focus on particular suspect); Malloy v. Hogan, 378 U.S. 1, 6 (1964) (incorporating self-incrimination protection of Fifth Amendment into Fourteenth Amendment, thus broadening scope to apply to states); Fay v. Noia, 372 U.S. 391, 414–15 (1963) (granting habeas corpus relief upon proof that conviction was obtained through coerced confession); Gideon v. Wainwright, 372 U.S. 335, 339 (1963) (recognizing fundamental right of indigent accused in criminal case to have assistance of counsel).

21. *See* PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 65 (1982) (quoting Gail Pisarcik as stating: "With the court process there is no guarantee of a light at the end of a tunnel. Life plans are put on hold indefinitely and the victim merely treads water"); Josephine Gittler, *Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems*, 11 PEPP. L. REV. 117, 117 (1984) (casting victims of crime as forgotten people in criminal law); Ellen Yaroshefsky, *Balancing Victim's Rights and Vigorous Advocacy for the Defendant*, 1989 ANN. SURV. AM. L. 133, 139 (characterizing victim as being "caught up in a process which is routine to the authorities but not to her").

tims, leading to many victims' disenchantment with the entire criminal justice process.[22] Consequently, many victims declined to report crimes to spare themselves from the problems of the legal system.[23]

The current victims' rights movement is a relatively recent development.[24] The movement originally arose as a campaign by women's groups to inform the public about the problems rape victims encounter in the criminal justice system.[25] Gradually, the trend gathered steam and

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22. *See* JOLENE C. HERNON & BRIAN FORST, U.S. DEP'T OF JUST., THE CRIMINAL JUSTICE RESPONSE TO VICTIM HARM 1 (1984) (agreeing that nature of criminal system leads to neglect of crime victims); Brooks Douglass, *Oklahoma's Victim Impact Legislation: A New Voice for Victims and Their Families: A Response to Professor Coyne*, 46 OKLA. L. REV. 283, 284–85 (1993) (noting tendency of criminal justice system to ignore victims, which reduces public confidence in legal system); Andrew J. Karmen, *Who's Against Victims' Rights? The Nature of the Opposition to Pro-Victim Initiatives in Criminal Justice*, 8 ST. JOHN'S J. LEGAL COMMENT. 157, 158 (1992) (characterizing victim as merely catalyst that put criminal process in motion, quickly forgotten by system); Deborah P. Kelly, *Victims*, 34 WAYNE L. REV. 69, 69 (1987) (claiming that criminal system dehumanizes victims as result of having state, rather than victim, as plaintiff in criminal case); R.P. Peerenboom, Note, *The Victim in Chinese Criminal Theory and Practice: A Historical Survey*, 7 J. CHINESE L. 63, 66–67 (1993) (suggesting view that transformation of American criminal system to more professional system led to dehumanization of victims) Karyn E. Polito, Note, *The Rights of Crime Victims in the Criminal Justice System: Is Justice Blind to the Victims of Crime?*, 16 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 241, 243 (1990) (emphasizing minimal role in justice process for victims of crime).

23. *See* Karen L. Kennard, Comment, *The Victim's Veto: A Way to Increase Victim Impact on Criminal Case Dispositions*, 77 CAL. L. REV. 417, 417 (1989) (asserting that many crime victims are so dissatisfied with court system that they refuse to report crimes, do not appear in court, and even rely on vigilantism to deal with crime); Karyn E. Polito, Note, *The Rights of Crime Victims in the Criminal Justice System: Is Justice Blind to the Victims of Crime?*, 16 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 241, 243 (1990) (noting that numerous crimes are never reported); Deborah P. Kelly, *What Do Victims Want? Why Should Their Concerns Be Considered?*, JUDGES' J., Spring 1984, at 4, 52 (stressing importance of victims reporting crimes since police discover 87% of crimes only through victim reports); *cf.* Matti Joutsen, *Listening to the Victim: The Victim's Role in European Criminal Justice Systems*, 34 WAYNE L. REV. 95, 97 (1987) (pointing out that most crimes are not reported to authorities in Europe as well as in United States).

24. *See* STEVEN R. SMITH & SUSAN FREINKEL, ADJUSTING THE BALANCE: FEDERAL POLICY AND VICTIM SERVICES 1 (1988) (estimating that victims' rights movement took place essentially in last three decades); JAMES H. STARK & HOWARD W. GOLDSTEIN, THE RIGHTS OF CRIME VICTIMS 1 (1985) (explaining tremendous developments in rights of victims over last 10 years); David L. Roland, *Progress in the Victim Reform Movement: No Longer the "Forgotten Victim,"* 17 PEPP. L. REV. 35, 35–36 (1989) (citing increase in public consciousness of victims' rights).

25. *See* STEVEN R. SMITH & SUSAN FREINKEL, ADJUSTING THE BALANCE: FEDERAL POLICY AND VICTIM SERVICES 3 (1988) (crediting feminists, along with senior citizens and children's advocates, with prompting initial enhancement of victims' rights); Richard L. Aynes, *Constitutional Considerations: Government Responsibility and the Right Not to Be a Victim*, 11 PEPP. L. REV. 63, 64 (1984) (theorizing that victims' rights movement began with private groups to aid victims in rape cases as part of women's movement); Ken Eikenberry,

today encompasses victims of all crimes. The movement has accomplished much in a short time, resulting in legislation including victims' bills of rights,[26] international victims' rights conferences,[27] and numerous victim assistance programs.[28] One of the most important advances in vic-

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The Elevation of Victims' Rights in Washington State: Constitutional Status, 17 PEPP. L. REV. 19, 23 (1989) (suggesting that women's movement contributed to victims' rights movement by stressing criminal justice system's poor handling of rape victims); Patrick M. Fahey, Note, Payne v. Tennessee*: An Eye for an Eye and Then Some*, 25 CONN. L. REV. 205, 206 n.7 (1992) (connecting development of victims' rights movement with battle for equality waged by women); *cf.* Andrew J. Karmen, *Who's Against Victims' Rights? The Nature of the Opposition to Pro-Victim Initiatives in Criminal Justice*, 8 ST. JOHN'S J. LEGAL COMMENT. 157, 158–59 (1992) (tracing victims' rights movement back to various groups that "emerged as a loosely constituted, highly de-centralized social movement in the early 1970s"); Robert V. Ward, *A Kinder, Gentler System: An Examination of How Crime Victims Have Benefitted from the Women's Movement*, 15 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 171, 173 (1989) (making argument that victims' rights movement developed as response to Warren Court's concern for defendants).

26. *See* CAL. CONST. art. I, § 28 (Deering 1994) (providing for victim's bill of rights). The California Victim's Bill of Rights reads in part: "The People of the State of California find and declare that the enactment of comprehensive provisions and laws ensuring a bill of rights for victims of crime, including safeguards in the criminal justice system to fully protect those rights, is a matter of grave statewide concern." *Id.* Several other states have created victims' bills of rights. *E.g.*, ARIZ. CONST. art. II, § 2.1 (1994); N.M. STAT. ANN. § 31-24-1 (Michie 1994); OR. REV. STAT. § 147.405 (1993); UTAH CODE ANN. § 77-37-3 (1994); *see also* Rosemary J. Loverdi, Note, *Victim Impact Evidence—Eighth Amendment Does Not Erect a Per Se Bar to the Introduction of Victim Impact Evidence at a Capital Sentencing Hearing:* Payne v. Tennessee, 24 RUTGERS L.J. 543, 564–65 n.144 (1993) (discussing briefly victims' bills of rights).

27. *See* R.P. Peerenboom, Note, *The Victim in Chinese Criminal Theory and Practice: A Historical Survey*, 7 J. CHINESE L. 63, 64 (1993) (listing international conferences on victims' rights in countries such as United States, West Germany, Israel, Japan, and Canada).

28. *See* 42 U.S.C. § 10603 (Supp. V 1994) (containing federal crime victim assistance program); OHIO REV. CODE ANN. § 2947.051(a) (Baldwin 1992) (providing for victim assistance program to aid in preparation of victim impact statements); TEX. CODE CRIM. PROC. ANN. art. 56.04 (Vernon Supp. 1995) (establishing position of "victim assistance coordinator," who acts as crime victim liaison to inform victim of rights and trial proceedings); Kathryn E. Bartolo, Comment, Payne v. Tennessee*: The Future Role of Victim Statements of Opinion in Capital Sentencing Proceedings*, 77 IOWA L. REV. 1217, 1218 (1992) (estimating that more than 7,000 victim assistance programs existed in 1991); Patrick M. Fahey, Note, Payne v. Tennessee*: An Eye for an Eye and Then Some*, 25 CONN. L. REV. 205, 207 (1992) (characterizing victim assistance programs as common measure to reform victim participation levels); Marie T. Farrelly, Note, *Special Assessments and the Origination Clause: A Tax on Crooks?*, 58 FORDHAM L. REV. 447, 455 n.64 (1989) (describing victim assistance programs as "more service-oriented than compensatory in nature; they include crisis intervention services, programs to assist victims acting as witnesses in criminal justice proceedings and programs to aid victims in securing compensation benefits"); *cf.* Denise K. Vowell, *To Determine an Appropriate Sentence: Sentencing in the Military Justice System*, 114 MIL. L. REV. 87, 93 (1986) (finding that victim assistance programs

tims' rights is the enactment of laws providing for victim impact statements. Victim impact statements are statements given before sentence is pronounced that allow the victim greater participation in the disposition of the case.[29] Currently, a majority of states provide for some form of victim impact statement.[30]

III. HISTORY OF HOUSE BILL 520

As a result of the flood of victims' rights legislation in recent years, some commentators have suggested that the criminal justice system gives crime victims excessive power over the trial process.[31] While victims' concerns should not be disregarded, the defendant's right to a fair and speedy trial should be of utmost importance.[32] Article 42.03 is an exam-

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have retributive effect on criminals); Kathleen G. McAnaney et al., Note, *From Imprudence to Crime: Anti-Stalking Laws*, 68 NOTRE DAME L. REV. 819, 908 (1993) (suggesting that victim assistance programs should include victims of stalkers).

29. *See* ILL. ANN. STAT. ch. 38, para. 1003-3-4 (Smith-Hurd 1992) (permitting victim impact statement to be in writing, in person, on videotape, on film, or on "any other electronic means available"); Patrick M. Fahey, Note, Payne v. Tennessee*: An Eye for an Eye and Then Some*, 25 CONN. L. REV. 205, 211–12 (1992) (casting victim impact statements as method of increasing victims' feelings of participation); Craig E. Gilmore, Note, Payne v. Tennessee*: Rejection of Precedent, Recognition of Victim Impact Worth*, 41 CATH. U. L. REV. 469, 479 (1992) (indicating that victim impact statements are designed to heighten feeling of victim participation after court or jury determines verdict).

30. *See supra* note 8.

31. *See* Ellen Yaroshefsky, *Balancing Victim's Rights and Vigorous Advocacy for the Defendant*, ANN. SURV. AM. L. 135, 143–45 (1989) (theorizing that victims must realize plight of defendants or else victims' rights movement will lead to greater loss of liberty for all people as result of attacks on defendants' rights); Patrick M. Fahey, Note, Payne v. Tennessee*: An Eye for an Eye and Then Some*, 25 CONN. L. REV. 205, 207 (1992) (relaying concerns of other commentators that with greater rights for victims comes risk of jeopardizing rights of criminals); Christopher R. Goddu, Comment, *Victims' "Rights" or a Fair Trial Wronged?*, 41 BUFF. L. REV. 245, 271–72 (1993) (asserting that participation of victims must be limited to preserve fairness of trial); *see also* James M. Dolliver, *Victims' Rights Constitutional Amendment: A Bad Idea Whose Time Should Not Come*, 34 WAYNE L. REV. 87, 90 (1987) (campaigning against proposed victims' rights constitutional amendment because of potential psychological and economic harm to victims); Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 CAL. L. REV. 539, 669 (1990) (questioning whether American crime victims should possess as many rights as those in other countries such as France).

32. *See* U.S. CONST. amend. VI. (guaranteeing defendant's right to speedy trial by impartial jury); United States v. Briggs, 700 F.2d 408, 415 (7th Cir. 1983) (delegating to trial judge responsibility of ensuring defendant's right to fair and speedy trial); *In re* Anderson, 306 F. Supp. 712, 715 (D.D.C. 1969) (stating that parties should not hinder courts' attempts to grant fair and speedy trial); Bellizzi v. Superior Court, 524 P.2d 148, 154 (Cal. 1974) (Mosk, J., dissenting) (joking that "intentional suppression of evidence or bad faith on the part of the prosecution is not an essential element of a defendant's right to a fair or speedy

ple of a statute that gives victims an unnecessary right, at the expense of the legal system.

Representative Pete Gallego sponsored the original House Bill 520, which later became Article 42.03.[33] Representative Gallego initially drafted the Bill to give victims the right to present a statement after the court or jury assessed punishment, but before the actual pronouncement

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trial"); Commonwealth v. Brockway, 633 A.2d 188, 189 (Pa. Super. Ct. 1993) (excluding sentencing procedure in right to fair and speedy trial); Beachem v. Commonwealth, 390 S.E.2d 517, 521 (Va. Ct. App. 1990) (requiring government to reasonably protect right to fair and speedy trial even if defendant does not specifically request one); Stanley Mosk, *The Mask of Reform*, 10 Sw. U. L. REV. 885, 889–90 (1978) (commenting that essential element of constitutional law is that criminals do possess all rights). The President's Task Force on Victims of Crime nearly rendered Judge Mosk's comment—that defendants possess all of the rights in criminal proceedings—moot in 1986 when it proposed a constitutional amendment to grant victims greater rights. PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 114–15 (1982). In the Task Force's report, one victim explained the need for the proposed amendment by stating: "They explained the defendant's constitutional rights to the nth degree. They couldn't do this and they couldn't do that because of his constitutional rights. And I wondered what mine were. And they told me, I haven't got any." *Id.* The Task Force proposed that the Sixth Amendment to the Constitution read:

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the Assistance of Counsel for his defense. *Likewise, the victim, in every criminal prosecution shall have the right to be present and to be heard at all critical stages of the judicial proceedings.*

Id. Although this amendment would have been a landmark occurrence for the victims' rights movement, it still would not have affected the Texas practice of post-sentence victim allocution because statements after sentencing undoubtedly do not occur during a "critical stage" of the proceedings. *See* LeRoy L. Lamborn, *Victim Participation in the Criminal Justice Process: The Proposals for a Constitutional Amendment*, 34 WAYNE L. REV. 125, 198 (1987) (illustrating that meaning of word "critical" in proposed constitutional amendment is ambiguous).

33. Tex. H.B. 520, 72d Leg., R.S. (1991) (codified at TEX. CODE CRIM. PROC. ANN. art. 42.03, § 1(b) (Vernon Supp. 1995); *see also* Interview with Pete Gallego, Texas State Representative, in Austin, Tex. (Jan. 23, 1995) (recalling that original idea for Bill was not his own, but failing to remember who initially brought proposal to him); Jennifer Liebrum, *Speaking Up over Speaking Out in Court: Tense Monologues in Ertman-Pena Cases Lead Many to Back More Controls*, HOUS. CHRON., Oct. 13, 1994, at A36 (introducing Robert Keppel, General Counsel for Texas District and County Attorney's Association, as one of drafters of House Bill 520). Representative Gallego is a former prosecutor who is currently the representative for District 74, which encompasses Brewster, Culberson, Hudspeth, Jeff Davis, Kinney, Maverick, Pecos, Presidio, Terrell, and Val Verde Counties. TEXAS STATE DIRECTORY 56 (36th ed. 1993).

of sentence.[34] During the hearings conducted by the House Committee on Criminal Jurisprudence, panel members expressed concern that victim statements could influence the judge and change the degree of punishment before the pronouncement of sentence.[35] Consequently, the Committee amended the Bill to provide for victim statements only after the court pronounces the sentence.[36] Thus, the Bill attempted to alleviate the risk that victim statements made pursuant to Article 42.03 would affect the partiality of the court.[37]

IV. Purposes and Effects of Post-Sentence Victim Statements

With the recent brawl involving Randy Ertman in the Harris County Criminal Courthouse, the usefulness of the practice of post-sentence vic-

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34. House Comm. on Crim. Jurisprudence, Bill Analysis, Tex. H.B. 520, 72d Leg., R.S. (2564); *Hearings on Tex. H.B. 520 Before the House Comm. on Crim. Jurisprudence*, 72d Leg., R.S. (Feb. 26, 1991) (tapes available from House Committee Services); *see* 3 Barry P. Helft, Texas Criminal Practice Guide § 81.02[1], at 81-14.3 (1994) (opining that placing victim's statement after sentence is in opposition to legislative intent). The original title of the Bill read as follows: "AN ACT relating to permitting a victim, close relative of a deceased victim, or guardian of a victim to make a statement before pronouncement of sentence in a criminal case." Tex. H.B. 520, 72d Leg., R.S. (1991). However, when the Bill was amended to place the statement after pronouncement of sentence, the legislature apparently forgot to change the act's title, and it currently remains in its original form. *Id.*

35. *See Hearings on Tex. H.B. 520 Before the House Comm. on Crim. Jurisprudence*, 72d Leg., R.S. (Feb. 26, 1991) (tapes available from House Committee Services) (fearing that statements could influence judge despite short time between assessment of punishment and pronouncement of sentence during which judge could consider statements). *But see* Interview with Pete Gallego, Texas State Representative, in Austin, Tex. (Jan. 23, 1995) (insisting that concerns about judge changing mind in brief period between assessment and pronouncement of sentence were probably unfounded).

36. *See* Tex. Code Crim. Proc. Ann. art. 42.03, § 1(b) (Vernon Supp. 1995) (constituting final version of House Bill 520 as enacted). Representative Gallego still believes that such a change was a mere formality and that the Bill, in its original form, would not have posed any danger to the fairness of the judge's sentencing decision. Interview with Pete Gallego, Texas State Representative, in Austin, Tex. (Jan. 23, 1995).

37. *See* Debate on Tex. H.B. 520 on the Floor of the Senate, 72d Leg., R.S. (May 21, 1991) (tapes available from the Senate Staff Services Office) (statement of Judge Charles Miller, Texas Court of Criminal Court of Appeals) (testifying that Bill would have absolutely no effect on sentencing); *Hearings on Tex. H.B. 520 Before the House Comm. on Crim. Jurisprudence*, 72d Leg., R.S. (Feb. 26, 1991) (tapes available from House Committee Services) (statement of Rep. Gallego) (claiming that Bill would not affect outcome of cases). Betty Blackwell of the TDCLA countered that there is no point to allowing victims to speak unless it affects the sentence. *Id. Hearings on Tex. H.B. 520 Before the House Comm. on Crim. Jurisprudence*, 72d Leg., R.S. (Feb. 26, 1991) (tapes available from House Committee Services).

tim allocution in Texas has become questionable.[38] This uniquely Texan system has a number of drawbacks, with regard to the objectives of the Texas Penal Code, that the state legislature failed to address. The Penal Code outlines three objectives that the state's criminal statutes are intended to support: (1) general deterrence; (2) rehabilitation; and (3) specific deterrence.[39] The following section addresses the arguments

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38. *See* Gary Taylor, *Texans Take It Out on the Defendant*, NAT'L L.J., Nov. 14, 1994, at A6 (presenting views of professor and prosecutor that tend to doubt efficacy of victim statements pursuant to Article 42.03). After the Ertman episode, Neil McCabe, a criminal law professor at South Texas College of Law, equated post-sentence victim allocution to the pillory of years past. Jennifer Liebrum, *Speaking Up over Speaking Out in Court: Tense Monologues in Ertman-Pena Cases Lead Many to Back More Controls*, HOUS. CHRON., Oct. 13, 1994, at A36. Harris County District Attorney John B. Holmes, Jr. also expressed displeasure with the practice due to its tendency to create an unsavory atmosphere in the courtroom, stating: "I am one of those old-fashioned guys. I don't think the proceedings should be made to be a spectacle. The proceedings in the halls of justice are not meant for entertainment." *Id.* One of the prosecutors in the case, Kelly Siegler, also failed to see the purpose of the law:

> I just left there yesterday kind of thinking . . . I don't know if that did anybody any good or not. . . . To expect someone to stand up there and sound dignified and stay in control when all they really want to do is get their hands on that defendant's neck, I have to wonder, what's the point?

Id. However, groups like Victims Organized to Ensure Rights and Safety (VOTERS) support the law more than ever, believing that more victims will exercise their right to speak since the media has publicized the law. *Id.*

39. TEX. PENAL CODE ANN. § 1.02 (Vernon 1994). The Code reads, in pertinent part:

> The general purposes of this code are to establish a system of prohibitions, penalties, and correctional measures to deal with conduct that unjustifiably and inexcusably causes or threatens harm to those individual or public interests for which state protection is appropriate. To this end, the provisions of this code are intended, and shall be construed, to achieve the following objectives:
>
> (1) to insure the public safety through:
>
> (A) the deterrent influence of the penalties hereinafter provided;
>
> (B) the rehabilitation of those convicted of violations of this code; and
>
> (C) such punishment as may be necessary to prevent likely recurrence of criminal behavior.

Id. For definitions of the various theories of punishment that constitute goals of the Texas Penal Code, see generally H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW (1968). Hart divided deterrence into two categories: (1) general deterrence; and (2) individual deterrence, or specific deterrence as it is commonly known. *Id.* at 128–29. He defined general deterrence as "consisting of the threat of punishment to all who are tempted to commit offenses," while individual deterrence "consist[s] not merely of the threat of punishment for future offenses, but also of the application of punishment to individuals who have not been deterred by the law's threats and have actually committed the offense." *Id.* at 128. Hart made some interesting points concerning rehabilitative theory, or reform, as he calls it. *Id.* at 26. Hart mentioned the view that reform should be the dominant goal of criminal law: "the corrective theory based upon a conception of multiple causation and curative-rehabilitative treatment, should clearly predominate in legislation and in judicial and administrative practices." *Id.* (quoting HALL

surrounding the efficacy of Article 42.03 in relation to the objectives outlined in the Penal Code.

A. *Punitive Effect of Article 42.03 and the Goals of the Texas Penal Code*

Supporters of Article 42.03 contend that the statute is designed not to punish criminals, but to benefit victims.[40] The law provides an extremely important function because it gives victims a greater sense of participation in the legal system.[41] It is well documented that victims who feel as though they have participated in the disposition of a case generally have a greater sense of confidence in the criminal justice system.[42] Confidence

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& GLUECK, CASES ON CRIMINAL LAW AND ITS ENFORCEMENT 14 (1951)). However, Hart emphasized the peculiarity of this view:

> There is indeed a paradox in asserting that Reform should "predominate" in a system of Criminal Law, as if the main purpose of providing punishment for murder was to reform the murderer not to prevent murder; and the paradox is greater where the legal offence is not a serious moral one: e.g. infringing a state monopoly of transport.

Id. See generally JOHN KAPLAN & ROBERT WEISBERG, CRIMINAL LAW: CASES AND MATERIALS 5–45 (2d ed. 1991) (listing general theories of punishment and possible reasons for applying each).

40. *See* Interview with Pete Gallego, Texas State Representative, in Austin, Tex. (Jan. 23, 1995) (expressing that aim in enacting law was to benefit victims and give them opportunity for catharsis); *see also* Debate on Tex. H.B. 520 on the Floor of the Senate, 72d Leg., R.S. (May 21, 1991) (tapes available from the Senate Staff Services Office) (statement of Judge Charles Miller, Texas Court of Criminal Court of Appeals) (praising statute's benefit to victims and absence of effect on defendants). The statute's title also reflects the legislature's intention to benefit the victims, rather than punish the defendants. TEX. CODE CRIM. PROC. ANN. art. 42.03, § 1(b) (Vernon Supp. 1995). If the act was intended to be punitive, the legislature would have placed it in the Texas Penal Code rather than the Code of Criminal Procedure.

41. *See* Jennifer Liebrum, *Speaking Up over Speaking Out in Court: Tense Monologues in Ertman-Pena Cases Lead Many to Back More Controls*, HOUS. CHRON., Oct. 13, 1994, at A36 (quoting State District Judge Caprice Cosper as stating that law gives victims chance to be heard in court); Jennifer Liebrum, *Heated Exchange Outside Court: "You Belong in Hell," Convicted Killers Told*, HOUS. CHRON., Oct. 12, 1994, at A1 (presenting view of Marie Munier, prosecutor, that statute gives victims feeling that they are part of process rather than just bystanders); *see also Hearings on Tex. H.B. 520 Before the House Comm. on Crim. Jurisprudence*, 72d Leg., R.S. (Feb. 26, 1991) (tapes available from House Committee Services) (statement of Rep. Gallego) (testifying that law is needed to give victims larger role in criminal justice system).

42. *See* JOLENE C. HERNON & BRIAN FORST, U.S. DEP'T OF JUST. THE CRIMINAL JUSTICE RESPONSE TO VICTIM HARM at iii (1984) (reporting that victims had greater sense of satisfaction toward criminal justice system if apprised of case outcome and if they believed they had contributed to outcome); Dean G. Kilpatrick & Randy K. Otto, *Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning*, 34 WAYNE L. REV. 7, 23 (1987) (reporting that researchers found victims equate greater participation in criminal justice system with greater satisfac-

in the legal system is essential for its effective operation,[43] and victims who do not feel that justice will be done, or who feel that the criminal process will simply be too complicated, will elect not to report crimes.[44]

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tion with criminal process); *cf.* Betty J. Spencer, *A Crime Victim's Views on a Constitutional Amendment for Victims*, 34 WAYNE L. REV. 1, 1–4 (1987) (presenting firsthand experience of victim in criminal system and expressing view that courts can only do justice when they hears victims' sides as well as defendants'); Christopher R. Goddu, Comment, *Victims' "Rights" or a Fair Trial Wronged?*, 41 BUFF. L. REV. 245, 248 (1993) (explaining that, when victims cannot participate in system, they feel that authorities can do nothing and victims have no recourse). *But cf.* Shirley S. Abrahamson, *Redefining Roles: The Victim's Rights Movement*, 1985 UTAH L. REV. 517, 546 (admitting that no one knows the effect victim statements have on victims' feelings concerning criminal justice system); Karen L. Kennard, Comment, *The Victim's Veto: A Way to Increase Victim Impact on Criminal Case Dispositions*, 77 CAL. L. REV. 417, 418 (1989) (noting that reforms to give victims greater satisfaction with legal system have been only "marginally successful" in obtaining greater victim participation).

43. Deborah P. Kelly, *What Do Victims Want? Why Should Their Concerns Be Considered?*, JUDGES' J., Spring 1984, at 4, 52; *see* Dean G. Kilpatrick & Randy K. Otto, *Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning*, 34 WAYNE L. REV. 7, 7 (1987) (deciding that cooperation of witnesses and victims is necessary for proper functioning of criminal system); Patrick M. Fahey, Note, Payne v. Tennessee*:* An Eye for an Eye and Then Some, 25 CONN. L. REV. 205, 209 (1992) (pointing out that efficiency of criminal system depends largely on victim cooperation); Karen L. Kennard, Comment, *The Victim's Veto: A Way to Increase Victim Impact on Criminal Case Dispositions*, 77 CAL. L. REV. 417, 417 (1989) (stating that criminal system is dependent upon reporting of offenses by victims of crime). As one author explained, "[i]t is unreasonable and self-defeating to expect that citizens, no matter how dedicated, will automatically keep subjecting themselves to personal loss and inconvenience in the name of justice." Deborah P. Kelly, *Victims' Perceptions of Criminal Justice*, 11 PEPP. L. REV. 15, 20 (1984).

44. *See* Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL'Y 357, 357 (1986) (highlighting importance of victim participation in criminal process to cure current "crisis" of victim displeasure with system); Karen L. Kennard, Comment, *The Victim's Veto: A Way to Increase Victim Impact on Criminal Case Dispositions*, 77 CAL. L. REV. 417, 417 (1989) (concluding that victims show displeasure with system by not reporting crimes and failing to appear in court); Phillip A. Talbert, Comment, *The Relevance of Victim Impact Statements to the Criminal Sentencing Decision*, 36 UCLA L. REV. 199, 199 (1988) (claiming that greater participation by victims will foster more cooperation with criminal justice system in prosecution of criminals); *cf.* Craig E. Gilmore, Payne v. Tennessee*: Rejection of Precedent, Recognition of Victim Impact Worth*, 41 CATH. U. L. REV. 469, 478–79 (1992) (asserting that "[v]ictims surviving the initial impact of violent crimes often felt that they had to endure insensitivity and alienation at best, and degradation and maltreatment at worst, at the hands of the criminal justice system"); Rosemary J. Loverdi, Note, *Victim Impact Evidence—Eighth Amendment Does Not Erect a Per Se Bar to the Introduction of Victim Impact Evidence at a Capital Sentencing Hearing:* Payne v. Tennessee, 24 RUTGERS L.J. 543, 562 (1993) (explaining that victims are too often left out of criminal justice system and used only as tools of prosecution).

Thus, any sort of victim input in the proceedings will further the ultimate aim of the criminal justice system—the eradication of criminal activity.[45]

Assuming that post-sentence victim statements constitute some form of punishment, the effects of the punishment under Article 42.03 arguably conform to the Penal Code objectives. Requiring a defendant to listen to a final statement by the victim or the victim's family could prove rehabilitative in some cases.[46] Such statements arguably are so personal and emotional that they make the victims more human in the defendant's mind, thus forcing the defendant to consider the effects of his actions

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45. *See* Paul S. Hudson, *The Crime Victim and the Criminal Justice System: Time for a Change*, 11 PEPP. L. REV. 23, 29 (1984) (postulating that movement towards more victim rights and privileges could eventually lead to decrease in overall crime rate). Case law and scholarly writings reveal a great deal of disagreement regarding the ultimate goal of the criminal justice system. *See, e.g.*, Stone v. Powell, 428 U.S. 465, 523 (1976) (Burger, C.J., concurring) (claiming ultimate goal of system is "truth and justice"); State *ex rel.* Holifield, 319 So. 2d 471, 474 (La. Ct. App. 1975) (Lemmon, J., concurring) (stating that ultimate aim of system is "to protect society by separating criminals (including juveniles) from the other members of society"); Hagenkord v. State, 302 N.W.2d 421, 433 (Wis. 1981) (opining that main goal of criminal system is to "balance the various factors in light of the 'integrity of the fact-finding process' " (quoting State v. Olson, 250 N.W.2d 12, 19 (Wis. 1977))); Vincent M. Bonventre, *An Alternative to the Constitutional Privilege Against Self-Incrimination*, 49 BROOK. L. REV. 31, 44 n.111 (1982) (noting criminal system's main aim to be conviction of guilty and prompt acquittal of innocent); Daniel H. Foote, *The Benevolent Paternalism of Japanese Criminal Justice*, 80 CAL. L. REV. 317, 367 (1992) (finding that "the ultimate goal of the criminal-justice system is to suppress crime"); Richard L. Gabriel, Comment, *The* Strickland *Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due Process*, 134 U. PA. L. REV. 1259, 1286 (1986) (concluding generally that final goal of criminal justice system is "to do justice in all cases"); Marian E. Lupo, Comment, United States v. Salerno*: "A Loaded Weapon Ready for the Hand,"* 54 BROOK. L. REV. 171, 221 (1988) (contending that ultimate aim of criminal system is prevention of crime); Lara E. Simmons, Note, Michigan v. Lucas*: Failing to Define the State Interest in Rape Shield Legislation*, 70 N.C. L. REV. 1592, 1622 (1992) (positing that supreme aim of criminal system is "truth seeking").

46. *See* Debate on Tex. H.B. 520 on the Floor of the Senate, 72d Leg., R.S. (May 21, 1991) (tapes available from the Senate Staff Services Office) (statement of Judge Charles Miller, Texas Court of Criminal Appeals) (noting that rehabilitation of criminal is one aim of new statute). *But cf.* Susan A. Cornille, Comment, *Retribution's "Harm" Component and the Victim Impact Statement: Finding a Workable Model*, 18 DAYTON L. REV. 389, 396–97 (1993) (asserting that rehabilitation as goal of criminal justice system has little support in present-day America). Cornille explained that the rehabilitative theory involves "the notion that a primary purpose of penal treatment is to effect changes in the characters, attitudes, and behavior of convicted offenders, so as to strengthen the social defense against unwanted behavior, but also to contribute to the welfare and satisfactions of offenders." *Id.* at 396. Consequently, in a rehabilitative scheme, the focus is on the criminal rather than the victim. *Id.* at 397. The law could have a rehabilitative effect in that it may serve to humanize the victim.

much more deeply than if the defendant never had any contact with those who suffered.[47]

Supporters also suggest that Article 42.03 performs a deterrent function.[48] Although the public is unaware of this statute to the extent that it would prevent people in general from committing certain crimes,[49] a defendant forced to sit in court and listen to victims discuss the pain they

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47. Debate on Tex. H.B. 520 on the Floor of the Senate, 72d Leg., R.S. (May 21, 1991) (tapes available from the Senate Staff Services Office) (statement of Judge Charles Miller, Texas Court of Criminal Appeals). During the hearings, Judge Miller explained that the law would provide the one and only time that the defendant would see the victim and the effect of the crime on the victim. *Id.* For the law to have a rehabilitative effect on the defendant, the victim must become more human in the criminal's eyes. *See Livingston*, 444 S.E.2d at 757 (Benham, J., dissenting) (commenting that courts can humanize crime victims through use of victim impact statements); *cf.* Morris v. Slappy, 461 U.S. 1, 14 (1982) (containing view of former Chief Justice Burger that, "in the administration of criminal justice, courts may not ignore the concerns of victims"). Humanization of the victim is especially important since the nature of a criminal trial dehumanizes the victim. *See* Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL'Y 357, 371–72 (1986) (stating that current system of public prosecution has essentially removed victims from criminal process); Robert C. Davis et al., *Expanding the Victim's Role in the Criminal Court Dispositional Process: The Results of an Experiment*, 75 J. CRIM. L. & CRIMINOLOGY 491, 492 (1984) (dubbing crime victim "the forgotten person" in criminal justice system).

48. *Cf.* Ronald J. Rychlak, *Society's Moral Right to Punish: A Further Exploration of the Denunciation Theory of Punishment*, 65 TUL. L. REV. 299, 309 (1990) (giving general definition of deterrence: " 'It is not always through the perfect goodness of virtue that one obeys the law, but sometimes it is through fear of punishment' " (quoting THOMAS AQUINAS, SUMMA THEOLOGICAL at Q. 92, Art. 1, Reply Obj. 2 (Fathers of the English Dominican Province trans. 1947))); Susan A. Cornille, Comment, *Retribution's "Harm" Component and the Victim Impact Statement: Finding a Workable Model*, 18 DAYTON L. REV. 389, 396 (1993) (explaining shift in American legal thought away from retribution and incapacitation and towards deterrence). Rychlak gave excellent examples of specific and general deterrence: "If you spank a child, you hope the child will not repeat the wrong [specific deterrence]. If you spank the child in front of his or her siblings, you hope all will be deterred from committing the bad act in the future [general deterrence]." Ronald J. Rychlak, *Society's Moral Right to Punish: A Further Exploration of the Denunciation Theory of Punishment*, 65 TUL. L. REV. 299, 309 (1990).

49. *See* Interview with Pete Gallego, Texas State Representative, in Austin, Tex. (Jan. 23, 1995) (claiming that most victims do not know law exists); Telephone Interview with Judge Terry McDonald, 186th District Court, Bexar County, Tex. (Jan. 23, 1995) (discussing fact that very few victims make Article 42.03 statements). *But see* Jennifer Liebrum, *Speaking Up over Speaking Out in Court: Tense Monologues in Ertman-Pena Cases Lead Many to Back More Controls*, HOUS. CHRON., Oct. 13, 1994, at A36 (containing views of Janie Wilson, member of VOTERS, that more people will use post-sentence victim allocution as it receives more publicity); Felix Sanchez, *Top Ten Stories in Texas, Houston*, HOUS. POST, Jan. 1, 1995, at A26 (citing Ertman case, in which father of murdered teen was allowed to address killers at their trial, as one of 10 most important stories of year).

have suffered may cause that defendant to think twice about committing the crime again.[50]

1. The Denunciatory Effect of Article 42.03

Despite the arguable benefits derived from victim allocution through Article 42.03, the statute is inconsistent with the objectives behind Texas penal laws. Although it is located in the Texas Code of Criminal Procedure rather than in the Penal Code, Article 42.03 is not merely procedural because it subjects the defendant to a form of punishment.[51] When

50. *See* JOHN KAPLAN & ROBERT WEISBERG, CRIMINAL LAW: CASES AND MATERIALS 12–13 (1991) (defining specific deterrence as punishment that "teaches the convict to refrain from further crime by instilling a fear of punishment" (quoting DANIEL GLASER, SUPERVISING OFFENDERS OUTSIDE PRISON 208–12 (1983))). Granted, this characterization of Article 42.03 as a deterrent to crime is a stretch, but it is not entirely unrealistic, especially considering the amount of publicity the media has given the Ertman case. *See* United States v. William Anderson Co., 698 F.2d 911, 913 (8th Cir. 1982) (commenting that deterrent effect of punishment is increased "if it inflicts disgrace and contumely in a dramatic and spectacular manner").

51. *See* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 4–5 (1968) (offering own definition of punishment). In his book, Hart defined punishment as including five elements:

> (1) It must involve pain or other consequences normally considered unpleasant, (2) it must be for an offence against legal rules, (3) it must be of an actual or supposed offender for his offence, (4) it must be intentionally administered by human beings other than the offender, (5) it must be imposed and administered by an authority constituted by a legal system against which the offence is committed.

Id. According to this definition, one could consider post-sentence victim allocution as a form of punishment: (1) it is certainly unpleasant for a defendant to listen to a victim berate him in open court; (2) victims are allowed to give statements as a result of an offense against legal rules; (3) the statements are intended for an actual offender who committed the offense; (4) it is administered by the victim, who is a person other than the offender; and (5) it is imposed by the legal system pursuant to Article 42.03 of the Texas Code of Criminal Procedure.

If one views post-sentence victim allocution as a form of punishment, a defendant who is subject to such statements could assert an Eighth Amendment claim. *See* U.S. CONST. amend VIII (providing that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted"). In 1986, though, a Florida court of appeals held that a punishment requiring a defendant to affix a bumper sticker reading "CONVICTED D.U.I.—RESTRICTED LICENSE" to his vehicle, did not constitute cruel and unusual punishment. Goldschmitt v. State, 490 So. 2d 123, 124–26 (Fla. Dist. Ct. App. 1986). The defendant in *Goldschmitt* likened his punishment to the pillory of colonial America. *Id.* at 125; *see also* Hobbs v. State, 32 N.E. 1019, 1021 (Ind. 1893) (pointing out that "cruel" referred to colonial punishments of pillory or burning at stake); State v. Moilen, 167 N.W. 345, 347 (Minn. 1918) (claiming that phrase "cruel and unusual punishments" does not deal with time; rather, it deals with methods, such as pillory). However, the court did not agree with this argument, saying "the differences between the degrading physical rigors of the pillory and a small strip of colorful adhesive far outweigh the similarities." *Goldschmitt*, 490 So. 2d at 125. Nevertheless, courts have held some proposed pun-

viewed in this manner, the statute permitting post-sentence victim statements does not conform with the theories of punishment included in the Penal Code. The punitive effect of Article 42.03 does not reflect rehabilitative or deterrent objectives, but instead represents a classic form of denunciatory punishment.[52] Because the court reporter rarely transcribes the victim's statements,[53] no library details the types of statements that victims give. Not surprisingly, however, victims do not usually speak gra-

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ishments too extreme. *See* Bienz v. State, 343 So. 2d 913, 915 (Fla. Dist. Ct. App. 1977) (disallowing as unconstitutional punishment requiring worker to wear diapers over clothing because he behaved like baby). The court in *Bienz* explained: "Suffice it to say that a command . . . that an adult male wear diapers in public would certainly be demeaning in the minds of so-called reasonable men . . . . [N]ot surprisingly, prior decisions involving such bizarre incidents are sparse." *Id.* at 914. *But see* People v. McDowell, 130 Cal. Rptr. 839, 843 (Ct. App. 1976) (upholding punishment forcing purse snatcher to wear taps on shoes when outside house). However, Article 42.03 statements are surely not as extreme as these two cases; thus, an Eighth Amendment claim against such statements would most likely fail.

52. *See* Gary Taylor, *Texans Take It Out on the Defendant*, NAT'L L.J., Nov. 14, 1994, at A6 (quoting Deputy Director of National Organization for Victim Assistance: "If the victim uses the occasion to express enormous rage, that is one additional punishment the defendant has earned"); *cf.* Lawrence Crocker, *Justice in Criminal Liability: Decriminalizing Harmless Attempts*, 53 OHIO ST. L.J. 1057, 1092 (1992) (hoping that denunciation also serves deterrent purposes); Steven G. Gey, *Justice Scalia's Death Penalty*, 20 FLA. ST. U. L. REV. 67, 107 n.180 (1992) (claiming that true goal of punishment is not denunciation itself, but rather social benefits of denunciation); Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655, 681 (1989) (comparing denunciation with form of punishment often imposed by parents); Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 704 (1986) (noting concept of denunciation and stating that "conviction and punishment of a criminal defendant is in effect a 'status degradation ceremony' "); Ronald J. Rychlak, *Society's Moral Right to Punish: A Further Exploration of the Denunciation Theory of Punishment*, 65 TUL. L. REV. 299, 331 (1990) (defining denunciation theory of punishment as "those who disobey criminal laws should be held up to the rest of society and denounced as violators of the rules that define what the society represents"); Heathcote W. Wales, *Tilting at Crime: The Perils of Eclecticism*, 74 GEO. L.J. 481, 494 (1985) (renaming denunciation as "moral education" and contrasting it with deterrence (reviewing JAMES Q. WILSON & RICHARD HERRNSTEIN, CRIME AND HUMAN NATURE (1985))); *cf.* MICHAEL S. HINDUS, PRISON AND PLANTATION: CRIME, JUSTICE, AND AUTHORITY IN MASSACHUSETTS AND SOUTH CAROLINA, 1767-1878, at 100 (1980) (admitting that denunciatory punishment, or "shaming," did not seek to rehabilitate offender, and citing whipping, branding, pillory, and stock as forms of denunciation).

53. *See* TEX. CODE CRIM. PROC. ANN. art. 42.03, § 1(b)(3) (Vernon Supp. 1995) (using phrase "may not transcribe" rather than "shall not transcribe," and therefore suggesting that some degree of discretion is involved); *cf.* Inwood N. Homeowners' Ass'n v. Meier, 625 S.W.2d 742, 744 (Tex. App.—Houston [1st Dist.] 1981, no writ) (noting general rule of statutory interpretation that "may" is permissive and "shall" is mandatory).

ciously towards the defendants, as shown by Randy Ertman's comments in the Houston courtroom.[54]

Denunciation is a method of punishment that was once quite popular.[55] The punishing authorities gradually discontinued classic forms of denun-

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54. *See* Jennifer Liebrum, *Speaking Up over Speaking Out in Court: Tense Monologues in Ertman-Pena Cases Lead Many to Back More Controls*, HOUS. CHRON., Oct. 13, 1994, at A36 (noting difficulty for victim to speak in court to defendant without allowing harsh emotions to take control). *But see* Telephone Interview with Judge Terry McDonald, 186th District Court, Bexar County, Tex. (Jan. 23, 1995) (sharing that, in his experience, most victims use post-sentence victim allocution to express displeasure to judge about verdict rather than to express feelings towards defendant). The rage felt by victims of crime is evident in the much-publicized case of Jeffrey Dahmer, who murdered and cannibalized at least 16 young men and was then murdered himself as he served the first of 16 consecutive life sentences in the Columbia Correctional Institution in Portage, Wisconsin. Dennis Cauchon & Haya El Nasser, *Dahmer Slain in Prison: Families of His Victims Feel "Relief,"* USA TODAY, Nov. 29, 1994, at A1. An outburst similar to the one in the Ertman case occurred at Dahmer's trial as families of the victims presented victim impact statements to the court prior to sentencing. *See* Susan A. Cornille, Comment, *Retribution's "Harm" Component and the Victim Impact Statement: Finding a Workable Model*, 18 DAYTON L. REV. 389, 390–91 (1993) (detailing trial of Jeffrey Dahmer). At Dahmer's trial, victims made comments such as "diablo, puro diablo—devil, pure devil," and "I hope you go to hell!" *Id.* at 391 n.14 (citing Debbie Howlett, *Dahmer Sentencing Explodes in Emotion*, USA TODAY, Feb. 18, 1992, at A3)). One woman yelled obscenities and actually rushed at Dahmer. *Id.* at 390–91. The victims' families' wounds still had not healed when a fellow inmate killed Dahmer two years later. *See* Rebecca Carr & Maureen O'Donnell, *Clash of Emotions for Victims' Families: Violent Death Pleases Some; Others Just Glad It's Over*, CHI. SUN-TIMES, Nov. 29, 1994, at 6 (documenting reactions of families of victims). Some reacted harshly with comments like "I'd like to know him (the prisoner who killed Dahmer) and get to talk to him. He's my hero," and "Whatever you do wrong, it comes back to you," while the slaying simply reminded others of the pain they felt two years ago—"Whether he's dead or alive, it still can't bring your brother back." *Id.*

55. *See* SIDNEY L. BARNES, INSTITUTE OF CONTEMPORARY CORRECTIONS AND THE BEHAVIORAL SCIENCES, EVOLUTIONARY IMPLICATIONS OF LEGALIZED PUNISHMENT 21 (1974) (discussing many public forms of punishment in colonial period that served denunciatory purposes); MICHAEL S. HINDUS, PRISON AND PLANTATION: CRIME, JUSTICE, AND AUTHORITY IN MASSACHUSETTS AND SOUTH CAROLINA, 1767-1878, at 100 (1980) (noting use and effects of various shaming punishments used during colonial period); SAMUEL WALKER, POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE 14 (1980) (describing various forms of public humiliation used in colonial America). A recent article cited several examples of recent and interesting denunciatory punishments:

> (1) A minister in Wisconsin persuaded a man who burglarized his church to stand up before the entire congregation to apologize, then to help repair the church;
>
> (2) A Memphis judge sometimes sentences thieves to probation with the condition that they permit their victims to come into their homes, in front of all the neighbors, and take something they want; and
>
> (3) A federal judge ordered a defendant convicted of tax evasion to purchase computers and teach parolees, noting that by dealing with street criminals the cheat would be "constantly reminded that his conduct was legally and socially wrong."

ciation in favor of deterrence and rehabilitative punishment.[56] In the context of the modern legal system, denunciatory methods of exacting revenge are somewhat barbaric,[57] leading to descriptions of post-sentence victim allocution as the "modern-day equivalent of the pillory."[58] While

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Jonathan Alter & Pat Wingert, *The Return of Shame*, NEWSWEEK, Feb. 6, 1995, at 21–25. Moreover, a recent poll found that 23% of people think that publicly shaming criminals, in addition to fines and jail sentences, would be an effective form of punishment. *Id.* at 22 (citing Newsweek Poll, Jan. 26-27, 1995). However, 64% of Americans felt that public shaming would have no effect "because most criminals have no sense of shame." *Id.*

56. *See* SIDNEY L. BARNES, INSTITUTE OF CONTEMPORARY CORRECTIONS AND THE BEHAVIORAL SCIENCES, EVOLUTIONARY IMPLICATIONS OF LEGALIZED PUNISHMENT 30 (1974) (detailing unsuccessful efforts from 1935 to 1970 to rehabilitate criminals rather than punish them); MICHAEL FOUCAULT, DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON 73 (1979) (relating how public punishments gradually became intolerable). *But see* Susan A. Cornille, Comment, *Retribution's "Harm" Component and the Victim Impact Statement: Finding a Workable Model*, 18 DAYTON L. REV. 389, 389 (1993) (mentioning retribution as growing objective of sentencing). In addition to the fact that denunciation was not effective, Hindus pointed out that rehabilitation became one of the new preferred methods of punishment. *See* MICHAEL S. HINDUS, PRISON AND PLANTATION: CRIME, JUSTICE, AND AUTHORITY IN MASSACHUSETTS AND SOUTH CAROLINA, 1767-1878, at 105 (1980) (noting that judges considered rehabilitation issues when making sentencing determinations). For an excellent novel displaying the horrible effects of denunciation, see generally NATHANIEL HAWTHORNE, THE SCARLET LETTER (1950), which traces the life of a woman in colonial America who was forced to wear a red "A" on her chest at all times as a result of her adultery.

57. *See* MICHAEL S. HINDUS, PRISON AND PLANTATION: CRIME, JUSTICE, AND AUTHORITY IN MASSACHUSETTS AND SOUTH CAROLINA, 1767-1878, at 100 (1980) (describing branding as "the most literal way a society had of labeling a person a deviant, thus combining present pain with permanent shame"). Hindus further explained that shaming punishment was successful in close-knit communities, but lost effectiveness in the "anonymous and transient world of Federalist Massachusetts." *Id.* Arguably, modern-day society is slightly more impersonal and transient than colonial Massachussets, which would significantly hinder the effectiveness of denunciatory punishment. *But see* Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1925 (1991) (recognizing that denunciation could still work to reduce crime in modern America (citing J. BRAITHWAITE, CRIME, SHAME, AND REINTEGRATION 86 (1989))). This is not to suggest that modern society does not embrace forms of punishment which some consider "barbaric." *See* Gray v. Lucas, 463 U.S. 1237, 1245 (1983) (Marshall, J., dissenting) (describing lethal-gas method of capital punishment as barbaric); Daniel T. Kobil, *Do the Paperwork or Die: Clemency, Ohio Style?*, 52 OHIO ST. L.J. 655, 674 (1991) (pointing to former Ohio Governor DiSalle's characterization of death penalty as "futile barbaric relic"); Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1491 (1992) (stating that homophobic violence inflicted on gays and lesbians is barbaric punishment); Gerald F. Uelmen, *Justice Thurgood Marshall and the Death Penalty: A Former Criminal Defense Lawyer on the Supreme Court*, 26 ARIZ. ST. L.J. 403, 407 (1994) (reiterating Justice Marshall's view that death penalty is barbaric and should be barred by Eighth and Fourteenth Amendments).

58. Gary Taylor, *Texans Take It Out on the Defendant*, NAT'L L.J., Nov. 14, 1994, at A6.

the pillory was more of a public denunciation than are victim statements pursuant to Article 42.03, both have a significant denunciatory effect.[59]

2. Article 42.03 and Victim Retribution

Retribution, at its core, refers to the biblical "eye for an eye" method of punishment.[60] Within the modern legal context, retribution refers to a holistic approach to punishment in which the offender must be punished so that society may restore an objective order.[61] Retribution differs from vengeance in that retribution is prescribed by law and is not intended to exceed the crime, while vengeance stems from the individual and has no boundaries.[62] In this sense, victim statements made pursuant to Article

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59. *See* MICHAEL S. HINDUS, PRISON AND PLANTATION: CRIME, JUSTICE, AND AUTHORITY IN MASSACHUSETTS AND SOUTH CAROLINA, 1767-1878, at 100 (1980) (describing practice of placing offenders on public display so they would feel shame for their acts).

60. *Exodus* 21:24. This passage reads, "And if any mischief follow, then thou shalt give life for life, eye for eye, tooth for tooth." *Id.* The Bible uses the phrase "eye for an eye" in two other places. *See Leviticus* 25:20 ("Breach for breach, eye for eye, tooth for tooth: as he hath caused a blemish in a man, so shall it be done to him again"); *Matthew* 5:38-39 ("Ye have heard that it hath been said, An eye for an eye, and a tooth for a tooth: But I say unto you, That ye resist not evil: but whosoever shall smite thee on thy right cheek, turn to him the other also"); *see also* Payne v. Tennessee, 501 U.S. 808, 819 (1991) (pointing out that *lex talionis*, or justice of retaliation, was ancient basis of criminal sentencing); Caldwell v. Mississippi, 472 U.S. 320, 324 (1985) (commenting that "eye for an eye" is not modern way to address problems); Lockett v. Ohio, 438 U.S. 586, 635 (1978) (Rehnquist, J., dissenting) (claiming that many penologists and moralists do not approve of "eye for an eye" mentality); MARK TUNICK, PUNISHMENT: THEORY AND PRACTICE 86 (1992) (explaining that many associate retribution with *lex talionis*).

61. *See* Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 991 (1985) (quoting Herbert Morris, *Persons and Punishment*, *in* PUNISHMENT 75 (J. Feinberg & H. Gross eds., 1975) as stating "that society's members implicitly agree to an allocation of benefits and burdens," and "punishment serves the purpose of restoring the equilibrium of benefits and burdens"); Susan A. Cornille, Comment, *Retribution's "Harm" Component and the Victim Impact Statement: Finding a Workable Model*, 18 DAYTON L. REV. 389, 398 (1993) (citing Immanuel Kant's belief that "punishment of crime was needed to give the wrongdoer his 'just deserts' and to purge the public of the injustice that was created by the criminal act"); Phillip A. Talbert, Comment, *The Relevance of Victim Impact Statements to the Criminal Sentencing Decision*, 36 UCLA L. REV. 199, 222 (1988) (distinguishing moral retribution and social retribution by stating that aim of social retribution is to recover balance of society which defendant's crime ruined).

62. *See* MARK TUNICK, PUNISHMENT: THEORY AND PRACTICE 86 n.67 (1992) (establishing that revenge is dictated by feelings of victim, while retribution is more of "repayment"). Tunick also discussed the views of a very famous retributivist, Hegel, who claimed that revenge is arbitrary and can lead to even more damage to society, unlike retribution, which is more structured since it depends on a third party, such as a judge. *Id.* at 87–88; *see also* Stuart P. Green, *The Criminal Prosecution of Local Governments*, 72 N.C. L. REV. 1197, 1235 (1994) (noting that retribution involves maintenance of societal order and respect for law); Susan A. Cornille, Comment, *Retribution's "Harm" Component and the Victim Impact Statement: Finding a Workable Model*, 18 DAYTON L. REV. 389, 399 (1993)

42.03 are a form of retribution. The statements are prescribed by law and serve to return society to its pre-crime status by allowing the victim to become part of the punishment process as an agent for society.[63] The retributive punitive effect of Article 42.03 is thus incompatible with the objectives of deterrence and rehabilitation outlined in the Penal Code.

B. *Effects of Article 42.03 on the Dignity of the Courtroom*

The Ertman case represents the only highly publicized trial in which a problem resulted from statements made during post-sentence victim allocution.[64] Arguably, the remarks made by Randy Ertman, and the free-for-all that ensued in the courthouse hallway, were anomalous, and the legislature should not abolish Article 42.03 simply because of one incident.[65] Although the court reporter rarely transcribes the statements, the

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(asserting that modern retributivists generally believe that punishment should be humane and in proportion to crime). *But see* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 45 (1935) (characterizing retribution as "only vengeance in disguise").

63. *See* Leslie Sebba, *The Victim's Role in the Penal Process: A Theoretical Orientation*, 30 AM. J. COMP. L. 217, 231–33 (1982) (elucidating view that under "adversary-retribution" modes of punishment, state gives victim machinery to achieve satisfaction for society and self); Phillip A. Talbert, Comment, *The Relevance of Victim Impact Statements to the Criminal Sentencing Decision*, 36 UCLA L. REV. 199, 212 (1988) (asserting that victim may utilize criminal justice system of state to retaliate against defendant under retributive theory of punishment); *cf.* Michael A. Johnson, Note, *The Application of Victim Impact Statements in Capital Cases in the Aftermath of* Booth v. Maryland*: An Impact No More?*, 13 T. MARSHALL L. REV. 109, 109–10 (1988) (characterizing victim impact statements during sentencing as form of retribution). Talbert spoke of a "victim-initiated retaliation model" of retributive punishment. Phillip A. Talbert, Comment, *The Relevance of Victim Impact Statements to the Criminal Sentencing Decision*, 36 UCLA L. REV. 199, 214 (1988). However, retaliatory systems do not have a great deal of support from social scientists or practicing attorneys. *Id.*; *see also* Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 994 (1985) (commenting that philosophers do not give retaliation theory much credence despite favorable reviews of theory by victims' rights movement).

64. Comprehensive searches of Westlaw and LEXIS databases revealed no articles concerning the Texas practice of post-sentence victim allocution other than those dealing with the Ertman case. *See* Gary Taylor, *Texans Take It Out on the Defendant*, NAT'L L.J., Nov. 14, 1994, at A6 (mentioning no other incidents dealing with Article 42.03 victim statements); Felix Sanchez, *Top Ten Stories in Texas, Houston*, HOUS. POST, Jan. 1, 1995, at A26 (characterizing Ertman case as one of most highly publicized cases involving practice of post-sentence victim allocution). *But see* Susan A. Cornille, Comment, *Retribution's "Harm" Component and the Victim Impact Statement: Finding a Workable Model*, 18 DAYTON L. REV. 389, 390–91 (1993) (giving example of victim getting carried away as victim's family member attempted to assault serial killer Jeffrey Dahmer while victim's statements were made *during* sentencing hearing).

65. *Cf.* Siddoway v. Bank of Am., 748 F. Supp. 1456, 1462 (N.D. Cal. 1990) (noting that courts have seen certain cases as anomalies and not overruled law because of them).

victim must still present them in open court.[66] Presumably, a judge could order a victim to stop speaking, or even sanction a victim for contempt, if the remarks do not conform to the statute or the dignity of the court.[67]

On its face, Article 42.03 does not affect the trial proceedings, since victims may only present such statements after sentence, when the trial is all but concluded.[68] However, post-sentence victim allocution presents a significant challenge to the ideal that a courtroom is a place of dignity.[69] A large dose of the respect that the public affords the American legal system is derived from its appearance of authority.[70] When the legal sys-

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66. TEX. CODE CRIM. PROC. ANN. art. 42.03, § 1(b) (Vernon Supp. 1995).

67. *See In re* Cohen, 370 F. Supp. 1166, 1174 (S.D.N.Y. 1973) (emphasizing need for judge to maintain order and dignity in courtroom); Leatherwood v. Holland, 375 S.W.2d 517, 522 (Tex. Civ. App.—Fort Worth 1964, writ ref'd n.r.e.) (giving trial judge broad discretion in conduct of proceedings); Louis S. Raveson, *Advocacy and Contempt: Constitutional Limitations on the Judicial Contempt Power; Part One: The Conflict Between Advocacy and Contempt*, 65 WASH. L. REV. 477, 478–80 (1990) (stressing importance of judicial power to punish disorderly conduct with contempt charge); Telephone Interview with Judge Terry McDonald, 186th District Court, Bexar County, Tex. (Jan. 23, 1995) (acknowledging that judges can guard against post-sentence victim allocution getting out of hand simply by ordering victim to stop).

68. *See* TEX. CODE CRIM. PROC. ANN. art. 42.03, § 1(b) (Vernon Supp. 1995) (specifying that court may only allow right of post-sentence victim allocution after court has both assessed and pronounced punishment of defendant); Debate on Tex. H.B. 520 on the Floor of the Senate, 72d Leg., R.S. (May 21, 1991) (tapes available from the Senate Staff Services Office) (statement of Judge Charles Miller, Texas Court of Criminal Appeals) (asserting that Article 42.03 statements will not affect sentences at all); *Hearings on Tex. H.B. 520 Before the House Comm. on Crim. Jurisprudence*, 72d Leg., R.S. (Feb. 26, 1991) (tapes available from House Committee Services) (statement of Rep. Gallego) (contending that victim allocution pursuant to House Bill 520 will not affect fairness of sentence).

69. *See* Illinois v. Allen, 397 U.S. 337, 351 (1970) (Douglas, J., dissenting) (emphasizing inherent dignity associated with courts); Cody v. Mustang Oil Tool Co., 595 S.W.2d 214, 216 (Tex. Civ. App.—Eastland 1980, writ ref'd n.r.e.) (holding that court must maintain decorum in judicial proceeding). In his dissent in *Allen*, Justice Douglas explained that "[a] courtroom is a hallowed place where trials must proceed with dignity and not become occasions for entertainment by the participants, by extraneous persons, by modern mass media, or otherwise." *Allen*, 397 U.S. at 351 (Douglas, J., dissenting); *see also* Francis Bacon, *Of Judicature* (claiming that "[t]he place of justice is a hallowed place; and therefore not only the bench, but the foot-pace and precincts and surprise thereof, ought to be preserved without scandal and corruption"), *in* 12 THE WORKS OF FRANCIS BACON 268 (James Spedding et al. eds., 1969); Commonwealth v. Stevenson, 393 A.2d 386, 392 (Pa. 1978) (describing court as "hallowed place of justice" (quoting Cooke v. United States, 267 U.S. 517, 536 (1925))).

70. *See* J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1438 n.3 (1994) (Scalia, J., dissenting) (asserting that appearance of justice is equally important as actual justice); Mayberry v. Pennsylvania, 400 U.S. 455, 456 (1971) (noting traditional Western courtroom as "hallowed place of quiet dignity"); Illinois v. Allen, 397 U.S. 337, 343 (1970) (declaring that dignity, order, and decorum are necessary for success of criminal justice system); Sacher v. United States, 343 U.S. 1, 38 (1952) (Frankfurter, J., dissenting) (suggesting court

tem allows this appearance to be reduced by courtroom tirades permitted by Article 42.03,[71] it undoubtedly diminishes the level of respect that people have for the courts.[72]

If the Texas Legislature and the judicial system continue to permit the dignity of the courtroom to suffer as a result of Article 42.03, the statute may negatively affect public confidence in the criminal justice system.[73] Although Article 42.03 victim statements occur only after the court pro-

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is place of "hush and solemnity"); Louis S. Raveson, *Advocacy and Contempt: Constitutional Limitations on the Judicial Contempt Power; Part One: The Conflict Between Advocacy and Contempt*, 65 WASH. L. REV. 477, 592 (1990) (stressing not only court's role in resolving disputes, but also importance of appearance of authority).

71. *See* TEX. CODE CRIM. PROC. ANN. art. 42.03, § 1(b) (Vernon Supp. 1995) (specifying no parameters for control of tone or content of victim's statements). While the authors of Article 42.03 probably did not envision a system in which a victim would embark on lengthy courtroom tirades, the fact remains that no significant limits are placed on the victims' statements during post-sentence allocution. *Id. But see* Louis S. Raveson, *Advocacy and Contempt: Constitutional Limitations on the Judicial Contempt Power; Part One: The Conflict Between Advocacy and Contempt*, 65 WASH. L. REV. 477, 479–80 (1990) (showing that court has power to hold one in criminal contempt if one obstructs court business and disobeys court authority).

72. *See Mayberry*, 400 U.S. at 456 (intimating that conduct unbecoming courtroom is at odds with concept of justice); *Allen*, 397 U.S. at 343 (stressing that dignity and proper conduct are essential for criminal justice system to function properly); Bloom v. Illinois, 391 U.S. 194, 202 (1968) (stating that "[e]ven when the contempt is not a direct insult to the court or the judge, it frequently represents a rejection of judicial authority"); Estes v. Texas, 381 U.S. 532, 565 (1965) (Warren, C.J., concurring) (explaining that reliability of trial is undermined when dignity in courtroom is not preserved); United States v. Giovanelli, 897 F.2d 1227, 1230 (2d Cir. 1990) (postulating that contempt power is necessary to sustain dignity of courtroom and respect of public for courts and their orders); People v. Higgins, 16 N.Y.S.2d 302, 305 (1939) (maintaining that disorderly conduct harms respect which courts deserve); Paul L. Haines, Note, *Restraining the Overly Zealous Advocate: Time for Judicial Intervention*, 65 IND. L.J. 445, 463 (1990) (determining that court must use power to maintain favorable public view of criminal justice system).

73. *See Cohen*, 370 F. Supp. at 1174 (urging courts to maintain atmosphere of dignity and respect in courtroom to preserve reality and appearance of fair trial). Arguably, public perception of the justice system is not at an all-time high. *See* Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363, 364 (1993) (citing view that poor compensation and subpar representation by public defenders have reduced public's confidence in judicial system); William P. Nelson, Comment, *Should the Ranch Go Free Because the Constable Blundered? Gaining Compliance with Search and Seizure Standards in the Age of Asset Forfeiture*, 80 CAL. L. REV. 1309, 1356 (1992) (describing decreased public confidence in criminal system due to system's failure to lower public's fear of criminal activity); *cf.* David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063, 1088 (1986) (proposing view that self-incrimination privilege reduces public's confidence in criminal justice system). However, a sense of respect for courtroom proceedings persists. *See Allen*, 397 U.S. at 351 (Douglas, J., dissenting) (stressing importance of inherent dignity of courtrooms).

nounces sentence, the general public will not be informed of that fact. In the Ertman case, for example, a majority of the newspaper and television reports did not mention that Randy Ertman made his statements only after the sentencing hearing.[74] Without such knowledge, the public could perceive that the court, in a highly publicized trial with inflammatory Article 42.03 remarks, did not properly conduct the proceedings, even though the statements had no actual effect on the verdict or the sentence.[75] As one court explained, "[i]f there is to be the reality of a fair trial, both in fact and in appearance, it must be conducted in an atmosphere of respect, order, decorum and dignity befitting its importance both to the prosecution and the defense."[76]

C. *Effect of Article 42.03 on Judicial Economy*

Victim allocution under Article 42.03 increases the use of judicial resources. Supporters of Article 42.03 could contend that judicial economy must give way to the rights of the parties when an injustice would occur.

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74. *See, e.g.*, *Fathers Confront Killers in Court*, PHOENIX GAZETTE, Oct. 12, 1994, at A13 (failing to note that Texas law allows victims' comments only after sentencing); *Angry Dads Lash Out at Killers of Daughters: "I'll Watch You Die, Boy," Father Tells Gang Members*, ROCKY MTN. NEWS, Oct. 12, 1994, at A36 (neglecting to mention that Texas law only allows harsh comments subsequent to pronouncement of sentence); *News: Survivors of Violent Crime Find Holidays Very Tough* (CNN television broadcast, Nov. 23, 1994) (transcript on file with the *St. Mary's Law Journal*) (describing Ertman case, but declining to acknowledge that strong comments took place following sentencing); *A Current Affair* (syndicated television broadcast, Feb. 1, 1995) (showing woman reading statement in court concerning her son's death without noting point in trial at which statements occurred); *Geraldo: When Private Pain Goes Public: Crimes Caught on Tape* (syndicated television broadcast, Oct. 24, 1994) (transcript on file with the *St. Mary's Law Journal*) (making no mention of either Texas law permitting victim statements or of fact that victim made statements after court had already pronounced sentence). *But see* Gary Taylor, *Texans Take It Out on the Defendant*, NAT'L L.J., Nov. 14, 1994, at A6 (discussing impact of allowing victims to speak after sentencing).

75. *See* Gary Taylor, *Texans Take It Out on the Defendant*, NAT'L L.J., Nov. 14, 1994, at A6 (suggesting possible unfairness of trial by quoting attorney Jerry Guerinot's comment that courtroom "looked like a bloodthirsty mob at the turn of the century"); Debate on Tex. H.B. 520 on the Floor of the Senate, 72d Leg., R.S. (May 21, 1991) (tapes available from the Senate Staff Services Office) (statement of Judge Charles Miller, Texas Court of Criminal Appeals) (claiming that Bill could not possibly affect sentencing); *cf. J.E.B.*, 114 S. Ct. at 1438 n.3 (Scalia, J., dissenting) (indicating that "appearance of justice is as important as its reality"); *Estes*, 381 U.S. at 596 (Harlan, J., concurring) (commenting that publicity of courtroom proceedings through cameras in court "detract[s] from the essential dignity of the proceedings, degrade[s] the court and create[s] misconceptions with respect thereto in the mind of the public and should not be permitted").

76. *Cohen*, 370 F. Supp. at 1174.

The rights of the parties to a lawsuit are paramount.[77] Because a judge possesses broad discretion concerning the flow of the trial, the argument can be made that even without time restrictions, a judge could stop a victim whenever the interests of time dictate a conclusion of the proceedings.[78]

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77. Granted, victims are not parties in a criminal prosecution. Republic Ins. Co. v. Feidler, 875 P.2d 187, 192 (Ariz. Ct. App. 1993); People v. Daggett, 253 Cal. Rptr. 195, 198 (Ct. App. 1988) (Marvin, J., dissenting); Matt Pawa, Comment, *When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us? An Examination of Section 5 of the Fourteenth Amendment*, 141 U. PA. L. REV. 1029, 1089–90 n.379 (1993). However, because of the increase in victims' rights, some perceive victims as parties to the prosecution and believe victims should be recognized as parties. *See* Josephine Gittler, *Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems*, 11 PEPP. L. REV. 117, 177 (1984) (commenting that "[c]haracterization of the victim as a party to the criminal proceeding would signal a basic reorientation of the criminal justice system towards the goal of providing redress to the victim and vindicating their interests in restitution and retribution"); Kenneth L. Wainstein, Comment, *Judicially Initiated Prosecution: A Means of Preventing Continuing Victimization in the Event of Prosecutorial Inaction*, 76 CAL. L. REV. 727, 731 n.18 (1988) (explaining that many commentators favor granting victims right to pursue private prosecutions). *But see* John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 587 (1994) (claiming that private prosecutions are harmful because they favor wealthy). Undisputably, defendants possess a significant number of rights. *See* United States v. Cross, 928 F.2d 1030, 1038 n.16 (11th Cir.) (finding that judicial economy was not overriding reason to impair defendant's rights), *cert. denied*, 502 U.S. 985 (1991); United States v. Pepe, 747 F.2d 632, 651 n.21 (11th Cir. 1984) (noting that while judicial economy is relevant, it may not take precedence over constitutional rights of defendant); Williams v. Superior Court, 683 P.2d 699, 706 (Cal. 1984) (concluding that defendant's right to fair trial may never be refused because of consideration of judicial economy (citing *In re* Anthony T., 169 Cal. Rptr. 120 (Ct. App. 1980))); Anne S. Emanuel, *The Concurrent Sentence Doctrine Dies a Quiet Death—Or Are the Reports Greatly Exaggerated?*, 16 FLA. ST. U. L. REV. 269, 296 (1988) (indicating that defendant's right to appeal may not be refused on basis of judicial economy); Bruce A. McGovern, Note, *Invalid Waivers of Counsel as Harmless Errors: Judicial Economy or a Return to* Betts v. Brady?, 56 FORDHAM L. REV. 431, 448 (1987) (stating that defendant may not be deprived of right to counsel based on judicial economy rationale). *But cf.* United States v. Castillo-Valencia, 917 F.2d 494, 498 (11th Cir. 1990) (citing United States v. Gonzalez, 804 F.2d 691, 694 (11th Cir. 1986) for balancing of defendant's right to fair trial against judicial economy); United States v. Martino, 648 F.2d 367, 386 (5th Cir. 1981) (weighing judicial economy and protection of defendant's rights in appellate claim involving complex issues); United States v. Zicree, 605 F.2d 1381, 1388 (5th Cir. 1979) (requiring judge in motion for severance to weigh right to fair trial versus judicial economy); United States v. Uptain, 531 F.2d 1281, 1291 (5th Cir. 1976) (acknowledging that both rights of accused and judicial economy are factors for trial courts to consider); Christopher J. Sinnott, *When Defendant Becomes the Victim: A Child's Recantation as Newly Discovered Evidence*, 41 CLEV. ST. L. REV. 569, 577 (1993) (reiterating that defendant must be afforded due process rights to adjudicate claim, but judicial economy considerations dictate against successive litigation).

78. *See* Telephone Interview with Judge Terry McDonald, 186th District Court, Bexar County, Tex. (Jan. 23, 1995) (expressing opinion that judge could easily order victim to stop

However, post-sentence victim allocution does not afford any party a sufficient benefit to justify prolonging the criminal process.[79] The last thing the criminal justice system needs is a statute that could further clog the docket.[80] Enhancing a victim's participation in the trial is important, but laws permitting a victim to present a statement to the court, absent time constraints, prolong an already arduous process.[81]

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victim statement if judge believed victim was exceeding boundaries of law); *cf.* Schroeder v. Brandon, 172 S.W.2d 488, 491 (Tex. 1943) (authorizing great deal of discretion for trial judge); Jeter v. Associated Rack Corp., 607 S.W.2d 272, 277 (Tex. Civ. App.—Texarkana, writ ref'd n.r.e.) (reporting that judges have broad discretion in control of trial), *cert. denied*, 454 U.S. 965 (1980); Fulmer v. Thompson, 573 S.W.2d 256, 263 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.) (relating that trial judge has great amount of discretionary control over court); Texas Employers' Ins. Ass'n v. Garza, 557 S.W.2d 843, 845 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.) (asserting that trial judge has broad discretion in control of trial); Clark v. Turner, 505 S.W.2d 941, 945 (Tex. Civ. App.—Amarillo 1974, no writ) (granting broad discretion to trial judge to control conduct in courtroom).

79. *See* Jennifer Liebrum, *Speaking Up over Speaking Out in Court: Tense Monologues in Ertman-Pena Cases Lead Many to Back More Controls*, HOUS. CHRON., Oct. 13, 1994, at A36 (relaying views of prosecutor Kelly Siegler, who wondered about purpose of allowing victims to speak after sentencing); *Hearings on Tex. H.B. 520 Before the House Comm. on Crim. Jurisprudence*, 72d Leg., R.S. (Feb. 26, 1991) (tapes available from House Committee Services) (conveying concern of legislature that victim statements would consume too much time and "bog down" criminal justice system).

80. *See* Callahan v. Callahan, 579 S.W.2d 385, 387 (Ky. Ct. App. 1979) (mentioning tendency of dockets to become clogged); State v. Linsky, 379 A.2d 813, 817 (N.H. 1977) (referring to crowded condition of criminal courts' dockets); State v. Kuhnausen, 272 P.2d 225, 263 (Or. 1954) (Rossman, J., dissenting) (dealing with overload of cases in criminal courts); Karen E. Holt, *Hard Blows and Foul Ones: The Limited Bounds on Prosecutorial Summation in Tennessee*, 58 TENN. L. REV. 117, 143 (1990) (commenting on factors contributing to clogging of criminal dockets); *cf.* People v. Thomas, 197 N.W.2d 51, 56 (Mich. 1972) (Kavanagh, J., dissenting) (making note of backlog in civil as well as criminal docket).

81. *See* Mitchell v. Superior Court, 632 F.2d 767, 771 (9th Cir. 1980) (mentioning cost and length of most criminal trials); Speake v. Grantham, 317 F. Supp. 1253, 1267 (S.D. Miss. 1970) (commenting on time-consuming nature of criminal trials); Abraham S. Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L.J. 515, 519 (1982) (warning of danger that further rights for victims could clog courts' dockets even more); Bruce Ledewitz, *Civil Disobedience, Injunctions, and the First Amendment*, 19 HOFSTRA L. REV. 67, 128 (1990) (suggesting that criminal justice process is lengthy); Gregory K. McCall, Note, *Cameras in the Criminal Courtroom: A Sixth Amendment Analysis*, 85 COLUM. L. REV. 1546, 1569 (1985) (stating that trial proceedings are currently too long and expensive and should not be lengthened because of media coverage); *Supreme Court Review: Fourteenth Amendment—Peremptory Challenges and the Equal Protection Clause*, 82 J. CRIM. L. & CRIMINOLOGY 1000, 1027 (1992) (describing exorbitant cost and length of criminal trial); *cf.* United States v. Jones, 997 F.2d 1475, 1484 (D.C. Cir. 1993) (Wald, J., dissenting) (noting that sentencing procedures have placed more time-consuming requirements on criminal justice system), *cert. denied*, 114 S. Ct. 741 (1994). Goldstein has stated, however, that the "greater amount of time devoted to the victim may then be counteracted by a decreased need for imprisonment." Abraham S. Goldstein, *Defining the Role of the Victim*

D. *Vengeance Aspects of Article 42.03*

Society should never hesitate to make criminals suffer for their wrongs; as one court stated:

> We have . . . no sympathy with that sickly sentimentality that springs into action whenever a criminal is at length about to suffer for crime. It may be a sign of a tender heart, but it is also a sign of one not under proper regulation. Society demands that crime shall be punished and criminals warned, and the false humanity that starts and shudders when the axe of justice is ready to strike, is a dangerous element for the peace of society. We have had too much of this mercy. This is not true mercy. It only looks to the criminal, but we must insist upon mercy to society, upon justice to the poor woman whose blood cries out against her murderers.[82]

Article 42.03, as previously discussed, allows for a form of societal retribution; however, it also gives the victim an opportunity to obtain a form of personal vengeance. Conflicting views exist with respect to whether the benefits of allowing the victim to exact revenge through allocution outweigh the potential for infringing upon the defendant's rights.[83] In the

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in Criminal Prosecution, 52 MISS. L.J. 515, 561 (1982). *But see Hearings on Tex. H.B. 520 Before the House Comm. on Crim. Jurisprudence*, 72d Leg., R.S. (Feb. 26, 1991) (tapes available from House Committee Services) (statement of Rep. Gallego) (stating that there is too much concern to move trial along and that victims deserve at least this short time in court to give views on crime).

82. Eberhart v. Georgia, 47 Ga. 598, 610 (1873).

83. *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 11 (1972) (clarifying that main goal of criminal law is to protect public from harm, not to ensure rights of victims); Patrick M. Fahey, Note, Payne v. Tennessee*: An Eye for an Eye and Then Some*, 25 CONN. L. REV. 205, 207 (1992) (commenting that increasing rights of victims could infringe on rights of criminal offenders); Phillip A. Talbert, Comment, *The Relevance of Victim Impact Statements to the Criminal Sentencing Decision*, 36 UCLA L. REV. 199, 203 (1988) (relaying view that allowing victims to speak at sentencing could deny defendants fair sentence); Deborah P. Kelly, *Have Victim Reforms Gone Too Far—Or Not Far Enough?*, CRIM. JUST., Fall 1991, at 28 (claiming that no evidence exists that defendants suffer as result of increased victims' rights); *cf.* Brooks Douglass, *Oklahoma's Victim Impact Legislation: A New Voice for Victims and Their Families: A Response to Professor Coyne*, 46 OKLA. L. REV. 283, 283 (1993) (asserting that purpose of criminal system is to balance interests of accused versus interests of state in promotion of justice); Andrew J. Karmen, *Who's Against Victims' Rights? The Nature of the Opposition to Pro-Victim Initiatives in Criminal Justice*, 8 ST. JOHN'S J. LEGAL COMMENT. 157, 157 (1992) (pointing out that criminals do not vehemently oppose victims' rights movement since it is too difficult for criminals to form interest groups). Not surprisingly, many victims are not especially concerned about the rights of criminal defendants. *See, e.g.*, PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 28 (1982) (providing view of victim who said: "I just couldn't believe that the judge could actually suppress this evidence. It's like it really didn't happen . . . it just seems very unfair that something so crucial could be just elimi-

history of the American criminal justice system, when the states began to take control over prosecutions and punishments, victims found themselves almost entirely removed from the process.[84] As a result, victims did not usually receive any personal satisfaction from the punishment of the criminal.[85] Laws such as Article 42.03 enable victims to regain a small sense of personal involvement in the punishment of the offender that could provide victims a greater feeling of vindication.[86]

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nated"); Dennis Cauchon & Haya El Nasser, *Dahmer Slain in Prison/Families of His Victims Feel "Relief,"* USA TODAY, Nov. 29, 1994, at A1 (quoting Janie Hagen, sister of one of Jeffrey Dahmer's victims, after Dahmer's murder in prison: "I was so excited that finally the monster was gone"); *Geraldo: When Private Pain Goes Public: Crimes Caught on Tape* (syndicated television broadcast, Oct. 24, 1994) (transcript on file with the *St. Mary's Law Journal*) (interviewing Randy Ertman about daughter's murder and when Ertman said he would not be satisfied until killers were dead).

84. *See* Mario M. Cuomo, *The Crime Victim in a System of Criminal Justice*, 8 ST. JOHN'S J. LEGAL COMMENT. 1, 5 (1992) (referring to American criminal justice system as "victim-blind"); Ken Eikenberry, *Victims of Crime/Victims of Justice*, 34 WAYNE L. REV. 29, 36 (1987) (describing how system of public prosecution has left victim in background of criminal justice system); Christopher R. Goddu, Comment, *Victims' "Rights" or a Fair Trial Wronged?*, 41 BUFF. L. REV. 245, 248 (1993) (examining fact that victims were virtually forgotten by criminal process); Karen L. Kennard, Comment, *The Victim's Veto: A Way to Increase Victim Impact on Criminal Case Dispositions*, 77 CAL. L. REV. 417, 417 (1989) (complaining that criminal justice system in America gives no significant role to victim in prosecution of offenders); R.P. Peerenboom, Note, *The Victim in Chinese Criminal Theory and Practice: A Historical Survey*, 7 J. CHINESE L. 63, 66–67 (1993) (writing on view that state police forces and courts can achieve justice much better without much involvement from victims of crime); Paul Pringle, *Simpson Case Spurs Outrage: Victims' Rights Groups See a Familiar Pattern*, DALLAS MORNING NEWS, Dec. 12, 1994, at A1 (explaining how criminal justice system totally disregards concerns of crime victims).

85. *See* Furman v. Georgia, 408 U.S. 238, 333 (1972) (Marshall, J., concurring) (describing how vengeance by state replaced individual vengeance); STEVEN R. SMITH & SUSAN FREINKEL, ADJUSTING THE BALANCE: FEDERAL POLICY AND VICTIM SERVICES 13 (1988) (exploring fact that victims of crimes were usually "relegated to the sidelines" concerning punishment of offender). Some commentators have suggested that victims do not seek personal satisfaction for the punishment of the defendant since many victims are not vengeful about their suffering. *See* Donald J. Hall, *Victims' Voices in Criminal Court: The Need for Restraint*, 28 AM. CRIM. L. REV. 233, 244–45 (1991) (citing study indicating that many victims of crime do not desire vengeance against their offenders); Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 1001 (1985) (identifying focus of state authority that state acts as mediator among individuals to curb vigilante justice); Deborah P. Kelly, *Victims' Perceptions of Criminal Justice*, 11 PEPP. L. REV. 15, 21 (1984) (observing that victims do not seek harsher penalties for offenders); Karen L. Kennard, Comment, *The Victim's Veto: A Way to Increase Victim Impact on Criminal Case Dispositions*, 77 CAL. L. REV. 417, 417 (1989) (noting that victims are essentially left out of criminal justice system). *But see Angry Dads Lash Out at Killers of Daughters: "I'll Watch You Die, Boy," Father Tells Gang Members*, ROCKY MTN. NEWS, Oct. 12, 1994, at A36 (quoting Randy Ertman's comments to defendant sentenced to death).

86. *See* PRESIDENT'S TASK FORCE ON CRIME: FOUR YEARS LATER 27 (1986) (demanding that prosecuting authorities give victims more personal feeling of participation);

An infringement upon defendants' rights is not justified, even if victims may find some solace through victim allocution. The criminal courts should not subject the defendant to the additional punishment of post-sentence victim statements because the court has already sentenced the criminal, usually to a jail term or to death. In this sense, the additional "punishment" of the victim's harsh words is not warranted.

E. *Article 42.03 as a Form of Closure*

A possible psychological benefit for victims is that post-sentence victim allocution provides victims with a sense of closure following the traumatic experiences of the crime itself and the subsequent trial.[87] However, the cathartic effect of addressing the convicted criminal one last time before the defendant must face the court's punishment is debatable.[88] For exam-

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Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 999 (1985) (wondering how much victim participation at sentencing will help victims); *cf.* State v. Huerta, 855 P.2d 776, 783 (Ariz. 1993) (stressing importance of participation and healing in arguing that non-essential new trial should not be granted); Michael A. Johnson, Note, *The Application of Victim Impact Statements in Capital Cases in the Aftermath of* Booth v. Maryland*: An Impact No More?*, 13 T. MARSHALL L. REV. 109, 119–20 (1988) (emphasizing that participation through victim impact statement enables victim to heal more easily); Survey of Bexar County District Attorney's Office, San Antonio, Tex. (Feb. 1995) (results on file with the *St. Mary's Law Journal*) (containing prosecutor's opinion that "the 42.03 statement is beneficial to the victim and their family as a release and a means to express their feelings, which are not addressed at trial").

87. *See* Interview with Pete Gallego, Texas State Representative, in Austin, Tex. (Jan. 23, 1995) (casting law as extremely important for victims' rights since it provides them with sense of closure); Jennifer Liebrum, *Speaking Up over Speaking Out in Court: Tense Monologues in Ertman-Pena Cases Lead Many to Back More Controls*, HOUS. CHRON., Oct. 13, 1994, at A36 (quoting Dr. John P. Vincent, Professor of Psychology at University of Houston, that post-sentence victim allocution provides adequate closure). Dr. Vincent explained:

> For many of these people, there is a depth of rage that is beyond most of our comprehension. Their feelings and needs often get lost in the shuffle. I think there are instances where confronting the person that has caused you grief and distress provides you some measure of relief.

Id.; *cf.* PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 78 (1982) (containing quotation on traumatic experience of criminal trial: "In putting the man who robbed me on probation, the judge said he had suffered enough by being tried and losing his job. I was put through the system, too. I lost my job. The big difference between us is he chose to rob me; I didn't choose to be a victim"); Mario M. Cuomo, *The Crime Victim in a System of Criminal Justice*, 8 ST. JOHN'S J. LEGAL COMMENT. 1, 20 (1992) (concluding that one goal of criminal justice system should be closure to victims' feelings of violation).

88. *See* Debate on Tex. H.B. 520 on the Floor of the Senate, 72d Leg., R.S. (May 21, 1991) (tapes available from the Senate Staff Services Office) (statement of Judge Charles Miller, Texas Court of Criminal Appeals) (positing that law is therapeutic since it gives victims only chance they have to vent their emotions); Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 979 n.205 (1985) (citing FRIEDA FROMM-

ple, Randy Ertman has publicly stated that he will not be able to move on until his daughter's attackers are dead.[89]

As previously noted, Texas is the only state that permits post-sentence victim allocution. However, Louisiana has a law that provides relatives of victims the right to view the execution of the defendant.[90] Somewhat analogous in effect to the Texas law, this right may be exercised only after sentencing, and it assists the victim in dealing with the effects of the crime.[91] Reactions to the Louisiana statute and other similar experiences

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REICHMAN, PRINCIPLES OF INTENSIVE PSYCHOTHERAPY (1960) for proposition that catharsis is overrated form of therapy); Rosemary J. Loverdi, Note, *Victim Impact Evidence—Eighth Amendment Does Not Erect a Per Se Bar to the Introduction of Victim Impact Evidence at a Capital Sentencing Hearing:* Payne v. Tennessee, 24 RUTGERS L.J. 543, 565 (1993) (commenting that benefits of allowing victims to speak at sentencing are questionable); *cf. Only Poetic Justice: Dahmer's Story is Unfinished*, ARIZ. REPUBLIC, Nov. 30, 1994, at B4 (opining that even death of children's slayer, Jeffrey Dahmer, could never bring closure to killings). One commentator described the cathartic effect of victim testimony in this way:

> But is testifying against a defendant really "cathartic"? If the term is used loosely to mean the release of tension, testifying can be viewed as "cathartic." In strict psychoanalytic terms, however, catharsis involves the retrieval of threatening or painful early life experiences and the process of bringing those emotions into consciousness to be expressed. In this term of emotionally purging the experience of victimization, testifying is not necessarily cathartic. Catharsis encompasses articulation and expression of traumatic experiences in appropriate settings. . . . The victim is unlikely to feel that a courtroom is the right place for this kind of emotional experience.

Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 979–80 (1985).

89. *See Geraldo: When Private Pain Goes Public: Crimes Caught on Tape* (syndicated television broadcast, Oct. 24, 1994) (transcript on file with the *St. Mary's Law Journal*) (documenting Ertman's feelings that death sentence was fine, "[b]ut it ain't over until they're dead").

90. *See* LA. REV. STAT. ANN. § 46:1844(N) (West Supp. 1995). The Louisiana statute provides: "In cases where the sentence is the death penalty, the victim's family shall have the right to be notified by the appropriate court of the time, date, and place of the execution, and a representative of the family shall have the right to be present." *Id.* Victims' rights advocates are currently attempting to get a similar law passed in Texas. *See* Jennifer Liebrum, *Group Pushes Right to View Executions: Victims Advocates Want Families to Have a Say*, HOUS. CHRON., Oct. 15, 1994, at A29 (disclosing some victims' families desire to watch execution of killers); *Geraldo: When Private Pain Goes Public: Crimes Caught on Tape* (syndicated television broadcast, Oct. 24, 1994) (transcript on file with the *St. Mary's Law Journal*) (indicating that Randy Ertman is one of driving forces behind move to allow victims' families to view executions in Texas). *But see* Jennifer Liebrum, *Group Pushes Right to View Executions: Victims Advocates Want Families to Have a Say*, HOUS. CHRON., Oct. 15, 1994, at A29 (presenting opposing views of Steve Hall, attorney for inmates on death row, that shoving and shouting incidents similar to one in Ertman case could occur if law passed allowing victims to view execution).

91. *See* Jennifer Liebrum, *Group Pushes Right to View Executions: Victims Advocates Want Families to Have a Say*, HOUS. CHRON., Oct. 15, 1994, at A29 (showing how first people who witnessed execution of daughter's murderer praised new law since it assured

show that whether a victim experiences some sort of closure from addressing the defendant, or from watching the defendant die, depends primarily upon the individual victim.[92] What is clear is that the victim will have to learn to cope with the loss of a loved one no matter how many avenues of closure the legislature chooses to provide.[93]

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them "that it was really over"). The two laws are somewhat similar, but they differ in that the rehabilitative and deterrent aspects of post-sentence victim allocution arguably do not apply to the law permitting victims to witness executions. For an unintentionally humorous view on the proposed law, see *id.*, which quotes the head of the Death Penalty Education Center, Jimmy Dunne, as stating: "I would not want the victims' family to be there if they are just going to gloat over the execution. That would just bring the execution down to a lower level to have someone there cheering a man's homicide." *Id.*

92. *See* Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 979–81 (1985) (focusing on individual's ability and readiness to deal with emotions as key to process of psychological healing); Rebecca Carr & Maureen O'Donnell, *Clash of Emotions for Dahmer Victims' Families: Violent Death Pleases Some; Others Just Glad It's Over*, CHI. SUN-TIMES, Nov. 29, 1994, at 6 (contrasting views of serial killer Jeffrey Dahmer's victims upon his death); Jennifer Liebrum, *Group Pushes Right to View Executions: Victims Advocates Want Families to Have a Say*, HOUS. CHRON., Oct. 15, 1994, at A29 (pointing out that something that will be effective for one victim may not be so for another); *Louisiana Killer is Put to Death*, N.Y. TIMES, Dec. 29, 1984, at 5 (indicating satisfaction felt by family of victim witnessing execution of daughter's murderer); Survey of Bexar County District Attorney's Office, San Antonio, Tex. (Feb. 1995) (results on file with the *St. Mary's Law Journal*) (providing some data that certain victims experience closure by using Article 42.03 to say something good or forgiving about defendant). One writer suggested that forgiveness is the only way for a victim to truly deal with the effects of the crime:

> [F]orgiveness is the exact opposite of vengeance, which acts in the form of re-acting against an original trespassing, whereby far from putting an end to the consequence of the first misdeed, everybody remains bound to the process . . . In contrast to revenge . . . the act of forgiving can never be predicted; it is the only reaction that acts in an unexpected way and thus retains . . . something of the original character of action. Forgiving, in other words, is the only reaction which does not merely re-act but acts anew and unexpectedly, unconditioned by the act which provoked it and thereby freeing from its consequences both the one who forgives and the one who is forgiven.

HANNAH ARENDT, THE HUMAN CONDITION 240–41 (1989).

93. *See* Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 979 (1985) (explaining that one cannot force cathartic process); *cf.* Morris v. Slappy, 461 U.S. 1, 14 (1982) (insisting that courts take concerns of victims into account when considering constitutional rights of criminal defendants); Ken Zapinski, *Victim's Families Find No Peace: And Dahmer's Kin Are Quiet About His Death*, THE PLAIN DEALER (Cleveland), Nov. 29, 1994, at 6A (intimating difficulty families of Jeffrey Dahmer's victims have had coping with children's deaths even after fellow inmate killed Dahmer). This is not to suggest that the courts and the legislature should not do what they can to help victims; however, the search for a final sense of closure through the justice system is probably futile. *See Only Poetic Justice: Dahmer's Story is Unfinished*, ARIZONA REPUBLIC, Nov. 30, 1994, at B4 (realizing that, even though Jeffrey Dahmer died, pain of losing loved ones will never end for victims' families). Though many people believed Dahmer's death was justly deserved, authorities should not let the criminal justice system suffer as a result of an attempt to provide closure for victims. *Id.*; *see also* Helen Prejean, *Crime Victims on the Anvil of*

F. *The Judge as Object of a Victim's Statement*

While many of the victims who use Article 42.03 do so to address the defendant, a fair number of victims use the law to make a statement to the judge.[94] Often, victims feel as though the justice system is too lenient with criminals.[95] Since the Texas Legislature enacted Article 42.03, some

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Pain, ST. PETERSBURG TIMES, May 15, 1988, at D1 (contending that even laws which permit victims to view execution of murderers may not help, as one parent said: "I got to witness the son of a b[itch] fry who killed our daughter. The chair is too quick. I hope he's burning in hell"). An interesting method to help crime victims recover from the offense is victim-offender mediation. *See* Mark W. Bakker, Comment, *Repairing the Breach and Reconciling the Discordant: Mediation in the Criminal Justice System*, 72 N.C. L. REV. 1479, 1484 (1994) (describing victim-offender mediation as permitting two parties in crime to discuss event, negotiate restitution, talk about future, and, in general, produce fair resolution to conflict); *cf.* Leonard J. Long, *A Problem of the Heart: Few Feel for the Poor*, 66 S. CAL. L. REV. 1317, 1335 (1993) (noting one author's characterization of victim-offender mediation programs as possible alternative to imprisonment).

94. *See* Telephone Interview with Judge Terry McDonald, 186th District Court, Bexar County, Tex. (Jan. 23, 1995) (conveying view that many victims use Article 42.03 to express displeasure for sentence judge imposed). Judge McDonald explained that victims who are satisfied with the sentence the judge imposes rarely elect to make statements under Article 42.03. *Id.* However, even when they are not pleased with the verdict, only in rare cases do the victims choose to address the judge. *Id.* Judge McDonald gathered that, in his experience, many victims choose to direct their statements to the judge, rather than to the defendant, since the victim already has the opportunity to address the defendant, albeit indirectly, through victim impact statements. *Id.* One argument for allowing victims to address the judge concerning the victims' views was postulated by a county court in New York:

> In most instances, victims can and should communicate to the court through the prosecutor, but they should not be limited to that form of communication and participation in the system. Indeed if the crime victim cannot vent his frustrations to the Trial Judge, that "personification" of justice, it undermines all of our efforts to ensure that justice is done under law.

People v. Michael M., 475 N.Y.S.2d 774, 776 (County Ct. 1984).

95. *See* People v. Gardner, 188 Cal. Rptr. 578, 579 (Ct. App. 1983) (describing lenient treatment of one offender by criminal justice system); Newsome v. State, 829 S.W.2d 260, 268 (Tex. App.—Dallas 1992, no writ) (giving example of offender who committed more crimes because of lenience of criminal justice system); *cf.* Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1159–60 (1991) (claiming that corporate criminals could receive more lenient treatment from criminal system); Koichiro Fujikura, *Administering Justice in a Consensus-Based Society*, 91 MICH. L. REV. 1529, 1535 (1993) (book review) (describing very lenient criminal justice system of Japan); Dorothy E. Roberts, *Motherhood and Crime*, 79 IOWA L. REV. 95, 106 (1993) (citing view that Caucasian women receive more lenient treatment from criminal justice system than African-American women); Kristina H. Chung, Note, *Kids Behind Bars: The Legality of Incarcerating Juveniles in Adult Jails*, 66 IND. L.J. 999, 1005 (1991) (mentioning leniency of juvenile justice system); Carol Sanger, *Law and Society: Seasoned to the Use*, 87 MICH. L. REV. 1338, 1350 (1989) (book review) (commenting that women get more lenient treatment in criminal process).

victims have used the statute to vent their frustrations with the legal system on the presiding judge.[96]

The use of the law in this manner implicates the fairness of the trial even though the victim can only give the statement after the judge pronounces the sentence.[97] Judges who are aware that a victim has a right to confront them in the wake of an unfavorable sentence may be intimidated at the prospect of having to face legions of angry victims after an allegedly lenient sentencing.[98] Thus, a judge may hesitate to impose a lesser sentence in such a situation.

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96. *See* Telephone Interview with Judge Terry McDonald, 186th District Court, Bexar County, Tex. (Jan. 23, 1995) (acknowledging that victims often use Article 42.03 statements against judges). *See generally* Steve Baker, *Justice Not Revenge: A Crime Victim's Perspective on Capital Punishment*, 40 UCLA L. REV. 339, 340–41 (1992) (relating personal anger and frustration with criminal justice system); Ken Eikenberry, *Victims of Crime/Victims of Justice*, 34 WAYNE L. REV. 29, 32 (1987) (detailing level of frustration felt by victims in criminal justice system); Dean G. Kilpatrick & Randy K. Otto, *Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning*, 34 WAYNE L. REV. 7, 19 (1987) (suggesting that victims could have perception that judge did not administer justice if sentence is not as long as victim envisioned); Lorraine Slavin & David J. Sorin, *Congress Opens a Pandora's Box—The Restitution Provisions of the Victim and Witness Protection Act of 1982*, 52 FORDHAM L. REV. 507, 573 (1984) (explaining how frustrated victims can become with criminal system); Karen L. Kennard, Comment, *The Victim's Veto: A Way to Increase Victim Impact on Criminal Case Dispositions*, 77 CAL. L. REV. 417, 417 (1989) (describing deleterious effect on criminal justice system of frustrations felt by victims); N. Jean Schendel, Note, *Patients as Victims—Hospital Liability for Third-Party Crime*, 28 VAL. U. L. REV. 419, 460 n.284 (1993) (noting victims' frustrations and suffering when dealing with criminal law); *cf.* Marks v. State, 492 So. 2d 681, 684 (Fla. Ct. App. 1986) (sympathizing with frustration of crime victim at hands of criminal justice system).

97. TEX. CODE CRIM. PROC. ANN. art. 42.03, § 1(b)(3) (Vernon Supp. 1995).

98. *See* Shirley S. Abrahamson, *Redefining Roles: The Victim's Rights Movement*, 1985 UTAH L. REV. 517, 547 (citing concerns that judge might wilt under pressures of media and victims); Telephone Interview with Judge Terry McDonald, 186th District Court, Bexar County, Tex. (Jan. 23, 1995) (relating experience of when approximately 15 victims addressed Judge McDonald in chambers to comment on sentence); *cf.* Jenkins v. McKeithen, 395 U.S. 411, 419 (1969) (noting complaint of alleged judge intimidation); Pierson v. Ray, 386 U.S. 547, 554 (1967) (asserting tremendous problem of intimidation would exist if unsatisfied litigants were allowed to sue judges); Cox v. Louisiana, 379 U.S. 559, 575 (1965) (Black, J., concurring) (assuring people that state authorities can protect judges from intimidation); Moore v. Dempsey, 261 U.S. 86, 96 (1923) (McReynolds, J., dissenting) (describing how fairness of trial could be affected through intimidation of judge and jury); Jonathan P. Nase, *Pennsylvania's Evolving Judicial Discipline System: The Development and Content of the 1993 Constitutional Amendments*, 98 DICK. L. REV. 429, 454 (1994) (commenting that rules of judicial discipline system could harass and intimidate judges); Robert G. Vaughn, *Proposals for Judicial Reform in Chile*, 16 FORDHAM INT'L L.J. 577, 603 (1993) (detailing systematic intimidation of judges in Latin American countries); James G. Wilson, *The Role of Public Opinion in Constitutional Interpretation*, 1993 B.Y.U. L. REV. 1037, 1116–17 (conveying message that judges should not allow public to intimidate them).

V. THREE OPTIONS FOR THE FUTURE

A. *Maintain the Status Quo*

One course of action that the state legislature could take regarding Article 42.03 is to continue the present course of victim allocution. The statute does not create a significant strain on the inner workings of the criminal justice system because the law has neither resulted in fiscal drain, nor has it markedly impacted the workload of the state's prosecutors.[99] In addition, the case involving the Ertman family could represent an anomaly, without major problems resulting from Article 42.03. Since the legislature passed the statute, the media has not reported a significant number of courthouse incidents that would warrant its abolition.[100]

The easy response to the concern that victim statements influence judicial decisionmaking is that post-sentence victim statements directed to the judge are not within the scope of the statute. The statute provides that a court must permit victims to give a statement, after the court has pronounced sentence, concerning "the person's views about the offense, the defendant, and the effect of the offense on the victim."[101] Thus, a court has no obligation to permit a victim to present to the court a statement regarding the victim's displeasure with the length of the sentence.[102]

Essentially, if the Harris County Criminal Court had enforced the law as it is written, the court may have avoided the ugly episode that occurred

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99. *See* CRIMINAL JUSTICE POLICY IMPACT STATEMENT, Tex. H.B. 520, 72d Leg., R.S. (1991) (determining that House Bill 520 will have no significant impact on workload or services of criminal justice system); FISCAL NOTE, Tex. H.B. 520, 72d Leg., R.S. (1991) (finding that House Bill 520 will not effect state or other local governmental units); Debate on Tex. H.B. 520 on the Floor of the Senate, 72d Leg., R.S. (May 21, 1991) (tapes available from the Senate Staff Services Office) (statement of Judge Charles Miller, Texas Court of Criminal Appeals) (asserting that statements under Article 42.03 will take up very little court time).

100. *See supra* note 64; *see also* Survey of Bexar County District Attorney's Office, San Antonio, Tex. (Feb. 1995) (results on file with the *St. Mary's Law Journal*) (suggesting that no such incidents involving Article 42.03 statements getting out of control have occurred in Bexar County).

101. TEX. CODE CRIM. PROC. ANN. art. 42.03, § 1(b) (Vernon Supp. 1995).

102. *Cf.* Telephone Interview with Judge Terry McDonald, 186th District Court, Bexar County, Tex. (Jan. 23, 1995) (claiming that judge may stop statements if they get out of control, but usually lets them continue because law requires it). *But see* Interview with Jeffrey K. Pokorak, Criminal Law Professor, St. Mary's University School of Law, in San Antonio, Tex. (Jan. 25, 1993) (pointing out that many judges allow victims to speak even if judges would rather not). Professor Pokorak explained that, if the judge is an elected official, he will probably let the victims speak regardless of the judge's feelings about the statements or their appropriateness. *Id.* If the judge is appointed, however, there is no reason to cater to the desires of the general public as an elected official must do. Therefore, the appointed judge is more likely to refuse to allow a victim to speak. *Id.*

in the Ertman case.[103] The statute provides that the victim's statement must be addressed "to the court."[104] However, Randy Ertman's comments were, at least in part, addressed directly to the defendants.[105]

Allowing post-sentence allocution probably caused the defendants and their families to view the statements as much more personal than if the statements had been presented directly to the court. Arguably, there is not a huge difference between the statements "you are worse than spit" and "the defendant is worse than spit," but a more careful approach by the judge could have reduced the likelihood of a post-trial incident.[106] Thus, strict adherence to the statute could make any changes in Article 42.03 unnecessary.

B. *Modify the Article 42.03 Procedure*

Modifying the Article 42.03 procedure presents a second option for the future of post-sentence victim allocution in Texas.[107] For example, the legislature could amend the statute to further emphasize the requirement that the victims address the court and not the defendant with their Article

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103. *See "We Live for the Day That You Die" . . . Enraged Fathers Confront Condemned Killers of Their Daughters*, THE COLUMBIAN, Oct. 12, 1994, at C2 (referring to fact that Ertman addressed defendants over objections of prosecutors). Courts experience many problems when they do not enforce the laws as they are written. *See, e.g.*, United States v. Standard Brewery, Inc., 251 U.S. 210, 217 (1920) (emphasizing need for courts to enforce laws as written so long as they are constitutional); Chicago, Burlington & Quincy Ry. v. United States, 220 U.S. 559, 575 (1911) (concluding that courts' duty is to enforce law as written); United States v. Hamblin, 911 F.2d 551, 555 (11th Cir. 1990) (noting that court is required to enforce law as written).

104. TEX. CODE CRIM. PROC. ANN. art. 42.03, § 1(b) (Vernon Supp. 1995); *see* Jennifer Liebrum, *Speaking Up over Speaking Out in Court: Tense Monologues in Ertman-Pena Cases Lead Many to Back More Controls*, HOUS. CHRON., Oct. 13, 1994, at A36 (asserting that law allows victims to address court, not defendants).

105. *See "We Live for the Day That You Die . . ." Enraged Fathers Confront Condemned Killers of Their Daughters*, THE COLUMBIAN, Oct. 12 1994, at C2 (giving examples of Ertman's comments directly to defendants).

106. *Cf.* Jennifer Liebrum, *Speaking Up over Speaking Out in Court: Tense Monologues in Ertman-Pena Cases Lead Many to Back More Controls*, HOUS. CHRON., Oct. 13, 1994, at A36 (claiming that critics in Ertman case called for more control in post-sentence victim allocution and not abolition of practice); *"We Live for the Day That You Die . . ." Enraged Fathers Confront Condemned Killers of Their Daughters*, THE COLUMBIAN, Oct. 12 1994, at C2 (quoting defense attorney Ricardo Rodriguez that proceedings were "three-ring circus"). For an interesting case involving the effect of personalizing an insult, see Baines v. City of Birmingham, 240 So. 2d 689, 692 (Ala. Crim. App. 1970) (holding that, as matter of law, "God damn you" is profanity, while "God damn it" is not).

107. *See* Gary Taylor, *Texans Take It Out on the Defendant*, NAT'L L.J., Nov. 14, 1994, at A6 (postulating number of changes that legislature could make in law).

42.03 statements.[108] Another suggested change would require prosecutors in the case to review the proposed statements of the victim.[109] This would diminish the possibility that the victim's Article 42.03 statements would be unnecessarily harsh or would compromise the dignity of the court.[110] However, emotion would probably take over once the victim is before the court.[111] A better solution would be to amend the statute to allow only written statements that the prosecutor could review and read before the court.[112] The downside of this modification, however, is that it

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108. *See* TEX. CODE CRIM. PROC. ANN. art. 42.03, § 1(b) (Vernon 1979 & Supp. 1995) (giving only cursory attention to fact that victim must address court rather than defendant); *"We Live for the Day That You Die" . . . Enraged Fathers Confront Condemned Killers of Their Daughters*, THE COLUMBIAN, Oct. 12, 1994, at C2 (presenting Ertman case as example of when judge should have been more conscious of requirement that victims direct statements to court, not defendant); *cf.* Kathryn E. Bartolo, Comment, Payne v. Tennessee: *The Future Role of Victim Statements of Opinion in Capital Sentencing Proceedings*, 77 IOWA L. REV. 1217, 1243–44 (1992) (expressing that victim angry with criminal justice system could direct rage at defendant, not at system).

109. *See* ILL. ANN. STAT. ch. 725, para. 120/6 (Smith-Hurd 1992 & Supp. 1994) (permitting victim to present victim impact statement subject to review of prosecutor). The Illinois statute provides: "If the victim chooses to exercise this right, the impact statement must have been prepared in writing in conjunction with the Office of the State's Attorney prior to the initial hearing or sentencing, before it can be presented orally at the sentencing hearing." *Id.* However, the court may still have to face the problem since emotion could take over once the victim is in the courtroom. *See* State v. Brown, 698 S.W.2d 9, 12 (Mo. Ct. App. 1985) (noting that victim became extremely emotional during course of testimony). *But see* State v. Martucci, C.C.A. No. 213, 1990 LEXIS 265, at *22 (Tenn. Crim. App. Apr. 3, 1990) (commenting that victim's family was in control of emotions in courtroom); *cf.* Nicole R. Economou, Note, *Defense Expert Testimony on Rape Trauma Syndrome: Implications for the Stoic Victim*, 42 HASTINGS L.J. 1143, 1171–72 (1991) (explaining that some victims display emotions in "controlled style").

110. *See* Gary Taylor, *Texans Take It Out on the Defendant*, NAT'L L.J., Nov. 14, 1994, at A6 (proposing that district attorneys edit victims' remarks prior to court date); *cf.* ILL. ANN. STAT. ch. 725, para. 120/6 (Smith-Hurd 1992 & Supp. 1994) (requiring victim to prepare victim impact statement in conjunction with prosecutor). Al Manning, Director of Communications for the Illinois Attorney General's Office expressed his views about the Illinois statute as follows: "The victim works with the state's attorney and has a written statement. The goal is to have it within the boundaries of the court as opposed to emotional outbursts." Gary Taylor, *Texans Take It Out on the Defendant*, NAT'L L.J., Nov. 14, 1994, at A6.

111. *See* Gary Taylor, *Texans Take It Out on the Defendant*, NAT'L L.J., Nov. 14, 1994, at A6 (giving comments of Director of Communications for Illinois Attorney General's office that goal of written victim impact statements is to remain within courtroom restrictions and prevent emotional outbursts); *cf.* Huffman v. State, 543 N.E.2d 360, 376 (Ind. 1989) (discussing incident of family's emotional outburst); State v. Gagne, 349 A.2d 193, 198 (Me. 1975) (giving example of emotions overcoming victim while in courtroom).

112. *See* GA. CODE ANN. § 17-10-1.1 (Harrison Supp. 1992) (granting victims right to submit written victim impact statement as long as court had not previously given victim right to do so); Ellzey v. Detella, No. 93 C 1030, 1994 U.S. Dist. LEXIS 10234, at *11–12

would needlessly increase the workload of the prosecutors on a matter that has no actual bearing on the trial.[113]

Another modification to improve Article 42.03 would be to allow the court to better control the tone of the victim's comments by wielding the judicial power to hold people in contempt of court.[114] A specific mention in the statute of the possibility of a sanction for contempt would enable courts to exert greater control over the post-sentence statements of the

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(N.D. Ill. July 26, 1994) (discussing Illinois requirement of written victim impact statement before allowing victim's testimony at sentencing); Tanya K. Hernandez, Note, *Bias Crimes: Unconscious Racism in the Prosecution of "Racially Motivated Violence,"* 99 YALE L.J. 845, 858 n.53 (1990) (defining victim impact statements as "written statements informing the court of the impact the crime has had upon the victim"); Phillip A. Talbert, Comment, *The Relevance of Victim Impact Statements to the Criminal Sentencing Decision*, 36 UCLA L. REV. 199, 203 n.22 (1988) (claiming that state laws more often provide for written, rather than oral, victim impact statements because written ones are "less disruptive").

113. *See Hearings on Tex. H.B. 520 Before the House Comm. on Crim. Jurisprudence*, 72d Leg., R.S. (Feb. 26, 1991) (tapes available from House Committee Services) (expressing concern that law would take up too much court time); *cf.* Santobello v. New York, 404 U.S. 257, 260 (1971) (describing adverse effects of heavy workload in prosecutors' offices); United States v. Pitts, 569 F.2d 343, 347 n.5 (5th Cir. 1978) (illustrating delays that can occur as result of work overload in prosecutor's office); Miles v. State, 825 P.2d 904, 905 (Alaska Ct. App. 1992) (citing workload of prosecutor as consideration in bringing criminal charges); Stevens H. Clarke & Susan T. Kurtz, *Criminology: The Importance of Interim Decisions to Felony Trial Court Dispositions*, 74 J. CRIM. L. & CRIMINOLOGY 476, 501 n.38 (1983) (gathering that increase in prosecutorial workload could lead to higher dismissal rates); Cary Clennon, *Pre-Trial Discovery of Witness Lists: A Modest Proposal to Improve the Administration of Criminal Justice in the Superior Court of the District of Columbia*, 38 CATH. U. L. REV. 641, 673 (1989) (discussing effect of overburdened prosecutors' offices on plea bargaining); Bradley C. Nielson, Note, *Controlling Sports Violence: Too Late for the Carrots—Bring on the Big Stick*, 74 IOWA L. REV. 681, 705 (1989) (characterizing local prosecutors' workloads as "ballooning").

114. *See* Cooke v. United States, 267 U.S. 517, 536 (1925) (concluding that courts must have power to sanction others for contempt if conduct in open court is threat to dignity of courtroom); Bauguess v. Paine, 586 P.2d 942, 948 (Cal. 1978) (holding that court should take action to punish contempt and control courtroom); Louis S. Raveson, *Advocacy and Contempt: Constitutional Limitations on the Judicial Contempt Power; Part One: The Conflict Between Advocacy and Contempt*, 65 WASH. L. REV. 477, 478–80 (1990) (writing that courts must have control over courtroom and authority to order compliance); Teresa S. Hanger, Note, *The Modern Status of the Rules Permitting a Judge to Punish Direct Contempt Summarily*, 28 WM. & MARY L. REV. 553, 558 (1987) (presenting view that courts should only use power of contempt when necessary to ensure decorum and dignity of courtroom).

victim.[115] The threat of a contempt charge would provide victims with an incentive to conduct themselves in a manner befitting a courtroom.[116]

C. *Abolish Article 42.03*

The best suggestion for the future of post-sentence victim allocution is that the legislature abolish the practice altogether. First, the law is merely superfluous and does not actually benefit anyone.[117] Second, few victims are even aware that Texas law affords them the right to make a statement following sentencing, and most of those who are conscious of the law do not choose to exercise their right.[118] Third, when a court per-

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115. *See* United States v. Meyer, 462 F.2d 827, 831 (D.C. Cir. 1972) (encouraging courts to act swiftly in suppressing any disturbance in courtroom to maintain dignity and authority of court); Louis S. Raveson, *Advocacy and Contempt: Constitutional Limitations on the Judicial Contempt Power; Part One: The Conflict Between Advocacy and Contempt*, 65 WASH. L. REV. 477, 478–80 (1990) (commenting that court possesses inherent power to prevent and punish obstacles to authority and dignity); Teresa S. Hanger, Note, *The Modern Status of the Rules Permitting a Judge to Punish Direct Contempt Summarily*, 28 WM. & MARY L. REV. 553, 558 (1987) (emphasizing need for court to exercise power of contempt to control courtroom proceedings).

116. *See* Mitchell v. State, 580 A.2d 196, 199 (Md. 1990) (underscoring seriousness of criminal contempt charge); *cf. Ex Parte* Terry, 128 U.S. 289, 302–03 (1888) (acknowledging power of courts to hold people in contempt for violating orders or interfering with decorum of court); *Ex Parte* Robinson, 86 U.S. (19 Wall.) 505, 512 (1873) (holding that power of contempt may be used to sanction outrageous conduct by attorney in open court); Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 227 (1821) (concluding that "[c]ourts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates"); Louis S. Raveson, *Advocacy and Contempt: Constitutional Limitations on the Judicial Contempt Power; Part One: The Conflict Between Advocacy and Contempt*, 65 WASH. L. REV. 477, 481 (1990) (asserting that contempt power is very effective tool to control behavior of attorneys).

117. *See* Gary Taylor, *Texans Take It Out on the Defendant*, NAT'L L.J., Nov. 14, 1994, at A6 (providing various opinions that post-sentence victim allocution may not serve legitimate purpose).

118. *See* Interview with Pete Gallego, Texas State Representative, in Austin, Tex. (Jan. 23, 1995) (agreeing that very low percentage of victims use Article 42.03, and citing as reason fact that many victims do not know about law); Telephone Interview with Judge Terry McDonald, 186th District Court, Bexar County, Tex. (Jan. 23, 1995) (guessing that extremely low percentage of crime victims ever use Article 42.03 to make statement to court). In a survey of members of the Bexar County District Attorney's office in San Antonio, Texas, those who answered the questionnaire that the author distributed varied widely in their responses with respect to the percentage of victims who made statements pursuant to Article 42.03. Survey of Bexar County District Attorney's Office, San Antonio, Tex. (Feb. 1995) (results on file with the *St. Mary's Law Journal*). The estimated percentages ranged from 1% all the way up to 50%. *Id.* One reason for the disparity could be that those who filled out the survey worked in a broad range of departments. Obviously, prosecutors who work mainly in violent crime and capital cases would witness Arti-

mits victims to address defendants in open court, it is nearly impossible, especially in the case of a brutally violent crime, for the victims to conduct themselves in a dignified manner.[119] Inevitably, the emotional element will intervene and the victim will not be able to speak without experiencing severe and possibly uncontrollable anger.[120] Finally, and most importantly, Texas law already permits victims to make statements to the court before sentencing regarding the effect the crime has had on their lives.[121] Numerous states provide for victim impact statements that the judge may consider before assessing punishment.[122] Prior to 1991, the United States Supreme Court held such statements unconstitutional

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cle 42.03 statements much more than those who deal primarily with juvenile offenders, simply because of the greater pain suffered by victims of violent crime.

119. *See* Susan A. Cornille, Comment, *Retribution's "Harm" Component and the Victim Impact Statement: Finding a Workable Model*, 18 DAYTON L. REV. 389, 390–91 (1993) (illustrating problems in victim impact statement by telling that relative of victim in Jeffrey Dahmer's trial began shouting obscenities and physically approaching defendant during her statement); Paul Pringle, *Simpson Case Spurs Outrage: Victims' Rights Groups See a Familiar Pattern*, DALLAS MORNING NEWS, Dec. 12, 1994, at A1 (describing, through words of attorney Gloria Allred, how victims hold suffering in until reaching breaking point).

120. *Cf.* Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 996 (1985) (asserting that offender is just one possible target of victim's anger); Kathryn E. Bartolo, Comment, Payne v. Tennessee*: The Future Role of Victim Statements of Opinion in Capital Sentencing Proceedings*, 77 IOWA L. REV. 1217, 1243–44 (1992) (claiming that victims may channel anger with judicial system toward defendant). *But see* Gary Taylor, *Texans Take It Out on the Defendant*, NAT'L L.J., Nov. 14, 1994, at A6 (quoting John Stein, Deputy Director of National Organization for Victim Assistance, as stating that judge is obligated to make statements of victims pursuant to 42.03 possible by bringing security into courtroom if necessary).

121. *See* TEX. CODE CRIM. PROC. ANN. art. 56.03 (Vernon Supp. 1995) (listing requirements of victim impact statement in Texas). The Texas victim impact statement includes, inter alia:

> (1) the name of the victim of the offense or, if the victim has a legal guardian or is deceased, the name of a guardian or close relative of the victim;
>
> . . . .
>
> (3) a statement of economic loss suffered by the victim, guardian, or relative as a result of the offense;
>
> (4) a statement of any physical or psychological injury suffered by the victim, guardian, or relative as a result of the offense, as described by the victim, guardian, relative, or by a physician or counselor;
>
> (5) a statement of any psychological services requested as a result of the offense;
>
> (6) a statement of any change in the victim's, guardian's, relative's personal welfare or familial relationship as a result of the offense;
>
> . . . .
>
> (8) any other information, other than facts related to the commission of the offense, related to the impact of the offense on the victim, guardian, or relative.

Id.

122. *See supra* note 8 (listing state statutes providing for victim impact statements).

in death penalty cases.[123] In *Payne v. Tennessee*,[124] however, the Court overruled this precedent and held that the prosecution may present victim impact statements to the court for consideration in sentencing.[125]

As mentioned before, victim impact statements are either oral or written, and they grant the victim extensive participation in the disposition of the case. Because Texas courts permit such statements before sentencing, granting victims the right to speak after sentencing as well is superflu-

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123. *See* Booth v. Maryland, 482 U.S. 496, 509 (1987) (concluding that victim impact statement during sentencing phase of capital murder case violates Eighth Amendment); Phillip A. Talbert, Comment, *The Relevance of Victim Impact Statements to the Criminal Sentencing Decision*, 36 UCLA L. REV. 199, 223–27 (1988) (discussing *Booth* holding and its possible future implications). The *Booth* Court found that victim impact statements could lead to "arbitrary and capricious" verdicts because the statements allow the jury to consider irrelevant evidence. *Booth*, 482 U.S. at 502–03. The Court emphasized the narrow nature of its holding:

> Our disapproval of victim impact statements at the sentencing phase of a capital case does not mean, however, that this type of information will never be relevant in any context. Similar types of information may well be admissible because they relate directly to the circumstances of the crime. Facts about the victim and family also may be relevant in a non-capital criminal trial. Moreover, there may be times that the victim's personal characteristics are relevant to rebut an argument offered by the defendant.

Id. at 507 n.10. The Supreme Court extended *Booth* in 1989 to prohibit statements by the prosecutor that concern the victim's personal characteristics. South Carolina v. Gathers, 490 U.S. 805, 810–11 (1989).

124. 501 U.S. 808 (1991).

125. *See Payne*, 501 U.S. at 826-830 (affirming decision of Supreme Court of Tennessee to allow judge to consider victim impact statements at sentencing). Interestingly, *Payne* hinted that a portion of the *Booth* holding could survive the ruling in *Payne* because the *Payne* Court gave no opinion on the admissibility of the victim impact statements of victims' family members. *Id.* at 830 n.2. Several commentators have addressed *Payne*'s curious reversal of *Booth* just a few years after the Supreme Court decided *Booth*. *See* Jimmie O. Clements, Jr., Note, 23 ST. MARY'S L.J. 517, 533–35 (1991) (examining impact of *Payne* decision on stare decisis); Patrick M. Fahey, Note, Payne v. Tennessee*: An Eye for an Eye and Then Some*, 25 CONN. L. REV. 205, 206 n.6 (1992) (characterizing stare decisis issue in *Payne* as significant); Craig E. Gilmore, Note, Payne v. Tennessee*: Rejection of Precedent, Recognition of Victim Impact Worth*, 41 CATH. U. L. REV. 469, 473–75 (1992) (noting rejection of stare decisis in *Payne* to dismay of dissenter, Justice Marshall); *The Supreme Court, 1990 Term—Leading Cases*, 105 HARV. L. REV. 177, 187 (1991) (decrying *Payne*'s rejection of stare decisis and stating that "the Court has invited defiance of a range of existing precedents and has suggested that the doctrine of stare decisis directs the Court to overrule all precedents that are wrong—which is really no doctrine of stare decisis at all"); *cf.* Jonathan H. Levy, Note, *Limiting Victim Impact Evidence and Argument After* Payne v. Tennessee, 45 STAN. L. REV. 1027, 1028 (1993) (complaining that, in overruling *Booth*, *Payne* Court did not bother to establish sufficient guidelines for admissibility of victim impact statements). One reason for the reversal of *Booth* and *Gathers* after just a short time was the fact that both cases involved narrow majorities and contained extremely critical dissenting opinions. Craig E. Gilmore, Note, Payne v. Tennessee*: Rejection of Precedent, Recognition of Victim Impact Worth*, 41 CATH. U. L. REV. 469, 471 (1992).

ous.[126] In addition, since the prosecution presents victim impact statements before sentencing, the court must conduct the proceedings with order and dignity to avoid affecting the impartiality of the trial or the jury's decision.[127] Consequently, the court must monitor the actions of the victim carefully and entertain all objections that opposing counsel raises to ensure impartiality.[128] If the court in the Ertman case had al-

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126. *See* TEX. CODE CRIM. PROC. ANN. art. 56.03 (Vernon Supp. 1995) (describing rights of victims to present statement for court to consider in punishing defendant); Gary Taylor, *Texans Take It Out on the Defendant*, NAT'L L.J., Nov. 14, 1994, at A6 (presenting view that "allocution for allocution's sake" is absurd); Telephone Interview with Judge Terry McDonald, 186th District Court, Bexar County, Tex. (Jan. 23, 1995) (pointing out that victim impact statement in pre-sentence report already allows victim to present view on offense); *cf.* Mayo v. State, 861 S.W.2d 953, 954 n.1 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd) (noting that court cannot look at victim impact statement until after guilt phase).

127. *See* Illinois v. Allen, 397 U.S. 337, 351 (1970) (Douglas, J., dissenting) (emphasizing that courtroom is place of dignity which participants must not disturb); Estes v. Texas, 381 U.S. 532, 565 (1965) (Warren, C.J., concurring) (warning that lack of dignity in courtroom could affect fairness of trial by introducing irrelevant external factors); *In re* Cohen, 370 F. Supp. 1166, 1174 (S.D.N.Y. 1973) (stressing that court must maintain dignity and decorum within courtroom to preserve both appearance and reality of fair trial); *cf.* People v. Lucero, 750 P.2d 1342, 1350–51 (Cal. 1988) (describing risk to fairness of trial when victims shouted from courtroom seats about evidence that prosecution did not introduce); Christian v. United States, 394 A.2d 1, 23 (D.C. 1978) (discussing possible prejudicial effect of victim or family's emotional outburst in courtroom). *But cf.* Underwood v. State, 535 N.E.2d 507, 518 (Ind. 1989) (holding that curative instruction to jury is sufficient to avoid prejudice and to support denial of motion for mistrial); State v. Morales, 513 N.E.2d 267, 271 (Ohio 1987) (establishing test for prejudicial effect of victim's outburst in courtroom (quoting State v. Bradley, 209 N.E.2d 215, 215-16 (Ohio 1965))). The *Morales* court stated:

> Whether an emotional demonstration in the courtroom during the course of a murder trial by a spectator related to the victim improperly influences the jury against the accused[,] . . . constitute[s] misconduct so as to deprive the accused of a fair trial . . . [is a question] of fact to be resolved by the trial court, whose determination thereon will not be disturbed on review in the absence of evidence contrary to that determination clearly and affirmatively appearing on the face of the record.

Id.

128. *See Payne*, 501 U.S. at 825 (arguing that Due Process Clause of Fourteenth Amendment protects defendant from victim impact evidence which is "so unduly prejudicial that it renders the trial fundamentally unfair"); *Booth*, 482 U.S. at 506–07 (holding victim impact statements unconstitutional in capital cases since they could lead to arbitrary and unfair sentences); Williams v. Chrans, 945 F.2d 926, 947 (7th Cir. 1991) (stating as appellate standard of review for victim impact admissibility that sentencing hearing must not have been " 'so fundamentally unfair as to deny [the defendant] due process' " (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 645 (1974))); Gilmore v. Armontrout, 861 F.2d 1061, 1069 (8th Cir. 1988) (concluding that victim impact statements must not inflame jury and infect partiality of trial); *cf.* Jonathan H. Levy, Note, *Limiting Victim Impact Evidence and Argument After* Payne v. Tennessee, 45 STAN. L. REV. 1027, 1037 (1993) (postulating two-prong test to review constitutionality of prosecutor's argument and victim impact statement so that courts will not violate guarantees of Due Process Clause).

lowed Randy Ertman to speak only prior to sentencing, the court would certainly not have permitted Ertman's statements to reach the level of harshness that they did. However, as the system stands, Texas provides victims a relatively unrestricted means to express their feelings regarding the crime.[129] Thus, the risks that post-sentence victim allocution poses to the dignity of the courtroom, coupled with the availability of victim impact statements, support the conclusion that Article 42.03 should be abolished.

VI. CONCLUSION

Post-sentence victim allocution in Texas is a unique practice that has gone relatively unchallenged since its inception in 1991. The incident that occurred in the recent Houston murder case involving the brutal slayings of Jennifer Ertman and Elizabeth Pena calls into question the utility of permitting victims to describe in open court the impact a crime has had on their lives.

Crime victims must feel that they are a part of the criminal justice system. If victims do not believe that they have participated in prosecuting the offender, confidence in the legal system will decrease, making it nearly impossible for the system to function effectively. However, the legislature should not risk other crucial elements of the criminal process, such as the rights of the defendant or the dignity of the courtroom, to grant victims their wishes. While this Comment suggests several ways in which Article 42.03 could be amended to solve some of its shortcomings, the best solution is to abolish Article 42.03, leaving victim impact statements as the proper vehicle for victim allocution. Post-sentence victim allocution is not a crucial step in the trial process. More importantly, recent legislation providing for victim impact statements and victim assistance programs adequately serves a therapeutic function for victims, which is the primary justification for Article 42.03. The continuing increase in the participation of crime victims in the criminal justice system is essential to the system's ultimate success. However, victims rights should not unnecessarily diminish the overall integrity of the judicial system.

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129. *See* TEX. CODE CRIM. PROC. ANN. art. 42.03, § 1(b) (Vernon Supp. 1995) (omitting any reference to constraints on actual statement of victim other than requiring it to follow pronouncement of sentence). *But cf.* Livingston v. State, 444 S.E.2d 748, 752 (Ga. 1994) (ordering district attorney to warn victim's family against displaying emotion in court, but denying request that family sit out of jury's sight); Huffman v. State, 543 N.E.2d 360, 376 (Ind. 1989) (warning victim's family that emotional outbursts could result in removal from courtroom).