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Crime Victims Role: An Analysis of Laws and Regulations Which Give Crime Victims a Role in the Criminal Prosecution and Litigation Processes

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I hereby declare and confirm that this thesis is entirely the result of my own work except where otherwise indicated. I have acknowledged on foot note 1, the supervision and guidance I have received from Professor Nuno Garoupa. This thesis is not used as part of any other examination and has not yet been published.

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Table of Contents

Section	Subject	Page
	Introduction	5
1.	General Introduction	5
2.	The Analysis Method	8
Chapter I	A Discussion of Law and Economics Writings on Victims' Position and Role in Public Crime Enforcement	10
1.	Basic theoretical Concepts	10
2.	Victims' Precaution	12
2.1	An Ex Ante Position Vs an Ex Post Role	12
2.2	Specific Issues of Precaution and Crime Divergence Arguments	16
2.3	Precaution Issues Summary	20
3.	Victims as Monitors, Discipliners and Reporters (including plea bargains, agency issues, and administrative law influence)	21
3.1	Victims as Reporters	21
3.2	Victims as Monitors or Discipliners of Prosecution and Trials	24
4.	Special Crimes	31
5.	Private Interest Theory or Rent Seeking, of Victims' Role Legislation	32
Chapter II	An Analysis of Victims' Role Legislation	34
1.	Victims Rights and Roles in Trials	34
1.1	Impact Statements	34
1.1.1	Harm Information Function	36
1.1.2	Disciplining Function	38
1.1.3	Private Interests	40
1.1.4	Ex Ante Position Effects	42
1.2	Rights for Information and Presence	44
1.2.1	Information Function	45
1.2.2	Monitoring and Disciplining Functions	45
1.2.3	Private Interests	47
1.2.4	Ex Ante Position Effects	48

1.3	A Right for a Reasonable Length Of procedures	49
1.3.1	Optimal Length of Criminal Procedures Vs Procedure Continuation as an Additional Harm	50
1.3.2	Efficient Monitoring?	51
1.3.3	Private Interests	52
1.3.4	Ex Ante Position Effects	52
2.	Victims Rights With Regard to Police and Prosecution Decisions	53
2.1	An Appeal Regarding a Decision Not to Indict	54
2.1.1	Monitoring and Disciplining	56
2.1.2	Information Aspects	58
2.1.3	Private Interests	59
2.1.4	Ex Ante Position Effects	62
2.2	Rights to be Heard	60
2.2.1	A Right to be Heard Prior to a Plea Bargain	60
2.2.1.1	Information Aspects	65
2.2.1.2	Private Interest	64
2.2.1.3	Ex Ante Position Effects	64
2.2.2	A Right to be Heard Prior to A Delay of Procedures by the Attorney General	65
	Conclusion	67
	Bibliography	72

Introduction

1. General introduction

During the last thirty years, with a major increase in the last ten years (as part of the “victims’ rights” movement), laws and regulations were enacted in different countries, which gave crime victims ("**Victims**", hereinafter) certain roles regarding decisions of the public prosecution, or criminal court procedures, ex post a crime, different formally and substantially than the traditional witness role ("**Victims' Role Legislation**"¹, hereinafter).²

These roles raise important questions, since they do not always go together with some of the existing normative law and economics suggestions regarding optimal public crime enforcement, and also since although they are applied ex post a crime, they may influence victims’ efficient behaviour ex ante.

The goal of this paper is to find if law and economics analysis can justify or explain different economic functions of existing victims’ role legislation, while taking into account this legislation’s influence on victims’ ex ante position (“**The Positive Law Question**”).

The second question which could have been asked is whether there is a more efficient alternative, not implemented yet (“**The Normative Law Question**”). This paper gives lower priority to the normative law question, since most law and economics writings on victims’ ex post role, use already and mainly, normative law arguments. There is a greater need for a comprehensive positive law analysis of the

¹ I would like to thank Professor Nuno Garoupa for his supervision and bibliographic initial guidance. This paper uses the term “legislation” for both regulation and law, for convenience. Important differences between them are discussed later.

² As reviewed in the next chapters.

economic functions of the roles in the existing legislation,³ specifically for a combined analysis of the functions of victims' ex post role legislation with a positive law analysis of their position ex ante.

The meaning of the term "role" in this paper is wide and differs among different legal systems. The paper differentiates "role" from "position". The term position is used here to demonstrate how victims stand ex ante, facing a potential crime, what their preferences are, and how legislation can shape them to achieve optimal public crime enforcement.

The meaning of the term role is the economic function of the formal rights that litigation gives victims in the criminal process, ex post a crime (such as rights to be heard prior to prosecution decisions, to appeal regarding police or prosecution decisions, to make impact statements in court, to receive information on procedures, a right for a reasonable length of procedures, and more).⁴ Victims might hold both a passive position ex ante (regarding precaution, for example) and an active role ex post (some of the rights discussed above).

An interim term between position and role is reporting.⁵ This paper differentiates reporting of suspicion ex ante, which is a position, from reporting a crime ex post, which is a role, and also between voluntary reporting, and voluntary or forced testifying. The latter is a classic role which is not unique to victims, and is less discussed here.

The law and economics analysis of victims' position is not new. Various scholars suggest normative law arguments regarding victims' efficient position fronting

³ With exceptions, for example Garoupa (2001) or Cook (2008).

⁴ See chapter 2.

⁵ For example, Garoupa, supra note 3.

potential crimes, as shaped by criminal legislation and public enforcement rules and conduct.⁶

Unlike many of the above writings, the analysis in this paper is mostly a positive law analysis, which discusses the functions of existing victims' roles created by recent legislation, not limited to a positive law description of passive victims ex ante position only.⁷

Putting aside issues of plea bargaining or impact statements (which are discussed later), many of the scholars who did conduct a positive law analysis of victims' ex post roles, came from a Sociology, Criminology, Psychology, Philosophy, or pure Law perspective, not using law and economics efficiency analysis of victims' ex post role in the existing legislation as a part of the public crime enforcement model. They usually use concepts of victims' "voices", dignity, or human rights.⁸

These traditional writings are not sufficient to explain the divergence from the traditional common law witness only role (which is not be analysed here broadly).

This paper examines recent victims' role legislation mainly in Israel, with some comparison with England or the U.S. (and some remarks about other countries). It does not suggest that one can necessarily generalise from these systems. It uses them mainly, due to technical constraints of width, language, and available resources (therefore discusses mainly common law systems).⁹ It will not discuss the EU

⁶ See chapter 1.

⁷ See for example (of passive position description before suggesting normative corrections): Ben-Shahar and Harel (1995); Garoupa, *supra* note 3; Harel (1994); Posner (1985); Ben-Shahar and Harel (1996) (and many others).

⁸ See Henham and Mannozi (2003) (In Italy and the UK); and: Erez (1990); Fenwick (1997); Cellini (1997); Erez and Rogers (1999); Edwards (2001), (2002), (2004); Ford (2003); Miers (2004); Bierschbach (2006); Kirchengast (2006) (In Australia); O'Hear (2006); Norton (2007) (in Ireland); Hodgson (2008) (in France) Rock (2008) (In England and Wales) and others, see chapter 2.

⁹ Israel's legal system is not a "pure" common law system (see Oz-Salzberger and Salzberger (1998)).

process regarding victims' rights, which has not developed yet to a level of valid legislation.¹⁰

The first chapter discusses several existing law and economics victims' roles classification, suggestions and explanation (including efficient precaution, reporting, monitoring or disciplining role and agency problems in plea bargains and trials, "biased crimes", and the application of private interest theory on victims' role legislation).

It uses criticism if needed, illuminating gaps which are not covered sufficiently by existing law and economics writings (such as the effect of parallel administrative law procedures on the efficiency of victims' role). It also tries to contradict existing views on the assumed effect of victims' ex ante position (such as suggesting an opposite direction of the diversion of crime).

The paper uses the analysis method introduced below.

2. The analysis method:

The second chapter uses the classification of law and economics explanations or justifications of different roles of victims, as discussed in the first chapter, to analyse existing victims' role legislation.

It compares them with different formal roles or "rights" created by existing legislation, using alternative explanations if needed, or trying to disprove some current law and economics justifications or explanations or normative suggestions of victims' efficient roles (following the concept of deduction in social science, by

¹⁰ The European Union Council Framework Decision on the Standing of Victims in Criminal Proceedings (2001/220/jHA).

popper, where a failed disprove effort is the best way to develop a theory, since positive proves can never logically exist (since they always might be disproved later on)).¹¹ After analysing this comparison, it examines the effects of these roles on victims' efficient behaviour ex ante a crime (position), in the basic crime enforcement model.

The second chapter sections are divided to various formal rights of victims which exist in the legislation analysed in this paper. Each section tries to analyse a different right or group of rights, according to the method discussed above. The term "Right", is used here only to make it easier for the reader to differentiate what is formally enacted by legislation from what is suggested or explained by law and economics. This does not mean that a discussion of moral or legal concepts of right is a major part of this paper.

¹¹ Popper (1963).

Chapter I: A Discussion of Law and Economics Writings on Victims Position and Role in Public Crime Enforcement

This chapter discusses existing writings of law and economics with regard to victims' position and role, since some of their concepts are used by the analysis made in chapter two. It starts by introducing general basic concepts of law and economics analysis of public criminal law enforcement.

1. Basic Theoretical Concepts

Becker (1968) and others, argued that criminal rules (like any rule) should be analysed according to supply and demand economic theories. Crime is an externality, because it creates harm which is not compensated by the criminal in the free market (or according to others, since it forces victims to bare the costs of prevention).¹² However, this does not necessarily mean that deterrence is always efficient. Crime should be deterred only when it creates more harm than benefit (in order to address other problems of crime (which might be needed due to other reasons, if efficiency is not the only consideration) when deterrence is not efficient, other means can be used ex post).¹³

In order to create optimal deterrence, criminal legislation should be shaped to align criminal's private utility function with the social one. A Criminal is deterred if his costs (probability of getting caught and prosecuted and convicted (combined) multiply by the fine) equals or higher than his benefits from this crime.

According to further developments, Crime should be deterred only if the criminal's benefit is lower than the harm he causes. Therefore, fine should be equal to the harm divided by the probability (multiplier principle). According to this approach,

¹² Becker (1968); Dau-Schmidt (1990).

¹³ *Ibid*; Polinsky and Shavell (2005).

efficient and optimal deterrence is created by using monetary sanctions (since fine has lower costs than imprisonment).

Since punishment and probability creation is costly, probability should be minimal, fine should be maximal.¹⁴

During the following years, scholars have suggested theories regarding optimal enforcement of laws,¹⁵ or supplements, criticisms, and developments to the above model.¹⁶ According to some developments, complete deterrence is not efficient; some under deterrence is more efficient. The multiplier principle is not efficient.¹⁷

This can be explained by an information problem which creates errors (criminal's mistaken assessment of his benefit or "government" mistaken assessment of the efficient fine), disutility of risk, enforcement costs, or some practical reasons which might hinder the adoption of the theoretical multiplier principle (such as fairness considerations of courts or difficulties or errors with the assessments of probability).¹⁸

When combining the social joint function, criminal's gains should be considered, and not only legal gains or harm alone (Total social wealth is: criminal's benefit, minus the expected sanction, minus criminal's taxes, minus social harm, minus victim's taxes, plus joint government revenue (from both taxes), plus revenue from the sanction, minus enforcement costs. **After summing up:** social wealth is

¹⁴ Becker, supra note 12.

¹⁵ Stigler (1970).

¹⁶ For a literature review: Garoupa, (1997); Polinsky and Shavell (2000a); Polinsky and Shavell, supra note 13.

¹⁷ Shavell (1985), (1987), (1993); Polinsky and Shavell (1979); (1984); (1992); (1994); (1998); (1999); *Ibid*; (2000b); Supra note 13; At and Chappe (2008).

¹⁸ *Ibid*; Persson and Siven (2007).

criminal's benefit, minus social harm, minus enforcement costs).¹⁹ There were further developments and complications of these models, not covered here.

This paper does not discuss general issues of private law enforcement, or its history in common law countries (moving from private to public),²⁰ unless contributes to analyze aspects of victims' role in public enforcement processes.

The basic models considered the position of victims as exogenous (for example, the possibility that some precaution by victims is efficient). However, since these theories argue that criminal's benefit should be included, it means that they imply that some criminal activity can have benefits of its own. Therefore, it is not enough to suggest a-priori that the criminal should be the one avoiding it necessarily (which could have been the conclusion had we assumed the activity is a-priori unbeneficial or unwanted, and therefore criminal avoidance is the cheapest solution). An analysis of efficiency aspects of victims' position was therefore needed, and made in later writings.²¹ The following discussion relates to these aspects.

2. Victims' Precaution

2.1 An Ex Ante Position Vs an Ex Post Role

This paper discusses precaution issues, assuming that precaution action itself does not create harm or constitutes a crime. Introducing concepts of criminal or harmful precaution measures (such as violent actions by potential victims to protect their life or property against a crime),²² complicates the theoretical discussion and go beyond this paper's goal (it may also create a need to discuss defences in criminal law).

¹⁹ *Ibid.* For other developments not discussed here, see Ditmann (2005).

²⁰ For example, Friedman (1984).

²¹ See the next section.

²² Posner (1971).

Scholars argue that the existing criminal legislation does not give victims incentives to take precaution, and treats them as passives.²³ Many scholars, do not compare position and role in efficiency terms, but analyse them separately (however, few do try to compare them in efficiency terms (despite naming both “role”))²⁴ (it is discussed later).

In the early 1970’s, some focused on risk aversion and moral hazard theories of victims, relating to insurance theories, but paid less attention to optimal efficient crime legislation which creates optimal victims’ precaution in the sense of victims’ relative precaution, as a part of the general crime enforcement economic model of Becker and followers.²⁵ In the 1980’s development were made towards analysing concepts of victims’ precaution as part of the general discussion of optimal crime enforcement.

Most scholars assume that a coaseian bargaining solution between victims and criminals is impossible due to high transaction costs;²⁶ therefore, it could have been implied that the question is of separate non negotiable precaution and not precaution as a product of joint bargaining. Posner has justified criminal legislation as preventing forced market bypasses, and by that, preventing over precaution by victims.²⁷

Cook analysed crime opportunities, suggesting that criminal legislation can shape victims’ precaution causing under precaution if uses incapacitation or rehabilitation which create lower risk perception of victims, making victims’ easier targets for criminals, and therefore increase crime.²⁸ He did not argue that victims

²³ Ben Shahaar and Harel (1995), supra note 7.

²⁴ Supra note 3.

²⁵ For example: Clotfelter (1977); Bartel, (1975); Ehrlich and Becker (1972).

²⁶ On the impossibility of a coasian bargaining solution see Dau-Schmidt, supra note 12, his note 41.

²⁷ Posner (1985), at 1198.

²⁸ Cook (1986).

should necessarily take precaution, but rather implied that criminal law should be shaped not to make victims an easier target.

Shavell argued that victims' private precaution is different than the optimal social level of precaution (for reasons explained later - [PR]), public policy can try to shape it towards the efficient level by giving subsidies if precaution is too low, or imposing taxes if precaution is too high. This can be efficient since private precaution is usually cheaper than public precaution due to information differences (Shavell did not suggest yet to shape criminal law to achieve victims precaution).²⁹

Since the 1990s', arguments regarding victims' precaution developed further. A justification of existing legislation's shaping of a passive victims' position,³⁰ is usually the argument that victims' precaution is inefficient since it is not on the optimal social level due to several reasons such as over precaution, since victims do not consider gains for the criminal,³¹ or since it might divert crime (criminals will choose less protected victims instead) (but ,victims still care about themselves, so still take over precaution),³² or since it may cause under precaution due to overreliance on state enforcement or a fear that state would reduce enforcement if private precaution is higher.³³

Others suggested normative exceptions to the passivity approach, while only few have argued that the passivity shaping positive law description itself might be wrong:

²⁹ Shavell, (1991), pp. 131-132.

³⁰ A similar description of the writings in notes 31-34 is made in Garoupa, Klick, and Parisi (2006) p. 158.

³¹ Ben Shahrar and Harel (1995), supra note 7.

³² Hui-wen and Png (1994).

³³ Hylton (1996).

Cohen suggested that punishment should be influenced by the relative avoidance costs. Crimes against higher cost avoiders should be punished more severely.³⁴ Harel suggested a normative concept of comparative fault (similar to torts) to decrease the problem of inefficient level of victims' precaution, by reducing criminal's fault according to part which is due to the victims under precaution, based on some utilitarian arguments compared with fairness issues,³⁵ and later focused on a more utilitarian wealth model using similar ideas based on further results.³⁶ Bergelson, argued (a positive law argument) that the passivity shaping description of criminal law is imprecise. Certain existing defences or limitation to criminal fault, based on victims' behaviour, might suggest that victims are not presumed to be passive even in the existing criminal law.³⁷ On the normative side, she suggested a concept of relative liability, not based only on utilitarian efficiency but on relative morality standards and community standards regarding the moral fault in victim's own behaviour, how much he reduced his right by his action, not only by efficiency considerations, but according to the specific moral value society attribute to certain victims behaviour relative to the criminal's behaviour (she criticises Harel on ignoring moral differences between under precaution of a victim to an anti social (morally speaking) behaviour of a criminal).

Harel replied arguing that Bergelson's positive analysis is not precise (the criminal law doctrines introduced have nothing in common and cannot be explained by Bergelson's arguments) and that the concept of relative rights is too broad to be

³⁴ Cohen (2000).

³⁵ Harel, *supra* note 7.

³⁶ Ben Shahr and Harel (1995), *supra* note 7.

³⁷ Bergelson (2005a).

useful.³⁸ Bergelson answered repeating that efficiency should also be analysed with concepts of relative rights and morality lawfulness.³⁹

There is not much use of the debate between Bergelson and Harel, since they speak in different languages. Bergelson claim that rewording unlawful behaviour in the cost of lawful behaviour is inefficient (and unfair),⁴⁰ while Harel's efficiency concepts do not recognise unlawfulness, or moral inferiority as a-priory wasteful in comparison to lawful moral accepted acts. Their concepts of efficiency and of different actions moral neutrality and values are different.

2.2 Specific Issues of Precaution and Crime Divergence Arguments

Clements argues that a positive externality is created when one victim's precaution creates a benefit for other potential victims not paying for it, so it makes them take under precaution, so that total precaution is lower than the social optimal level. It can be fixed by a system which differentiates crimes according to victims' different levels of precaution, to shape efficient spread of precaution and therefore efficient level of social precaution.⁴¹

Others discussed normative aspects regarding the efficiency of victims' reporting or help to authorities in detection and punishment, such as of terrorists.⁴²

This section is interested in a short remark they made regarding the effect of terror victims' precaution on terrorist decisions (therefore relevant for this papers' discussion of victims' position). They argue that terrorists choose less protected

³⁸ Harel, (2004) (Harel relates to an article by Bergelson which was published in 2005 after Harel's article, but written earlier).

³⁹ Bergelson (2005b).

⁴⁰ *Ibid*, p. 589.

⁴¹ Clements (2003).

⁴² Garoupa, Klick, and Parisi, *supra* note 30.

targets since it is less costly for them to achieve (their argument may seem as a development of the crime divergence argument regarding precaution).⁴³

This argument isolated several last years' examples (Madrid, New York, London, Israel) out of a longer period and trends of world terrorism in the last fifty years. It did not relate to contradicting cases in which certain groups of terrorist preferred better protected targets than less protected ones⁴⁴ (an answer to this criticism may be that it depends how one defines terror, arguing that whatever is not a civilian target is not terror, but this is a tautological argument, since it means that all which is terror is only efficient terror).

Beside these empirical gaps, an interesting theoretical note is made as follows:

The above assumption may be using a too naïve definition of terrorists' economic benefits. A relevant question is what are the terrorists' economic benefits according the terrorists preferences, and is it only killing or harming? This question should be answered prior to a suggested explanation of the influence of victims' precaution on terror.

Law and economics is not superior to answer this, compared with other fields of science. Political science, International Relations, Psychology, or History Research, can help law and economics answer what exactly are terrorists' benefits according to their own preferences (which is the relevant parameter when discussing the effect of victims' precaution on terrorists' decisions).

The above alternative analysis of terrorism may suggest that some of the main terrorists' preferences and benefits are public support of their political ideology or nationalist goal, or prestige which comes from hitting "high profile" secured targets

⁴³ *Ibid*, at 158.

⁴⁴ Such as the first Palestinian uprising in Israel, many IRA actions, many Hisbulla actions, see note 45.

(targets such as army bases or government offices or highly secured places, which are harder to reach and more costly for the terrorists). It is reasonable to assume that these benefits typically increase with certain types of terror acts, but decrease with others (the first benefit above can be true at least for nationalist terrorists which are motivated by real politics goals, even if not true with regard to some religious terrorists).⁴⁵ Therefore, a method which is less costly in increasing the number of killings or making it easier, is not necessarily more efficient as a whole for the terrorist himself, considering public support or prestige as terrorists' benefits according to their own preferences.

Certain types of terror acts, despite achieving easier or cheaper killings, might decrease public support of the terrorist's political goal, or achieve less support, or be less prestige or decrease existing prestige; therefore, have lower benefits for the terrorists themselves (for example, for a nationalist (non religious) terrorists, killing of children and women in busses, compared with hitting on adult men or a secured high profile target or armed police or soldiers).

If public support and prestige are relevant benefits for terrorists themselves (it can be proved empirically only by a preference revealing or other preference examination mechanism), it is not clear if committing an act in an unsecured underground station against unprotected civilians, is more beneficial or more efficient than killing an armed soldier or a secured high profile office, contrary to the above authors' assumption. One may assume that a correlation can be found such as that the easier and less protected the target is, the more the act decreases public support and is less prestige.

⁴⁵ On terrorists' goals, see: Hewitt (2006); Shughart (2006); on behavioural analysis of terrorists, see Post (2008).

This discussion's contribution to this chapter is its argument that some under precaution can divert crime to an opposite direction than earlier suggested by Hui-Wen and Png or by the article above, or by others.⁴⁶ In short, the argument is that some criminals (nationalist terrorists for example) may prefer harming better protected victims than less protected ones, since it gives them higher overall benefits (or at least equates marginal cost to marginal benefits (if dealing with nationalist terrorists that are not a monopoly)). It depends on the correct benefit definition, or at least in comparing parallel multiple benefits and parallel multiple costs to the terrorists themselves, of the same terrorist act.

Other writings of victims' precaution argued that there are social benefits to crime divergence and therefore not all victims should be passive. Different victims suffer different level of harm from the same potential crime. Therefore, crime divergence might be socially beneficial, if it shifts crime to victims who suffer less relative harm (victims that are likely to suffer more harm, will invest in precaution).⁴⁷

Medina, used game theory analysis of optimal enforcement and distributional effects of sanctions on enforcement, considering victims' precaution as exogenous, but suggested that had it been endogenous, it would have effected both behaviour of the criminal but also of the public enforcers, making the investing victims worse off, since enforcer will protect the more vulnerable victims.⁴⁸

It is interesting to compare Medina's argument with the critic notes made here about terrorism analysis. His argument and this paper's criticism, are somewhat similar by suggesting that precaution investment of victims might divert crime in the opposite direction than suggested previously (terrorists will target better self protected

⁴⁶ Supra note 32 and Lakdawalla and Zanjani (2005).

⁴⁷ Mikos (2006).

⁴⁸ Guttel and Medina (2007).

victims due to prestige and public support which are terrorists' benefits (this paper's argument), better self protected victims might be worse off (either less secure or secure with unnecessary private cost) because police defends less protected victims (this paper's interpretation of Medina's argument).

Other scholars, differentiate observable from non observable precautions and argue that non observable precaution might reduce crime in general, but have no advantage on the personal victims deterrence effect (might have negative diversion effect, since criminals do not know who is taking precaution, and therefore will spread an average effort on all victims or choose them randomly).

Observable precaution has an opposite influence (shifts crime for private victims, but not creates lower crime rates in general).⁴⁹

2.3 Precaution Issues Summary

As discussed above, existing writings suggest normative solutions which move on the axis between precautionary victims to passive victims, but few have sufficiently analysed both ex ante position and ex post active role in an existing legislation and not only on a normative basis.

A reason for this phenomenon may be that some writings which discuss victim's active role, examine other market failures ex post, without suggesting a combined discussion which includes efficient position problem ex ante. Most writings of victims' ex post role, relate mainly to agency problems, information problems, or public enforcement resources problem, or alternative explanation such as private

⁴⁹ This is only a simplistic interpretation of a complicated economic model by Hotte and Ypersele, (2008).

interest theory, which is discussed later.⁵⁰ Some exceptions to the above description were made, mainly about reporting, as discussed next.

3. **Victims as Monitors, Discipliners or Reporters (including plea bargains, agency issues, and administrative law influence)**

3.1 Victims as Reporters

In this paper's view, writings can be divided to those which use a combined analysis of reporting role's influence on victims' position ex ante, and others who analyse victims' reporting role ex post (help detection or conviction by supplying information) but did not examine its influence on victims' efficient position ex ante.⁵¹

Among the first type above, some argued that although rules which compensate victims for reporting crimes create moral hazard and decrease incentive to take ex ante precaution, they are overall socially efficient, since their resulting benefits of better information, detection and apprehension, are higher than the loss resulted from the under precaution they cause.⁵²

The analysis discussed above is relevant to demonstrate the need for a research comparison of the effect of legislation on position (ex ante) and of the created role (ex post), at the same time, examining social aggregated efficiency, rather than a dichotomy that either analyses the effect on position (precaution for example) or the effect of a role, but not the joint effects.

⁵⁰ See a review in the next sections.

⁵¹ For the first type of scholars, see Garoupa, supra note 3 and Garoupa, Klick and Parisi, supra note 30. For the second type, see Norton supra note 8, pp. 63-64 or Nahra (1999) (not a law and economics analysis).

⁵² Garoupa, supra note 3; Cook, supra note 3.

This paper uses a similar approach while conducting a positive law analysis of victims' role legislation, analysing these combined effects.

Some non law and economics scholars have discussed the problem of victims' fear of reprisal, which decreases reporting efforts (among other reasons for under reporting such as victims; private cost-benefit calculations), while law and economics scholars did not attach sufficient weight to this aspect in their public crime enforcement cost-benefit analysis of the effect reporting.⁵³

One can argue that this fear of reprisal should be analysed also in the economic models of crime enforcement, since it influences the level of efficient reporting (if we agree with the arguments above that some reporting is efficient) by creating under reporting, or effect the optimal social wealth, even if not influences reporting, but does happen after reporting was made (more externalities of more crimes due to reprisal on reporters (new crimes which are the direct result of reporting)).

In this paper's view, reporting is not a monitoring or enforcement tool and cannot decrease agency problems directly, because police can still close a reported crime file using its authority,⁵⁴ or use fewer resources on the reported crime's investigation than on other investigated crimes, according to its own preferences (even if forced to examine every complaint). In some systems, prosecution still has the authority not to prosecute or to ask a lower punishment than the public or victims (the principles) wants, also with regard to reported crimes.

⁵³ Singer (1988); on the other hand, Garoupa, Klick and Parisi did not relate to the fear of reprisal, supra note 30 at 158); for a review on other writings on reasons for reporting and an analysis on reporting's effects see Levitt (1998);Culotta (2005); Schnebly (2008).

⁵⁴ For example in Israel, Article 62, *Chok Seder Hadin Haplili*, 1982 (The Israeli Criminal Procedure Law, as amended).

Therefore, reporting does not decrease agency problems, but reduce other costs (information, detection, conviction, apprehension). Other roles analysis is needed to tackle agency issues, as discussed in the next sections.

A final note should be made. Reporting, or any other victims' role which is given prior to a conviction, has a logical problem which is difficult to explain using economic tools. It is the problem of creating a "Victim" moral status (or even legal status as for victims' formal rights or roles), before a parallel "Guilty" criminal moral status was created, which may stand against the presumption of innocence as a moral presumption. Some non law and economic scholars argue that for this reason, victims should not participate in the process prior to conviction.⁵⁵

Law and economics usually is not interested in this moral equation, since the basic model assumes that there is a criminal "out there", and we need to examine the most efficient way of discovering him, victims' role should be therefore analyzed only according to these discovery process efficiency aspects (including ex ante influence on victims behaviour).

This paper argues that these two approaches cannot be compared, since they use different logical concepts. For law and economics, the criminal is there even prior to conviction, but in moral philosophical or legal status terms, the presumption of innocence should logically mean that we have to presume that the suspect is not a criminal until conviction. Only conviction changes a moral and legal status and "creates" a criminal in the moral and philosophical meaning. It can be argued that this logic cannot be grasped by law and economics, which does not see the criminal conviction process as a moral status creation, but as a detection and apprehension process (a discovery and not creation).

⁵⁵ As reviewed in Doak (2005).

3.2 Victims as Monitors or Discipliners of Prosecution and Trials

Several scholars have discussed victims' role as monitors or discipliners, some using law and economics terms and methods, and some using other terms, but with similar meaning.

Bibas, suggested that victims' monitoring role should be applied on trials rather than on plea bargains, since the last it is assumed to be made "in the dark" (more costly to monitor due to information problem) and not subject to clear rules as trials.⁵⁶ This problem was discussed also by others, who analysed a formal system of plea bargaining (by subjection to procedural rules and judicial review) to improve its transparency and accountability. They argued it should be compared with its costs (administrative costs, vulnerability to third parties intervention, and the criminal which had formally plead is tied to this plea, if bargain is cancelled).⁵⁷

One may argue that the above descriptions of an existing legal world where plea bargaining is informal, non controlled, non transparent and less subjected to judicial review, is exaggerated, especially in some legal systems which already apply both private law existing contractual doctrines and case law, on the bargain as a contract, and also administrative and constitutional law doctrines ("**Administrative Law**" – hereinafter) on prosecutions bargain decision as an administrative decision, subject therefore already today to judicial review, and transparency administrative doctrines and rules, just like any other administrative decision.⁵⁸

This note does not come to criticise the normative suggestions above, but to suggest that a positive law analysis should be made, which includes existing administrative law influence on plea bargaining and on victims' role with regard to it,

⁵⁶ Bibas (2004) at 2476.

⁵⁷ Garoupa and Stephen (2008).

⁵⁸ For example, Israel, note 59.

in some legal systems. Judicial review on plea bargains and some other prosecution decisions already exists in some legal systems, even if not as a part of the criminal process, but of administrative law doctrines.

The application of administrative law doctrines on plea bargains creates problems less predicted within the typical law and economics analysis of plea bargaining.

An interesting example of the problem of subjecting plea bargains to judicial review which is applied by a parallel administrative procedure (and to some monitoring role by victims that can enforce this review to take place), is the problem of the prosecution to go back on a bargain and apply harsher charges, when it needs to do so, as explained below.

This problem may arise in a situation where the criminal decides not to plea guilty, to cancel the bargain, and to go on a trial, but the prosecution already had defended its decision on the charges agreed upon, in an earlier administrative process opened by the victim or someone else, before the criminal had decided to cancel the bargain. It can happen only in systems that enable criminals or prosecution to cancel a bargain, and enable the victims or third parties to open a parallel administrative procedure regarding the bargain's validity, in a high court of justice or an administrative court, all before the final dead line to plea as promised on the bargain in the criminal process, has come.⁵⁹

Even if there is no formal restriction on the prosecution to go back to harsher charges, there are procedural or practical problems, which might arise in the criminal procedure, when the prosecution will try to explain the new harsher charges. This

⁵⁹ A similar situation happened recently in Israel in the case of its former president. See BGZ 5699/07 *Plonit V Hayoetz Hamishpati Lamemshala* (Israel's High court of Justice Decision, 26.02.2008).

problem is created because the prosecution had elaborately defended and explained why it chosen limited charges, or even harmed the credibility of its witnesses, including victims, when defended on its decision on a bargain in the parallel administrative process.⁶⁰

In this example, the subjection of the prosecution to judicial review (which can be the result of monitoring by victims) creates unpredicted problems that arise due to the possibility of having parallel legal procedures, an administrative one and a criminal trial. It can be considered as a separate cost of victims monitoring, which may also harm victims themselves (the initiation of an administrative judicial review process by a victim, might eventually weaken his testimony credibility in the criminal court, such as in a situation as described above).

To conclude, a law and economics analysis which argues that plea bargains should be subjected to monitoring by victims through initiating judicial review procedures, but not includes a cost benefit analysis of the constraints, costs, contradictions, and waste of resources, created by the existence of this parallel administrative court procedure (or at least suggests its abolishment), is not sufficient, since the existence of a parallel procedure may create restrictions or force the prosecution to behave in a contradicting way, that has costs of its own, both social, and private to the victim itself.

Another view that favours victims as active monitors argues that giving victims active roles of monitoring and disciplining, can decrease agency problems created by the gap between prosecution's self interests, different preferences, better

⁶⁰ The prosecution explained in the administrative process, its difficulty of applying harsher charges due to witnesses' credibility problems, *Ibid.*

information, and incentives, on the one side, and victims and public interests, information, preferences and incentives, together, on the other side.⁶¹

This argument can be criticised as follows:

While it did mention a difference of interests and preferences between the general public and victims (and among victims themselves), it still suggested aggregated simplification that treats them all as one group of outsiders (as one joint principle)⁶² (however he did suggest victims should be the main discipliners due to advantages they hold compared with the general public (motivation, discretion and information) suggesting that the fear of vengeful biased victims compared with the general public is empirically exaggerated).⁶³

This argument can be criticised: first, it uses general policy or moral terms such as vengeance, but does not use a multi principle economic agency model using objective values (victims Vs general public as competing principles with conflicting interests) to find optimal social monitoring on prosecution. Second, it did not compare the marginal benefit of better monitoring or decreasing agency problems, with the marginal loss/cost of more under precaution caused by moral hazard (which might increase due to this monitoring active role). This criticism does not mean that victims' active monitoring is necessarily inefficient; but that in order to argue it is efficient, the above analysis of marginal costs and benefits should be made.⁶⁴

⁶¹ Bibas (2006).

⁶² For a comprehensive review of principle-agent models see Posner (2000a).

⁶³ See Bibas; supra note 61, pp. 57-58 and Jacobs (1993).

⁶⁴ Similar to Garoupa, supra note 3, comparing reporting role with moral hazard.

Many scholars have analysed the efficiency of prosecution. Garoupa discussed some contrasting views regarding prosecution preferences, which might differ from civil law countries to common law countries (such as mandatory Vs selective prosecution, the structure of employment of prosecutors and its effect on their interests, and moral hazard and adverse selection of prosecutors). He argued that mandatory prosecution can be efficient when the prosecution is excessively risk averse or is motivated by self goals, which would lead it not to prosecute even when it is efficient to do so. Therefore, mandatory prosecution reduces agency costs (when the general public is the principle).⁶⁵ His argument can be interpreted as a solution to an agency problem when social efficiency requires prosecuting, but prosecutors avoid it due to other preferences.⁶⁶

In the context of this paper, when the above argument holds, monitoring or enforcement by the victim is not needed (since it is prosecuted any how, and it will be efficient). One may also argue that if prosecution is mandatory, there will almost never be a conflict of interests between the prosecution as an agent and victims as principles, since usually victims prefer files to be prosecuted.⁶⁷

Unlike the above case, a problem arises when prosecuting is not socially optimal, for example, due to limited resources of the administrative system, or specific costs and benefits of a certain crime. These cases may require selective prosecution. In this case the social interest of not prosecuting will conflict with victims' interest. If prosecution is inefficient in a specific case, but mandatory, a multi principles model may show a non optimal bias in favour of the victim (a too high

⁶⁵ For a general description of scholars views of efficient prosecution and for his argument see Garoupa (2008).

⁶⁶ Garoupa discussed prosecutor as less of an agent in inquisitorial systems (*Ibid*, at 7.), but this paper discusses mainly adversarial systems.

⁶⁷ Ramsey (2002) and Bibas, *supra* note 61.

effort of prosecuting) on the expense of other principles interest of not prosecuting (general public).

Garoupa and Stephens argue that victims should be heard, since despite their interests being different than the social one, they are still relevant for aggregated wealth (therefore, an optimal solution should also consider them among other factors, even if not fully achieving them). However, they argue that this should be limited to a right to be heard, not a veto right, since applying victims' interest only, is not optimal due to this divergence of interests and leads to less bargains being made in the first place, and since judges are the optimal appreciators of the joint preferences ex post a bargain.⁶⁸

They differ than Bibas who supports a more active victims' role, mainly since he used specific empirical data from 1993 of a specific US state which shows similarity of interests of victims and public⁶⁹ (one can doubt if this can be generalised to support his general conclusion).

A further note is that a right to be heard exists already in some legal systems, by specific rules or by administrative justice doctrines;⁷⁰ therefore, there is a need for its positive law function analysis also.

A right to be heard, is not equal to a monitoring or a disciplining role, but may create some monitoring and disciplining as a by-product (prosecution may fear being overruled by a judge and loose reputation if did not examine victims interest or gave them insufficient weight, so may take more informed and calculated decisions).

⁶⁸ Garoupa and Stephen, supra note 57 pp. 36-37, 40.

⁶⁹ Bibas, supra note 61 at his note 245.

⁷⁰ See discussion in chapter 2.

In order to reach a conclusion regarding the optimal level of efficient monitoring by victims, if any, a multi principles-agent model should be used (public and different victims, as different principles). Furthermore, a comparison should be made of victims' role influence ex post (on the range from a hearing to a veto), on their position regarding precaution ex ante (a veto can create higher under precaution due to moral hazard, but hearing only, might create over precaution due to a fear of insufficient punishment).

One may argue that a positive law description of the application of general administrative law review on plea bargains shows that victims already have a certain active role in some legal systems. This role is explained by legislators or some scholars in general moral concepts of a human's right against an arbitrary power of a public authority (just as with any administrative decision), which does not arise from the reasoning of the criminal process itself, or of agency problem solving within it.

Even if we do not consider moral considerations or concepts of rights and powers, the historical roots of administrative justice rules and doctrines in some legal systems (for example, the development of a general right to be heard before a public decision was made, or legislation and duties of public information revealing)⁷¹ creates a need for a law and economics analysis which considers the preferences of a private person who feels to be arbitrarily harmed or uninformed by the public authorities use of power (for example, signing a plea bargaining without informing or hearing).

This analysis can be done by regarding the above as a separate harm or externality forced upon this person (a harm which comes not due to a punishment which does not fit the interest of the victim, but because of the arbitrary use of a public authority's power itself without giving the victim his administrative rights).

⁷¹ Both are discussed in chapter 2.

The general discussion of the economic meaning of recognising people's rights against public authority's use of power is too broad for this paper.⁷² Therefore, the next chapter analyses victims' role even if results from administrative justice rules, only as part of the discussion of victims' role in the criminal enforcement models.

4. Special Crimes

Some acts are defined in some legal systems as specific crimes or are subject to harsher punishments, due to the type of victims they target or if based on motives influenced by specific types of relations to specific types of victims, such as incest crimes, domestic crimes⁷³ or hate crimes.⁷⁴ Many scholars analysed the efficiency of special crimes, called also "Biased Crimes".⁷⁵

This paper argues that although these crime's special definitions or punishments are the result of "choosing" a specific type of victim or relations/motive by the criminal, they cannot be considered as victims' role legislation, since they do not give victims an active role ex post, even if it may shape victims behaviour (position) ex ante (a normative "victims' centred" approach, as suggested by some).⁷⁶ Even if other legislation gives victims some active role as part of the same general policy, it should be analysed separately. Therefore, chapter two will not analyse biased crimes themselves, but only specific active role legislation.

⁷² For a review of law and economics justification of rights analysis, see: Blume and Voigt (2007).

⁷³ For example, Quarm and Schwartz (1982).

⁷⁴ Dharmapala and Garoupa (2004) (also for a review of literature); Posner (2004); Gan (2004), Harel and Parchomovsky (1999); compare with a non law and economics writing: Blake (2001).

⁷⁵ *Ibid*; regarding the effects of murder felony rule on weaker victims see Garoupa and Klick (2006); see also: Beale (2000); Dharmapala, Garoupa, and McAdams (2008);

⁷⁶ As suggested by Harel and Parchomovsky, supra note 74, responded by Dharmapala and Garoupa supra note 74.

5. Private Interest Theory or Rent Seeking of Victims' Role Legislation

The private interest theory of regulation and the theory of rent seeking were introduced by Stigler and Tullock, and developed since.⁷⁷ They describe regulation which is not trying to maximise public interest (social wealth), but to pursue benefits (private interests) of a specific group (which is in a position to capture decision makers or to “win” over other groups, due to certain advantages (already established, have lower cost of enforcement on members to prevent free riding, lower organisation costs and other advantages, and that can solve a collective action problem) (which can be met with politicians seeking rents in return). While private interest regulation is not necessarily always inefficient (for example, in cases when the private interest aligns with the social one or due to specific special circumstances); its general motive is private interests and not social wealth.⁷⁸

This paper uses the term legislation for both legislation and regulation. However, the process of reaching majorityrian legislation is different than regulation, less easily captured, and subject to another field of research. Short remarks of this difference are made in chapter two.

There are two aspects of applying private interest theory on crime legislation: **First**, is the use of this theory to explain the existence of special crimes (such as hate crimes), not based on efficient deterrence or level of harm, but arises from ideological trends, or provides private rents to supporting politicians in form of political statement or decreasing the pressure of political groups.⁷⁹

⁷⁷ Tullock (1967); Stigler (1971); for a review of developments since Stigler and Tullock, see Mattiacci, Langlais, Lovat, and Parisi (2007), pp 200-201.

⁷⁸ *Ibid.* For a review ,criticism and recent developments, see: Stancil (2008);

⁷⁹ See Posner, *Supra* note 74, pp. 235-237, for a review of the first aspect, see Beale, *supra* note 75, pp. 1247-1253.

Others have criticised this approach, arguing that penalty enhancement may have a social wealth explanation rather than private interests explanations, since these crimes' types of victims usually have higher precaution costs compared with regular crimes, and since a long past of prejudice can show that some criminals gain specific high benefits from attacking these groups.⁸⁰

This first research aspect is not analysed here, due to reasons explained in section four above.

The second research aspect is the application of private interest theory on existing legislation which gives victims an active role in the criminal process ex post a crime (compared with its effect on their efficient position ex ante). There are relatively few examples of scholar's positive law private interest analysis of the second aspect.⁸¹ The next chapter discusses mainly the second aspect and examines the application of private interest theory on victims' role legislation.

This chapter have discussed various law and economics justification, explanations or suggestions of victims' positions and roles. The next chapter compares them to different victims' formal ex post rights given in existing legislations, analyses economic ex post functions of these rights and their influence on victims ex ante position.

⁸⁰ See Dharmapala and Garoupa, supra note 74, pp. 197-198 (they referred to an earlier addition than cited here).

⁸¹ For example, O'hear (2007).

Chapter II - An Analysis of Victims' Role Legislation

This chapter discusses existing legislation which gives crime victims certain rights regarding prosecution decisions and criminal trials. The term “rights” is used for convenience only, to differentiate formal existing roles from their economic functions as analyzed in this paper.

1. Victims' Rights and Roles In Trials

1.1 Impact Statements

In some systems, victims of certain crimes (usually severe crimes), are entitled to give or deliver a statement before a judge or jury, of the crime's impact on them (in most systems, after a conviction and before sentencing). This right exists (or existed temporarily) in different forms (written or oral), in several countries such as: the U.S.,⁸² Australia,⁸³ Canada,⁸⁴ England and Wales,⁸⁵ Scotland,⁸⁶ The Netherlands,⁸⁷ and Israel.⁸⁸

To avoid theoretical complications arise from the presence of juries (mostly behavioural economics discussion), this section discusses mainly, statements made before judges.

⁸² Article (a) (4) of 18 U.S.C. § 3771; The U.S. Dept. of Justice, Office For Victims of crime, *Attorney general Guidelines for Victim and Witness Assistance* (2005); See Posner (2000b), pp. 19-21, and Logan (2008). In the U.S. this was subject to a constitutional debate (fears of disproportionate punishments due to statements), but decided as constitutional: *Payne v. Tennessee*, 501 U.S. 808 (1990).

⁸³ Kirchengast, *supra* note 8.

⁸⁴ Roberts and Edgar (2003).

⁸⁵ Rock, *supra* note 8.

⁸⁶ Leverick, Chalmers and Duff (2007).

⁸⁷ Wemmers (2005).

⁸⁸ See note 89.

The Israeli “*Chok Zechuyot Nifgaey Aveira*” (2001) (“**Crime Victims Rights Law**”, Hereinafter)⁸⁹ is a comprehensive victims’ role legislation. Among its goals are the recognition of victims’ special interests in the criminal process, including investigation, indictment, trial and punishment, and assuring victims participation in criminal trials (although not considered as a party) based on victims dignity as a basic human right.⁹⁰ However, it states that even if it is breached, the breaching act will be valid for all proposes.⁹¹ This article might decrease its practical influence, but since the bodies which are obliged to apply its rights are public (police, prosecution and court), they are likely to apply them, moreover, since usually applying them does not force them to change their substantive decisions.

Under this law, victims (or close relatives of desists victims), are entitled to give the public prosecutor a written statement regarding physical, psychological or property harms they allegedly suffered by the crime. The prosecutor must bring it before the judge of the criminal trial, after conviction and prior to sentence (this paper does not attribute an agency problem to the delivery by the prosecutor, since he is obliged to deliver it as is).⁹²

In England, a scheme of victims’ personal statements in serious crimes began in 2001. Subject to criticism, it was suggested in 2005 to include relatives’ statements in severe crimes with desist victims.⁹³ In Scotland, a similar pilot was ended in 2005.⁹⁴

⁸⁹ *Chok Zechuyot Nifgaei Aveira*, 2001.

⁹⁰ IP 2393/06 *Kamel N’ Medinat Yisrael* (21.11.2007); Article 1, *Ibid.*

⁹¹ Article 21, *Ibid.*

⁹² *Supra* note 89.

⁹³ *Practice direction (Victims Personal Statement)* [2002] 1 Cr. App. R. (S) 482; Rock; *supra* note 8; Sanders and Jones (2007); Wemmers, *supra* note 87; Doak, *supra* note 55.

⁹⁴ Leverick, Chalmers and Duff, *supra* note 86.

Pure law or criminology writings analyse this right from a perspective of victims' dignity, "voice" or human right.⁹⁵ Even if it is true, can it also be justified or explained using law and economics? Impact statements are brought or given before a judge after conviction, so they do not affect directly detection or conviction (unlike reporting), but mainly the level of punishment, as analysed below.

1.1.1 Harm Information Function

Impact statements may be explained by an analysis of the efficient fine or punishment, in the crime enforcement model introduced earlier, since precise information regarding victim's harm is needed for setting efficient punishment or fine by court.⁹⁶ This right may be considered as an information supply tool of victims' harm level. Since victims know best their own harm, they may be the cheapest harm information providers.

In some countries, desist victims' relatives can also give impact statements.⁹⁷ This paper discusses mainly statements by living victims. However, relatives' statements may be explained in efficiency terms. Desist victims cannot provide information. The next efficient harm information providers are the relatives, being close to the victim, or by other reasoning: the harm is caused to the relatives themselves, or as victim's heirs, so they are the relevant harm information providers.

The information justification may be criticised by arguing that victims manipulate harm either intentionally, or by overestimation.⁹⁸

⁹⁵ Wemmers, supra note 87.

⁹⁶ See Chapter 1; Edwards (2004), supra note 8, pp. 975-978, discussed also a harm information provision role, but on fairness and not economic justifications.

⁹⁷ Supra notes 85, 87.

⁹⁸ See the Literature of Chapter 1 regarding the basic model, specifically Polinsky and Shavell.

This criticism can be answered as follows:

First, if this legislation does not create a direct connection between impact statements to victims' compensation⁹⁹ it decreases victims' incentives of manipulation (beside revenge, which still exists).¹⁰⁰ However it may not be sufficient, since if compensations are depended on harm level, victims may still have an incentive for manipulation.

Second, this legislation does not let victims set the fine or punishment, but leaves this decision to the discretion of a judge. It enables judges to ignore the manipulative part, or at least decrease it. This can still be cheaper than judges or prosecution seeking for information regarding the entire harm, had there been no impact statements. However, the above argument is not sufficient to answer critics who argue that impact statements can influence emotionally juries or judges.¹⁰¹ This can be answered either by assuming that judges are less influenced than juries, or by allowing only written statements¹⁰² less subject to emotional influence on judges, or by empirical work that showed case studied countries in which punishments after an impact statement were not harsher than without it, or only to a slightest degree which can be explained by impact statements usually being given in more serious crimes to begin with.¹⁰³

Third, in some jurisdictions (such as England), judges receive also other sources of information of victims' harm, such as social workers reports which can help them set accurate harm, even if manipulated or overestimated by the victim.¹⁰⁴ This answer may be criticised by arguing that it causes costs duplication. It might be

⁹⁹ Israel for example, supra note 89.

¹⁰⁰ On revenge motives, see Harel (2008), pp.9-11.

¹⁰¹ See Posner, supra note 82; Rock, supra note 8; Rose, Nadler, and Clark (2006).

¹⁰² See this section above.

¹⁰³ See Erez and Rogers (1999), supra note 8, and Leverick and Chalmers, supra note 86.

¹⁰⁴ Field (2007).

cheaper to use only social workers reports as information source of accurate harm. However, these reports alone might not reflect sufficiently the correct harm; a combination of sources might be more precise.

Law and economics can contribute by suggesting (a positive law explanation) that this harm information function may explain why common law system where not satisfied with the limited traditional witness role of victims, better than the vague explanation of giving them a “voice” (a witness also has a ‘voice’).¹⁰⁵

As witnesses only, victims’ information of their own harm is irrelevant, or at least not more than what is necessary for conviction. In the basic economic model, this is not enough, since the correct level of harm is needed for efficient punishment or fine calculations, so adding impact statements as harm information tool, may still be needed despite having testimonies.

A similar explanation can be applied as a reason for going beyond a reporter role which was discussed in the first chapter (the function of reporting is better detection, but is not a harm information tool for optimal fine or punishment calculation).

1.1.2 Disciplining Function

Impact statements do not seem to solve agency problems directly (no monitoring). They might be considered indirectly, as part of a disciplining tool, if we assume that prosecution or judges (the agents) will be less subjected to public criticism without statements to compare with. Prosecution might provide biased harm information (low or high) according to self interests, or judges might set harm below or above the correct level following self interests.

¹⁰⁵ See Wemmers, supra note 87.

Is there a multi principles problem here (victims Vs public as separate principles)?

In the optimal enforcement model, non victim public perceptions of victims' harm are less relevant as for harm information itself. If victim's harm manipulation problem can be decreased (by written statements only, discretion of a judge supplementary reports and separation of compensation from statements) victims should be the relevant principles of disciplining agents' decisions regarding assessment of the correct harm (unlike other issues of victims' role that involve non victims (general public) as other principles).

This argument may be criticised if crime is considered not only as an act between criminals and victims, but also between criminals and society. If translating social concepts of amorality or society's interest to economic values, each crime creates (at least) two separate harms: a harm to the victim, and an additional harm to society as an organ (disruption of society's well being or joint moral values, even if the act took place in private between two persons only, even consensually).¹⁰⁶

This criticism can be answered as follows: in economic terms, the above argument actually means that there are many joint victims (society's harm, is actually aggregated harm of many victims. Economics cannot grasp a concept of "society" as one organ). Moreover, in victimless crimes, if society's harm is actually the joint harm of many victims, they seem to have the same interest (an equal level of shared harm), so even if they are multi principles, they share the same goal (so a problem of a conflict between a private victim's impact statement as a disciplining tool, to other principles, does not exist).

¹⁰⁶ Similar to a "public wrong" view, discussed in Lamond (2007), and see Cohen (2008) at 287.

To conclude, the main economic function of impact statements is harm information supply. It may also have an indirect disciplining role. A multi principle conflict problem might arise in crimes against specific number of victims and less with victimless crimes which are only directed against society as a whole. With the first type, if manipulation problem is solved, victims are the relevant principles, since their harm is the relevant harm in the enforcement optimal equilibrium.

1.1.3 Private Interests

If one accepts law and economics criticism of impact statements (such as manipulation, over, or under-estimation of harm,¹⁰⁷ or biases and over-punishment decision due to emotional influence or other reasons),¹⁰⁸ can a private interest or rent seeking analysis explain this inefficiencies?

In Israel, this legislation was lobbied by traceable groups (women organisations and sex crime female victims' organisations), which initiated, lobbied and were present in meetings of the legislative committees, joined by law scholars who operates pro bono women victims' aid organisations, as reviewed in a recent conference on the Israeli Victims Rights Law: (translated – [PR]):

“This law is a product of a joint work of a group of women jurists from aid organisations and of women victims of crime. Around the table gathered representatives of the central organisation of aid for sex crime female victims, families of murder victims, council for the child, the

¹⁰⁷ Rose, Nadler, and Clark, supra note 101.

¹⁰⁸ Posner, supra note 82.

forum of shelters for women victims of violence, and the organisation for women...”¹⁰⁹

This fact alone is not sufficient to prove that this legislation was motivated mainly by private interests or rents. More over, in Israel, this right is given in a law, enacted by parliament, which is less easily captured than a regulator. Furthermore, these groups do not hold the advantages usually explained as needed for a lobby to win against other interests, public or lobbies.¹¹⁰ Last, it is hard to trace rents which supporting politicians may expect in return (more than vague concepts of ideology, making political statements or decreasing political pressures, which were criticised earlier).¹¹¹

This legislation was also promoted by several law scholars who advocated victims’ rights for years, on a feminist or basic human rights basis, which usually went together with their academic writings, some combined it with pro bono workshops for female victims in their academic institutions, before and after the legislation came into force.¹¹²

Can a legislation which fulfil academic theory and was consistently promoted by scholars, be considered as private interest motivated by these scholars?

Their interests may be, increased publicity, improved relations with political leaders that influence decisions regarding their academic institutions, potential of improving career opportunities within their institutions due to this legislative success and publicity, or even directly, providing research topics and material for their writings (a scholar can promote legislation and later write about this process and its

¹⁰⁹ Protocols of the Tel Aviv conference (16.12.2007).

¹¹⁰ See discussion in chapter 1.

¹¹¹ See discussion in chapter 1 on Posner and his criticsers.

¹¹² For example, Fugach (writings, pro bono aid and other academic work: 1997-2007), legislative comities presence (for example (2004)); Tutian (2008); and many others.

outcome) or increase their activity in pro bono workshops in their institutions, which represents or help victims (which contribute to their academic publicity and success).

Since it is hard to support this general argument, and it needs a wider empirical research, it is left here unanswered, as a basis for future analysis.

A final note should be made. Even if this legislation was motivated by private interests, it does not necessarily mean that impact statements are inefficient. It depends on finding who is the cheapest harm information provider, and does leaving the final decision to a judge, using written statements only, supplementary reports, and not creating a direct connection between the statements to victims' compensation, are sufficient and not too costly, to solve potential victims' manipulation, compared to a non statement world. One should also commence a costs-benefit analysis as mentioned in the end of this section.

1.1.4 Ex ante Position Effects

An ex post role analysis alone is not sufficient to examine aggregate social wealth effects. How may the role of giving impact statements effect victims' efficient position before a crime?

On the one hand, if one agrees with the manipulation argument, victims may take under precaution expecting they can manipulate harm information, using impact statements ex post. On the other hand, the above possible solutions for the fear of an ex post manipulation may decrease motivation for under precaution.

It may be argued that since victims do not know ex ante if the crime is of the type that "creates" a right to make impact statements, victims might take less precaution, to increase the chance for a severe crime that gives a right to make impact

statements. This criticism should be rejected, since in this type of severe crimes (mostly includes physical, sexual or psychological effects) it is reasonable to assume that most victims prefer to be less harmed with no impact statement, than more harmed but with impact statement.¹¹³

A normative law remark can be made. One may suggest borrowing Harel's idea of relative fault,¹¹⁴ and apply it on impact statements. That is, to limit the right for an impact statement if the victim did not take efficient precaution.

This suggestion should be rejected. If we agree with explaining impact statements as harm information tool which is crucial for optimal enforcement, this suggestion is wasteful, since it creates ambiguity of the precise harm. Therefore, even if it motivates some more precaution ex ante, it would lead to a non optimal fine or punishment, due to insufficient information of harm ex post.

It may be necessary to compare the marginal benefit of one more unit of precaution, to the marginal loss of one more unit of ambiguity regarding harm (or one less unit of preciseness), and the marginal cost of alternative information provision tools, due to abolish or lack of impact statements (it should only be done after solving victims' manipulation problem).

¹¹³ Following various scholars' suggestions of victims' precaution motives, see Chapter 1.

¹¹⁴ See Chapter 1.

1.2 Rights for Information and Presence

The Israeli Law gives victims rights to receive information regarding investigation, prosecution and trial, such as a right to read the indictment, and to be updated by the prosecution regarding different stages and developments.¹¹⁵

These rights can be limited in special circumstances, at prosecution's discretion (subject to administrative judicial review).¹¹⁶ A somewhat different right is to be present (with certain crimes) in non public criminal trials (which may be limited by the criminal court's discretion).¹¹⁷ This right is analyzed here as part of the group of rights for information, for reasons discussed below.

Most of these rights exist in variations in several countries, such as the US, in internal guidelines (2005) and in the U.S. Crime Victims Act (2004).¹¹⁸ In England and Wales, victims are entitled to similar rights under the Code of Practice for Victims of Crime (2005) ("**The Home Office Code**", hereinafter) (regulations issued under the Domestic Violence, Crime and Victims Act (2004) ("**The English Victims' Act**", hereinafter) (a comprehensive victims' role legislation), which entitles them to receive information from the police and the prosecution, regarding investigation and trial process and it's decisions.¹¹⁹ Similar to Israel, in England and Wales and the U.S. these rights may be limited in certain circumstances.¹²⁰

How can law and economics analyze these rights?

¹¹⁵ See Articles 8, 9, *Chok Zechuyot Nifgaey Aveira*, supra note 89.

¹¹⁶ *Ibid.*

¹¹⁷ Article 15, *Ibid.*

¹¹⁸ *Attorney general guidelines*, supra note 82; 18 U.S.C. § 3771, supra note 82; Cassel (2005).

¹¹⁹ Home Office (2006), *Code of Practice for Victims of Crime; Domestic Violence, Crime and Victims Act* (2004).

¹²⁰ Article 7.5, *Ibid.*; Supra note 118.

1.2.1 Information Function

These rights do not create new information on crime or harm, but only on the activity of agents in the criminal processes. Therefore, the following discussion focuses on agency issues.

1.2.2 Monitoring and Disciplining Functions

Can these rights be explained as a part of a monitoring or disciplining tool which may decrease prosecution agency inefficiencies?

On the one hand, a principle needs information of the agent activity and outcomes. On the other hand, a principle which has non or very limited authority to influence or change these activities or to “punish” the agent, cannot act as an efficient principle, even if receives sufficient information, the more so when he may be limited by the agent, as discussed above.

Traditional non law and economics analysis based on fairness arguments, suggests that these rights of information are only passive, less important than active rights of participation, such as impact statements, discussed earlier.¹²¹

This argument reflects only a partial understanding of the right for information. Law and economics analysis may suggest that a parallel application of administrative law judicial review on prosecution decisions (or of some appeal rights which are analyzed later) may complete this right to create an active disciplining role as a whole.

In some systems, victims have can appeal to an administrative court or court of justice against a prosecution decision, on basis of constitutional or administrative rights (in some, parallel to a similar right in the criminal procedure itself).¹²²

¹²¹ Edwards (2004), supra note 8, pp. 295-298.

¹²² Compare Israel with the US, for example, as discussed in this chapter.

The rights for information can help victims seek judicial review on different prosecution decisions during the criminal process, by using this information in an administrative review process (for example, in Israel, victims can ask for an administrative procedure arguing that a limited indictment was extremely unreasonable).¹²³ Prosecution expect this, so may be disciplined (it fears public opinion or overruling and decrease of reputation).

Another problem is that of multi principles. If we assume that public interest is also relevant for efficient enforcement, than the public as the other principle (or principles) of the prosecution, should also have a right for information, to monitor the prosecution and reach optimal social wealth and enforcement.

A note should be made here. Public trials may decrease this problem without a need for special legislation, but as far as decisions which are not made in court itself, or made before trials, or trials which are not public, most systems do not give the public a parallel right. Even administrative law doctrines of information usually do not apply in this situation.¹²⁴ It leaves victims with a superior right for information compared with other principles. Moreover, this right is enhanced by the right to be present in non public trials, discussed below.

The right of presence is more complicated to analyze. Some may argue that it is not only an information supply tool for a principle to monitor an agent, but might effect conviction or punishment by manipulation due to emotional effect of victims' presence on judges or other witnesses (or even more severe in jury systems).¹²⁵ However, this problem is somewhat decreased, first, by different tools which protect

¹²³ See for example: BGZ 3535/05 *Chen N Medinat Yisrael* (11.4.2006).

¹²⁴ For example, article 9 (4), *Chok Chofesh Hamieda*, 1998 (the Israeli Law of The Right for Information).

¹²⁵ Donahoe (1999).

other witnesses that can still testify without the victims' presence, in some circumstances, or by judges discretion to limit victims presence.¹²⁶ Second, it may also presume to be less severe in a non jury system (professional judges).

To conclude, it may be helpful to equate the marginal administrative cost of another unit of information provision for the principle, with the marginal benefit of another unit of improved disciplining and monitoring (reducing agency problems of prosecution), taking into account the need to fulfil multi principle goals at the same time (general public Vs victims).

1.2.3 Private Interests

The private interest discussion in section 1.1.3 above can be applied here similarly, with some additional notes: the validity of private interest arguments might be influenced by the legislation type, as mentioned earlier.

In this aspect, it is interesting to note that unlike the Israeli law, the English victims' act does not include victims' right for information in the act itself (despite other victims' right being included), but in the home office code issued under the act, which is a regulation.¹²⁷ This might imply that these specific rights are easier to capture than other victims' rights which are in the act itself, and are the direct result of a parliamentary voting.

¹²⁶ *Chok Zechuyot Nifgaey Aviera*, supra note 89.

¹²⁷ Supra note 119.

1.2.4 Ex Ante Position Effects

A right for information or presence might create some under precaution, assuming that each more unit of improved monitoring or disciplining for the victim might create some more moral hazard ex ante (victims expect a better chance of fulfilling their interests due to better monitoring or disciplining).

This assumption may be criticised: First, even if better monitoring of victims on prosecution or judges as agents creates some more moral hazard, it is not necessarily correlated one by one (better monitoring still does not assure victims that there will be a conviction or that prosecution will fulfil their interests, since they cannot change its decision despite the right for information, and since judges have the final discretion).

Second, victims know ex ante that even if a procedure of judicial review on the prosecution will take place (therefore will enable them to use this monitoring function, therefore might create some moral hazard ex ante) still, under the reasonability doctrine, judges may consider other interests, such as public interest or efficient enforcement, therefore the chance for a major moral hazard effect is low.

To conclude, it is hard to estimate the precise ex ante effect of more ex post information for victims, but it may be beneficial to examine the marginal cost/loss of more under precaution with the marginal benefit of better monitoring or disciplining (deducting also information supply administrative costs), to understand the efficiency of the right for information or presence.

1.3 A Right for a Reasonable Length of Procedures

The Israeli Crime Victims Rights Law gives victims a right that procedures (including trial) in sex or violence crimes, will not take longer than a reasonable period, in order to prevent “*Inuy Din*” (a term explained below).¹²⁸

A similar right exists in the US Victims Act.¹²⁹

The Israeli law does not base this right on a cost-benefit analysis, but on a moral concept of “*Inuy Din*”. This concept is known in English as delay in passing judgment or sentence, but its Hebrew meaning is more severe, it can be freely translated to “Torture Caused by a Continuation of the Justice Process”.

This right creates an internal contradiction in the Israeli legislation. On the one hand, this law does not treat victims as a party to the criminal trial (for example, by stating that its application cannot harm criminals rights in the trial, and by the way it was interpreted by court)¹³⁰ on the other hand, the above right treats victims as if they were a party, by using an existing concept of “*Inuy Din*” which is usually used in favour of a full party of a trial (in criminal trials, usually in favour of the criminal). This right is vague. It is not clear what a reasonable period of trial is. This article was rarely applied in the Israeli court.¹³¹

If accepting a law and economics argument that there is an optimal length for a trial or investigation or prosecution procedures (see below), basing the above right on moral concepts and not on a cost benefit analysis, might lead to its application even if these processes did not reach optimal length yet, but court decides that its length is already too much of a burden on victims’ feelings or dignity.

¹²⁸ Article 12, supra note 89.

¹²⁹ Article (a) (7), 18 U.S.C. § 3771, supra note 82.

¹³⁰ Article 1, *Chok Zechuyot Nifgaei Aveira*, supra note 89.

¹³¹ Only one case was found which discussed it, but did not apply it: BSP 10259/05 *Medinat Israel N Ploni* (3.11.2005).

How can this right be explained by law and economics?

1.3.1 Optimal Length of Criminal Procedures Vs Procedure Continuation as an Additional Harm

Criminal procedures have costs (administrative and private representation and litigation costs). Some of them are non avoidable in order to reach efficient detection and punishment in the enforcement model, but it may be assumed, that they have optimal length. That is, after a certain point, the marginal cost of process continuation, is higher than its marginal benefit (its marginal contribution for optimal deterrence or punishment).

On the other hand, the psychological effects of a too long procedure on a victim, might be considered as a separate additional harm (in addition to the harm caused by the crime itself), which decreases aggregate social wealth.

If this is true, considering optimal length of a procedure without taking into account this additional harm, is not sufficient. Before deciding if victims' right for a reasonable length of procedures is efficient, one should compare the marginal benefit of a decrease in this additional harm, with the marginal cost or loss due to a procedure length which is shorter or longer than the optimal length needed for efficient crime enforcement,

Even if we assume that court would use it only according to a cost benefit analysis of optimal length and additional harm decrease, is it justified to give this monitoring right to victims?

1.3.2 Efficient Monitoring?

Victims might not use this right even if it is efficient, because they may prefer conviction in any case, even if procedures continuation causes some additional harm (depends of their level of benefits from the outcome of the procedure), or the opposite, if the marginal additional harm from the continuation is higher than their marginal benefits from continuation's outcome. Therefore, giving monitoring role on length to victims might be inefficient, since they care only about their private cost benefit analysis.

A solution might be the subjection of this right to a final decision by a judge which is in a professional position to know if a process has passed its optimal length or not (after taking into account also the marginal additional harm to the victim due to over-continuation), and by that neutralise victims' biases. In Israel, judges have this authority using the term "reasonable" length. However, even if this is the case, it may be cheaper to give judges an authority without the need for a process opened by a victim, which is a waste of resources, in this case.

This argument may be contradicted by suggesting that victims are the cheapest additional harm information providers, since they know best what its level is. If judge still has the authority to continue a procedure based on aggregated social wealth after considering this additional harm, the combination of additional harm information supply by victim to judges prior to their decision on optimal length, and judge final discretion, may be efficient (only after solving over assessment and manipulation problem, as in the "regular" harm information problem).

1.3.3 Private Interests

The discussion of private interest theory in section 1.1.3 above can be applied here also. An additional note should be made. Two interest groups may be competing here. On the one side, victims' organisations, women organisations and law scholars (see above), on the other side, some lawyers, who benefit from a continuation of procedures (if their fee is based on time or efforts spent on file).

If using private interest theory, we should also compare relative lobbying "winning" qualities.¹³² Since lawyers seem to have more winning qualities than the other groups above, the existence of the right for a reasonable length of procedures, may imply either that it was not motivated by private interests, or that the lobbies winning qualities explanation, does not always hold (lawyers seem to be very organised and with less cost for a collective action, organisation and prevention of free riding (this qualities are even protected by bars legislation in some countries), but still "lost" here the "battle of lobbies" against victims and scholars).

1.3.4 Ex Ante Position Effects

One may argue that without a right for a reasonable length, victims may take over-precaution, since they expect an additional harm due to procedures continuation. The right for a reasonable length, may therefore be explained also as shaping efficient precaution ex ante, by decreasing the over precaution expected without it. It is an efficient tool, since it is flexible and applied ex post only if there is an additional harm.

¹³² See discussion in chapter 1.

A contradicting view would argue first, that victims might still take over-precaution for other reasons, so if this right leads to a non optimal length of procedures, it is just a waste of resources. Second, since judges have discretion not to apply it (using the reasonability principle), victims expect this, and will not change their behaviour ex ante, or change it insufficiently due to this uncertainty (there will still be some over precaution, expecting that in some cases judges will not prevent the additional harm of procedure continuation).

2. Victims Rights With Regard to Police and Prosecution Decisions

This section differentiates two types of rights: rights of appeal and rights to be heard, since they stand on two different levels of victims' activeness. A right to be heard seems more of an information supply tool (victims supply information to the prosecution prior to a decision) while the right of appeal, seems more of a disciplining tool on prosecution as an agent.

On the other hand, some may argue first, that the right to be heard is more than an information tool, since it encourages prosecution to consider victims' interest, which is also relevant for optimal enforcement (even if not alone but with other costs and benefits and interests considerations).¹³³ Second, it can be criticised if accepting an economic meaning of a moral concept of general administrative justice (the argument that a separate new harm or externality is created each time an administrative authority does not hear a person which is influenced by its decisions).¹³⁴

¹³³ See discussion in chapter 1.

¹³⁴ *Ibid.*

The first argument above can be criticised (if leaving aside the above general analysis of administrative justice): even if victims use this right to supply more than information of harm, this right itself, is only an information tool (even if using the above criticism idea, than this it is a supply of information regarding victim's preferences or interests). Only its completion by an administrative or other judicial review (as discussed earlier) gives it a disciplining or enforcement role, if any.

First, a right to appeal is analysed:

2.1 An Appeal Regarding a Decision Not to Indict

There are several rights to appeal regarding specific prosecution and police decisions. The first type is of decisions not related to other victims' rights. Of this first type, this section discusses appeals regarding decisions not to indict. The second type is of rights to seek administrative judicial review on any decision of the prosecution, including decisions that breach other formal rights of victims, discussed in this chapter.

This section does not analyse much of the second type, since some of these rights were discussed earlier, and since the right to enforce other victims rights, is only supplementary, less unique in law and economic terms (unless its supplement to the first type right creates a new economic role or function, as discussed earlier). Despite the above said, this section will analyse the right to seek administrative judicial review on a rejection of an appeal on a decision not to indict, in countries where this first stage of this appeal is internal, decided by the prosecution or the attorney general itself (and therefore, a law and economic analysis which ignores the second stage of an administrative review, will not be sufficient, such as in the Israeli case).

The discussion of this right is relevant only where prosecution is not mandatory.¹³⁵

In Israel, any person who reports a crime which was investigated but closed by a police officer or a prosecution official without indictment, has a right to appeal to the prosecution itself or the attorney general (depends on the level of the official who closed it (in Israel there are different closing authorities depends on the type of crime)), even if his decision was based on consideration accepted by the criminal procedure law, such as insufficient evidence, or no public interest in indictment.¹³⁶ Second, the reporter or any interested legal entity has the right to ask for an administrative judicial review,¹³⁷ based on administrative justice reasonability doctrine, if the appeal was rejected.¹³⁸ A similar right is given on decisions not to investigate, but it is not analyse here.

In many legal systems, a similar right does not exist or is limited to include only internal review by the prosecution itself (such is in Denmark, Norway and Brazil).¹³⁹ In England and the US federal law, procedures regarding indictment, are quite different than the Israeli case due to the possibility of having juries,¹⁴⁰ therefore, are not analyse in here (some states in the US recognised judicial review on non-indictments by case law).¹⁴¹

Some countries, apply a similar right (in some variations). In Japan victims have a right to be heard regarding a decision not to indict, before a special commission of citizens nominated by the prosecution, and a right (similar to Israel) to

¹³⁵ On aspects of mandatory prosecution, see chapter 1.

¹³⁶ Article 64, *Chok Seder Hadin Haplili*, supra note 54.

¹³⁷ Aaken, Salzberger, and Voigt (2004).

¹³⁸ For example, supra note 123.

¹³⁹ See Thaman (2007) and supra note 137.

¹⁴⁰ Fairfax (2008).

¹⁴¹ See Pennsylvania: *Commonwealth v. Benz*, 565 A.2d 764 (Pa. 1989).

ask for an administrative judicial review on prosecutions decision (on any prosecution decision, including the one discussed by this commission),¹⁴² In Germany, victims can ask a judge to review a decision not to indict. It is similar in the Netherlands, Poland, Bulgaria, Italy, and in Scotland (in rare cases).¹⁴³

How can it be explained using law and economics?

2.1.1 Monitoring and Disciplining

Can this appeal right serve as a tool of disciplining an agent?

The use of an internal appeal may be explained as an internal organisational agency problem solving mechanism. The head prosecutor or attorney general can change a decision of their inferiors, if it is biased due to agent's interest, and is not efficient considering optimal enforcement model. The Israeli High court of Justice considered this as a right to be heard only, due to its being internal (obiter).¹⁴⁴

Since this right does not solve an external agency problem of the prosecution Vs the victim or general public (the attorney general may still reject an appeal, seeking other interests than the victim), a completing administrative review by court, may be needed.¹⁴⁵

These arguments can be criticised:

First, some scholars' analysis of organisational structure of prosecution agencies in different countries, argue that a dependence of prosecution on the executive branch, might lead to lower prosecution of some types of crimes (however,

¹⁴² West (1992) pp. 685,692, 694; Marsh (2006).

¹⁴³ As reviewed in Thaman, supra note 139.

¹⁴⁴ See Court protocols in supra note 59.

¹⁴⁵ See above discussion. For a comprehensive discussion on subjecting crime enforcement authorities to administrative law, see Tamir (2006).

this was not proved empirically sufficiently).¹⁴⁶ If this argument holds, it may contradict the above explanation of efficiency by internal monitoring function in the Israeli law, since in Israel the attorney general is appointed by the government (although suppose to be independent).¹⁴⁷

Second, a decision not to indict even if based on agents' interests contrary to principles interests, is not necessarily inefficient, this depends on aggregated social wealth of the efficient public enforcement model, as discussed in chapter one.

Third, if prosecution discretion is efficient,¹⁴⁸ a right for a judicial review might be wasteful.

Fourth, even if we consider a decision not to indict as inefficient due to inconsideration of principles interests and therefore justify a right of appeal on non indictments, does it balance between multi principles interests?

The Israeli law might decrease multi principle tensions since it gives this right to any one who reports a crime.¹⁴⁹ However, this is not enough; a reporter might hold different interests than the general public, even if he is not the victim.

A possible solution is court's discretion, if court is authorised to examine the optimal balance of different principles interest, and of the aggregated efficiency of non indictment, in a specific case and its influence on future cases.

The Israeli administrative judicial review is not sufficient to solve this problem, since court may only interfere in cases of extremely unreasonable decisions. The Israeli High court of Justice or an administrative court will usually not interfere with a professional decision of the prosecution or attorney general if based on their

¹⁴⁶ Van Aaken, Feld, and Voigt (2008) and supra note 139.

¹⁴⁷ Supra note 137.

¹⁴⁸ See discussion of mandatory Vs selective prosecution in chapter 1.

¹⁴⁹ Supra note 136.

assessments of the sufficiency of evidence; ¹⁵⁰ it is closer to giving prosecution full discretion, which its efficiency is arguable.¹⁵¹

2.1.2 Information Aspects

If considering information aspects, giving reporters an appeal right on non indictments, may serve two different goals: First, like compensation (but less), it creates incentives for reporting (which is claimed by some to be efficient to some extent) ¹⁵² (the level of reporting will increase, since reporters know that if there is no indictment, they can seek judicial review (but with some under reporting, due to uncertainty of court's decision)).

Second, even if a report is investigated, there is still a chance that there is a miss assessment of the information reported, or that not all the reported information was processed by the prosecution, which lead prosecution to an inefficient non-indictment, but not due to agency problems. In this case, the reporter which still holds the correct information can influence intervention, which will be efficient. Regarding the Israeli law, this is more of a normative law suggestion, since the existing administrative justice judicial review in Israel will not examine professional assessments, for the reason discussed above.

This suggestion may be criticised by the usual arguments of reporters or victims manipulation of information.¹⁵³

¹⁵⁰ BGZ 1762/08 *Varkstel N Danino* (4.6.2008).

¹⁵¹ See chapter 1.

¹⁵² See discussion on reporting, *Ibid.*

¹⁵³ See discussion in section 2.2.1.1

2.1.3 Private Interests

The same arguments in section 1.1.3 can apply here, but seems to be of less impact, at least in the Israeli case.

First, in Israel this specific right was first enacted in the Criminal Procedure Law, long before the “victims’ rights” revolution, so empirically, there is less of a casual connection between these interest groups activity and this specific right.

Second, it applies on all reporters and not only on victims. It makes the private interest arguments less attractive, since this right is given to a wide circle of population which is closer to the general society.

2.1.4 Ex Ante Position Effects

The right for a judicial review of a decision not to indict, might decrease the level of victims’ precaution ex ante (not a full decrease, due to uncertainty of court’s final decision), but on the other hand may create more reporting, since there is a lower waste of reporting efforts (victims may expect that more evidence will make it easier for court to overrule a decision not to indict, so provide more reporting efforts).

In a similar way to Garoupa’s discussion regarding compensation for reporting,¹⁵⁴ an analysis of the benefits due to the expected increase in reporting, compared with the loss of more under precaution, all due to the incentives created by the above right for a judicial review, is helpful.

However, in some countries, the right of appeal regarding non indictments is given to any reporter, not only to victims.¹⁵⁵ This aspect may affect the above analysis,

¹⁵⁴ See chapter 1.

¹⁵⁵ For example, see the Israeli Legislation above.

since there is a potential that some of the reporting motivated by this right does not create more under precaution. This is assumed for reporters which are not victims, and their precaution is not relevant. If this argument holds, a comprehensive analysis should combine all the marginal benefits from reporting, including those comes from non victims' reports, and only then, compare it to the marginal loss due to the parallel decrease in victims' precaution, motivated by this right.

2.2 Rights to be heard:

Do rights to be heard serve are only an information supply mechanism, or may they have also other economic functions?

2.2.1 A Right to be Heard Prior to a Plea Bargain

The right to be heard prior to a plea bargain is already analysed in depth by the existing law and economics literature, using mainly normative law arguments, as discussed in chapter one.¹⁵⁶ Less analysed aspects of victims' role in plea bargains, where also discussed in chapter one, therefore, only some supplementary notes are made here, mainly of a positive law analysis of this right in existing different legislations.

The Israeli Victims Rights Law gives victims a right for a hearing by the prosecutor, in sex or severe violence crimes only, prior to a final decision on a plea bargain. High prosecution or police officials have discretion to limit this right if it might harm the plea bargaining process.¹⁵⁷

¹⁵⁶ See literature in chapter 1.

¹⁵⁷ Article 17, *Chok Zechuyot Nifgaey Aveira*, supra note 89.

At first, this seems like a new victims' role. But a closer examination suggests otherwise. A general right to be heard prior to any administrative authority decision, exists in the Israeli Administrative Law doctrines and existed prior to this victims' role legislation, as a general administrative justice rule default, unless limited specifically by law.¹⁵⁸ Therefore, the limiting part of the above article actually limited an existing right, and not created it.¹⁵⁹

In Israel, victims can seek judicial review for a breach of a right to be heard, based on administrative justice doctrines.¹⁶⁰

It can be argued that if this judicial review is limited to the enforcement of the right to be heard, it does not have an independent economic function (such as an appeal on prosecution substantive decision or considerations of the bargain) but only a supplementary role of enforcing the above right (which is an information supply function for the prosecution to have all the relevant information prior to bargain (this was also the Israeli court view when asked to review a breach of the right to be heard prior to a bargain)).¹⁶¹

A final note is that in some legal systems, victims may also seek administrative justice for a direct review of prosecution's decision regarding a plea bargain, on reasonability basis, even if a right to be heard was given properly. However, Court would usually not interfere with professional considerations, but only in extreme and rare cases,¹⁶² which makes this independent right less functional.

¹⁵⁸ BGZ 9631/07 *Katz N' Nasi Hamedina* (20.2.2008).

¹⁵⁹ *Ibid* and supra note 59.

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

In the U.S. this right is given directly in the criminal district court trial before a judge, as part of a general right to be heard in the criminal trial.¹⁶³ In this way victims can use it to attack directly prosecution's decision on the bargain, unlike the Israeli case. Therefore, it seems closer to an appeal right and a discipline and monitoring mechanism, than a preliminary information supply tool such as in the Israeli case. This is not a full disciplining tool however, since court has discretion not to overrule the bargain, even if it is against the victim's interest.

2.2.1.1 Information Aspects

If putting aside the possibility of an administrative or other judicial direct review on plea bargains, (rather than enforcement of the right to be heard only) and the US case of a hearing in a district court, a right to be heard before the prosecution only, seems no more than a tool for supply of information.

Victims supply information to the prosecution either regarding their harm, and/or regarding their interests. As argued earlier regarding impact statements, it may be efficient, since victims might be the cheapest harm providers, and victims' harm is relevant (among other factors) for optimal enforcement in the basic enforcement model. However, unlike impact statements, here it might be too preliminary, since the prosecution can ignore it due to its' own agent's interests, even when it is inefficient. On the other hand, if victim manipulates harm information, prosecution may correct it using the plea bargain tool.

¹⁶³ Article (a) (4) of 18 U.S.C. § 3771, supra note 82.

Another sort of information supplied by this tool is of victim's interest regarding indictment and or punishment. Unlike information of harm, information of interests is trickier, since to begin with, victim's interest may be different than the social interest or may go against efficient enforcement in specific circumstances (where a bargain is more efficient than a harsher indictment or punishment).

Most law and economics scholars argue that victim's interest should be heard and considered, but only among other consideration and interests. If this is true, a limited right to be heard and not a veto, may be efficient, since without it, there is a lack of information for an efficient enforcement, and on the other hand, had it been more than a hearing, it could had lead to biased decisions and an inefficient outcome.¹⁶⁴

Considering this argument, a final note should be made as follows: hearing victims' information of self interests has different costs than hearing victims' information of self harm. The information of self harm, if accurate and not manipulated, may contribute as is to optimal enforcement (if other factors are known and calculated correctly), while information of self interests, even if accurate and not manipulated, does not lead as is to optimal enforcement. There is always need to asses if it is the efficient interest.

In this sense, there is another assessment cost of hearing victims interest compared with hearing victims' harm.

¹⁶⁴ See Garoupa in chapter 1.

2.2.1.2 Private Interests

On the one hand, the private interests' earlier discussions could have applied here. On the other hand, in the Israeli case, if one accepts the argument that this legislation actually limited the right to be heard compared with a general administrative justice right which existed before, by giving prosecution discretion not to apply it in certain cases, it may suggest that it is less of private interests based.

2.2.1.3 Ex Ante Position Effects

A limited right to be heard, is less likely to have major effects on victims precaution if not combined with judicial review on the bargain itself. Victims indeed may take some under precaution if they value the chances to convince prosecution to cancel a bargain by supplying information, but only to a small extent, if prosecution is not subject to a judicial review.

In the US, where victims are heard by a judge, which can also examine the bargain itself,¹⁶⁵ there might be more under precaution, since it is more than an information supply tool. Victims might value the chance to convince a judge to overrule prosecution decision, as to take less precaution than with no such right. This will also not be on a full extent, due to the uncertainty of judge decision.

¹⁶⁵ Supra note 163.

2.2.2 A right to be heard Prior to a Delay of Procedures by the Attorney General

The Israeli law gives the Attorney General an independent authority, to delay (but practically stop) criminal procedures at any time after indictment and prior to conviction.¹⁶⁶ It is used mainly in unique personal circumstances of the criminal, or when there is no public interest of conviction.¹⁶⁷ The High Court of Justice may review it only in rare cases of non-reasonability.¹⁶⁸ Victims are entitled to be heard prior to such a decision.¹⁶⁹

In economic terms its result is similar to that of non indictment (criminal is not equated but also not convicted). Therefore, only few supplementary notes should be made: first, this right does not solve internal agency problems since it is used before the same body that decides on procedures' stoppage. Therefore, it is more likely to function as an information supply tool only. Since the attorney general may consider public interest in conviction, it may be efficient to supply him with information of victims' interests or harm, since they are also relevant for optimal enforcement.

Second, since its decision it is rarely subjected to judicial interference, it is needed that at least as second best, the attorney general is supplied with this information, since it is hard to correct his non informed and non efficient decision later on.

The above explanations consider mainly this right's contribution to an efficient use of the attorney general consideration of the public interest regarding conviction, but it did not explain its economic function regarding the other attorney general's consideration, that of the criminal's personal circumstances.

¹⁶⁶ Article 231, *Chok Seder Hadin Haplili*, supra note 54.

¹⁶⁷ BGZ 4723/96 *Atia N Hayoamash* (27.7.1997).

¹⁶⁸ *Ibid.*

¹⁶⁹ Article 16, *Chok Zechuyot Nifgaey Aveira*, supra note 89.

The economic implications of the balance between criminal's personal circumstances and the victim's ones, on the efficient enforcement model, may serve as a subject for future writings.

Conclusion

This paper discussed several rights or roles given to crime victims by legislation of different countries in the last years, regarding public crime enforcement processes. It tried to find if law and economics analysis can justify or explain different economic functions of these ex post rights or roles, while taking into account their influence on victims' ex ante position.

The first chapter introduced the basic crime enforcement economic model and main law and economics writings on victims' role and position. It stressed the need for a combined positive law analysis of the economic function of victims' ex post role while considering its effects on victims' efficient position ex ante, such as efficient precaution. Regarding specific issues of precaution, it argued that victims' precaution may divert crime in an opposite way than suggested earlier, towards better self protected victims. It also discussed contradicting views of the way existing legislation shapes victims precaution, and whether the passivity description of current legislation holds.

It further discussed writings on reporting, monitoring or disciplining role and agency problems in plea bargains and trials, "biased crimes", and the application of private interest theory as a possible explanation for inefficient victims' role legislation, and its criticism by law and economic scholars. It suggested that an analysis of victims' role in the criminal process only, is not enough, due to the effect of parallel administrative law procedures and review applied by victims, on prosecution decisions.

The second chapter discussed possible economic functions or explanations (roles) of current victims' rights in legislations of several countries while analysing their influence on victims' ex ante position and its efficiency.

It first discussed Impact Statements as victim's harm information supply tool, which is relevant for the calculation of optimal fine or punishment in an optimal crime enforcement model. It suggested that it may be an efficient tool if victims are the cheapest harm information suppliers, and if problems of victims' manipulation of harm can be solved, by judges' discretion, using written statements only, and cutting the relation of statements from compensations.

It argued that the overall effect of these statements on victims ex ante precaution may cause some under precaution due to some more moral hazard. To examine the efficiency of impact statements, it suggested comparing the marginal cost of more under precaution with the marginal benefit due to better or cheaper information on victims' harm.

It also analysed the right for information and presence, as a part of a disciplining and monitoring tool if combined with a right for judicial review on the decision itself. It showed that victims in most jurisdictions cannot use this information to change authorities' decisions, so that this monitoring role is only partial, mainly due to judges' final discretion. It discussed the problems created by giving this right mainly to victims while not giving a parallel right to other principles such as the general public.

It analysed these rights effect on victims ex ante position. It argued that they may cause some under precaution due to moral hazard, but to very limited extent if any, since victims know ex ante they cannot use this information ex post to force a change of decisions or fully disciplining the prosecution, due to judges final discretion and their use of the reasonability administrative law doctrine, which may include other - non victims interests.

It discussed the right for a reasonable length of procedures, and suggested it may serve an economic function of optimal length of procedures if assuming that there is an optimum which beyond it, marginal continuation administrative costs will be higher than its marginal benefit of better detection, conviction or apprehension, or if considering victims psychological harm due to over continuation as an additional economic harm in the crime enforcement model. However, it doubted whether giving this right to victims is efficient since judges may stop a process even if did not reach optimum length, since under this right they are suppose only to consider victims perception of over continuation, and the social efficient optimum length.

It further differentiated rights to be heard from rights of appeal, since the first type functions mainly as an information supply tool of victims interests, for the prosecution (such as prior to plea bargains), while the other type may serve also as a monitoring or disciplining tool. However, it argued that the second type is not sufficient in legal systems were these appeal rights are internal within prosecution authorities themselves (although this might decrease internal agency problems).

This paper discussed private interest theory as a possible explanation of victims' role, if inefficient. It discussed the influence of women victims' organisations or law scholars as interest groups, on the Israeli victims' role legislation, but doubted if this argument can be proved, among other reasons, since these groups do not seem to hold several typical qualities needed for winning a lobbying competition against other groups. It illuminated the difference between the legislation types with regard to the easiness of capture, and specifically discussed the conflict between lawyers and victims' organisations as separate private interest groups regarding the right for a reasonable length of procedures.

To conclude, the main insight which can be taken from this paper as a basis for further discussion, is the argument that despite the common conception that victims' rights movement motives of victims voices, human rights or dignity, are biased or inefficient in economic terms, it is not necessarily so. Victims' ex post rights can be an efficient tool, even under a utilitarian crime enforcement model.

These rights may function as efficient economic tools which save costs or decrease several market failures of crime enforcement (such as insufficient information on harm or its provision cost, disciplining of agents and creating optimal length of procedures), as long as some of its biased effects (such as manipulation of information, or multi principle tensions) are controlled by suitable efficient mechanisms.

This paper also suggested that factors such as victims dissatisfaction regarding prosecution decisions or length of processes are not necessarily biased or non relevant but may be considered as separate economic victims' harms (additional to the direct harm caused by crime itself) which should also be included when calculating efficient enforcement or aggregated social loss.

However, before concluding that some or more victims' roles are efficient, applying controlling mechanisms is not enough. One must also analyse this mechanism's costs, and the effect of the above role on victims ex ante behaviour, comparing marginal costs or losses due to a potential change in their ex ante behaviour, with the marginal benefit of the ex post decrease in the market failure or problem due to this role.

A more general conclusion can be drawn which suggests that even if certain legislation is commonly explained or motivated by non economic values such as moral or rights, it may also have an economic utilitarian efficiency function at the same time.

Future empirical analysis may shed more light on the economic efficiency of the new victims' roles that were discussed in this paper.

Bibliography

Legislation

Israeli Legislation and Legislative Committees Discussions

- *Chok Zechuyot Nifgaei Aveira*, 2001.
- *Chok Chofesh Hamieda*, 1998.
- *Chok Seder Hadin Haplili*, 1982.
- *Legislative Sub Committee on Crime Victims' Rights* (Discussion of 11/24/2004).

English Legislation, Regulation and Administrative Guidelines

- *Domestic Violence, Crime and Victims Act* 2004.
- Home Office, *Code Practice for Victims of Crime* 2006.
- Home Office, *Practice direction (Victims Personal Statement)* [2002] 1 Cr. App. R. (S) 482.

U.S. Federal Legislation and Administrative Guidelines

- 18 U.S.C. § 3771.
- The U.S. Dept. of Justice, Office For Victims of crime, *Attorney general Guidelines for Victim and Witness Assistance* (2005).

EU Council Framework

- *European Union Council Framework Decision on the Standing of Victims in Criminal Proceedings* (2001/220/jHA).

Israeli Cases

- BGZ 1762/08 *Varkstel N Danino*.
- BGZ 9631/07 *Katz N' Nasi Hamedina*.
- BGZ 5699/07 *Plonit V Hayoetz Hamishpati Lamemshala*.
- IP 2393/06 *Kamel Veach' N Medinat Yisrael Veach'*.
- BGZ 3535/05 *Chen N Medinat Yisrael*.
- BSP 10259/05 *Medinat Israel N Ploni*.
- BGZ 4723/96 *Atia N Hayoamash*.

U.S. Federal Cases

- *Payne v. Tennessee*, 501 U.S. 808 (1990).

U.S. State Cases

- *Commonwealth v. Benz*, 565 A.2d 764 (Pa. 1989).

Literature

- Aaken, A. V., E. Salzberger, and S. Voigt. "The Prosecution of Public Figures and the Separation of Powers. Confusion within the Executive Branch—A Conceptual Framework." *Constitutional Political Economy* 15, no. 3 (2004): 261-280.
- At, C. and N. Chappe. "Timing of Crime, Learning and Sanction." *Review of Law and Economics* 4, no. 1 (2008).
- Ayres, I. and S. D. Levitt. "Measuring Positive Externalities from Unobservable Victim Precaution: An Empirical Analysis of Lojack" *Quarterly Journal of Economics* 113, no. 1 (1998): 43-77.
- Bartel, Ann P. "An Analysis of Firm Demand for Protection Against Crime." *The Journal of Legal Studies* 4, no. 2 (Jun., 1975): 443-478.
- Beale, S. S. "Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement." *Boston University Law Review* 80, (2000): 1227-1281.
- Becker, G. S. "Crime and Punishment: An Economic Approach." *Journal of Political Economy* 76, no. 2 (1968): 169.
- Ben-Shahar, O. and A. Harel. "Economics of the Law of Criminal Attempts: A Victim-Centred Perspective." *U.Pa.L.Rev.* 145, (1996): 299.

———. "Blaming the Victim: Optimal Incentives for Private Precautions Against Crime." *Journal of Law, Economics, and Organization* 11, no. 2 (1995): 434-455.

- Bergelson, V. "Conditional Rights and Comparative Wrongs: More on the Theory and Application of Comparative Criminal Liability." *Buffalo Criminal Law Review* 8, (2005): 567.

- . "Victims and Perpetrators: An Argument for Comparative Liability in Criminal Law." *Buffalo Criminal Law Review* 8, (2005): 385.

- Bibas, S. "Transparency and Participation in Criminal Procedure." *New York University Law Review* 86, (2006):
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=869241 (Accessed 6/21/2008).

- . "Plea Bargaining Outside the Shadow of Trial." *Harvard Law Review* 117, no. 8 (2004): 2463-2547.

- Bierschbach, R. A. "Allocution and the Purposes of Victim Participation Under the CVRA." *Federal Sentencing Reporter* 19, no. 1 (2006): 44-48.

- Blake, M. "Geeks and Monsters: Bias Crimes and Social Identity." *Law and Philosophy* 20, no. 2 (2001): 121-139.

- Blume, L. and S. Voigt. "The Economic Effects of Human Rights." *Kyklos* 60, no. 4 (2007): 509-538.

- Casell, P. G. "Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victim's Rights Act." *BYU L.Rev.* (2005): 835.

- Cellini, S. A. M. "Proposed Victims' Rights Amendment to the Constitution of the United States: Opening the Door of the Criminal Justice System to the Victim, the." *Ariz.J.Int'l & Comp.L.* 14, (1997): 839.
 - Clements, M. T. "Precautionary Incentives for Privately Informed Victims." *International Review of Law & Economics* 23, no. 3 (2003): 237-251.
 - Clotfelter, C. T. "Urban Crime and Household Protective Measures." *Review of Economics and Statistics* 59, no. 4 (1977): 499-503.
 - Cohen, M. A. "Measuring the Costs and Benefits of Crime and Justice." <http://www.puaf.umd.edu/faculty/reuter/CCJS%20720/cohen%20on%20CBA.pdf> (accessed 06/21, 2008).
- . Cohen, M.A., "*The economics of crime and punishment: implications for sentencing of economic crimes and new technology of offenses*". *George Mason Law Review*, 9 (2000), 503–528.
- Cook, P. J. "Assessing Urban Crime and its Control: An Overview." *NBER Working Paper* (2008): <http://papers.nber.org/papers/w13781> (accessed 06/23/2008).
- . "Demand and Supply of Criminal Opportunities, the." *Crime & just.* 7, (1986): 1.
- Culotta, K. A. "Why Victims Hate to Report: Factors Affecting Victim Reporting in Hate Crime Cases in Chicago." *Kriminologija & Socijalna Integracija* 13, no. 2 (2005): 15-27.

- Dari-Mattiacci, G., E. Langlais, B. Lovat, and F. Parisi. "Crowding-Out in Productive and Redistributive Rent-Seeking." *Public Choice* 133, no. 1 (2007): 199-229.
- Dau-Schmidt, K. G. "Economic Analysis of the Criminal Law as a Preference-Shaping Policy." *Duke LJ* (1990): 1.
- Dharmapala, D. and N. Garoupa. "Penalty Enhancement for Hate Crimes: An Economic Analysis." *American Law and Economics Review* 6, no. 1 (2004): 185-207.
- Dharmapala, D., Garoupa, N. and McAdams, R. "'Vicious Circles' of Discrimination, the just World Belief, and Hate Crime Statutes." http://www.hertig.ethz.ch/LE_2008_files/Papers/McAdams_Vicious_Circles_2008.pdf (accessed 06/27/2008).
- Ditmann, I. "The Optimal use of Fines and Imprisonment if Governments Don't Maximize Welfare." (2005): http://papers.ssrn.com/sol3/papers.cfm?abstract_id=274449#PaperDownload (Accessed 06/23/2008).
- Doak, J. "Victims' Rights in Criminal Trials: Prospects for Participation." *Journal of Law and Society* 32, no. 2 (2005): 294-316.
- Donahoe, J. F. "Changing Role of Victim Impact Evidence in Capital Cases." *Western Criminology Review* 2, no. 1 (1999): 41.
- Easterbrook, F. H. "Criminal Procedure as a Market System." *J.Legal Stud.* 12, (1983): 289.

- Edwards, I. "An Ambiguous Participant the Crime Victim and Criminal Justice Decision-Making." *British Journal of Criminology* 44, no. 6 (2004): 967-982.
- . "The Place of Victims' Preferences in the Sentencing of "their" Offenders'." *Criminal Law Review* (2002): 689–702.
- . "Victim Participation in Sentencing: The Problems of Incoherence." *Howard Journal of Criminal Justice* 40, no. 1 (2001): 39-54.
- Ehrlich, I. and G. S. Becker. "Market Insurance, Self-Insurance, and Self-Protection." *The Journal of Political Economy* 80, no. 4 (1972): 623-648.
- Erez, E. "Victim Participation in Sentencing: Rhetoric and Reality." *Journal of Criminal Justice* 18, no. 1 (1990): 19-31.
- Erez, E. and L. Rogers. "Victim Impact Statements and Sentencing Outcomes and Processes. the Perspectives of Legal Professionals." *British Journal of Criminology* 39, no. 2 (1999): 216-239.
- Fairfax, R. "Grand Jury Discretion and Constitutional Design." *Cornell Law Review* 93, no. 703 (2008).
- Fenwick, H. "Procedural'Rights' of Victims of Crime: Public Or Private Ordering of the Criminal Justice Process?" *Modern Law Review* 60, no. 3 (1997): 317-333.
- Field, S. "Practice Cultures and the 'New' Youth Justice in (England and) Wales." *British Journal of Criminology* 47, no. 2 (2007): 311.

- Ford, D. A. "Coercing Victim Participation in Domestic Violence Prosecutions." *Journal of Interpersonal Violence* 18, no. 6 (2003): 669.
 - Friedman, D. "Efficient Institutions for the Private Enforcement of Law." *J.Legal Stud.* 13, (1984): 379.
 - Fugach, D, *Citations of Various articles, publications, academic work and participation in victims' organisations, legislative bodies and pro bono workshops* ((1997-2007):
<http://www.ono.ac.il/default.asp?pg=lecturer&CategoryID=765&ArticleID=18> (Her Personal Academic Web Site at Ono Academic College (Mainly Hebrew), Accessed 07/30/2008).
 - Gan, Li, R. C. Williams III, and T. Wiseman. "A Simple Model of Optimal Hate Crime Legislation." *NBER Working Paper* (2004).
 - Garoupa, N. "Optimal Law Enforcement when Victims are Rational Players." *Economics of Governance* 2, no. 3 (2001): 231-242.
- . "The Theory of Optimal Law Enforcement." *Journal of Economic Surveys* 11, no. 3 (1997): 267-295.
- . "Some Reflections on the Economics of Prosecutors: Mandatory v Selective Prosecution." *Working Papers, Instituto Madrileño De Estudios Avanzados (IMDEA) Ciencias Sociales* (02/2008), <http://repec.imdea.org/pdf/imdea-wp2008-04.pdf>. (Accessed 06/23/2008).

- Garoupa, N. and J. Klick. "Differential Victimization: Efficiency and Fairness Justifications for the Felony Murder Rule." *FSU College of Law, Public Law Research Paper 244*, (2006): http://papers.ssrn.com/sol3/papers.cfm?abstract_id=951795 (Accessed 06/23/2008).
- Garoupa, N., J. Klick, and F. Parisi. "A Law and Economics Perspective on Terrorism." *Public Choice* 128, no. 1 (2006): 147-168.
- Garoupa, N. and F. H. Stephen. "Why Plea-Bargaining Fails to Achieve Results in so Many Criminal Justice Systems: A New Framework for Assessment." *Working Papers, Instituto Madrileño De Estudios Avanzados (IMDEA) Ciencias Sociales* (2008): <http://repec.imdea.org/pdf/imdea-wp2008-02.pdf> (Accessed 06/17/2008).
- Guttel, E. and B. Medina. "Less Crime, More (Vulnerable) Victims: Game Theory and the Distributional Effects of Criminal Sanctions." *Review of Law & Economics* 3, no. 2 (2007): 9.
- Harel, A. "Why Only the State may Inflict Criminal Sanctions: The Case Against Privately Inflicted Sanctions." *Legal Theory* 14, no. 02 (2008): 113-133.
- . "Victims and Perpetrators: The Case Against a Unified Theory of Comparative Liability in Criminal Law." *Buff.Crim.L.Rev.* 8, (2004): 489.
- . "Efficiency and Fairness in Criminal Law: The Case for a Criminal Law Principle of Comparative Fault." *Cal L.Rev.* 82, (1994): 1181.

- Harel, A. and G. Parchomovsky. "On Hate and Equality." *Yale Law Journal* 109, no. 3 (1999).
- Henham, R. and G. Mannozi. "Victim Participation and Sentencing in England and Italy: A Legal and Policy Analysis." *European Journal of Crime, Criminal Law and Criminal Justice* 11, no. 3 (2003): 278-317.
- Hewitt, C. *Terrorism and Public Opinion*. Routledge, 2006.
- Hodgson, J. "Suspects, Defendants and Victims in the French Criminal Process: The Context of Recent Reform." *International and Comparative Law Quarterly* 51, no. 04 (2008): 781-815.
- Hotte, L. and T. V. Ypersele. "Individual Protection Against Property Crime: Decomposing the Effects of Protection Observability." *Canadian Journal of Economics/Revue Canadienne d'Economie* 41, no. 2 (2008): 537-563.
- Hui-wen, K. and I. Png. "Private Security: Deterrent Or Diversion?" *International Review of Law and Economics* 14, no. 1 (1994): 15.
- Hylton, K. N. "Optimal Law Enforcement and Victim Precaution." *Rand Journal of Economics* 27, (1996): 197-206.
- Jacobs, G. "Punishing Criminals: Pennsylvanians Consider the Options." (1993).
- Kirchengast, T. "Recent Developments in Victim Agency in the New South Wales Justice System: The Case of Victim Impact Statements." *James Cook University Law Review* 13, (2006): 125-152.

- Lakdawalla, D. and G. Zanjani. "Insurance, Self-Protection, and the Economics of Terrorism." *Journal of Public Economics* 89, no. 9-10 (2005): 1891-1905.
- Lamond, G. "What is a Crime?" *Oxford Journal of Legal Studies* 27, no. 4 (2007): 609.
- Leverick, F., J. Chalmers, and P. Duff. *An Evaluation of the Pilot Victim Statement Schemes in Scotland*. Edinburgh Scotland: Scottish Executive Social Research, 2007,
<http://www.scotland.gov.uk/Resource/Doc/173083/0048280.pdf> (accessed 07/01/2008).
- Levitt, S. D. "The Relationship between Crime Reporting and Police: Implications for the use of Uniform Crime Reports." *Journal of Quantitative Criminology* 14, no. 1 (1998): 61-81.
- Logan, W. A. "Confronting Evil: Victims' Rights in an Age of Terror." *Georgetown Law Journal* 96, (2008).
- Marsh, K. C. "To Charge Or Not to Charge, that is Discretion: The Problem of Prosecutorial Discretion in Chile, and Japan's Solution." *Pac.Rim L. & Pol'y J.* 15, (2006): 543.
- Metzkin, Z. (ed). "Ma Nishtana - Chok Zechuyot Nifgaey Aveira, Chazon Mul Metzuiot ("what has Changed, the Crime Victims Rights Law, Vision Vs Reality")." Tel Aviv, University of Tel Aviv, 12/16/2007, 2007,
http://www.law.tau.ac.il/Heb/_Uploads/dbsAttachedFiles/nifgaeyavera.doc (accessed 05/05/2008).

- Miers, D. "Situating and Researching Restorative Justice in Great Britain." *Punishment & Society* 6, no. 1 (2004): 23.
 - Mikos, R. A. "Eggshell Victims, Private Precautions, and the Societal Benefits of Shifting Crime." *Mich.L.Rev.* 105, (2006): 307.
 - Nahra, K. J. "Role of Victims in Criminal Investigations and Prosecutions." *Prosecutor* 33, no. 4 (1999): 6.
 - Norton, S. "The Place of Victims in the Criminal Justice System." *Irish Probation Journal* 4, no. 1 (2007): 63.
 - O'hear, M. M. "Plea Bargaining and Victims: From Consultation to Guidelines." *Marquette Law School Legal Studies* no. Paper No. 07-06 (2007): <http://ssrn.com/abstract=1005373> (Accessed 07/01/2008).
- . "Punishment, Democracy, and Victims." *Federal Sentencing Reporter* 19, no. 1 (2006): 1-4.
- Oz-Salzberger, F. and E. Salzberger. "The Secret German Sources of the Israeli Supreme Court." *Israel Studies* 3, (1998): 159-192.
 - Persson, M. and C. H. Siven. "The Becker Paradox and Type I Versus Type II Errors in the Economics of Crime." *International Economic Review* 48, no. 1 (2007): 211-233.
 - Polinsky, A. M. and S. Shavell. "The Theory of Public Enforcement of Law." *NBER Working Paper* (2005).
- . "The Economic Theory of Public Enforcement of Law." *Journal of Economic Literature* 38, no. 1 (2000): 45-76.

- . "The Fairness of Sanctions: Some Implications for Optimal Enforcement Policy." *American Law and Economics Review* 2, no. 2 (2000): 223-237.
- . "On the Disutility and Discounting of Imprisonment and the Theory of Deterrence." *The Journal of Legal Studies* 28, no. 1 (1999): 1-16.
- . "On Offense History and the Theory of Deterrence." *International Review of Law & Economics* 18, no. 3 (1998): 305-324.
- . "Should Liability be Based on the Harm to the Victim or the Gain to the Injurer?" *Journal of Law, Economics, and Organization* 10, no. 2 (1994): 427-437.
- . "Enforcement Costs and the Optimal Magnitude and Probability of Fines." *JL & Econ.* 35, (1992): 133.
- . "The Optimal use of Fines and Imprisonment." *Journal of Public Economics* 24, no. 1 (1984): 89-99.
- . "The Optimal Trade-off between the Probability and Magnitude of Fines." *American Economic Review* 69, no. 5 (1979): 880-891.
- Popper, K. R. "Conjectures and Refutations." In *Conjectures and Refutations*. Routledge & Kegan Paul, 1963.
 - Posner, E. A. "Agency Models in Law and Economics." *University of Chicago John M. Olin Law & Economics Working Paper* 92, (2000): <http://ssrn.com/abstract=204872> (Accessed 06/23/2008).

- . "Law and the Emotions." *University of Chicago John M. Olin Law & Economics Working Paper* 103, (2000):
- <http://ssrn.com/abstract=241389> (Accessed 07/01/2008).
- Posner, R. A. *Frontiers of Legal Theory*. Harvard University Press, 2004.
 - . "Economic Theory of the Criminal Law, an." *Colum.L.Rev.* 85, (1985): 1193.
 - . "Killing or Wounding to Protect a Property Interest." *JL & Econ.* 14, (1971): 201.
 - Post, J. M. *The Mind of the Terrorist: The Psychology of Terrorism from the IRA to Al-Qaeda*. Palgrave Macmillan, 2008.
 - Quarm, D. and M. D. Schwartz. "Legal Reform and the Criminal Court: The Case of Domestic Violence." *N.Ky.L.Rev.* 10, (1982): 199.
 - Ramsey, C. B. "The Discretionary Power of " Public" Prosecutors in Historical Perspective." *American Criminal Law Review* 39, no. 4 (2002): 1309-1394.
 - Roberts, J. V. and A. Edgar. "Victim Impact Statements at Sentencing: Perceptions of the Judiciary in Canada." *The International Journal of Victimology* 1, no. 4 (2003): 1-11.
 - Rock, P. "The Treatment of Victims in England and Wales." *Policing* 2, no. 1 (2008): 110.
 - Rose, M. R., J. Nadler, and J. Clark. "Appropriately Upset? Emotion Norms and Perceptions of Crime Victims." *Law and Human Behaviour* 30, no. 2 (Apr, 2006): 203-219.

- S, C., Thaman. "Negotiating Confessions and Consensual Resolution of Criminal Cases." In *General Reports at the XVIIIth Congress of the International Academy of Comparative Law*, edited by K. Boele-Woelki and Erp Van JHM Eleven Intl Pub, 2007.
- Sanders, A. and I. Jones. "The Victim in Court." Chap. 1, In *Handbook of Victims and Victimology*, edited by Walklate Sandra, 282-297Willan Publishing, 2007.
- Schnebly, S. M. "The Influence of Community-Oriented Policing on Crime-Reporting Behaviour." *Justice Quarterly* 25, no. 2 (2008): 223-251.
- Shavell, S. "The Optimal Structure of Law Enforcement." *JL & Econ.* 36, (1993): 255.
- . "Individual Precautions to Prevent Theft: Private versus Socially Optimal Behaviour." *International Review of Law and Economics* 11, (1991): 123-132.
- . "The Optimal use of Nonmonetary Sanctions as a Deterrent." *American Economic Review* 77, no. 4 (1987): 584-592.
- . "Criminal Law and the Optimal use of Nonmonetary Sanctions as a Deterrent." *Columbia Law Review* 85, no. 6 (1985): 1232-1262.
- Shughart, W. F. "An Analytical History of Terrorism, 1945–2000." *Public Choice* 128, no. 1 (2006): 7-39.
- Singer, S. I. "The Fear of Reprisal and the Failure of Victims to Report a Personal Crime." *Journal of Quantitative Criminology* 4, no. 3 (1988): 289-302.

- Stancil, P. J. "Assessing Interest Groups: A Playing Field Approach." *Cardozo Law Review* (2008).
- Stigler, G. J. "The Theory of Economic Regulation." *Bell Journal of Economics and Management Science* 2, no. 1 (1971): 3-21.
- ———. "The Optimum Enforcement of Laws." *Journal of Political Economy* 78, no. 3 (1970): 526.
- Tamir, M. "Public Law as a Whole and Normative Duality: Reclaiming Administrative Insights in Enforcement Review." *Texas Journal on Civil Liberties and Civil Rights* 12, no. 1 (2006).
- Tullock, G. "The Welfare Costs of Tariffs, Monopolies, and Theft." *Economic Inquiry* 5, no. 3 (1967): 224-232.
- Tutian, D. *Niar Emda*, (a policy paper of a victims' pro bono organisation prepared for the Israeli Parliament Legislative Committee), 20.7.2008: http://www.knesset.gov.il/committees/heb/material/data/H21-07-2008_10-04-41_noga240708.doc, (Accessed 07/30/2008).
- Van Aaken, A., L. P. Feld, and S. Voigt. "Power Over Prosecutors Corrupts Politicians: Cross Country Evidence using a New Indicator." *CES ifo Working Paper Series* 2245, (March 2008): <http://ssrn.com/abstract=1097675> (Accessed 07/04/2008).
- Wemmers, J. A. "Victim Policy Transfer: Learning from each Other." *European Journal on Criminal Policy and Research* 11, no. 1 (2005): 121-133.
- West, M. D. "Prosecution Review Commissions: Japan's Answer to the Problem of Prosecutorial Discretion." *Colum.L.Rev.* 92, (1992): 684.