



11-1-2001

Allocution for Victims of Economic Crimes

Jayne W. Barnard

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>

Recommended Citation

Jayne W. Barnard, *Allocution for Victims of Economic Crimes*, 77 Notre Dame L. Rev. 39 (2001).
Available at: <http://scholarship.law.nd.edu/ndlr/vol77/iss1/2>

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

ALLOCATION FOR VICTIMS OF ECONOMIC CRIMES

*Jayne W. Barnard**

INTRODUCTION	40
I. THE EVIDENTIARY BACKGROUND FOR THIS PROPOSAL.....	42
A. <i>The Role of the Sentencing Guidelines</i>	43
1. Upward Departures for Psychological Harms to Victims	43
2. Upward Departures for Knowingly Endangering a Victim’s Financial Solvency.....	45
3. Sentence Enhancements for Targeting Vulnerable Victims	46
4. Sentence Enhancements for Abuse of Trust	48
5. Departures from the Guidelines for Aggravating and Mitigating Circumstances	49
B. <i>The Common Use of Written Comments</i>	51
II. A SAMPLING OF THE VOICES OF VICTIMS OF NON-VIOLENT CRIMES	52
III. THE AFFIRMATIVE CASE FOR VICTIM ALLOCATION	56
A. <i>A Rule That Privileges Victims of Violent Crimes and Excludes Victims of Non-Violent Crimes Is Unsound</i>	57
B. <i>Requiring That Victim Impact Testimony Be Heard in Open Court Will Materially Assist the Sentencing Judge in Determining an Appropriate Sentence</i>	61
IV. THE ARGUMENTS AGAINST VICTIM ALLOCATION	65
A. <i>Cost and Court Time</i>	65
B. <i>Prosecutorial Resources</i>	66
C. <i>Exacerbation of Victimhood</i>	69
D. <i>The Likelihood of Emotional Outbursts</i>	70

* Cutler Professor of Law, The College of William & Mary. Thanks to Paul Cassell, Edna Erez, John Levy, Frank Bowman, Sarah Welling, and John Tucker for their comments on earlier drafts of this Article. Thanks also to the faculty at Seattle University School of Law whose comments during a faculty workshop sent me in some new directions. Also to Heather Stacey, Gretchen Greisler, Pia Thadhani, and Miles Uhlar for their research and cite-checking assistance on this project.

E. <i>The Problem of the Inarticulate Victim</i>	72
F. <i>Problems of Exclusion and the Representative Victim</i>	72
G. <i>The Unlikelihood of Influencing the Defendant's State of Mind</i>	73
H. <i>Inadequate Return on the Victim's Emotional Investment</i> ...	74
I. <i>Victim Allocution Is Merely a Vehicle for Harsher Sentencing</i>	77
V. VICTIM ALLOCUTION IN THEORY	78
A. <i>Allocution Is a Vehicle for Societal Denunciation</i>	79
B. <i>Allocution Is a Vehicle for Moral Education</i>	80
C. <i>Allocution Is a Vehicle for Restorative Justice</i>	82
VI. A PROPOSAL.....	84
CONCLUSION	86

Narratives with evocative, rich details about subjective experiences can be used to persuade people—like judges—who have sufficient power to make a difference actually to do so. . . .

Martha Minow¹

INTRODUCTION

Since 1994, the Federal Rules of Criminal Procedure have required federal courts to entertain in-court victim impact testimony as part of the sentencing process.² However, this testimony (also known as victim allocution) is required only in cases in which the defendant is guilty of a crime involving violence or sexual abuse.³

This Article argues that this limitation on the ability of victims of non-violent crimes to have access to the courts for purposes of allocution is unwise and inappropriate. Federal courts should be required to entertain in-court victim impact testimony in cases involving non-violent crimes as well as in cases involving violent crimes. Specifically, in-court victim impact testimony should be required in cases involving economic crimes such as mail fraud, wire fraud, securities fraud, telemarketing fraud, and “identity theft.” Victims of other federal

1 Martha Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 VAND. L. REV. 1665, 1689 (1990).

2 See FED. R. CRIM. P. 32(c)(3)(E) (“[Under appropriate circumstances, the sentencing judge must] address the victim personally if the victim is present at the sentencing hearing and determine if the victim wishes to make a statement or present any information in relation to the sentence.”). This provision was enacted as part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796.

3 See FED. R. CRIM. P. 32(c)(3)(E).

felonies, to the extent they are clearly identifiable as victims,⁴ should also be entitled to victim allocation.

The background for this proposal is simple. Experience in economic crime cases demonstrates that victims of these types of crimes often feel just as violated, anxious, confused, betrayed, and depressed as do victims of violent crimes.⁵ Often they are the kinds of "vulnerable victims" recognized in the U.S. Sentencing Guidelines,⁶ yet they have few resources by which to express their vulnerability or to feel they have had a real impact on decisions relating to their victimizer's fate.

Federal prosecutors often invite victims of economic crimes to recount their experiences *in writing*, in order to lend weight to a request for restitution, an enhancement of the defendant's sentence, or an upward departure from the Sentencing Guidelines.⁷ Frequently, federal judges will include specific references to these written declarations in the course of the sentencing process.⁸ What I am proposing in this Article involves a greater commitment to victims of non-violent crimes, however—a legislatively-assured opportunity to be heard in open court.⁹

The purpose of this proposal is three-fold: (1) to permit the victim to regain a sense of dignity and respect rather than feeling powerless and ashamed; (2) to require defendants to confront—in person and not just on paper—the human consequences of their illegal conduct; and (3) to compel courts to fully account in the sentencing process for the serious societal harms—harms that go well beyond issues of money—that economic crimes often impose.

The theories underlying this proposal are those that recognize the "expressive" and "educative" functions of sentencing, in addition to the deterrent and retributive functions. Victim allocation not only satisfies the public's need for denunciation of offenders,¹⁰ but it can

4 See *infra* note 228 and accompanying text.

5 Some fraud victims describe their experience as "the psychological equivalent of rape." Leslie Eaton, *Assault with a Fiscal Weapon: As Swindlers Branch Out, Victims Want To Be Heard*, N.Y. TIMES, May 25, 1999, at C1.

6 See U.S. SENTENCING GUIDELINES MANUAL § 3A1.1 (1998).

7 See *infra* Part I.B.

8 See Joseph A. Slobodzian, *A Phila. Lawyer Who Stole Millions Gets a 15-Year Term*, PHILA. INQUIRER, Aug. 13, 1998, at 1 (describing the collection of more than 1,000 victim impact statements compiled by federal prosecutors in connection with a \$53 million insurance fraud). The sentencing judge took specific notice of the statements of policyholders and their heirs who had been left without health or life insurance coverage. *Id.*

9 For the text of this proposal, see *infra* Part VI.

10 See *infra* Part V.A.

also serve as a platform for the moral re-education of the defendant.¹¹ At the same time, permitting fraud victims to tell their stories aloud and in public, rather than solely through the intermediation of a written document, can respond to victims' needs for restorative justice.¹² Most importantly, though, victim allocution should materially assist judges in reaching more appropriate sentencing decisions.

I. THE EVIDENTIARY BACKGROUND FOR THIS PROPOSAL

Victims of economic crimes are always permitted to offer testimony concerning a defendant's conduct, and facts supporting the *elements* of the crime. Courts have cautioned, however, that—at least during the *guilt* phase of the prosecution—testimony having to do with the victim's emotional reactions to the defendant's conduct may have “little, if any, probative value and may be unfairly prejudicial.”¹³ Consequently, testimony that is designed “to generate feelings of sympathy for the victims and outrage toward [the defendant] for reasons not relevant to the charges”¹⁴ is inadmissible during the defendant's trial on the merits.¹⁵ Failure to distinguish between occurrence testimony and victim impact testimony may lead to a reversal of a defendant's criminal conviction.¹⁶

By contrast, victim impact testimony during the *penalty* phase of a trial carries no such baggage. Victim impact testimony has been held to be relevant to sentencing issues generally and not inconsistent with principles of due process.¹⁷ Even in death penalty cases, and even where the testimony is repetitive, graphic, and emotionally overwrought,¹⁸ victim impact testimony is now an accepted feature on the federal sentencing landscape.

11 See *infra* Part V.B.

12 See *infra* Part V.C.

13 *United States v. Sokolow*, 91 F.3d 396, 407 (3d Cir. 1996); see also *United States v. Copple*, 24 F.3d 535, 545 (3d Cir. 1994) (stating that extensive victim impact testimony as to collateral losses “went beyond anything that was reasonable to prove [defendant's] specific intent to defraud”).

14 *Copple*, 24 F.3d at 546.

15 Typically, challenges to guilt-phase victim impact testimony are advanced under Rule 403 of the Federal Rules of Evidence. See, e.g., *United States v. McVeigh*, 153 F.3d 1166, 1199 (10th Cir. 1998).

16 As a practical matter, reviewing courts often find there has been no “plain error” in admission of victim impact-type evidence or find any such error in the trial to have been “harmless.” See, e.g., *id.* at 1201; *Sokolow*, 91 F.3d at 407; *Copple*, 24 F.3d at 538.

17 See *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

18 See *McVeigh*, 153 F.3d at 1220 (describing the intensely emotional victim impact testimony at the defendant's sentencing hearing); James Collins, *Day of Reckoning: The*

However, except in a handful of cases in which federal judges have *voluntarily* entertained victim impact testimony,¹⁹ such testimony has not been permitted in economic crime cases. That is not because the testimony is irrelevant to the sentencing process—as will be seen below,²⁰ it clearly *is* relevant. Rather, this exclusion of otherwise relevant testimony is a function of the limits of Rule 32(c)(3)(E).

A. *The Role of the Sentencing Guidelines*

Victim impact information may often be relevant in economic crime cases to specific sentencing issues such as the length of the defendant's prison term or the amount of the fine to be imposed. In fact, the Federal Sentencing Guidelines set out a number of victim-related issues which victim impact testimony could illuminate.

1. Upward Departures for Psychological Harms to Victims

Criminal sentencing in federal courts begins with the court determining an "offense level" for the crime, which, in economic crime cases, is typically based on the victim's economic loss.²¹ The resulting sentence or fine may then be adjusted upward or downward where certain factors are present. For example, where the victim's monetary loss "does not fully capture the harmfulness and seriousness of the

Jury That Found McVeigh Guilty Wrestles with Emotion and Tears as It Prepares To Decide His Fate, TIME, June 16, 1997, at 26 (same).

19 See, e.g., United States v. Dodson, No. 99-5039, 2000 U.S. App. LEXIS 6261, at *16-*19 (10th Cir. Apr. 4, 2000) (referring to victim testimony at sentencing as a basis for the trial court's upward departure from the Guidelines); United States v. Luca, 183 F.3d 1018, 1026-27 (9th Cir. 1999) (quoting victim impact testimony from some of the defendant's victims); United States v. Van Zandt, No. 97-1622, 1998 U.S. App. LEXIS 24472, at *3 (2d Cir. Sept. 25, 1998) (citing the testimony of a victim at the sentencing hearing); United States v. Robertson, No. 96-1233, 1998 U.S. App. LEXIS 690, at *9 (10th Cir. Jan. 16, 1998) (mentioning that the judge heard victim testimony at the sentencing hearing); United States v. Smith, 133 F.3d 737, 751 (10th Cir. 1997) (mentioning that the district court had received some victim impact testimony at the sentencing hearing); United States v. Akindele, 84 F.3d 948, 954 (7th Cir. 1996) (recounting the in-court testimony of victims); United States v. Dobish, 102 F.3d 760, 763 (6th Cir. 1996) (referring to in-court testimony of some of the defendant's victims); United States v. Serhant, 740 F.2d 548, 551 (7th Cir. 1984) (referring to the testimony of seven victims).

20 See *infra* Part I.A.

21 See U.S. SENTENCING GUIDELINES MANUAL § 2F1.1 (1998). For a critical examination of the mechanics of sentencing in economic crime cases, see generally Frank O. Bowman, III, *Coping with "Loss": A Re-Examination of Sentencing Federal Economic Crimes Under the Guidelines*, 51 VAND. L. REV. 461 (1998).

[defendant's] conduct,"²² the court may depart from the Guidelines' restrictions. Under this rubric, the prosecution may argue that the fraud "caused or risked reasonably foreseeable, substantial non-monetary harm"²³ or, more specifically, that the offense "caused reasonably foreseeable, physical or psychological harm or severe emotional trauma"²⁴ in addition to monetary losses.

Some degree of emotional harm is present in most economic crime cases.²⁵ But some economic crimes impose a special psychological burden on their victims and these are the cases that warrant upward departures. Using the available tools (that is, written documentation), judges have granted upward departures based on psychological or other non-economic harms where a telemarketer defrauded elderly victims, often by "badgering and insulting and degrading [them]";²⁶ another telemarketer persuaded elderly victims to contribute large sums to non-existent charities, often reducing them to begging to be left alone;²⁷ a bookkeeper defrauded dozens of small business owners, driving some of them into states of clinical depression;²⁸ and a neighbor defrauded his long-time neighbors, causing them to experience a "deep sense of loss and betrayal" at his actions.²⁹ Other examples of foreseeable psychological harms giving rise to an upward departure from the Guidelines include a business owner who looted his firm's pension fund, causing his retired employees "to seek work at an advanced age and rely on help from family members, [and

22 U.S. SENTENCING GUIDELINES MANUAL § 2F1.1, cmt. n.1 (1998).

23 *Id.* § 2F1.1, cmt. n.11(a).

24 *Id.* § 2F1.1, cmt. n.11(c).

25 For example, fraud victimization can often lead to self-blame, shame, guilt, feelings of societal condemnation and indifference (the attitude that victims of fraud deserve what they get as a result of their own greed and stupidity), and isolation (when victims suffer their losses in silence rather than risking alienation and blame from family members, friends, and colleagues). See OFFICE FOR VICTIMS OF CRIMES, DEP'T OF JUSTICE, PROVIDING SERVICES TO VICTIMS OF FRAUD: RESOURCES FOR VICTIM/WITNESS COORDINATORS I-I (1998), available at <http://www.ojp.usdoj.gov/ovc/publications/infores/fraud/psvf.pdf>. Fraud victimization can also lead to more serious pathologies. See Linda Ganzini et al., *Prevalence of Mental Disorders After Catastrophic Financial Loss*, 178 J. NERVOUS & MENTAL DISEASE 680, 682 (1990) (noting that 29% of fraud victims studied suffered a "major depressive episode" following the crime).

26 See *United States v. Davis*, 170 F.3d 617, 623 (6th Cir. 1999) (affirming an eight-level upward departure).

27 See *United States v. Smith*, 133 F.3d 737, 751-52 (10th Cir. 1997) (affirming a two-level upward departure).

28 See *United States v. Finnigan*, No. 95-50248, 1996 U.S. App. LEXIS 33991, at *11 (9th Cir. Dec. 31, 1996) (affirming a one-level upward departure).

29 See *United States v. Iannone*, 184 F.3d 214, 231 (3d Cir. 1999) (affirming a two-level upward departure).

to endure the] trauma that comes with losing one's savings";³⁰ a pharmacist who passed himself off as a physician and examined and treated hundreds of "patients";³¹ a defendant convicted of identity theft whose actions caused her victims "turmoil" and "upheaval";³² and a daughter who defrauded her own parents.³³

The common theme in these cases is that the victims of these crimes not only lost significant amounts of money, they also were injured in their sense of personal dignity and autonomy and, in some cases, had their intimate relationships destroyed. Obviously, information about these kinds of harm in an economic crime case can best be elicited from victims, their family members, neighbors, and mental health care providers. And the absence of an adequate record on this issue may make an upward departure impossible.³⁴

2. Upward Departures for Knowingly Endangering a Victim's Financial Solvency

A defendant's sentence may also be adjusted upward where the offense involved "the knowing endangerment of the solvency of one or more victims."³⁵ It is one thing to defraud a millionaire of \$10,000 and quite another to defraud a working-class person of the same amount. This provision of the Guidelines takes that factor into account.

Defendants subject to this adjustment are often particularly aggressive in their dealings with victims, persistent in their efforts to take those victims' money, and singularly heedless of the import of their actions. Thus, courts have granted upward adjustments for knowing endangerment of financial insolvency where financial advisors caused their clients to lose all of their money in various investment schemes;³⁶ where a greedy nephew stole his great-aunt's life savings

30 See *United States v. Helbling*, 209 F.3d 226, 251 (3d Cir. 2000) (affirming a two-level upward departure).

31 See *United States v. Barnes*, 125 F.3d 1287, 1294 (9th Cir. 1997) (affirming a two-level upward departure).

32 See *United States v. Sample*, 213 F.3d 1029, 1033-34 (8th Cir. 2000) (affirming a nine-month enhancement).

33 See *United States v. All*, No. 98-4205, 1998 U.S. App. LEXIS 22676, at *5 (4th Cir. Sept. 16, 1998) (affirming a two-level upward departure).

34 Sometimes, judges complain that the prosecution fails to alert the court to the severity of victim impact. See *United States v. Gill*, 99 F.3d 484, 487 (1st Cir. 1996) ("[T]he government could have simplified matters if it had offered evidence from some of [the defendant's] former patients.").

35 U.S. SENTENCING GUIDELINES MANUAL § 2F1.1, cmt. n.11(f) (1998).

36 See *United States v. Van Zandt*, No. 97-1622, 1998 U.S. App. LEXIS 24472, at *3 (2d Cir. Sept. 25, 1998) (affirming an eighteen-month upward departure where de-

and left her “financially dependent on the generosity of others, quite possibly for the rest of her life”;³⁷ and where a daughter misappropriated her elderly parents’ money, leaving them with “no income except Social Security” and therefore condemning them to a “bleak future.”³⁸ Once again, as in the case of psychological and other non-monetary harms, the best sources of information about the victim’s financial status prior to the crime, and the defendant’s knowledge that the victim’s solvency was imperiled, are the victim and others familiar with her finances.

3. Sentence Enhancements for Targeting Vulnerable Victims

A defendant’s sentence also may be adjusted upward where the victim can be shown to have been an “unusually vulnerable” victim.³⁹ Under this rubric, the government must first establish that the victim was “more susceptible to abuse from [the] perpetrator than most other potential victims of the particular offense.”⁴⁰ The government must then prove that the defendant “knew or should have known of this susceptibility or vulnerability; and [that] this vulnerability or susceptibility facilitated the defendant’s crime in some manner; that is, there was ‘a nexus between the victim’s vulnerability and the crime’s ultimate success.’”⁴¹

The vulnerable victim enhancement “cannot be based solely on the victim’s membership in a certain class; the sentencing court is required to make particularized findings of vulnerability, focusing on the individual victim and not the class of persons to which the victim

defendant’s mail fraud cost at least two victims “all of their money” and one was “close to losing her home”); *United States v. Hogan*, 121 F.3d 370, 373 (8th Cir. 1997) (affirming a two-level upward departure where a securities broker sold counterfeit certificates of deposit to victims, knowing they were living on fixed incomes and facing significant medical bills); *United States v. Pelkey*, No. 95-1008, 1995 U.S. App. LEXIS 15040, at *10-*11 (1st Cir. June 19, 1995) (affirming a two-level upward departure where a financial advisor defrauded her clients even when she knew that some of them were “right down to the last penny and she took that also”); *United States v. Strouse*, 882 F. Supp. 1461, 1466-67 (M.D. Pa. 1995) (imposing a three-level upward departure where an investment agent repeatedly solicited clients’ money for his fraudulent investment scheme, forcing many of them to survive solely on Social Security).

37 See *United States v. Kaye*, 23 F.3d 50, 53 (2d Cir. 1994) (affirming a two-level upward departure).

38 See *All*, 1998 U.S. App. LEXIS 22676, at *4.

39 See U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(b)(1), cmt. n.2.

40 *United States v. Singh*, 54 F.3d 1182, 1191 (4th Cir. 1995).

41 *United States v. Iannone*, 184 F.3d 214, 220 (3d Cir. 1999) (quoting *United States v. Monostra*, 125 F.3d 183, 188 (3d Cir. 1997)).

belonged.”⁴² Obviously, this means hearing from the victim (or a family member or others) concerning the victim’s gullibility, lack of sophistication, confusion, dependency, or misunderstanding of the defendant’s intentions. The test is whether because of their mental or educational deficiencies, or other reasons, “the victims are less likely to know that they have been defrauded or if they know to have the know-how and initiative required to press a criminal complaint or bring a civil suit.”⁴³

Enhancements based on vulnerable victim considerations have occurred in economic crime cases where financial advisors exploited the confusion and anxiety of elderly clients⁴⁴ (or a bewildered young widow);⁴⁵ where a con man preyed on a Vietnam veteran who wrongly believed him to be a “brother-in-arms”;⁴⁶ where a caregiver stole the savings of her client, an eighty-seven-year-old woman who, for the preceding three years had been “completely reliant on [the defendant] for her care”;⁴⁷ and where the defendant extorted money from a recent immigrant, persuading him that the money was necessary to pay off the police in order to avoid deportation.⁴⁸

Vulnerable victim adjustments also have been made where loan brokers extorted advance loan fees from people with poor credit ratings who were desperate for cash;⁴⁹ where telemarketers preyed on “mooches” (people who had previously been victims of telemarketing frauds);⁵⁰ and where insurance salesmen collected premiums for non-existent policies from people with uninsurable medical conditions.⁵¹ Homeless people,⁵² people with poor credit ratings,⁵³ and persons

42 *United States v. Smith*, 133 F.3d 737, 749 (10th Cir. 1997).

43 *United States v. Grimes*, 173 F.3d 634, 637 (7th Cir. 1999).

44 *See Smith*, 133 F.3d at 749 (affirming a two-level enhancement).

45 *See United States v. Giesse*, No. 98-8027, 1999 U.S. App. LEXIS 3812, at *10-*11 (10th Cir. Mar. 10, 1999) (affirming a two-level enhancement).

46 *See Iannone*, 184 F.3d at 221 (affirming a two-level enhancement).

47 *See United States v. Haines*, 32 F.3d 290, 292 (7th Cir. 1994) (affirming a two-level enhancement).

48 *See United States v. Bengali*, 11 F.3d 1207, 1212 (4th Cir. 1993) (affirming a two-level enhancement).

49 *See United States v. Grimes*, 173 F.3d 634, 637 (7th Cir. 1999) (affirming enhancement of sentence to sixty-three months); *United States v. Page*, 69 F.3d 482, 492 (11th Cir. 1995) (affirming a two-level enhancement).

50 *See United States v. Coffinan*, No. 97-5219, 1998 U.S. App. LEXIS 16912 (10th Cir. July 23, 1998) (affirming a two-level enhancement).

51 *See United States v. O'Brien*, 50 F.3d 751 (9th Cir. 1995) (affirming a two-level enhancement).

52 *See United States v. Bragg*, 207 F.3d 394, 400-02 (7th Cir. 2000) (affirming a two-level enhancement).

with mental deficiencies⁵⁴ have all been found to be unusually vulnerable victims.

In each of these cases, the finding that a victim is "unusually vulnerable" has been based on paper submissions. Persuading judges to appreciate the vulnerability of a particular victim, though, may often depend on their opportunity to observe the victim's demeanor, listen to the victim's narration of his experiences, and assess the victim's ability to resist the defendant's inducements. This is where victim allocution could greatly assist the court.

4. Sentence Enhancements for Abuse of Trust

A defendant's sentence may also be adjusted upward where the defendant can be shown to have "abused a position of public or private trust."⁵⁵ Under this rubric, the government may argue that the victim's particular relationship to the defendant "contributed in some significant way to facilitating the commission or concealment of the offense."⁵⁶ Positions of trust are not limited to traditional fiduciaries.⁵⁷ But "reliance on the integrity of the person occupying the position" is an essential element of the position of trust analysis.⁵⁸

"There are two indicia of [a] position of trust: (1) 'the inability of the trustor objectively and expediently to determine the trustee's honesty' and (2) 'the ease [or difficulty] with which the trustee's activities can be observed.'"⁵⁹ Both involve fact-specific inquiries⁶⁰ and both may be established by victim impact evidence.⁶¹ Upward adjustments based on abuse of trust considerations have occurred in economic crime cases where lawyers⁶² or financial advisors⁶³ defrauded their cli-

53 See *United States v. Borst*, 62 F.3d 43, 46 (2d Cir. 1995) (affirming a two-level enhancement); *United States v. Holmes*, 60 F.3d 1134, 1136-37 (4th Cir. 1995) (affirming a three-level enhancement); *United States v. Peters*, 962 F.2d 1410, 1416-18 (9th Cir. 1992) (affirming a two-level enhancement for both defendants).

54 See *United States v. Gabrion*, No. 98-1822, 2000 U.S. App. LEXIS 18740, at *18-*21 (6th Cir. July 27, 2000) (affirming a two-level enhancement).

55 U.S. SENTENCING GUIDELINES MANUAL § 3B1.3 (1998).

56 *Id.* cmt. n.1; *United States v. Williams*, 993 F.2d 1224, 1227-28 (6th Cir. 1993).

57 See *United States v. Iannone*, 184 F.3d 214, 223 (3d Cir. 1999).

58 See *id.*

59 *United States v. Velez*, 185 F.3d 1048, 1051 (9th Cir. 1999) (quoting *United States v. Hill*, 915 F.2d 502, 506 (9th Cir. 1990)).

60 See *United States v. Baker*, 200 F.3d 558, 564 (8th Cir. 2000).

61 See *United States v. Cusack*, 66 F. Supp. 2d 493, 502 (S.D.N.Y. 1999) (noting that "whether a position is one of trust 'is to be viewed from the perspective of the offense victims'" (quoting *United States v. Lajjie*, 184 F.3d 180, 195 (2d Cir. 1999)).

62 See *United States v. Holmes*, 193 F.3d 200, 205 (3d Cir. 1999) (holding that a lawyer who misappropriated funds from several clients had abused his position of

ents; a key employee embezzled from her employer;⁶⁴ a law firm paralegal misappropriated client documents in a forgery-and-fraud scheme;⁶⁵ a school administrator misappropriated school operating funds for his personal use;⁶⁶ and a real estate agent used his clients' social security numbers and other personal information from their files to fraudulently secure credit cards.⁶⁷ As in the case of unusually vulnerable victims, the evidence necessary to support an abuse of trust enhancement will best come from the victim(s) or their associates, and in-court testimony may prove the most effective way to establish the veracity of claims of a trust-type relationship.

5. Departures from the Guidelines for Aggravating and Mitigating Circumstances

Finally, a sentence may be calculated so as to depart from the Guidelines where "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines that should result in a sentence different from that described [in the Guidelines]."⁶⁸ A departure under this provision may only be granted where the crime is so different in kind or effect from a "typical" crime of its type that it "fall[s] outside the heartland of cases in the Guidelines."⁶⁹

Establishing the "heartland" and defining its boundaries usually involves proof that the defendant defrauded more than some "typical" number of victim,⁷⁰ or dealt with his victims in a way that is particu-

trust, and to such an extraordinary degree that an upward departure—on top of the two-level sentence enhancement—was warranted).

63 See *Baker*, 200 F.3d at 563–64 (holding that an insurance agent who received premium payments from her elderly clients, then misappropriated them for her own personal use, abused her position of trust); *United States v. Trammell*, 133 F.3d 1343, 1355 (10th Cir. 1998) (same).

64 See *United States v. Allen*, 201 F.3d 163, 165–66 (2d Cir. 2000) (affirming a two-level enhancement).

65 See *Cusack*, 66 F. Supp. 2d at 497–98 (imposing a two-level enhancement).

66 See *United States v. Robinson*, 198 F.3d 973, 975 (D.C. Cir. 2000) (affirming a two-level enhancement).

67 See *United States v. Akinkoye*, 185 F.3d 192, 196 (4th Cir. 1999) (affirming a two-level enhancement).

68 18 U.S.C. § 3553(b) (1994); U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (1998).

69 *Koon v. United States*, 518 U.S. 81, 98 (1996).

70 See, e.g., *United States v. Melvin*, 187 F.3d 1316, 1321 (11th Cir. 1999) (affirming upward departure where district court considered the large number of victims defrauded).

larly degrading, offensive, or cruel.⁷¹ Upward departures based on aggravating circumstances specifically related to economic crime victims have occurred where the defendant, an employee of a children's hospital, misappropriated the social security numbers of 135 of the hospital's patients and used them in an elaborate credit card scam;⁷² the defendant defrauded 336 elderly victims—sometimes repeatedly—in a telemarketing scheme;⁷³ the defendant defrauded more than 600 investors in twenty-two states in a Ponzi scheme;⁷⁴ the defendant paid his accomplices in drugs, rather than cash, for each stolen credit card they delivered to him;⁷⁵ the defendant defrauded real estate buyers, sellers, lending institutions, and title insurance companies in an elaborate scheme that played out over seven years;⁷⁶ and the defendant forged her mother's signature on dozens of checks in a scheme to defraud her mother's employer.⁷⁷ Defendants "without scruples,"⁷⁸ and those "who would sacrifice any person or institution in the service of [their] greed,"⁷⁹ may be subject to these sorts of upward departures. So may defendants whose crimes strike the court as "despicable,"⁸⁰ those who show no remorse for their crimes,⁸¹ and those whose crimes are "extraordinarily shocking to the public con-

71 See U.S. SENTENCING GUIDELINES MANUAL § 5K2.8 (authorizing upward departure where defendant's conduct was unusually heinous, cruel, brutal, or degrading to the victim).

72 See *Melvin*, 187 F.3d at 1319 (affirming a fifteen-level upward departure).

73 See *United States v. Brown*, 147 F.3d 477, 486 (6th Cir. 1998) (affirming a two-level upward departure).

74 See *United States v. Benskin*, 926 F.2d 562, 563 (6th Cir. 1991) (affirming a twenty-seven month upward departure).

75 See *United States v. Johnson*, No. 95-5414, 1997 U.S. App. LEXIS 7588, at *5 (4th Cir. Apr. 17, 1997) (affirming a one-level upward departure).

76 See *United States v. Conklin*, No. 97-1813, 1998 U.S. App. LEXIS 31975, at *5 (6th Cir. Dec. 22, 1998) (affirming a seven month upward departure).

77 See *United States v. Kay*, 83 F.3d 98, 100 (5th Cir. 1998) (affirming a seven-level upward departure).

78 See *United States v. Cusack*, 66 F. Supp. 2d 493, 517 (S.D.N.Y. 1999) (imposing a one-level upward departure).

79 See *id.*

80 See *United States v. Robertson*, No. 96-1233, 1998 U.S. App. LEXIS 690, at *9 (10th Cir. Jan 16, 1998) (affirming a two-level upward departure where the defendant solicited money from elderly victims by telling them their money was to be used to keep children off drugs—only \$45 out of \$915,000 collected went to charity).

81 See *United States v. Brown*, 147 F.3d 477, 486–87 (6th Cir. 1998) (affirming a three-level upward departure where the defendant led a telemarketing scheme that solicited funds from elderly victims by telling them they had won a "fabulous prize").

science.”⁸² In these sorts of cases, the number and nature of the victims, the manipulative ways in which the defendants interacted with them, and the totality of the impact of the crime on society can best be elicited by victim impact testimony.

B. *The Common Use of Written Comments*

Using the various victim-centered provisions of the Guidelines, courts in economic crime cases have frequently considered *written* victim impact statements and used them as an element in determining a defendant’s sentence. The documents relied on have included direct communications to the court,⁸³ written victim impact statements appended to the pre-sentence investigation report (PSIR),⁸⁴ summaries of victim interviews by U.S. Probation Service personnel,⁸⁵ affidavits prepared for submission at the sentencing,⁸⁶ and various forms of supporting documentation.⁸⁷ Written victim

82 See *United States v. Moskal*, 211 F.3d 1070, 1075 (8th Cir. 2000) (affirming a three-level upward departure where the defendant, a noted personal injury attorney, stole \$2.4 million from clients, referring attorneys, and his own law firm).

83 See *United States v. Van Zandt*, No. 97-1622, 1998 U.S. App. LEXIS 24472, at *3 (2d Cir. Sept. 25, 1998) (victims’ letters to the court); *United States v. Barnes*, 125 F.3d 1287, 1293 (9th Cir. 1997) (same); *United States v. Finnigan*, Nos. 95-50248, 95-50251, 1996 U.S. App. LEXIS 33991, at *10 (9th Cir. Dec. 31, 1996) (same); *United States v. Wells*, 101 F.3d 370, 372 (5th Cir. 1996) (same); *United States v. Dobish*, 102 F.3d 760, 763 (6th Cir. 1996) (same); *United States v. Hoffenberg*, No. 94-CR213, 1997 U.S. Dist. LEXIS 2394, at *38 (S.D.N.Y. Mar. 4, 1997) (sentencing opinion) (recounting the “hundreds of letters detailing the devastating economic, psychological, and even physical effects of [the defendant’s] successful scheme to defraud”); *United States v. Skodnek*, 933 F. Supp. 1108, 1121 n.31 (D. Mass. 1996) (referring to victims’ letters to the court).

There is no prohibition against courts considering letters from victims. See *Reid v. State*, 490 A.2d 1289, 1294 (Md. 1985) (holding that it does not violate a defendant’s due process rights for the sentencing judge to receive and consider information sent directly to him by the victim). But see *United States v. Hayes*, 171 F.3d 389, 392-95 (6th Cir. 1999) (vacating a sentence where the judge considered victims’ letters to the court without giving notice of same to the defendant).

84 See 18 U.S.C. § 3552 (1994) (describing the PSIR process). These statements may include a detailed history of the victims’ losses, including psychological harms, disruptions to their lives, and loss of income and property. See *United States v. Rezaq*, 134 F.3d 1121, 1141 (D.C. Cir. 1998).

85 See *Finnigan*, 1996 U.S. App. LEXIS 33991, at *10.

86 See *United States v. Pelkey*, No. 95-1008, 1995 U.S. App. LEXIS 15040, at *10 (1st Cir. June 19, 1995) (noting use of victims’ affidavits at sentencing).

87 For example, written victim impact statements may include corroborating materials from physicians, psychiatrists, and employers. See *Rezaq*, 134 F.3d at 1141. Occasionally, psychologists are also permitted to testify regarding victim impact at the

impact documentation is required to support an order of restitution.⁸⁸

II. A SAMPLING OF THE VOICES OF VICTIMS OF NON-VIOLENT CRIMES

Victims of economic crimes are currently afforded a limited range of options when it comes to communicating their stories. They are, of course, permitted to submit *written* forms of victim impact evidence, as noted above. But many victims of economic crimes have found that option to be inadequate and have sought other avenues to express their opinions and feelings about the crime and the offender. Thus, victims of economic crimes, like victims of violent crimes, are sometimes found demonstrating outside of the courthouse,⁸⁹ packing the seats at the defendant's trial or sentencing,⁹⁰ writing impassioned letters to the editor, or making their cases to sympathetic reporters. A few try physical violence against their victimizers⁹¹—others commit suicide.⁹² The need to be heard, to describe the events leading up to the crime, and to develop some sense that their listeners can truly *grasp* the depth of their loss, is obviously a compelling one for many economic crime victims.⁹³

sentencing hearing. See *United States v. Newman*, 965 F.2d 206, 209 (7th Cir. 1992) (describing the testimony of the victim's treating psychologist).

88 See 18 U.S.C. § 3664(d)(2)(A)(vi) (Supp. 2000); Fed. R. Crim. P. 32(b)(4)(D).

89 See John Rothchild, *A Wonderful Life*, L.A. TIMES, May 9, 1993, at Book Review 10 (book review) (incorporating a photograph of elderly picketers in front of the Los Angeles Criminal Courts Building protesting against Charles Keating).

90 See Tom Lowry, *Stockbroker Convicted in Laundering Scheme Scam Left 550 Investors with \$8.6 M in Losses*, U.S.A. TODAY, Nov. 23, 1998, at 8B (noting the attendance of forty of the defendant's victims at the sentencing hearing). As the defendant walked into the hearing, one victim was heard to shout, "Slither into the courtroom, you rat." *Id.*

91 During the trial of Charles Keating for securities fraud, two of Keating's elderly victims attacked him physically in the courtroom. See Joe Morgenstern, *Profit Without Honor*, PLAYBOY, Apr. 1992, at 68.

92 According to the Lincoln/ACC Bondholders Action Committee, seven of Keating's victims committed suicide. See Ted Johnson & Anne Michaud, *Buyers of Bonds Remain Bitter, Unsatisfied*, L.A. TIMES, Apr. 11, 1992, at A1.

93 See Gordon Bazemore, *Restorative Justice and Earned Redemption*, 41 AM. BEHAV. SCIENTIST 768, 783 (1998).

I can tell you that what most victims want most is quite unrelated to the law. It amounts more than anything else to three things: victims need to have people recognize how much trauma they've been through. . . . They need to express that, and have it expressed to them; they want to find out what kind of person could have done such a thing, and why to them; and it really helps to hear that the offender is sorry—or that someone is sorry on his or her behalf.

But what are their stories? Are they all about money? About shame? About vengeance? About loss of faith in others? The range of emotions, and the variety of victims' experiences, are at best merely hinted at in most written court records. Still, the experiences of victims of economic crimes, even when confined to the written page and even when they are merely summarized by the sentencing judge, are undeniably gripping.

In sentencing a defendant convicted of securities fraud, for example, one sentencing judge noted:

The correspondence received by the Court details again and again the effects on working people, the elderly, the disabled, single parents and their children, and police officers and firefighters whose lives were forever altered when their life savings, retirement and college funds were destroyed as a consequence of [the defendant's] acts.⁹⁴

In another securities fraud case, the court of appeals noted: Trial testimony indicated [the defendant] would ingratiate himself to victims in order to ascertain the extent of their financial resources. [The defendant] would then take everything he could get, going so far as to take one victim's last dollar. When victims indicated there was no more money, [the defendant] continued to call, proud of the fact these people were "mooches" who could be preyed on again and again. As a result of [the defendant's] conduct, victims lost all their savings. One victim, an 83 year-old widow, was forced to mow lawns and clean motel rooms to get by. [The defendant's] victims also were psychologically and emotionally harmed, suffering from depression and loss of self-esteem.⁹⁵

In a "theft of identity" case involving the unauthorized use of credit cards and related acts of mail fraud, the sentencing judge took particular note of two of the victims' experiences:

Id. (quoting a victim).

94 *United States v. Hoffenberg*, No. 94-CR213, 1997 U.S. Dist. LEXIS 2394, at *38 (S.D.N.Y. Mar. 4, 1997).

95 *United States v. Smith*, 133 F.3d 737, 751 (10th Cir. 1997). In a similar case, the sentencing judge noted that the victims in the case had "suffered mental strain and emotional anxiety," "become physically sick and [had to take] anti-depression and anxiety medication," one lost her home, and "many of the victims lost their life savings on which they planned to live for the rest of their lives." *United States v. Strouse*, 882 F. Supp. 1461, 1464-65 (M.D. Pa. 1995). In yet another case, the court noted that the fraud had "caused a range of stress, depression, and stress-related physical ailments" among the victims. *United States v. Finnigan*, Nos. 95-50248, 95-50251, 1996 U.S. App. LEXIS 33991, at *11 (9th Cir. Dec. 31, 1996).

The thing that impresses me is not just the misuse of the credit cards, but the description by each one of the victims about the tremendous amount of time and energy that they had to devote to getting their credit cleared up, the embarrassment which they suffered from stores, collection agencies, being turned down for credit, having to produce identification, having to carry—having to pay cash.

. . . .

[T]he [victims] whose identity [the defendant] assumed lost days from work, feared arrest, were forced to appear in court, struggled to repair their credit rating, were not able to use the credit cards in their possession, and still face problems connected with this offense.⁹⁶

In another credit card fraud case, the sentencing judge observed:

[I]t is an enduring victimization in that the persons subjected to it may never totally recover because it is true that once your name is sullied, it's very difficult to get everyone in the world to believe [the truth] . . . and you are then subject continually all your life to the possibility of being blindsided, although now you might know where it originated, you don't know how it has proliferated. . . . If you will, it's like having adult chicken pox and always wondering whether you're going to get shingles.⁹⁷

These passages, however compelling, only reflect the *translation* of the victims' stories into the rarified language of the judge who has recounted them. The language of the victims themselves is something else altogether.⁹⁸ Consider the comments of elderly churchgoers, who were defrauded by their pastor's son and who submitted their comments (in writing) to a state court in Florida:

This was someone that I trusted and knew . . . my husband has had to try and accept he may have lost his total retirement. This was all the money we had left.

My reaction to this atrocity is devastating. My husband died believing that the money . . . he left invested with Dan Strader . . . had left me financially able to take care of myself . . . for the rest of my

96 United States v. Wells, 101 F.3d 370, 372, 374 (5th Cir. 1996).

97 United States v. Akindele, 84 F.3d 948, 954 (7th Cir. 1996) (quoting the sentencing judge).

98 Anthony Alfieri has made this point in the context of Legal Services. There, lawyers must constantly guard against displacing client narratives with lawyer narratives. "The different voices of client narratives imbue client story with normative meanings. . . . When the client's voices are silenced and her narratives are displaced by the lawyer's narratives, client integrity is tarnished and client story is lost." Anthony V. Alfieri, Essay, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107, 2119 (1991).

life. . . . I am now emotionally and financially ruined. I am living on my Social Security and had to go out and find a job and return to work at the age of 70 years.

I have no one to help me and no money to hire help like I did before . . . we cannot buy the medicine that we need because of this . . . I would get a job if I had someone to stay with my wife . . . At the time this happened my wife was on a new drug for this problem and I had to quit it because she or we could not afford it any longer. Our granddaughter has been very sick for a long, extended time . . . We were using the interest that Daniel Strader guaranteed to pay her bills until she could go back to work. My granddaughter became permanently disabled so we decided to get our money from Mr. Strader to pay off her home. We never received our money, so they are foreclosing on her home, and she has no way of supporting herself. We only receive \$573 in Social Security payments to live on. This has made me depressed and I have lost trust in anyone.

I am 75 years old and will be long gone before I receive any amount that he owes me. In the mean time, I live day to day worrying about finances.

It has made me feel betrayed not only by the business community but also by the Christian community in which Mr. Daniel Strader is held in such high regard.

Mr. Strader has preyed on the trusting, the needy, the vulnerable, and elderly. We were gullible to trust his suave line of lies and deceptive innuendos. His deceit and cunning were well planned and he exploited all of us without any human conscience . . .

I was a victim of being a sad, lonely, widow.⁹⁹

Or consider the comments of a victim of another fraud scheme, also involving members of the defendant's close-knit church:

[The defendant] skillfully manipulated my faith in God to his advantage, looking in me in the eye while praying to God to bless the investment, all the while stealing my life savings To summarize, Luca is an expert at using people's faith in God as a means of getting to their savings, reaching through their souls to pick their pockets, taking not only their savings but also their faith.¹⁰⁰

Or consider the testimony of two victims of an identity theft:

I've had two missed days off [sic] work trying to get different problems straightened out, and the frustration of the many phone calls that I've had to deal with while I've been at work that relate to this case has been overwhelming and distracting. I'm an elementary

⁹⁹ *Judge Outlines Strader's Lies, Deceit*, LEDGER (Lakeland, Fla.), Aug. 10, 1995, at 3B (original punctuation retained).

¹⁰⁰ *United States v. Luca*, 183 F.3d 1018, 1027 (9th Cir. 1999) (quoting the victim's letter).

school teacher, and it has been extremely difficult for me to deal with these phone calls and then immediately step back into my classroom emotionally ready to meet the educational needs of my students.

. . . .

I cannot even begin to explain the embarrassment and the humiliation that I feel when I'm rejected [sic] credit or when stores refuse to accept my checks because of the criminal actions of Ms. Sample. Try to imagine how demoralizing it is to be treated like a criminal for a crime committed against you. Emotionally, it's very degrading.¹⁰¹

Two features characterize these written first-person reports: they are tendered in the victims' own—sometimes colorful and sometimes awkward—language, and they often express intense, and intimate, emotions. The best of them are painful to read, sometimes surprising, but always recognizable as a genuine human experience. The worst of the victim impact statements are obsessive, vindictive, and frankly unappealing.

In either case, though, first-person evidence can be instructive. "Research shows that legal professionals who have been exposed to [victims' stories] have commented on how uninformed they were about the extent, variety and longevity of various victimisations [sic], and how much they have learned from [victim impact statements]"¹⁰² It is this process of direct communication between the victim and the decisionmaker that underlies the proposal for victim allocation.

III. THE AFFIRMATIVE CASE FOR VICTIM ALLOCATION

Economic crimes now represent over twenty percent of the federal courts' criminal dockets.¹⁰³ And—unlike violent crimes—the

101 *United States v. Sample*, 213 F.3d 1029, 1033 (8th Cir. 2000).

102 Edna Erez, *Who's Afraid of the Big, Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice*, 1999 CRIM. L. REV. 545, 554.

103 See BUREAU OF JUSTICE STATS., U.S. DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 1998, at 53 tbl.4.1 (2000) ("Defendants in cases commenced, by offense, from October 1, 1997 - September 30, 1998."), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs98.pdf>. This figure is composed of fraud offenses (15.9% of the total), racketeering and extortion (1.5% of the total), and "regulatory offenses" (1.7% of the total). It does not include misdemeanors. By comparison, drug offenses represent 35.8% of the federal court caseload. *Id.*

number of economic crimes have been increasing in recent years.¹⁰⁴ This is especially true of economic crimes involving the Internet.¹⁰⁵

The victims of these crimes now represent a substantial cross-section of the American population. (As a practical matter, nearly two-thirds of adult Americans have been victimized by some form of fraud scheme.)¹⁰⁶ Many of these victims are indifferent to allocation issues, of course, but many others of them are clamoring for the courts' attention.¹⁰⁷ They question their exclusion from victims' rights protections,¹⁰⁸ and they want their stories to be heard. There are a number of reasons why their concerns should give rise to an amendment of Rule 32(c)(3)(E).

A. *A Rule That Privileges Victims of Violent Crimes and Excludes Victims of Non-Violent Crimes Is Unsound*

One argument to be made in favor of victim allocation in economic crime cases is that the current situation—in which victims of violent crimes are entitled to be heard in court while victims of other federal felonies are not entitled to be heard—makes little *principled* sense. The existing limitation may be a function of legislative triage (in which those victims whose circumstances seemed most compelling—or whose advocacy was the most politically appealing—were addressed first). Or, it may be a matter of resource conservation.

104 See Jayson Blair, *In a Side Effect of Economic Prosperity, White-Collar Crime Flourishes*, N.Y. TIMES, Mar. 13, 2000, at B1 (reporting that while violent crime has “plummeted” nationwide, white-collar crime has “skyrocketed”).

105 See *Complaints Soar About On-Line Fraud*, BOSTON GLOBE, Feb. 24, 1999, at D2 (reporting that the number of consumers complaining that they were defrauded in an Internet transaction had increased from 1,280 in 1997 to 7,752 in 1998); Frank James, *Scam Artists on Internet Warned of Big Crackdown*, CHI. TRIB., Mar. 24, 2000, § 1, at 4 (reporting that a multinational law enforcement team recently identified 1,600 sites “pitching scams over the Web”); Peter Lewis, *Police Finally Probe Scam on E-Bay*, SEATTLE TIMES, Nov. 26, 1999, at E2 (reporting that in the first half of 1999 the FTC’s Bureau of Consumer Protection received about 6000 complaints involving online auction fraud as compared with about 300 during the same period in 1998); Timothy L. O’Brien, *Officials Worried over a Sharp Rise in Identity Theft*, N.Y. TIMES, Apr. 3, 2000, at A1 (reporting on the increasing misuse of Social Security numbers, often involving purchases over the Internet).

106 See Richard Titus et al., *The Anatomy of Fraud: Report of a Nationwide Survey*, NAT’L INST. OF JUST. J., Aug. 1995, at 28 (noting that close to 60% of American adults have been the victims of fraud), available at http://ncjrs.org/pdffiles/nijj_229.pdf.

107 See Eaton, *supra* note 5.

108 For example, the most recent iteration of a victims’ rights constitutional amendment at the federal level only applied to victims of violent crime. See S. Res. 3, 106th Cong. (1999) (introduced by Senators Kyl and Feinstein).

(Barely 5% of federal prosecutions involve violent crimes.)¹⁰⁹ Or, it may be a function of institutional racism.¹¹⁰ Whatever its origin, the legal distinction between violent and non-violent crimes is problematic.

First, it is not necessarily true that violent crimes have a greater impact on a victim's sense of personal autonomy or well-being than other crimes. This may often be true, but is often *not* true in individual cases. Thus, some violent crimes have only a passing impact on some victims. And some economic crimes may have a devastating impact on other victims. Consider the argument of Senator Orrin Hatch (R-Utah), in response to the proposed Victims' Rights Constitutional Amendment, which provided protections to victims of violent crimes but not to victims of non-violent crimes:

I believe we must tread carefully when assigning constitutional rights on the arbitrary basis of whether the legislature has classified a particular crime as "violent" or "non-violent." Consider, for example, the relative losses of two victims. First, consider the plight of an elderly woman who is victimized by a fraudulent investment scheme and loses her life's savings. Second, think of a college student who happens to take a punch during a bar fight which leaves him with a black eye for a couple days. I do not believe it to be clear that one of these victims is more deserving of constitutional protection than the other.¹¹¹

Similar arguments are obvious. Some victims of a federal economic crime such as mail fraud (especially where they are "unusually vulnerable victims" or the victims of an abuse of trust) may suffer much more than, say, a victim who is assaulted while camping on federal lands.¹¹² But, under current law, only the latter will be permitted to offer victim impact testimony at the defendant's sentencing.

109 See BUREAU OF JUSTICE STATS., U.S. DEP'T OF JUSTICE, *supra* note 103, at 53 tbl.4.1 (reporting that violent offenses represented only 4.8% of the criminal cases prosecuted in federal courts during 1998).

110 Thanks to John Levy for making this point. Certainly, in the federal system, as elsewhere, violent crimes are more likely to be committed by persons of color than by whites. Conversely, white collar crimes are more likely to be committed by whites than by persons of color. See DAVID WEISBURD ET AL., CRIMES OF THE MIDDLE CLASSES: WHITE-COLLAR OFFENDERS IN FEDERAL COURTS 71 (1991) (discussing demographic characteristics of offenders which show whites constitute 77.9% of white-collar criminals, while the percentage of non-whites is more than twice that of whites in common street crimes).

111 See S. REP. NO. 105-409, at 42 (1998) (Sen. Orrin Hatch, proposing an amendment to the Constitution of the United States to protect the rights of crime victims).

112 In the civil context juries have long understood this distinction. For example, juries in defamation cases, invasion of privacy cases, and intentional infliction of emo-

And while Hatch's argument is persuasive on its own, Sissela Bok makes an even stronger argument—that in many ways (from the victim's perspective) fraud is a form of interpersonal abuse that, although not physical, may be even more insidious:

Deceit and violence—these are the two forms of deliberate assault on human beings. Both can coerce people into acting against their will. Most harm that can befall victims through violence can come to them also through deceit. But deceit controls more subtly, for it works on belief as well as action.¹¹³

In other words, neither the quality of a victim's suffering nor the perfidy of the offender bears any relationship to whether the crime committed was violent or non-violent. Such a distinction is arbitrary and offers no useful justification for Rule 32(c)(3)(E).

Paul Cassell argues that the distinction between violent and non-violent crimes is historical and that it "follows in a long line of state [victims' rights] amendments" that exclude victims of non-violent crimes.¹¹⁴ In fact, Cassell can point to only one state constitutional victims' rights amendment that expressly excludes victims of non-violent crimes.¹¹⁵ A handful of other states have elected to exclude these victims from victims' rights provisions statutorily.¹¹⁶ What is impor-

tional harm cases often award damages at a much higher rate than would be appropriate in a simple slip-and-fall case or a routine medical malpractice case. *See, e.g.,* *Weller v. Am. Broad. Co.*, 232 Cal. App. 3d 991 (Ct. App. 1991) (awarding \$1 million for infliction of emotional harm); *Almog v. Isr. Travel Advisory Serv., Inc.*, 689 A.2d 158 (N.J. Super. Ct. App. Div. 1997) (affirming award of \$525,000 for injury to reputation, plus \$4.5 million in punitive damages, in a libel case); *Household Credit Servs., Inc. v. Driscoll*, 989 S.W.2d 72 (Tex. App. 1998) (approving an award of \$450,000 in actual damages and \$1.25 million in punitive damages in an invasion of privacy case).

113 SISSELA BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* 18 (1989).

114 *See Protecting the Rights of Crime Victims: Hearing Before the Senate Subcomm. on the Constitution, Federalism and Property Rights of the Comm. on the Judiciary*, 106th Cong. 23–26 (1999) (statement of Paul G. Cassell, Professor of Law, on behalf of the National Victims' Constitutional Amendment Network) [hereinafter *Hearing*].

115 *See* N.M. CONST. art. II, § 24. This victims' rights amendment is limited to victims of

arson resulting in bodily injury, aggravated arson, aggravated assault, aggravated battery, dangerous use of explosives, negligent use of a deadly weapon, murder, voluntary manslaughter, involuntary manslaughter, kidnapping, criminal sexual penetration, criminal sexual contact of a minor, homicide by vehicle, great bodily injury by vehicle or abandonment or abuse of a child or that victim's representative

Id.

116 *See, e.g.,* COLO. REV. STAT. ANN. § 24-4.1-302 (West 2001) (victims' rights provisions applicable only in cases of murder, manslaughter, negligent homicide, assault, menacing, kidnapping, sexual assault, robbery, incest, child abuse, sexual exploitation

tant to note, though, is that a vastly larger collection of state victims' rights provisions specifically *include* victims of non-violent as well as violent crimes in their coverage. As of now, nearly half the states require their courts to hear live victim impact testimony—as well as to consider written victim impact statements—in economic felonies and other non-violent crime cases.¹¹⁷

of children, crimes against at-risk adults or at-risk juveniles, acts of domestic violence, stalking, ethnic intimidation, careless driving that results in the death of another person, and failure to stop at the scene of an accident where the accident results in the death of another person); GA. CODE ANN. § 17-17-3 (1997) (victims' rights provisions applicable only in cases of "crimes against persons," sexual offenses, theft and armed robbery, sexual exploitation of children, homicide by vehicle, feticide by vehicle, or serious injury by vehicle); IDAHO CODE § 19-5306 (Michie 2001) (victims' rights provisions applicable only to crimes involving physical injury, threat of physical injury, or sexual assault); TEX. CODE CRIM. PROC. ANN. art. 56.01 (Vernon Supp. 2001) (victims' rights provisions applicable only to victims of sexual assault, kidnapping, aggravated robbery, or crimes involving bodily injury or death).

117 See, e.g., ALA. CODE § 15-23-72 (1995) (allowing victims to be heard at any sentencing proceeding); ALASKA STAT. § 12.55.023(b) (Michie 2000) (allowing for sworn victim impact testimony or an unsworn victim presentation at sentencing); ARIZ. REV. STAT. ANN. § 13-702(E) (West 2001) (requiring the court to consider victim impact testimony at an aggravation or mitigation proceeding); CAL. PENAL CODE § 1191.1 (West Supp. 2001) (permitting victim to appear and reasonably present views concerning the crime, the person responsible, and the need for restitution); CAL. PENAL CODE § 679.02(a)(3) (West 1993); CONN. GEN. STAT. ANN. § 54-91c.(b) (West Supp. 2001) (permitting testimony of victim of a class A, B, or C felony concerning the facts of the case, the appropriateness of any penalty and the extent of any injuries, financial losses, and loss of earnings directly resulting from the crime); FLA. STAT. ANN. § 921.143(2)(a) (West 2001) (permitting victim impact testimony at sentencing, limited to the facts of the case, the extent of any harm, and "any matter relevant to an appropriate disposition of the case"); GA. CODE ANN. § 17-10-1.2 (1997) (permitting victim impact testimony in the discretion of the sentencing judge, with limitations as to subject matter); HAW. REV. STAT. ANN. § 706-604(3) (Michie 1999) (permitting victim impact testimony at sentencing); IND. CODE ANN. § 35-35-3-5(b) (Michie 1998) (same); IOWA CODE ANN. § 915.21 (West Supp. 2001) (same); LA. REV. STAT. ANN. § 46:1844K (West 1999 & Supp. 2001) (same); ME. REV. STAT. ANN. tit. 17-A, § 1174 (West Supp. 2000) (same); MASS. ANN. LAWS ch. 279, § 4B (Law. Co-op. 1992 & Supp. 2001) (same); MICH. COMP. LAWS ANN. § 780.765 (West 1998) (same); MINN. STAT. ANN. § 611A.038(a) (West Supp. 2001) (same—subject to "reasonable limitations as to time and length"); NEV. REV. STAT. ANN. § 176.015(3) (Michie 2001) (permitting testimony of a victim concerning the crime, the person responsible, the impact of the crime on the victim, and the need for restitution); N.J. STAT. ANN. § 39:4-50.11 (West 1990) (permitting victims to submit an oral statement to be considered in deciding sentencing terms); N.M. STAT. ANN. § 31-26-4(G) (Michie 2000) (permitting victim impact testimony at sentencing); OHIO REV. CODE ANN. § 2929.19 (Anderson 1999 & Supp. 2001) (same); R.I. GEN. LAWS § 12-28-3(11) (1998) (permitting victim impact testimony at sentencing where the defendant was found guilty following a trial); S.C. CODE ANN. § 16-3-1550(F) (Law. Co-op. Supp. 2000) (permitting victim impact testi-

In addition to the rules set out in state law, moreover, *federal* law traditionally has not distinguished between violent crimes and non-violent crimes. For example, there is no legal difference between violent crimes and non-violent crimes when it comes to the right to jury trial,¹¹⁸ the right to speedy trial,¹¹⁹ the right to confront witnesses,¹²⁰ the right to assistance of counsel,¹²¹ the right to avoid double jeopardy,¹²² the right to be excused from self-incrimination,¹²³ or the right to *defendant* allocation.¹²⁴ Nor is there any such distinction in the Federal Rules of Criminal Procedure, save for Rule 32(c)(3)(E).¹²⁵

In short, there is no obvious correlation between the fact of violence and the fact (or magnitude) of social harm. It therefore does not make sense to have a rule governing sentencing procedures in felony cases involving physical violence that differs in significant ways from the rule governing sentencing procedures in non-violent felony cases.

B. Requiring That Victim Impact Testimony Be Heard in Open Court Will Materially Assist the Sentencing Judge in Determining an Appropriate Sentence

There is a second, even more compelling, reason why victim allocation should be required in economic crime cases. Simply stated, *written* victim impact evidence is not as useful as *spoken, narrative* vic-

mony at sentencing); S.D. CODIFIED LAWS § 23A-28C-1(8) (Michie 1998) (same); UTAH CODE ANN. § 77-38-4(7) (1999) (same); VT. STAT. ANN. tit. 13, § 7006(a)(2) (1998) (same); WASH. REV. CODE ANN. § 9.94A.110 (West Supp. 2001) (permitting victims to make "arguments" at sentencing); W. VA. CODE § 61-11A-2(b) (1997) (permitting victim impact testimony at sentencing); WIS. STAT. ANN. § 972.14(3)(a) (West 1998) (same); WYO. STAT. ANN. § 7-21-102 (Michie 2001) (same).

118 See U.S. CONST. art. III, § 2, cl. 3.

119 See *id.* amend. VI.

120 See *id.*

121 See *id.*

122 See *id.* amend. V.

123 See *id.*

124 See FED. R. CRIM. P. 32(c)(3)(C) (providing that the court must personally address the defendant, inquiring into the defendant's wish to speak on his behalf).

125 Similarly, the law in civil cases makes no categorical distinction between violent and non-violent conduct. For example, neither the Federal Rules of Civil Procedure nor the Federal Rules of Evidence treat violent (or "bodily") torts any differently than dignitary torts. The remedies may differ (as the sanctions may differ in criminal cases based on the gravity of the crime), but the process of adjudication does *not* differ merely because violence is involved.

tim impact evidence and judges can benefit from the presence of victims in the courtroom.

The utility of a victim's own words, inflections, and gestures—as opposed to a written statement or a summary by others—lies partly in the fact that court officials—and judges especially—often become desensitized to the pain that victims of a crime may feel. Judges often develop an inherent sense of the “normal” degree of suffering a “normal” victim should experience.¹²⁶ This may be based on their own experiences and preconceptions about crimes¹²⁷ and may not reflect the true impact of a crime on a specific victim. Moreover, over time, some judges may lose their outrage about crimes in general or about specific crimes¹²⁸ and may come to regard them—especially economic crimes—as routine and unexceptional, and unworthy of their special attention.

Often, for example, fraud can be reduced to a caricature of a victim who is greedy, a defendant who is clever, and a transfer of money from one unworthy hand to another. Identity theft is easy to minimize—why doesn't the victim simply get a new set of credit cards? Indeed, why didn't the victim of a securities scam think twice before investing his savings in a company of which he learned over the Internet? How stupid could he have been?

Even the grossest of frauds—the fleecing of clients with limited education or the exploitation of the elderly or infirm—can involve the court in a complex review of hundreds of documents that leaves the judge fatigued at the point of handing down a sentence. Differentiating among these burdensome cases, identifying those defendants who are deserving of enhanced punishment, calculating an appropriate sanction, and writing a reversal-proof sentencing opinion, can sometimes simply seem like a chore. As a practical matter, determining an appropriate sentence for a defendant may not be the most rewarding work a federal judge (or her clerk) is called upon to perform.

Personalized victim impact statements—especially those highlighting the intimate details of loss, pain, and recovery—can break through this barrier of contempt, familiarity, and ennui.¹²⁹ This is

126 See Edna Erez & Linda Rogers, *Victim Impact Statements and Sentencing Outcomes and Processes: The Perspectives of Legal Professionals*, 39 BRIT. J. CRIMINOLOGY 216, 224 (1999) (recounting interviews with judges and lawyers).

127 See Erez, *supra* note 102, at 554.

128 See Erez & Rogers, *supra* note 126, at 225.

129 Martha Minow makes a related point when writing about the power of a victim's personal narrative to break through the complacency of family court judges, in the context of spousal and child abuse. See Minow, *supra* note 1, at 1689.

true even of written victim impact statements.¹³⁰ It is even more true of statements made orally, in the presence of the court, and especially true of statements made without prior scripting.

Even if a statement is rehearsed, however (as may be desirable as will be seen below),¹³¹ spoken testimony—as compared to a written victim impact statement—can engage the listener in a totally different way than reading a printed document possibly could.¹³² Thus, courts routinely now allow the testimony of absent witnesses to be presented by videotape rather than by written deposition, and experienced trial lawyers spend large sums of money to present key testimony in that form, solely because of its greater impact on the factfinder.¹³³ (Similarly, no lawyer who has participated in an administrative proceeding where the direct testimony is presented in writing can doubt the difference between that form of “testimony” and testimony from a live witness.)

It is because oral testimony is so much more powerful than equivalent evidence in writing that, in one Maryland case, the court of appeals (the state’s highest court) directed trial judges who might otherwise rely solely on written victim impact statements, to “accept victim impact testimony wherever possible.”¹³⁴ And it is why some

130 See Erez, *supra* note 102 and accompanying text.

131 See *infra* Part IV.E.

132 See Dennis O’Brien, *Ruling Supports Victim Testimony at Sentencing*, BALT. SUN, June 7, 1995, at 1B (“It’s easy to read a statement and brush it off, but to hear someone’s voice when they talk about the emotional toll of [a crime], it’s a lot harder to put that out of your mind.”) (quoting prosecutor); see also Paul Gewirtz, *Victims and Voyeurs: Two Narrative Problems at the Criminal Trial*, in LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW 135, 146–47 (Peter Brooks & Paul Gewirtz eds., 1996).

A VIS [victim impact statement] document can be shaped, structured, and polished to produce a desired effect. It also has the imprimatur of the “state” as author and therefore arguably gains narrative authority. . . . But, as a written document that is read, it will not have the human immediacy of live testimony from the victims’ survivors, which allows their sadness and suffering to be observed, not just explained.

Id.

133 See Michael J. Henke & Craig D. Margolis, *The Taking and Use of Video Depositions: An Update*, 17 REV. LITIG. 1, 14 (1998) (stating that a video deposition is “a superior method of conveying to the fact finder the full message of the witness”) (quoting *Riley v. Murdock*, 156 F.R.D. 130, 131 (E.D.N.C. 1994)); Gregory T. Jones, *Lex, Lies & Videotape*, 18 U. ARK. LITTLE ROCK L.J. 613, 613 (1996) (describing videotape as a “high-impact litigation tool” and noting that “as a means for offering testimony from one’s own witness, videotapes normally are the medium of choice”).

134 *Cianos v. State*, 659 A.2d 291, 295 (Md. 1995).

federal courts have voluntarily received victim impact testimony, in order to capture the flavor of the victims' experiences.¹³⁵

It is important, incidentally, to recognize that victim impact testimony need not be limited to emotionally-appealing victims or even to the stories of defrauded individuals. Often, organizations are victims of economic crimes, and they, too, may suffer harms beyond mere economic loss. For example, more than 180 evangelical groups, colleges, and seminaries were victims of the pyramid scheme involving the Foundation for New Era Philanthropy.¹³⁶ Many religious organizations, including the Anti-Defamation League of B'Nai B'Rith along with numerous black Baptist churches, were among the defrauded victims of the Reverend Henry Lyons.¹³⁷ Unions can be victims.¹³⁸ Banks can be victims.¹³⁹ Insurance companies can be victims too.¹⁴⁰ Organizations should not be excluded from the opportunity to present victim impact testimony any more than individual victims should be excluded.¹⁴¹ Organizations can express their victimhood in the same way that any organizational value is expressed—through their elected or appointed leaders.¹⁴²

What is most important, though, is that all victims of serious federal crimes be given a realistic opportunity to be present in the courtroom, to be heard with respect to issues that are relevant to the

135 See cases cited *supra* note 19.

136 See Tony Carnes, *New Era's Bennett to Prison: How Could a Little-Known Christian Business Executive Defraud Charities of \$354 Million While Claiming To Do God's Work?*, CHRISTIANITY TODAY, Oct. 27, 1997, at 86.

137 See *Black Baptists: A Collection for What?*, ECONOMIST, Feb. 13, 1999, at 30.

138 See Lou Mumford, *Former Niles Police Officer Avoids Jail*, S. BEND TRIB., Feb. 23, 1999, at D1 (detailing an embezzlement from the local Fraternal Order of Police).

139 See T. Christopher McLaughlin et al., *Financial Institutions Fraud*, 1998 AM. CRIM. L. REV. 789, 802-07 (detailing recent prosecutions under 18 U.S.C. § 1344 (1994) for bank fraud).

140 See Deborah Lohse & Mitchell Pacelle, *Case of Vanishing Manager and Missing Millions*, WALL ST. J., June 21, 1999, at C1 (describing a fraud involving at least \$218 million in losses and resulting in the insolvency of at least eight insurance companies).

141 See *United States v. Ruffen*, 780 F.2d 1493, 1496 (9th Cir. 1986) (awarding restitution to a governmental agency victimized by defendant's scheme to defraud); *United States v. Trettenaro*, 601 F. Supp. 183, 185 (D. Colo. 1985) (awarding restitution to a corporate victim); *United States v. Hendey*, 585 F. Supp. 458, 462 (D. Colo. 1984) (same); see also Deborah P. Kelly, *Have Victim Reforms Gone Too Far—Or Not Far Enough?: What Their New Rights Mean*, CRIM. JUST., Fall 1991, at 22, 25 (noting that medical clinics and other institutions have successfully used victim participation statutes).

142 See *United States v. Medford*, 194 F.3d 419, 422 (3d Cir. 1999) (recounting the victim impact testimony of the president of the Historical Society of Pennsylvania, from which priceless artifacts had been stolen by the defendant).

sentencing decision, and to educate the judge as to the many and varied consequences of economic crimes. The more detail they are able to provide, the more easily the judge will be able to articulate a basis for her sentencing decision. And the more detailed (and thoughtful) the sentencing decision, the less likely it is to be reversed on appeal.

It is this aspect of the victim allocation proposal that is most compelling in my view—not that it will afford victims the opportunity to purge their emotions (though in many cases that may be one result of the allocation experience), but that it will afford victims the opportunity to educate the judge on the true nature and consequences of the crime.

IV. THE ARGUMENTS AGAINST VICTIM ALLOCATION

There are nine obvious arguments against the required use of victim impact testimony in the sentencing phase of an economic crime case: (1) allocation hearings will consume judicial resources; (2) preparation for the hearings will consume prosecutorial resources; (3) allocation will tend to reward, and thus to protract, the witness's feelings of victimhood; (4) it will encourage disorder and histrionics in the courtroom; (5) it may result in disparate sanctioning outcomes depending on the articulateness of the testifying victims; (6) in cases of multiple victims, it may exclude victims who desire to testify, thus compounding their frustration and feelings of loss; (7) it may be fruitless in terms of its intended behavioral impact; (8) it may (paradoxically) result in exacerbation of victim dissatisfaction; and (9) it is merely a retributive device, designed to infringe the defendant's right to a fair sentence. All these concerns are legitimate, and each has been advanced with respect to victim allocation in violent crime cases.

A. *Cost and Court Time*

Of course, any proposal that would extend the time required of a judge to determine an appropriate sentence is open to challenge. And requiring a court to entertain the testimony of an economic victim or a group of victims will inevitably take up some scarce court time. One cannot merely dispatch such witnesses, but must treat them with care and respect and solicitude. One must be patient. Even with coaching, most victim witnesses will be hesitant, perhaps

inarticulate, but will want to tell their stories in some detail.¹⁴³ In addition, those stories will likely be duplicative of some of the testimony already received during the guilt phase of the trial or of material contained in the defendant's pre-sentence investigation report.¹⁴⁴

The simple response to concerns about time is to permit the judge to set time limits on victim impact testimony, to set limits on the number of victims permitted to testify,¹⁴⁵ and even, perhaps, to require the victim witnesses to confine their remarks to a prepared script or outline.¹⁴⁶ So long as all parties know the court's expectations, time and cost can be kept to a minimum.¹⁴⁷

B. Prosecutorial Resources

A related concern about victim allocation is that selecting victims to testify and orchestrating victim impact presentations will demand increased time and attention from federal prosecutors and victim ser-

143 See JOHN M. CONLEY & WILLIAM M. O'BARR, *RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE* 130 (1990) ("[In small claims court cases,] the opportunity to tell [one's] whole story is sometimes more important than the result.").

144 See *supra* note 84.

145 In the sentencing hearing for Timothy McVeigh following his conviction for the bombing of the Oklahoma City Federal Building in 1995, the court limited the number of witnesses who could present in-court victim impact testimony. "[T]hese [thirty-eight] witnesses comprised an extremely small percentage of the number of potential witnesses the government might have called . . ." *United States v. McVeigh*, 153 F.3d 1166, 1216 (10th Cir. 1998). At the sentencing hearing for Terry Nichols, the prosecutors were permitted to call fifty-five victim witnesses. See *No Execution for Terry Nichols*, N.Y. TIMES, Jan. 8, 1998, at A26.

146 See, e.g., *State v. Muhammad*, 678 A.2d 164, 180 (N.J. 1996) (permitting a victim witness to read his or her written testimony only if it is previously approved by the court).

147 Overall, studies have shown that involvement of victims in the trial and sentencing process does not prolong the proceedings. See Deborah P. Kelly & Edna Erez, *Victim Participation in the Criminal Justice System*, in *VICTIMS OF CRIME* 231, 237 (Robert C. Davis et al. eds., 2d ed. 1997). The experience of the state courts, several of which have been subject to comprehensive victims' rights legislation for several years now, is that the inclusion of victim impact testimony from victims of non-violent crimes has in no way overwhelmed those systems or their judges. See *Hearing*, *supra* note 114, at 18 (statement of Darrell Ashlock, President of Missouri Victim Assistance Network, Inc.) (arguing that those states—such as Missouri—that extend victims' rights protections to victims of non-violent as well as violent crimes have not found the system unworkable); *id.* at 23 (statement of Joe Traylor, President of AID for Victims of Crime, Inc.) (arguing that those states that have extended procedural rights to victims of non-violent crimes have "not [been] bogged down as a result").

vices personnel. These resources are always limited and jealously guarded.¹⁴⁸

To some extent, Congress has already anticipated these sorts of concerns, by permitting use of the Crime Victims Fund to address the needs of economic crime victims.¹⁴⁹ As a consequence, the Victims of Crime Act Victim Assistance Program Guidelines have recently been amended to take into account the needs of those victims,¹⁵⁰ a handbook for fraud victims has been prepared,¹⁵¹ and a video has been circulated to U.S. Attorneys' offices across the country, illustrating both the problems of fraud victims and the means of addressing them in the course of fraud prosecutions.¹⁵²

Resource issues, nevertheless, are legitimate. We are talking about increasing the number of cases in which victim impact testimony would be required by more than 14,000 defendants each year.¹⁵³ If these cases were spread evenly across the U.S. Attorneys' offices (an unlikely proposition), that could mean up to 150 additional victim impact presentations per office each year.¹⁵⁴

One response to this concern is that not all eligible victims will exercise their right of allocation so the burden on U.S. Attorneys' offices should not be as great as these numbers at first suggest. According to one victims' services professional, many victims—especially victims of financial crimes—“live far away, don't want to waste any more time or money, are intimidated at the thought” of appearing before a federal judge and are “happier to write than to speak” about

148 Recently, for example, federal prosecutors lobbied successfully to exclude victims of non-violent crimes from coverage under a proposed victims' rights constitutional amendment, largely because of concerns about resource issues. See Eaton, *supra* note 5.

149 See *id.*

150 See OFFICE FOR VICTIMS OF CRIME, U.S. DEP'T OF JUSTICE, 1997 VOCA VICTIM ASSISTANCE FINAL PROGRAM GUIDELINES, <http://www.ojp.usdoj.gov/ovc/welcovc/scad/guides/vaguide.htm> (last modified Apr. 19, 2001).

151 See OFFICE FOR VICTIMS OF CRIME, U.S. DEP'T OF JUSTICE, ROLES, RIGHTS AND RESPONSIBILITIES: A HANDBOOK FOR FRAUD VICTIMS PARTICIPATING IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, <http://www.ojp.usdoj.gov/ovc/publications/infores/fraud/irr/irrp.pdf> (last modified Apr. 19, 2001).

152 See Videotape: Victims of Fraud: Beyond the Financial Loss (Office for Victims of Crime, U.S. Dep't of Justice 1998).

153 See BUREAU OF JUSTICE STATS., U.S. DEP'T OF JUSTICE, *supra* note 103, at 53 tbl.4.1 (indicating that approximately 15,000 persons were tried for felony-level “property offenses” (including all forms of fraud) in federal courts in 1998). The figure above assumes that 95% of these defendants would be found or plead guilty. See *id.*

154 There are 93 U.S. Attorney's offices. See Executive Office for United States Attorneys, at <http://www.usdoj.gov/usao/eousa/index.html> (last visited Sept. 8, 2001).

their victimhood experiences.¹⁵⁵ Recent studies also make clear that victims who are entitled to offer victim allocation (in those states where allocation is available for all felonies, for example) often decline to do so.¹⁵⁶

Another (and more persuasive) response is that funds for the support of victim allocation should be plentiful in coming years. The Crime Victims Fund is fed largely by criminal fines,¹⁵⁷ and, in recent years, the Antitrust Division alone has delivered more than two billion dollars in such fines to the Treasury.¹⁵⁸ The Crime Victims Fund may be used (1) to respond to the emotional and physical needs of crime victims; (2) to assist victims of crime in stabilizing their lives after a victimization; (3) to help victims understand and *participate in* the criminal justice system; and (4) to provide victims of crime with a measure of safety and security.¹⁵⁹ The breadth of the fund (and the depth of its pockets) means that resources should be available to help support victim services for economic crime victims.

A third response to concerns about resources is that the rules governing victim allocation can be drafted so as to minimize the impact on prosecutors and their offices. In the proposal in this Article, for example, I address those concerns by (1) excluding all misdemeanor cases from the victim allocation provision;¹⁶⁰ (2) expressly permitting

155 Telephone Interview with Karen Spinks, Victim-Witness Coordinator, Office of the U.S. Attorney, Eastern District of Virginia (Sept. 1, 1999).

156 In an early study of victim allocation in California, "very few victims took advantage of [the allocation] opportunity. . . . [O]nly about 3 percent of the eligible victims . . . made statements at sentencing hearings." ANDREW KARMEN, CRIME VICTIMS: AN INTRODUCTION TO VICTIMOLOGY 202 (2d ed. 1990) (citing EDWIN VILMOARE & VIRGINIA V. NETO, VICTIM APPEARANCES AT SENTENCING UNDER CALIFORNIA'S VICTIMS' BILL OF RIGHTS (Nat'l Inst. of Justice, U.S. Dep't of Justice, Research in Brief No. NCJ 107206, 1987)). A more recent study reports that, of those permitted to do so, over 90% of victims surveyed made an in-court statement at the sentencing proceeding. See DEAN G. KILPATRICK ET AL., THE RIGHTS OF CRIME VICTIMS—DOES LEGAL PROTECTION MAKE A DIFFERENCE? 6 (Nat'l Inst. of Justice, U.S. Dep't of Justice, Research in Brief No. NCJ 173839, 1998), available at <http://ncjrs.org/pdffiles/173839.pdf>. Recent experience in Missouri has been in between these figures, averaging just under a 20% victim allocation rate. See *Hearings, supra* note 114, at 18 (statement of Darrell Ashlock, President of Missouri Victim Assistance Network, Inc.).

157 See 42 U.S.C. § 10601(b)(1) (1994 & Supp. V 1999).

158 See Antitrust Div., U.S. Dep't of Justice, *Sherman Act Violations Yielding a Fine of \$10 Million or More* (May 23, 2001), at <http://www.usdoj.gov/atr/public/criminal/8271.pdf>.

159 See OFFICE FOR VICTIMS OF CRIME, U.S. DEP'T OF JUSTICE, *supra* note 25, app. A (emphasis added).

160 Such cases currently represent 17% of the federal courts' workload. See BUREAU OF JUSTICE STATS., U.S. DEP'T OF JUSTICE, *supra* note 103, at 39 tbl.3.1.

the sentencing judge to limit the number of victims who can testify;¹⁶¹ and (3) suggesting that many federal financial felonies are in fact "victimless" for purposes of victim allocation.¹⁶² In short, only some felony cases will result in victim allocation, and those that do should be amply supported by the resources of the Crime Victims Fund.

C. *Exacerbation of Victimhood*

Some critics have suggested that permitting a victim to appear in court to testify regarding her experiences serves only to reinforce the victim's preoccupation with her loss. Apparently, there has been no real research on this issue, but let's assume that, at least for some victims, victim allocation may do more harm than good.

As Paul Gewirtz writes,

We have been assuming thus far that survivors are pushing to have their stories heard and that allowing victim impact evidence to be considered at the sentencing phase promotes the interests of the victims and the survivors. But surely the dynamic of survivor testimony is far more complicated. To tell the story of personal suffering requires the teller to relive that suffering, to retrieve it from repression, to reexpose wounds that may have started to heal. This may be beneficially therapeutic, but it may not be.¹⁶³

The presence of victim services professionals in U.S. Attorneys' offices should minimize this problem, and recent publications addressing the special needs of fraud victims¹⁶⁴ should make the efforts of these professionals even more successful. Further, U.S. Attorneys should be encouraged to select which persons among a group of victims are likely to be the most effective witnesses and most able to cope with the emotions unleashed in the course of providing victim impact testimony, should limit the risk that unhealthy victimhood will be rewarded.

161 See *infra* Part VI.

162 See *infra* notes 228–29 and accompanying text.

163 Gewirtz, *supra* note 132, at 148.

[I]t is well known that certain forms of intervention can . . . aggravate or perpetuate the psychological wounds rather than healing them. Some interventions can be effective in some cases and totally ineffective in others or beneficial to some recipients and deleterious to others. . . . [V]ictim services might have a side effect of delaying the natural healing process and prolonging the trauma of victimization.

Ezzat A. Fattah, *Toward a Victim Policy Aimed at Healing, Not Suffering*, in VICTIMS OF CRIME, *supra* note 147, at 257, 268.

164 See generally, e.g., OFFICE FOR VICTIMS OF CRIME, U.S. DEP'T OF JUSTICE, *supra* note 25 (outlining services provided for fraud victims).

D. *The Likelihood of Emotional Outbursts*

A recurring concern about victim impact testimony is that the victim will lose his composure in the courtroom. Some critics fear the spread of "lawless emotionalism" in court proceedings.¹⁶⁵ Others decry the "Oprah-ization of sentencing."¹⁶⁶ Judge Richard Matsch, who presided over both the Timothy McVeigh and Terry Nichols trials, expressed a concern that the overwhelming emotional force of extensive victim impact testimony in those trials might turn the proceedings "into some kind of lynching."¹⁶⁷ Whatever the metaphor, the concern is familiar: victims set free to describe their losses will overwhelm the decisionmaker's ability to exercise reasoned judgment.

A victim's loss of control while testifying about her victimization may be especially troubling where the sentencing decision is made by a jury,¹⁶⁸ but there is no jury sentencing in federal economic crime cases. Rather, the decisionmaker in a federal economic crime case is an experienced, professional, federal judge. These judges—like all judges—are accustomed to dealing with emotional witnesses.¹⁶⁹ So, the mere fact that some economic crime victims—like some violent crime victims—may become emotional or distraught in their victim impact presentations is no reason, standing alone, to reject the use of victim allocution.

It is also possible to limit the likelihood of an emotional outburst by setting time limits, excluding certain subjects,¹⁷⁰ indicating to the

165 See Editorial, *Victim Justice*, NEW REPUBLIC, Apr. 17, 1995, at 9.

166 See Michael J. Sandel, *The Hard Questions: Crying for Justice*, NEW REPUBLIC, July 7, 1997, at 25 (quoting a defense attorney).

167 See Tom Kenworthy & Lois Romano, *Death-Penalty Testimony Limited; Judge Seeks To Prevent "Lynching"*, CHI. SUN-TIMES, June 4, 1997, at 33.

168 In such cases, "when a victim impact witness succumbs to [her] emotions, the trial court has a duty to take appropriate action." *Jackson v. State*, 964 P.2d 875, 893 (Okla. Crim. App. 1998). Otherwise, the jury's sentencing recommendation may be voided. See *Payne v. Tennessee*, 501 U.S. 808, 831 (1991) (O'Connor, J., concurring) ("If, in a particular case, a witness' testimony . . . so infects the sentencing proceeding as to render it fundamentally unfair, the defendant may seek appropriate relief under the Due Process clause."); *Conover v. State*, 933 P.2d 904, 920 (Okla. Crim. App. 1997) (finding that the probative value of victim impact evidence was substantially outweighed by its prejudicial effect where that evidence was "inflammatory" and "designed to invoke an emotional response by the jury").

169 See Christopher Johns, Editorial, *Court Not Place To Salvage Victims*, ARIZ. REPUBLIC, June 29, 1997, at H5 ("It is true that daily courtrooms are unavoidably scenes of intense emotions. Grief, anger, hate, greed and the grotesque are frequent inhabitants of trial courts.").

170 For example, in the sentencing hearing of Timothy McVeigh, the sentencing judge directed that victim witnesses not mention the funerals of loved ones who had died as a result of the federal building bombing and not present pictures of the vic-

witness and her supporters that an emotional outburst will end that witness's testimony,¹⁷¹ or confining the witness's testimony to the reading of a pre-approved statement.¹⁷² None of these practices need be required in every case, but they are tools that should be available (and are now available) to federal judges in every sentencing proceeding.

There may be a larger issue, however, surrounding the issue of victim emotionalism—that is, whether the federal courts should be encouraged to limit victim impact testimony to that which is professionally attractive or socially acceptable. Judges often prefer to take victim impact testimony in its most bloodless form—in writing.¹⁷³ They recognize that, by its nature, live victim impact testimony often “cannot be controlled.”¹⁷⁴

The simple response to these (often class-based) concerns is that federal judges' comfort level (and the status quo which currently affords them total discretion as to whether to entertain live victim impact testimony in economic crime cases) ought not to govern this issue. Rather, public policy concerns—specifically, principles of equity and restorative justice¹⁷⁵—should override the judges' (perfectly understandable) preferences for victims whose behavior they find to

tims or their family members at weddings, Christmas celebrations, or other joyous occasions. See Beth E. Sullivan, Note, *Harnessing Payne: Controlling the Admission of Victim Impact Statements to Safeguard Capital Sentencing Hearings from Passion and Prejudice*, 25 *FORDHAM URB. L.J.* 601, 621 n.82 (1998) (citations omitted). Judge Matsch also prohibited the use of certain videotapes of victims and the testimony of a nine-year old concerning the loss of his mother. See Kevin Flynn, *Boy's Words Describe Life Without Mom*, *ROCKY MOUNTAIN NEWS*, June 7, 1997, at 10A; *Penalty Testimony Powerful*, *DENVER POST*, June 12, 1997, at A22; see also Collins, *supra* note 18, at 28.

171 See, e.g., *Huffman v. State*, 543 N.E.2d 360, 376 (Ind. 1989) (recounting trial judge's admonition—after the victim's mother cried and fled the courtroom—that if another outburst occurred, the victim's family would be removed from the courtroom); *State v. Muhammad*, 678 A.2d 164, 180 (N.J. 1996) (“During the preliminary hearing, the trial court should inform the victim's family that the court will not allow a witness to testify if the person is unable to control his or her emotions.”).

172 See, e.g., *Muhammad*, 678 A.2d at 180 (permitting a victim witness to read his or her written testimony only if it is previously approved by the court).

173 See Sandra Crockett, *A Voice for the Victims*, *BALT. SUN*, June 26, 1995, at 1D.

“There's nothing those [victim impact witnesses] could tell me that [hasn't] already been said in whatever letters I've received While I respect their right to be heard, we're already running, I think, a half hour late. I really don't think it would be beneficial to take the time to hear from them.”

Id. (quoting a trial judge).

174 See *Ball v. State*, 699 A.2d 1170, 1189 (Md. 1997).

175 See *infra* Part V.C.

be "appropriate" and whose presentation to the court is untainted by emotion.

E. The Problem of the Inarticulate Victim

One problem with victim allocution is that not all victims are similarly gifted in describing their experiences, expressing their pain, or communicating effectively with the sentencing judge. In a series of well-drawn hypotheticals, Donald Hall has illustrated how the educational level of a victim, his race, his ability to formulate a coherent story, his mental stability, his ability to hire a lawyer to assist him, and his own criminal history all may influence the way in which a judge receives that person's victim impact testimony.¹⁷⁶ Hall also points out that, in a survey of judges, "a number of judges observed that articulate victims' statements, whether written or oral, were far more effective than those received from inarticulate victims."¹⁷⁷

Victim advocates may be able to assist victims in preparing for their in-court appearance, but even with rehearsal, many victims—especially those who are elderly, ill-educated, or speakers of English as a second language—may be intimidated by the courtroom setting, embarrassed to speak before a distinguished federal judge and, thus, unable to tell their stories effectively. This could lead to increased frustration, a continuing sense of their own incompetence, or a sense that their efforts were not recognized or appreciated.

Even so, the risk that some victims will not be as forceful as others, or as reasoned in their presentations, should not exclude all economic crime victims from testifying at sentencing hearings. Once again, the ability of the U.S. Attorneys' offices to select out those victims with the greatest ability to tell their stories well and those with the most compelling personal characteristics should minimize the problems of the inarticulate victim. And where selection does not eliminate the problem (in the case of a fraud with a handful of victims, for example), support from victim services personnel should go a long way toward minimizing the problem.

F. Problems of Exclusion and the Representative Victim

The inevitable by-product of those steps that can be taken to minimize both emotionalism and inarticulateness is that, in cases of multi-

176 See Donald J. Hall, *Victims' Voices in Criminal Court: The Need for Restraint*, 28 AM. CRIM. L. REV. 233, 236-38, 259 (1991).

177 *Id.* at 246 (citing HILLENBRAND & SMITH, VICTIM RIGHTS LEGISLATION: AN ASSESSMENT OF ITS IMPACT ON CRIMINAL JUSTICE PRACTITIONERS AND VICTIMS 70 (A.B.A. Crim. Just. Sec., Victim Witness Project 1989)).

ple fraud victims, not everyone who wishes to do so may be permitted to testify. This means that the judge will have to decide how much time she wishes to allot to hearing presentations of victim impact testimony, and the prosecutor will then have to make choices about whom to present. In some cases, the process of winnowing may cause disappointed fraud victims to feel that they have been victimized once again.

Nevertheless, limiting victim witnesses to a reasonable number may be required by due process considerations.¹⁷⁸ It may also represent the most effective form of advocacy. Either way, a prosecutor orchestrating the sentencing proceeding has a duty to select victims who are both representative of the universe of the defendant's victims and able to withstand the rigors of victim impact testimony. The fact that some victims who desire to testify will not be selected for this task, and may be angry with the prosecutor or the court or "the system," is not sufficient reason to exclude victim impact testimony by other witnesses. Rather, these problems should be the focus of attention for victim advocates and victim services professionals.

G. *The Unlikelihood of Influencing the Defendant's State of Mind*

If one purpose of victim allocation is to make some kind of moral impression on the defendant,¹⁷⁹ the proposal in this Article will often fail. Some—perhaps many—defendants will be morally indifferent to having to listen to the stories their victims tell the court. Some defendants—especially in fraud cases—show no remorse for their actions, regard their victims as suckers and fools, and regard the court system as just another "mark" to be conned. Many fraud defendants are repeat offenders,¹⁸⁰ some fraud defendants even continue their

178 See *State v. Muhammad*, 678 A.2d 164, 176 (N.J. 1996) (indicating that the use of victim impact testimony "requires a balancing of the probative value of the proffered evidence against the risk that its admission may pose the danger of undue prejudice or confusion"); Katie Long, Note, *Community Input at Sentencing: Victim's Right or Victim's Revenge?*, 75 B.U. L. REV. 187, 223 (1995) ("Information overload may . . . lead to unfair sentencing. As the amount of information and the number of people testifying at a sentencing hearing increases, so does the risk of unjust punishment.").

179 See *infra* Part V.B.

180 Studies of the records of persons convicted of mail fraud, bank embezzlement, income tax evasion, false claims, and bribery have found that approximately 40% of the offenders had at least one prior arrest. See Michael L. Benson & Elizabeth Moore, *Are White-Collar and Common Offenders the Same? An Empirical and Theoretical Critique of a Recently Proposed General Theory of Crime*, 29 J. RES. CRIME & DELINQ. 251, 260 (1992); David Weisburd et al., *White-Collar Crime and Criminal Careers: Some Preliminary Findings*, 36 CRIME & DELINQ. 342, 343-47 (1990) (discussing how white-collar criminals are

scams while in prison.¹⁸¹

Thus, for some defendants at whom victim impact testimony would be directed, the notions of shaming or moral education are irrelevant, perhaps even laughable. And the idea that *any* defendant would be likely to develop empathy for his victims as a consequence of having to listen to them tell their stories in the context of a request for enhanced sentencing may be fanciful. So be it.

As in the case of uncontrollable witnesses, the argument must be that just because some—indeed many—defendants may well be immune to victim impact testimony at the time it is offered, that is no reason to exclude all victim impact testimony in economic crime cases. Victim impact testimony has multiple purposes: to express community values, to assist the judge in reaching an appropriate sentencing determination, to unburden the witness, and to enlighten the defendant. That not all of these purposes will be satisfied in many of the cases in which victim allocution would be required, or be satisfied at the same time, is no reason to reject the victim allocution proposal.

H. *Inadequate Return on the Victim's Emotional Investment*

Another concern is that in-court victim impact testimony—especially if it is offered by just a few among many victims of an economic crime—will be no more effective in purging the victims' emotions regarding the crime than the less costly, less time-consuming written victim impact statement has proven to be. Even those victims who are permitted to testify may be disappointed. There is no real evidence that offering victim impact *testimony* results in a more satisfying encounter with the judicial system than filling out a written victim impact *statement*.¹⁸² In fact, there is some evidence that victim impact testimony may be *less* satisfying than filling out a victim impact

often repeat offenders). For just one example of a recidivist defrauder, see Michael Perlstein, *Couple Given Stiff Sentences for Scam*, TIMES-PICAYUNE (New Orleans), Mar. 18, 1999, at B1 (reporting on a defendant who "launched [an elaborate fraud scheme that resulted in \$3.3 million in losses to his victims] while on parole from an earlier federal fraud conviction").

181 See Scott Higham, *Swindler Draws Top Sentence, 12 1/2 Years*, BALT. SUN, Feb. 8, 1997, at 2B (reporting on a defendant in a home-refinancing scheme who, after being sent to federal prison, was accused of swindling a fellow inmate out of \$15,000).

182 Indeed, there is some evidence that systems that offer an opportunity to submit a *written* victim impact statement offers no more victim satisfaction than systems in which such statements are prohibited. See Robert C. Davis & Barbara E. Smith, *Victim Impact Statements and Victim Satisfaction: An Unfulfilled Promise?*, 22 J. CRIM. JUST. 1, 10-11 (1994) (finding that victims permitted to submit a written victim impact statement did not report greater satisfaction with the criminal justice system than those not permitted to do so); Edna Erez et al., *Victim Harm, Impact Statements and Victim*

form,¹⁸³ most likely because a witness permitted to testify has a higher level of expectation than those who are confined to written expression.

Not only may allocution prove disappointing, moreover, but in-court testimony, and all the stress that it entails, may add to, rather than reduce, victims' feelings of dissatisfaction with the system. As one commentator has noted, "[t]he victim is unlikely to feel that a courtroom is the right place for this kind of emotional experience."¹⁸⁴ Another has argued that "most judges and lawyers simply aren't trained to respond in any therapeutic sense to grief."¹⁸⁵

That being said, studies do suggest that, in general, the more participation a jurisdiction affords crime victims, the greater the victims' levels of satisfaction and sense of resolution of the matter.¹⁸⁶ There are many reasons why this is so:

For some, [providing victim impact evidence to the court restored] the unequal balance between themselves and the offender, particularly in cases in which the victim did not have an opportunity to testify or be heard because they were resolved by a plea. Others wanted "to communicate the impact of the offense to the offender."¹⁸⁷

Still others "wanted to remind judges of the fact that behind the crime is a real person who is a victim."¹⁸⁸ Providing victim impact testimony can further any of these objectives.

The "feel good" factor may not be enough, however. Looking at these studies more critically, we find that victims who believed their participation had an *impact* on their cases were more satisfied with their experience as a victim witness than those who thought their par-

Satisfaction with Justice: An Australian Experience, 5 INT'L. REV. VICTIMOLOGY 37, 51 (1997) (same).

183 For example, one study suggests that 62% of the victims given the opportunity to present an oral victim impact statement were satisfied with their experience with the criminal justice system, while 66% of the victims given the opportunity to present a written victim impact statement reported satisfaction. See IMPACT STATEMENTS: A VICTIM'S RIGHT TO SPEAK, A NATION'S RESPONSIBILITY TO LISTEN (Ellen K. Alexander & Janice Harris Lord eds., 1994), at <http://www.ojp.usdoj.gov/ovc/help/impact>.

184 Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 980 (1985).

185 Johns, *supra* note 169, at H5; see also Vivian Berger, *Payne and Suffering—A Personal Reflection and a Victim-Centered Critique*, 20 FLA. ST. U. L. REV. 21, 59 (1992) ("The system is not equipped to nurture victims or their representatives.").

186 See Kelly & Erez, *supra* note 147, at 239.

187 Erez, *supra* note 102, at 551.

188 *Id.* at 552.

ticipation was meaningless.¹⁸⁹ Thus, one might readily hypothesize that victims providing testimony in jurisdictions (like the federal system) that are governed by strict sentencing guidelines may be more dissatisfied than victims providing testimony in jurisdictions giving judges more discretion in sentencing decisions.¹⁹⁰ They may also feel that the use of complex guidelines—which necessarily require the sentencing judge to prepare preliminary calculations in advance of the sentencing hearing—will render their testimony extraneous or unwelcome. This in turn might suggest that victim allocution in the federal sentencing context is a recipe for frustration and dissatisfaction. A study conducted abroad suggests that this is *not* the case and that victims who provide victim impact evidence have a high level of satisfaction even where they conclude that it has had little appreciable impact on the sentence.¹⁹¹

One way of dealing with the concern about victim dissatisfaction would be to conduct a pilot study in one or more judicial circuits, just as studies have previously been conducted regarding cameras in the courtroom, electronic document filing, and alternative dispute resolution. The experiences of victims who have been granted the right to allocution could then be compared to those who have not.

Another (and, in my view, preferable) way of dealing with this concern is to have federal victim services personnel explain in careful detail the way in which the Sentencing Guidelines work, the limitations they impose on sentencing judges, and the issues to which victim impact testimony can most effectively be directed, including claims related to psychological and other non-monetary harms,¹⁹² claims related to abuses of trust,¹⁹³ claims relating to the victim's "unusual vulnerability,"¹⁹⁴ and (perhaps most important) claims that can clearly demonstrate to the sentencing judge the lasting and devastating impact that can result from economic crime victimization. Victims should be told that judges are educable when it comes to crime victims' concerns¹⁹⁵ and that their testimony is important but will not be

189 See KILPATRICK ET AL., *supra* note 156, at 8.

190 See Hall, *supra* note 176, at 265 (noting that in states governed by sentencing guidelines, a victim's testimony, however forceful, is likely to have only a small, if not negligible, impact on the sentence).

191 See Erez, *supra* note 102, at 552 ("[F]or the majority of the victims filing [a written victim impact] statement was a worthwhile therapeutic experience, and the cathartic effect of recording the impact of the offence had been an end in itself.").

192 See *supra* Part I.A.1.

193 See *supra* Part I.A.4.

194 See *supra* Part I.A.3.

195 See Erez, *supra* note 102, at 554.

dispositive of the sentencing decision. They should also be advised that testimony is not therapy.

With preparation and professional counseling, the limitations of allocation—and the limitations of the Sentencing Guidelines—need not be fatal to the proposal advanced in this Article.

I. Victim Allocation Is Merely a Vehicle for Harsher Sentencing

A final objection to victim allocation in economic crime cases is that, like other victims' rights mechanisms, allocation is really just designed to persuade the sentencing judge to impose a draconian sentence.¹⁹⁶ It would be perfectly fine, according to this view, to permit—even encourage—victims to pursue their claims against the defendant in a civil proceeding. Let them sue; let them testify; let them vent within the context of a civil trial for damages. They should not, however, be permitted to influence the criminal sentencing process.

There are at least three responses to this (again, legitimate) concern. First, not all victim impact testimony is aimed at enhancing the defendant's sentence. The Guidelines permit evidence of mitigating as well as aggravating circumstances,¹⁹⁷ and, although it is uncommon, victims have sometimes offered such evidence, even in capital cases.¹⁹⁸ Further, studies show that, even where testimony has been aimed at sentence enhancement, some judges have *reduced* the sentences they originally had in mind as a result of hearing victim impact testimony.¹⁹⁹ Certainly, the presence of victim impact testi-

196 See Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 401 (1996) (arguing that victim allocation is "prejudicial and inflammatory").

197 See U.S. SENTENCING GUIDELINES MANUAL § 5K2.10 (permitting departure where victim's conduct was provocative); *id.* § 5K2.12 (permitting departure where defendant acted under duress); *id.* § 5K2.13 (permitting departure where the defendant committed the crime while suffering from a significantly reduced mental capacity); *id.* § 5K2.20 (permitting departure where defendant's conduct was aberrational); *id.* § 5K2.0 (permitting departure for other mitigating circumstances).

198 In the case involving the 1993 murder of Matthew Shepard, for example, the victim's parents argued that the death penalty ought not to be imposed on the killer, even though they personally supported the death penalty in other cases. See Julie Cart, *Killer of Gay Student Is Spared Death Penalty*, L.A. TIMES, Dec. 31, 1999, at A1; see also Karen L. Kennard, *The Victim's Veto: A Way To Increase Victim Impact on Criminal Case Dispositions*, 77 CAL. L. REV. 417, 447 (1989) ("[M]any victims . . . exercise their influence in the direction of leniency").

199 See Erez, *supra* note 102, at 548.

mony does not always mean that requests for enhancement or departures will be granted.²⁰⁰

Second, and more importantly, the Sentencing Guidelines sharply circumscribe judges in the degree to which they can punish defendants, even in the most heinous cases. However powerful the victim impact testimony may be, judges cannot simply impose whatever sentence they want, and their efforts to do so will be reversed on appeal.²⁰¹ Thus, to the extent that victim impact testimony has the potential to inflame the decisionmaker or distort her judgment (and remember that in this proposal, the sentencing decisionmaker is the judge and not a jury), the Sentencing Guidelines and the appellate process both serve as a strong source of discipline and protection.

Third, it is not at all illegitimate to provide a forum for victims to seek retributive punishment for their offenders, so long as the system is designed to moderate that impulse. It may be true that victim allocution is usually "an enormous benefit to the prosecution because the defendant will almost certainly lose this sort of contest."²⁰² But victim allocution, as confined by the Federal Sentencing Guidelines, is only a mechanism for victims' expression, not a guarantee of excessive state punishment of the defendant.

V. VICTIM ALLOCUTION IN THEORY

Three bodies of theory and research support the proposal for victim allocution in economic crime cases. First, the "denunciation" theory of punishment suggests that, to be socially legitimate, any punishment system must clearly express the community's moral condemnation of the defendant's behavior.²⁰³ It must say to her, "You

200 One recent study suggests that there is, at best, a "meager" correlation between the use of victim allocution and the imposition of harsher sentences. See Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment*, 1999 UTAH L. REV. 479, 542 (demonstrating only a slight increase in death penalty decisions after the Supreme Court's approval of victim allocution in *Payne v. Tennessee*, 501 U.S. 808 (1991)); see also Edna Erez & Pamela Tontodonato, *The Effect of Victim Participation in Sentencing on Sentence Outcome*, 28 CRIMINOLOGY 451, 468-69 (1990) (stating that, though the presence of the victim in court may have a measurable effect on sentence length, "[n]either the inclusion of a VIS in the file nor the victim's making an oral statement in court influence[s] the length of the prison term").

201 See, e.g., *United States v. Sarno*, 73 F.3d 1470, 1502 (9th Cir. 1995) (reversing the trial judge's two-level upward departure for lack of a sufficient foundation to support the departure).

202 Robert P. Mosteller, *Victims' Rights and the Constitution: Moving from Guaranteeing Participatory Rights to Benefiting the Prosecution*, 29 ST. MARY'S L.J. 1053, 1060 (1998).

203 See Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 598 (1996) (discussing the importance of a sentencing system that expresses the com-

have done something terribly wrong, in our view.” Victim allocation can facilitate this result. Second, the “moral education,” or “moral reform” theory of punishment suggests that a well-designed punishment system should influence the defendant’s attitudes and behavior, and discourage him from committing future criminal acts.²⁰⁴ It must say to him, “You have done something wrong, and here’s how you can go about becoming a morally better person.” In many cases, victim allocation can facilitate this result as well. Third, theories of restorative justice suggest that a properly constructed punishment system must address not only the needs of the community for effective denunciation and the needs of the defendant for some degree of moral re-education, but also must meet some significant needs of the victim.²⁰⁵ It must say to her, “We know you have suffered at the hands of this defendant, and society recognizes your loss.” Victim allocation can also facilitate this outcome.

A. *Allocation Is a Vehicle for Societal Denunciation*

The first basis for embracing victim allocation is to look at sentencing from the perspective of the law-abiding public. The denunciation theory of punishment is addressed to that public and has as its focus the public’s “interest in a just scheme of punishment.”²⁰⁶ Specifically, the denunciation theory says that “those who disobey criminal laws should be held up to the rest of society and denounced as violators of the rules that define what the society represents.”²⁰⁷ The message of denunciation should be clear and unambiguous—“You have behaved unacceptably and society therefore condemns you.”

Some critics argue that mere denunciation—the cataloguing of “moral facts about what is right and wrong”—is not as important an objective of the criminal justice system as is moral reformation—

munity’s moral condemnation of the defendant’s behavior); see also Ronald J. Rychlak, *Society’s Moral Right To Punish: A Further Exploration of the Denunciation Theory of Punishment*, 65 TUL. L. REV. 299, 332 (1990) (describing punishment as an essential means of reinforcing societal values).

204 See Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733, 739 (1998) (discussing the need for a sentencing system that can “morally ‘educate’ [the defendant], to make him see the error of his ways, and ideally, to lead to him to repentance”). See generally Jean Hampton, *The Moral Education Theory of Punishment*, 13 PHIL. & PUB. AFF. 208 (1984) (setting out moral education theory as a basis for inflicting punishment).

205 See MARTIN WRIGHT, *JUSTICE FOR VICTIMS AND OFFENDERS: A RESTORATIVE RESPONSE TO CRIME* 110–14, 117 (1991).

206 Rychlak, *supra* note 203, at 335.

207 *Id.* at 331.

“teach[ing] criminals how to make better moral decisions”²⁰⁸ But denunciation has an independent societal value, even where moral reformation would seem to be impossible. As Dan Kahan points out, “[p]unishment is *not* just a way to make offenders suffer; it is a special social convention that signifies moral condemnation.”²⁰⁹ It is for this reason that sentences are handed down in public, that judges often accompany the announcement of their sentences with critical comments directed at the defendant, and that defendants are required to be present when sentence is rendered.²¹⁰

Denunciation typically comes from the prosecutor in her arguments to the jury and to the sentencing judge, and from the sentencing judge while handing down the sentence. But denunciation may equally, and often as effectively, come from the victim(s) of a crime. This is so, in part, because of the passion that a victim is likely to bring to the denunciation process. But this is also true because the public can often more easily identify with the victim’s expressions of denunciation than with the studied and professional statements of the prosecutor or the judge.

B. *Allocution Is a Vehicle for Moral Education*

Another way of looking at victim allocution is from the defendant’s perspective. Ideally, a sentencing proceeding will be designed to have some impact on the defendant, cause him to examine his criminal behavior, and cause him in the future to conform to societal norms. One way to accomplish these objectives is through some form of “shaming ritual”²¹¹ by which the defendant is held up to the moral judgment of persons whose opinions he values and is caused to feel unworthy of their esteem—or even their love—unless he changes.²¹² An even better way to accomplish these objectives may be through some educative process by which the defendant is made to “recognize

208 See Lisa Anne Smith, *Supplemental Paper: The Moral Reform Theory of Punishment*, 37 ARIZ. L. REV. 197, 200 (1995).

209 Kahan, *supra* note 203, at 593 (emphasis in original).

210 See 18 U.S.C. § 3553(c) (1994) (requiring the court to provide a statement of reasons for imposing a sentence); FED. R. CRIM. P. 43(a) (requiring the defendant’s presence at sentencing).

211 The term “shaming ritual” is taken from anthropological studies. See Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1906–15 (1991) (describing shaming rituals from other cultures); see also WILLIAM IAN MILLER, *HUMILIATION: AND OTHER ESSAYS ON HONOR, SOCIAL DISCOMFORT, AND VIOLENCE* 161–65 (1993) (describing the universal characteristics of shaming rituals).

212 See JOHN BRAITHWAITE, *CRIME, SHAME AND REINTEGRATION* 57–59, 69–83 (1989) (describing the shaming process and its objectives).

and understand why what he has done was wrong, and ideally, to repent.”²¹³

One example of an effort to achieve some combination of shaming and moral education is the Victim Impact Panel (VIP) program initiated in 1982 by Mothers Against Drunk Drivers.

Victim impact panels provide a forum for crime victims to tell a group of offenders about the impact of the crime on their lives and on the lives of their families, friends, and neighbors. Panels typically involve three or four victim speakers, each of whom spends about 15 minutes telling their story in a non-judgmental, non-blaming manner. The offenders of the victim presenters are not present. While some time is usually dedicated to questions and answers, the purpose of the panel is for the victims to speak, rather than for the victims and offenders to engage in a dialogue.²¹⁴

The purpose of victim impact panels is “to individualize and humanize consequences to the victims, to change attitudes and behaviors, to deter drinking [and] driving, and to reduce recidivism.”²¹⁵ Most offenders who complete evaluations after listening to a victim impact panel indicate that their experiences were “positive” and “educational” and “contributed to a change in their attitudes and perceptions about their crimes.”²¹⁶ There is also some evidence that victim impact panels have had the intended effect of reducing recidivism among drinking drivers.²¹⁷

Victim impact panels take place outside of the courtroom and typically are part of the punishment package, but the principles underlying them can translate effectively into victim allocation at sentencing: (1) VIP programs make it impossible for defendants to escape into the anonymity of the criminal justice system; (2) VIPs require defendants to reflect on the pain of their victims in the presence

213 Garvey, *supra* note 204, at 763. According to Garvey, “[t]he aim of the educating model is to get the offender himself to understand why what he did was wrong, an understanding to which the morally appropriate emotional response is guilt. The aim is not, as in the shaming model, to shame him in the eyes of others.” *Id.* at 766.

214 Nat’l Inst. of Justice, U.S. Dep’t of Justice, *Victim Impact Panels*, at http://www.ojp.usdoj.gov/nij/rest-just/CH5/7_impnl.htm (last visited Sept. 8, 2001). A similar program has been developed for men convicted of rape. See Garvey, *supra* note 204, at 781.

215 Dorothy Mercer et al., *Drunken Driving Victim Impact Panels: Victim Outcomes 4* (Aug. 11, 1995) (unpublished paper, on file with author).

216 Nat’l Inst. of Justice, U.S. Dep’t of Justice, *supra* note 214.

217 See Stuart W. Fors & Dean G. Rojek, *The Effect of Victim Impact Panels on DUI/DWI Rearrest Rates: A Twelve-Month Follow-up*, 60 J. STUD. ON ALCOHOL 514, 519 (1999) (finding that the re-arrest rates for participants in VIP programs were lower than for others convicted of drunk driving).

of others; and (3) VIPs have at their core the fundamental belief that, if exposed to the harm their conduct has caused, some criminal offenders may change their behavior and ultimately become better social actors.

Permitting victim allocation in the sentencing process would replicate these features, but in some respects more effectively than the VIP system. First, the defendant in an economic crime case would be required to confront directly, rather than indirectly, the losses occasioned by his own behavior—that is, he would be forced to listen to the words and claims of his own victims rather than those of surrogates.

Second, victim allocation, unlike a VIP program, will not be a part of the defendant's punishment but a precursor to it. It will not provide an escape from confinement or a source of entertainment. Rather, as a process, allocation is designed to command the defendant's attention at precisely the time—the sentencing hearing—when his energies are most focused on what is being said.

Third, victim allocation will involve some measure of *public* exposure not found in typical VIP programs.²¹⁸ The victim's comments will be given under oath, in a courtroom, and in the presence of spectators as well as the sentencing judge. By honoring the victim's presentation with the *gravitas* of an official, rather than an ad hoc, proceeding, victim allocation at sentencing should have a deeper and more lasting impact on the defendant than may occur in the case of a typical VIP.²¹⁹

C. *Allocation Is a Vehicle for Restorative Justice*

A final way of looking at victim allocation is from the victim's perspective. Under theories of restorative justice, sentencing should be designed so as to restore the material and psychological losses experienced by the defendant's victim(s).²²⁰ These theories have been

218 It is important to note, however, that the public aspect of the sentencing proceeding proposed here bears little resemblance to those shaming practices involving posting signs, wearing of insignia, or taking out newspaper ads. Critics rightly challenge those practices as degrading, retributive, and "a species of lynch justice." See James Q. Whitman, *What Is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055, 1058–59 (1998).

219 Sarah Welling points out that the sense that something *important* is happening when the victim speaks in open court is a significant advantage of victim allocation. See Sarah N. Welling, *Victim Participation in Plea Bargains*, 65 WASH. U. L.Q. 301, 347 (1987).

220 See Howard Zehr, *Restorative Justice: The Concept*, CORRECTIONS TODAY, Dec. 1997, at 68, 68 ("Restorative justice begins with a concern for victims and how to meet

implemented in a number of forms: restitutional programs, victim-offender mediation programs (VOMs) (also sometimes known as victim-offender reconciliation programs (VORPs)), and various victim support and advocacy programs. All of these programs, like the proposal for victim allocation, have as their focus the recognition that it is the victim—not the state—who suffers most harm from a crime.

VOM and VORP programs—which are typically used in cases of non-violent crimes such as burglary, shoplifting, and vandalism—are based on face-to-face encounters between the defendant and his victim:

The meeting begins with the mediator explaining his or her role, identifying the agenda and stating any ground rules that may be necessary, such as allowing each party to complete their statements before interrupting them with questions or comments.

The first part of the meeting focuses on a discussion of the facts and feelings related to the crime. Victims are given the opportunity to express their feelings directly to the person who violated them, as well as to receive answers to lingering questions such as “Why me?” or “Were you stalking us and planning on coming back?”

While offenders are put in the uncomfortable position of having to face the people they violated, they also are given the rare chance to show a more human dimension to their characters and to express remorse in a very personal way.²²¹

VOMs and VORPs have been shown to produce significant satisfaction among both victim and defendant participants.²²² Specifically, “almost all [VOMs] produce mutually agreeable restitution plans that are successfully completed, victims report a reduction of fear and anxiety, juvenile offenders commit considerably fewer and less serious new crimes, and victims and offenders report high levels of satisfac-

their needs, for repairing the harm as much as possible, both concretely and symbolically.”)

221 Mark S. Umbreit, *Having Offenders Meet with Their Victims Offers Benefits for Both Parties*, CORRECTIONS TODAY, July 1991, at 164, 166. See generally Barbara E. Smith & Susan W. Hillenbrand, *Making Victims Whole Again: Restitution, Victim-Offender Reconciliation Programs, and Compensation*, in VICTIMS OF CRIME, *supra* note 146, at 245 (describing programs).

222 See Mike Niemeyer & David Shichor, *A Preliminary Study of a Large Victim/Offender Reconciliation Program*, FED. PROBATION, Sept. 1996, at 30, 30 (reporting that 59% of victims and 83% of offenders participating in victim-offender mediation reported satisfaction with the experience); Mark S. Umbreit, *Information on Research Findings Related to Uniquely Restorative Justice Interventions: Victim Offender Mediation and Family Group Conferencing* at 7–8 (Dec. 12, 1996), available at <http://ssw.che.umn.edu/rjp/Resources/Documents/cumb96d.pdf> (reporting that, in a study of victim offender mediation programs in four U.S. states, 90% of the victims and 91% of the offenders expressed satisfaction with the mediation outcome).

tion with the mediation process and outcomes."²²³ As yet, there is no useful study on the impact of VOMs and VORPs on adult offenders' recidivism.

VOMs and VORPs share two important characteristics: (1) voluntary participation by the victim²²⁴ (and sometimes the defendant) and (2) a dialogue (usually facilitated) between the victim and the defendant. Victim allocution would be similar to these programs in that participation by the victim would be voluntary.²²⁵ It would differ, however, in that dialogue between the victim and defendant is not anticipated and, indeed, is unlikely to be permitted. This formula may minimize participant anxiety (and also the court's time), but it also eliminates some of the more interactive (and arguably motivational) aspects of the VOM/VORP model.²²⁶ Nonetheless, utilizing a restorative justice perspective—one which forces the defendant to "see [the victim] as [a] human being[] in a state of distress"²²⁷—argues in favor of victim allocution.

VI. A PROPOSAL

Congress should amend Federal Rule of Criminal Procedure 32(c)(3)(E) so that it would read as follows:

IMPOSITION OF SENTENCE. Before imposing sentence, the court must:

223 Charles Tracy, Editorial, *The Promises and Perils of Restorative Justice*, 42 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 275, 275–76 (1998); see also Jennifer M. Cunha, Comment, *Family Group Conferences: Healing the Wounds of Juvenile Property Crime in New Zealand and the United States*, 13 EMORY INT'L L. REV. 283, 330 (1999) ("Regarding victims' satisfaction with VORP sessions, 79% of victims in mediation groups indicate[d] satisfaction with how the system handled their case, compared with only 57% of victims who did not participate in mediation programs.").

224 For a discussion of the reasons why a victim might choose *not* to participate in a VORP, see John Gehm, *Mediated Victim-Offender Restitution Agreements: An Exploratory Analysis of Factors Related to Victim Participation*, in CRIMINAL JUSTICE, RESTITUTION, AND RECONCILIATION 177, 179–81 (Burt Galaway & Joe Hudson eds., 1990). For a critique suggesting that victims often feel coerced to participate, see Jennifer Gerarda Brown, *The Use of Mediation To Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247, 1266–67 (1994).

225 Victim participation in sentencing is always voluntary in the sense that a victim has no obligation to provide a written statement or to appear to testify at the sentencing hearing, even if requested to do so by the government.

226 See Robert B. Coates, *Victim-Offender Reconciliation Programs in North America: An Assessment*, in CRIMINAL JUSTICE, RESTITUTION, AND RECONCILIATION, *supra* note 224, at 125, 132 (arguing that eliminating the face-to-face aspect of VORP is unwise and does not serve the goal of humanizing the parties to a crime).

227 Fattah, *supra* note 163, at 270.

(E) in any felony case address the victim personally if the victim is present at the sentencing hearing and determine if the victim wishes to make a statement or present any information in relation to the sentence.

Where the felony involves multiple victims, the court may limit the number of victims permitted to testify. Questions as to whether a person is a "victim" in any particular case shall be resolved by the sentencing judge and shall not be reviewable.

This proposal recognizes that there must be some limits to victim allocation, both in terms of the types of crimes to which it will apply (felonies) and the amount of time that a court must devote to it. It also recognizes that some types of felonies (like securities fraud or identity theft) have direct and identifiable victims whose testimony is both relevant (as determined by the Sentencing Guidelines) and useful to the judge's sentencing determination. Other types of felonies (like money laundering, drug trafficking, or bribery of a public official) may have indirect and less identifiable victims whose stories of victimization and loss, though genuine, may not be relevant to the sentencing process.²²⁸ I leave the making of such distinctions to the sentencing judge in the first instance²²⁹ and, by making those judgments unreviewable, I minimize the amount of collateral litigation that will arise.

This proposal carves out some politically safe space between those critics who oppose broad victims' rights accommodations as unduly burdensome on prosecutors and the judicial system²³⁰ and those victims' rights advocates who favor such accommodations regardless of the nature or gravity of the crimes involved.²³¹ By limiting the protec-

228 Richard Wiebe categorizes crimes as those (such as fraud) for which there are "specific, readily ascertainable victims," those (such as espionage) in which victims are difficult to identify, and those (such as public drunkenness) that are victimless. Richard P. Wiebe, *The Mental Health Implications of Crime Victims' Rights*, in *LAW, MENTAL HEALTH, AND MENTAL DISORDER* 414, 415-16 (Bruce D. Sales & Daniel W. Shuman eds., 1996). Though I do not share Wiebe's categorization of public drunkenness, I do agree that some crimes result in abstract and collective, rather than specific and personal, victimization.

229 Congress, of course, has the right to define more specifically which crimes would entitle victims to make allocation, and the circumstances in which even indirect victims should be given the right to testify. Thus, Congress could determine that local community leaders are appropriate victim witnesses in drug trafficking or public corruption cases or that representatives of consumer organizations are appropriate victim witnesses in antitrust cases.

230 This was an objection of many state and federal prosecutors to early versions of the victims' rights constitutional amendment. See Eaton, *supra* note 5.

231 The National Victim Center has taken this position and opposed the proposed federal Victims' Rights Amendment because it failed to protect victims of non-violent

tions of the proposed rule to victims of federal felonies and by making clear that not all victims of felonies can be afforded the right to allocution in every case, this proposal plugs a hole in Rule 32(c)(3)(E) that has deprived victims of economic crimes of important procedural rights, but does so without having to rewrite the Constitution.

CONCLUSION

Over the last fifteen years, we have developed useful experience with victims' rights legislation.²³² The victims' services profession has become over that period a true profession with standards, best practices, and a track record of achievement. It is time to move beyond the initial stages of victim empowerment as represented by the current version of Rule 32(c)(3)(E) and amend the Rule so as to include non-violent crime victims. Doing so is the best way to recognize that victims of economic crimes, like victims of violent crimes, may suffer significantly as a result of the crime and ought to be heard in the federal sentencing process.

crimes. See Nat'l Center for Victims of Crime, *The National Center for Victims of Crime Does Not Support SJR 3*, at http://www.ncvc.org/law/Nvc_ca.htm (last visited Sept. 8, 2001).

²³² See Peggy M. Tobolowsky, *Victim Participation in the Criminal Justice Process: Fifteen Years After the President's Task Force on Victims of Crime*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 21, 32-38, 103-05 (1999).