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Cleaning Salt from the Victim's Wound: Mandamus as a Remedy for the Denial of a Victim's Right of Allocution

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CLEANING SALT FROM THE VICTIM'S WOUND: MANDAMUS AS A REMEDY FOR THE DENIAL OF A VICTIM'S RIGHT OF ALLOCUTION[1]

1. I would like to thank Melinda's parents, Don and Patsy Lee, for letting me tell their story. I would also like to thank Brenda O'Quin, Jana Freelove, Jo Ann Starkey and the other members of the North Texas Chapter of Parents of Murdered Children, Inc. for helping me see the criminal justice system from the victims' perspective. Thank you to Associate Professor Lynne Rambo, Professor Frank Elliott, Professor Paul Cassell, and John Stein for advice on the paper, and finally a big thank you to my family, Derek and Tucker, for their patience and support during the composition of this paper.

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I. INTRODUCTION

Imagine that your child has been murdered. Your life will never be the same, and the one thing you want, besides the impossible wish of getting your child back, is to see that the person responsible for your child's death is punished for his crime. Because criminally injured parties have a limited role in the criminal justice process, you watch from the sidelines as the police investigate and the prosecutors prepare their case. You watch and wait for over two years, not only for a guilty verdict, but also for your chance to participate in this quest for justice. You have been warned by the prosecutor not to show any emotion in front of the jury, so you sit through the trial every day, struggling not to cry as the painful details of your child's last moments unfold. Under Texas Law, you, as the parent of a murdered child, have the right to make a statement after sentencing.[2] Though you may not ask the defendant questions, you are allowed to express your views on the offense, the defendant, and the devastating impact this crime has had on your life;[3] thus, you spend months preparing a statement hoping that it will convey your devastation and suffering. As your day in court finally arrives, you listen in disbelief as the judge tells you that you will not be allowed to make your statement because he feels that the defendant has been through enough. Your only opportunity to participate is taken away because the judge feels that the *defendant* has already been through enough? You are stunned and confused. After all, *you* are the one who has been through enough. It is *you* who can never hold your child again or tell her that you love her one last time. You earned your right to speak when the defendant was found guilty of murdering your child. What, if anything, can you do to see that your right to make a statement is enforced?

This comment discusses victim allocution as a statutory right in Texas and proposes mandamus as a remedy when that right is denied or overlooked. The Introduction asked the reader to consider the

2. TEX. CODE CRIM. PROC. ANN. art. 42.03, § 1(b)(1) (Vernon Supp. 2001); *see also* JANICE HARRIS LORD, NO TIME FOR GOODBYES, 132 (Pathfinder Pub. 1997) (reporting that "[a]ll states except Hawaii have enacted laws or procedures which allow for the victim family to give a written or oral statement to the court about the impact of the crime on their lives"). Texas, unlike other states and the federal system, does not allow victim allocution statements prior to sentencing. *Compare* FED. R. CRIM. P. 32(c)(3)(E), *with* TEX. CODE CRIM. PROC. ANN. art. 42.03, § 1(b)(1) (Vernon Supp. 2001). Instead, Texas allows victims to speak only after a sentence has been imposed. TEX. CODE CRIM. PROC. ANN. art. 42.03, § 1(b)(1) (Vernon Supp. 2001).

3. TEX. CODE CRIM. PROC. ANN. art. 42.03, § 1(b) (Vernon Supp. 2001).

right of allocution from the victim's perspective, imagining himself as the parent of a murdered child. Part II provides a brief history of victims' rights in the United States, highlighting the general difficulty of enforcing victims' rights. Part III contains the text and history of Article 42.03, section 1(b) of the Texas Code of Criminal Procedure, which gives victims, or the close relatives of deceased victims, the right to make a statement after sentencing. Part III also distinguishes the victim's right of allocution from the victim impact statement, with which it is often confused. Furthermore, Part III refutes the arguments against the victim's right of allocution. Part IV provides the true story of a Texas family and how they became victims of the criminal justice system when they were twice denied the right of allocution. Part V proposes mandamus as a proper remedy for victims[4] whose rights of allocution are denied or overlooked, and Part VI provides a conclusion.

II. BACKGROUND OF VICTIMS' RIGHTS

A. *Brief History of Victims' Rights in the United States*

When the United States Constitution was written in 1787, the Framers were fearful of innocent men being terrorized by a tyrannical federal government.[5] They included the Bill of Rights, which contained specific constitutional protections for defendants and expressly limited the government's prosecution of accused men.[6] These rights included "the right to a speedy and public trial[ ] by an impartial jury,"[7] the right to confront one's accusers,[8] the right against self-incrimination,[9] the right against excessive bail and cruel and unusual punishment,[10] and the right to due process before deprivation of life, liberty, or

4. Hereinafter the term "victim" will be used in a collective sense, including the victim, close relatives of a deceased victim, and the legal guardian of a victim. All three categories of people are provided the right to make an allocution statement by Article 42.03, section 1(b) of the Texas Code of Criminal Procedure. TEX. CODE CRIM. PROC. ANN. art. 42.03, § 1(b) (Vernon Supp. 2001); TEX. CODE CRIM. PROC. ANN. art. 56.01 (Vernon Supp. 2001) (defining victim).

5. *See* CHARLES WARREN, CONGRESS, THE CONSTITUTION, AND THE SUPREME COURT 79 (1935).

6. The Sixth Amendment states:

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

U.S. CONST. amend. VI.

7. *Id.*

8. *See id.*

9. *Id.* amend. V.

10. *Id.* amend. VIII.

property.[11] The Framers did not, however, provide any specific rights for crime victims. The reasons for this may be surprising to some.

When the Colonists migrated to the land that later became the United States of America, they brought with them the English common law system of private prosecutions.[12] Under this system of criminal justice, a crime victim was a private prosecutor who had the right to initiate and prosecute a criminal case against the accused.[13] This system adequately protected victim's rights; therefore, no protective provisions for victims were included in the Constitution by the Framers. By failing to provide rights for victims in the Constitution, there were no safeguards in place to ensure that victims' rights would remain protected.

The system of private prosecution was gradually replaced by the public prosecution system and victims lost the rights they previously enjoyed as "parties" to criminal prosecutions.[14] Based on the theory that a defendant commits a criminal act against the state, the state maintains complete responsibility and control over criminal prosecutions.[15] Accordingly, victim's participation in the prosecution of criminals is limited[16] to initially reporting the crime and testifying as a witness at trial.[17] Moreover, victims are relegated to the position of by-standers as the state's prosecuting attorney seeks redress against the defendant for a wrong suffered by the victim. The unfortunate side effect of this change created a criminal justice system that failed

11. *Id.* amend. V; *id.* amend. XIV, § 1.

12. Paul G. Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373, 1380; *see also* Chief Justice Richard Barajas & Scott Alexander Nelson, *The Proposed Crime Victims' Federal Constitutional Amendment: Working Toward a Proper Balance*, 49 BAYLOR L. REV. 1, 2 (1997).

13. Cassell, *supra* note 12, at 1380.

14. Barajas & Nelson, *supra* note 12, at 8–11; Cassell, *supra* note 12, at 1379–80; Meghan E. Miller, *Victim Impact Testimony in Texas: The Need for Reformation and Clarification*, 5 TEX. WESLEYAN L. REV. 121, 123 (1998); Keith D. Nicholson, *Would You Like More Salt With That Wound? Post-sentence Victim Allocution in Texas*, 26 ST. MARY'S L.J. 1103, 1110 (1995).

15. *See* Eric Schlosser, *A Grief Like No Other*, ATLANTIC MONTHLY, Sept. 1997, at 37, 46.

16. *See* Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973) (stating that "a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution. . . . [A] private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.") (citations omitted). *But see* Karyn Ellens Polito, Note, *The Rights of Crime Victims in the Criminal Justice System: Is Justice Blind to the Victims of Crime?* 16 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 241, 245 (1990) (adding that *Linda R.S. v. Richard D.* also noted that, if the legal right that was violated was created by statute, the victim may have standing).

17. *See* Schlosser, *supra* note 15, at 46.

to acknowledge victims and their rights. This victim-exclusive system has generated numerous criticisms and calls for reform.[18]

B. *Movement to Amend the United States Constitution*

The victims' rights movement began in the 1970s[19] when women's groups lobbied for the improved treatment of rape and domestic violence victims in the criminal justice system.[20] The campaign expanded to include all crime victims[21] and has been instrumental in the successful passage of many state and federal victims' rights statutes.[22] "In 1982, [President Reagan] established the President's Task Force on Victims of Crime ("Task Force"), whose mandate was to suggest better ways to treat victims and to propose victims' rights legislation."[23] The Task Force proposed a modification to the Sixth Amendment of the Constitution,[24] prompting alternative amendment proposals sub-

18. *See Senators Join Push for Victims' Rights Amendment*, SAN ANTONIO EXPRESS-NEWS, Apr. 2, 1998, at 10A, *available at* 1998 WL 5085843 ("Advocates for victims' rights complain that their concerns and needs often are overlooked or ignored by a justice system they believe gives more rights to defendants."); *see also* S. REP. NO. 106-254, at 2 (2000) (reporting findings of Senate Committee on the Judiciary recommending the passage of a Crime Victims' Rights Constitutional Amendment). For justification of victim participation in the criminal justice process, see generally Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289.

19. Alice Koskela, *Victim's Rights Amendments: An Irresistible Political Force Transforms the Criminal Justice System*, 34 IDAHO L. REV. 157, 158 (1997).

20. Nicholson, *supra* note 14, at 1111; *see also* Marlene A. Young, Ph.D., J.D., Speech at National Symposium on Victims of Federal Crime 1 (Feb. 1996) (discussing the evolution of victims' rights) (transcript on file with the Texas Wesleyan Law Review) [hereinafter Young speech]. Ms. Young is the Executive Director of the National Organization for Victim Assistance (NOVA).

21. According to Ms. Young:

> [The history of the victims' movement] is one marked by individuals and inspiration spurred by a rising social consciousness emanating from the 1960s. For the emergence of the victims' movement was in great measure due to the energies of the "twenty-something" generation of the 1970s.
>
> . . . .
>
> But an authentic victims' movement did begin to build toward the end of the 70s decade, as the invidious spread of random violence ravaged the countryside. It was not by chance that when the nation's crime rate hit an all-time peak, victim activist groups began to spring up both to support their traumatized members and to protest what they considered abuses in the criminal justice system.

Young speech at 1–2; *see also Senators Join Push for Victims' Rights Amendment*, SAN ANTONIO EXPRESS-NEWS, Apr. 2, 1998 at 10A, *available at* 1998 WL 5085843 (recognizing victims' rights advocates concerns).

22. *See Senators Join Push for Victims' Rights Amendment*, *supra* note 21, at 10A ("[A constitutional amendment] will try to balance the scales." (quoting John Walsh, the father of a murder victim who launched the television show "America's Most Wanted")).

23. Barajas & Nelson, *supra* note 12, at 3.

24. *Id.* at 4. The proposed change would add the following sentence to the end of the Sixth Amendment: "Likewise, the victim, in every criminal prosecution shall have the right to be present and to be heard at all critical stages of judicial proceedings."

mitted by groups like the National Organization for Victim Assistance (NOVA) and the National Victims' Constitutional Amendment Network (NVCAN).[25] Given the unsuccessful attempt to amend the Constitution, victims groups turned to state legislatures and urged the adoption of a victims' bill of rights to their respective state constitutions.[26] To date, thirty-one states have adopted a crime victims' bill of rights—including Texas.[27]

C. *Victims' Rights in Texas*

Texas enacted Article 1, section 30 ("Victims' Bill of Rights") of the Texas Constitution on November 7, 1989.[28] Crime victims rights include: "(1) the right to be treated with fairness and with respect for the victim's dignity and privacy throughout the criminal justice process; and (2) the right to be reasonably protected from the accused throughout the criminal justice process."[29] Upon specific request by a victim, a number of other rights are provided,[30] including:

> (1) the right to notification of court proceedings;
>
> (2) the right to be present at all public court proceedings related to the offense, unless the victim is to testify and the court determines that the victim's testimony would be materially affected if the victim hears other testimony at the trial;
>
> (3) the right to confer with a representative of the prosecutor's office;
>
> (4) the right to restitution; and

Id. While the Task Force recommended modifying the Sixth Amendment, Ken Eichenberry, a member of the Task Force, recommended pursuing "a federal constitutional amendment [to provide for] victim[s'] rights." Young speech, *supra* note 20, at 3.

25. Barajas & Nelson, *supra* note 12, at 4–5; *see also* E-mail from John H. Stein, Deputy Director of NOVA, to Nikki Morton, Law Student, Texas Wesleyan University School of Law (Sept. 20, 2000, 5:33 PM (EDT)) [hereinafter Stein E-mail] (on file with the Texas Wesleyan Law Review) (stating that it was Bob Preston who strongly advocated for a crime victims amendment, garnering support among NVCAN). "NVCAN tested the waters in Congress for a few months, and then decided, prudently, to take the cause to the states. NVCAN was an exporatory [sic] venture until Steve Twist" proposed the idea to Senator John Kyl. *Id.* These groups continue to push for a victim's amendment to the United States Constitution. *See generally* S. REP. NO. 106-254, *supra* note 18.

26. Barajas & Nelson, *supra* note 12, at 5; *see also* Stein E-mail, *supra* note 25 and accompanying text.

27. These states include: Alabama, Alaska, Arizona, California, Colorado, Connecticut, Florida, Idaho, Illinois, Indiana, Kansas, Louisiana, Maryland, Michigan, Missouri, Nebraska, New Jersey, New Mexico, Nevada, North Carolina, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, Texas, Tennessee, Utah, Virginia, Washington and Wisconsin (as of July 9, 2000). *NVCAN; State Victim Amendments, at* http://www.nvcan.org/stvras.htm (last visited Sept. 23, 2000) (on file with the Texas Wesleyan Law Review).

28. TEX. CONST. art. I, § 30.

29. *Id.* § 30(a)(1)–(2).

30. *Id.* § 30(b).

(5) the right to information about the conviction, sentence, imprisonment, and release of the accused.[31]

While not contained in the Texas Constitution, Article 42.03, section 1(b) of the Texas Code of Criminal Procedure provides victims or close relatives of deceased victims the right to make a statement to the court and the defendant after sentencing—the victims' right of allocution.[32]

D. *General Difficulty of Enforcing Victims' Rights*

Victims' rights are generally difficult to enforce.[33] One reason enforcement is difficult is because judges, peace officers, or law enforcement agencies are exempt from civil liability for their failure, or inability, to provide a right enumerated in the Victims' Bill of Rights.[34]

Additionally, some of the rights listed above are difficult to enforce because there are few, if any, practical remedies available to victims whose rights have been violated. For example, victims have the right to be notified of any legal proceedings relevant to the offense that caused their injuries.[35] A victim who does not receive prior notification of a proceeding and as a result does not attend the proceeding has no remedy because the court cannot repeat the proceeding.[36] The most difficult right to enforce, is the victims' "right to be treated with fairness and with respect for [their] dignity and privacy throughout the criminal justice process."[37] While noble of the legislature to have had such high hopes for our criminal justice system, this right is difficult to define, much less enforce.

Finally, victims have "the right to be present at all public court proceedings related to the offense,"[38] however this right is difficult to enforce when the victim is going to testify. When victims are called to testify they, like other witnesses, can be sequestered or excluded from

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31. *Id.* § 30(b)(1)–(5).

32. *Compare* TEX. CONST. art. I, § 30, *with* TEX. CODE CRIM. PROC. ANN. art. 42.03, § 1(b) (Vernon Supp. 2001).

33. *See generally* Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment,* 1999 UTAH L. REV. 479 (discussing the general difficulty of enforcing victims rights and supporting an amendment to the United States Constitution to reduce the difficulty).

34. TEX. CONST. art. I, § 30(e); TEX. CODE CRIM. PROC. ANN. art. 56.02(d) (Vernon Supp. 2001).

35. TEX. CONST. art. I, § 30(b)(1).

36. A repetition of criminal proceedings would, of course, violate the constitutional provision against "double jeopardy." U.S. CONST. amend. V (providing that "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ").

37. TEX. CONST. art. I, § 30(a)(1).

38. *Id.* § 30(b)(2); TEX. CODE. CRIM. PROC. ANN. art. 56.02(b) (Vernon Supp. 2001).

the courtroom.[39] Victims, however, may be exempt from the rule of sequestration, but this decision is up to the court.[40] A victim who is wrongfully excluded *could* seek a writ of mandamus,[41] however this potential remedy is impractical because it may jeopardize the prosecution's efforts of obtaining a conviction.[42] Few victims would be willing to risk a "not guilty" verdict at the expense of enforcing their right to be present. Therefore, most victims would quietly leave the courtroom rather than take the legal steps necessary to see that their right to be present is enforced.

The question is what can a victim do when his statutory rights are denied? As demonstrated above, there are no easy answers to that question. This comment attempts to provide an answer to that question with respect to the denial of a victim's right of allocution.

III. ARTICLE 42.03, SECTION 1(b) OF THE TEXAS CODE OF CRIMINAL PROCEDURE

A. *Overview of the Victims' Right of Allocution*

Article 42.03, section 1(b) states:

> The court shall permit a victim,[43] close relative of a deceased victim, or guardian of a victim, as defined by Art. 56.01 of this code, to appear in person to present to the court and to the defendant a statement of the person's views about the offense, the defendant,

39. TEX. R. EVID. 614. Rule 614 states: "At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion." *Id.*

40. *Id.* Rule 614 does not exclude from the courtroom "the victim in a criminal case, unless the victim is to testify and the court determines that the victim's testimony would be materially affected if the victim hears other testimony at the trial." *Id.* 614(4).

41. *See* Wilmer, Cutler & Pickering, *Petition for Writ of Mandamus in the Oklahoma City Bombing Case,* West's Legal News, Nov. 12, 1996, *available at* 1996 WL 652158 (reporting that a group of victims of the Oklahoma City Bombing sought a writ of mandamus directing the U.S. District Judge presiding over the case to allow the victims to be present at all public court proceedings concerning Timothy McVeigh and Terry Nichols). The action seeking mandamus in the Oklahoma City bombing case was, however, unsuccessful. *See* United States v. McVeigh, 106 F.3d 325 (10th Cir. 1997); *see also* Cassell, *supra* note 33, at 517 (discussing that Oklahoma City bombing victims filed a writ of mandamus, as well as a separate appeal because they were unsure how to proceed procedurally). Because Rule 614 gives the court discretion, *see supra* note 39, a victim seeking mandamus would have to prove an abuse of discretion with no adequate remedy by appeal—a high standard to meet. Walker v. Packer, 827 S.W.2d 833, 839 (Tex. 1992).

42. Victims often wait so long for a case to come to trial that any delay caused by a writ of mandamus mid-trial could severely affect the outcome of the trial. For example, witnesses may forget testimony, disappear, or become deceased, any of which may thwart attempts to obtain a conviction.

43. Article 56.01 of the Texas Code of Criminal Procedure defines victim as follows: "[A] person who is the victim of sexual assault, kidnapping, or aggravated robbery or who has suffered bodily injury or death as a result of the criminal conduct of another." TEX. CODE CRIM. PROC. ANN. art. 56.01(3) (Vernon Supp. 2001).

> and the effect of the offense on the victim. The victim, relative, or guardian may not direct questions to the defendant while making the statement. The court reporter may not transcribe the statement. The statement must be made:
>
> (1) after punishment has been assessed and the court has determined whether or not to grant community supervision in the case;
>
> (2) after the court has announced the terms and conditions of the sentence; and
>
> (3) after sentence is pronounced.[44]

This right to address the court and the defendant after sentencing has many names, including the right of victim allocution,[45] the victim's post-sentence testimony,[46] and the victim impact testimony.[47] In this paper, the right will be referred to as victim allocution or the victim's right of allocution.

The right of allocution was designed to give victims a sense of participation in the legal process.[48] Before the legislature created the right of allocution, victim participation in trials was limited to moments when they were invited by the State to participate.[49] With respect to victim allocution however, it is the victim who decides whether he or she will participate.[50] Victims who feel the need to make a statement can exercise their statutory right to speak, but victims are not required to make a statement. This is the only time when the victim has a choice whether or not to participate and, it is the only time where the victim is the focus of the courtroom for a few brief moments.

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44. *Id.* art. 42.03, § 1(b).

45. Nicholson, *supra* note 14, at 1105; *see also* Andrew Blum, *Impact of Crimes Shakes Sentencing: Statements by Victims or Their Loved Ones Inform Judges But Risk Mayhem,* NAT'L L. J., June 26, 1995, at A1 (referring to the right of victims, or their loved ones, to speak after sentencing as "victim allocution").

46. Fryer v. State, 993 S.W.2d 385, 387 (Tex. App.—Fort Worth 1999, pet. granted) (referring to this right as a victim's post-sentencing testimony).

47. Miller, *supra* note 14, at 121 (referring to this right as victim impact testimony).

48. Nicholson, *supra* note 14, at 1105; *see* State v. McDonald, 839 S.W.2d 854, 857 (Tex. App.—San Antonio 1992, orig. proceeding) (citing the House Committee on Criminal Jurisprudence stating that it was enacting rights for crime victims that include the right to be informed, heard, and protected).

49. *See* Schlosser, *supra* note 15, at 46.

50. Representative Pete Gallego stated to the House Committee on Criminal Jurisprudence that if victims want to speak, then "the court shall permit" the victim to do so. *Hearings on Tex. H.B. 520 Before the House Comm. on Crim. Juris.*, 72d Leg., R.S. (Feb. 26, 1991) (tapes available from House Committee Services). However, the word "shall" is not to be interpreted to mean that the victim is required to speak, thus the victim gets to choose whether or not to give an allocution statement. *See id.*

B. *The Right of Allocution Distinguished from the Victim Impact Statement*

In Texas, the victim's right of allocution is commonly confused with the victim's right to provide a victim impact statement. These, however, are distinct rights that serve different purposes and are articulated in different statutes.[51] The victim impact statement is a *form* that a victim or relative of a deceased victim completes to provide the prosecutor and judge with information about the impact of an offense on the victim and his or her family.[52] The information includes details about any physical, psychological, or financial injuries suffered by the victim.[53] Before a court imposes a sentence, it must consider the information provided in the victim impact statement.[54] By contrast, a victim allocution statement is the oral statement of a victim or close relative of a deceased victim delivered *after* sentencing.[55] Victim allocution statements are often personal testimonies of the pain and suffering caused by the defendant's offense.[56] The statements sometimes express frustration, anger, and sorrow.[57] Family members of deceased

51. Both however, can be found in the Texas Code of Criminal Procedure. The right of allocution can be found in Article 42.03, section 1(b), and the victim impact statement is addressed in Article 56.03. TEX. CODE CRIM. PROC. ANN. art. 42.03, § 1(b), art. 56.03 (Vernon Supp. 2001).

52. *Id.* art. 56.03(a). The victim impact statement form also serves as notice to the victim of his or her rights and responsibilities. *See id.* art. 56.03(b). Those responsibilities include requesting notification and keeping the proper agency informed of the victim's current address. *Id.* art. 56.03(d). Interestingly, notification of the victims' right of allocution is not provided on this form. *See id.* art. 56.03(b)(1)–(8).

53. *Id.* art. 56.03(b)(3)–(4).

54. *Id.* art. 56.03(e).

55. *Id.* art. 42.03, § 1(b)(3). Note, however, that in death penalty cases when a defendant offers evidence to mitigate punishment from the penalty of death to a life term in prison, both victim allocution statements and victim character evidence are allowed before sentencing as rebuttal to the mitigation evidence offered by the defendant. Osler McCarthy, *Death Penalty Case Rule Changed, State Will Allow Family, Friends of Murder Victims to Testify When Life Sentence Is Sought,* AUSTIN AM.-STATESMAN, July 2, 1998, at B7, *available at* 1998 WL 3616274 (reporting the Texas Court of Criminal Appeals decision to allow pre-sentence testimony from the family and friends of a murder victim in order to rebut any mitigating evidence put on by defendant seeking life in prison as opposed to the death penalty).

56. Allocution Statement of Patsy Lee, Mother of Murder Victim, July 27, 1995 (never delivered) (reproduced in the appendix); *see also* Kendall Anderson, *Jury Sentences Ex-DJ to 2nd Life Term/ Rape Victim "Grateful" After Verdict Read,* DALLAS MORNING NEWS, May 22, 1999, at 27A, *available at* 1999 WL 4122824 (quoting rape victim who expressed the inability to forgive the defendant, Gary Curtis "Babyfase" Faison, and her desire for him to sit in prison and think about what he has done to her. She stated that he "took a piece of my spirit and my soul away from me."); M.K. Geutersloh, *DUI Driver Who Hit Official Sentenced,* THE PANTAGRAPH, July 16, 1999, at A4 (quoting the mother whose daughter was killed by a drunk driver as stating, "[T]hrough no fault of my own, I have been given a life sentence .... I will forever carry with me the pain of the injuries ... and the scars of the surgeries.") (first and second alterations supplied; third in original).

57. *See* Steve Brewer, *Teen Gets Life Term for Sex Assault, Stabbing:Tunwar Ineligible for Parole for 30 Years,* HOUSTON CHRON., Apr. 8, 1998, at 19A, *available at*

victims often seize this opportunity to tell the defendant about the life of the victim.[58] They speak about the victim's accomplishments, as well as the hopes and dreams that will never materialize.[59] Some victims (or surviving family members) speak hoping that the defendant will feel remorse upon hearing about the promising life he destroyed and the resulting pain, anguish, and suffering he caused in the lives of those who loved the victim.[60] Many condemn the defendant for his acts,[61] but some offer forgiveness.[62] The opportunity to participate is

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1998 WL 3570449 (noting the victim's tearful statements that she did not want others to be harmed by the defendant and her frustration about becoming a victim); Holly J. Wolcott, *Murderer-Rapist Is Given Life Sentence*, LOS ANGELES TIMES (Ventura County), Feb. 23, 1999, at B3, *available at* 1999 WL 2182615 (quoting Los Angeles County Deputy Dist. Atty. Steve Giedzinski as stating "[the victim's] mother talked about how much pain she had been through and how the defendant made it worse by smiling and winking and giving her and the family the thumbs-up at the trial").

58. In her allocution statement, Patsy Lee stated:

> Melinda was an achiever. She was going places. She would have made quite a mark on this world. She was a junior at Texas Tech. She had made a career decision to pursue a Business Degree with a major in marketing. She was so excited about life in general. She had been elected to the Golden Key National Honor Society. She was a member of Alphi [sic] Chi Omega Sorority where she was their house manager. She was a member of Pi Sigma Beta Business Fraternity and the Texas Marketing Association.

Allocution Statement of Patsy Lee, Mother of Murder Victim, July 27, 1995 reproduced in the appendix; Allocution Statement of Jana Freelove, Mother of Murder Victim (on file with the Texas Wesleyan Law Review) ("[Channing] was always an honor student . . . . She was a great athlete. She had the lead in school plays and worked as [sic] photographer on the yearbook.").

59. Allocution Statement of Patsy Lee, Mother of Murder Victim, July 27, 1995 (reproduced in the appendix) (Melinda was pursuing a Business Degree with a major in marketing.); Allocution Statement of Jana Freelove, Mother of Murder Victim (on file with the Texas Wesleyan Law Review) (Channing's goal was to become a doctor.).

60. *See* Jim Henderson, *Ex-priest Gets Three Life Terms/Abuse Victims Say Kos Stole Childhood*, HOUSTON CHRON., Apr. 2, 1998, at 1A, *available at* 1998 WL 3569406 (quoting two of the four victims who chose to address Rudy Kos, a priest convicted of molesting four boys); Hilary E. MacGregor, *Man Receives 47 Years to Life for Rape, Assaults*, LOS ANGELES TIMES (Ventura County), Jan. 27, 1998, at B4, *available at* WL 2392660 (quoting victim's account in a witness-impact statement of her ongoing fear of going out in public since her attack and rape); Tracy Wilson, *Man Gets Life in Restaurateur Death*, LOS ANGELES TIMES (Valley Edition), Sept. 1, 1999, at B11, *available at* WL 26171511 (quoting a victim's father as saying "I am here to tell you how this bad person hurt us by killing our son . . . . I want him to see what he did . . . . The entire family has been killed").

61. *See* Evelyn Larrubia, *2 Get Long Prison Sentences in Separate Murders*, LOS ANGELES TIMES, Aug. 6, 1999, at B3, *available at* WL 2184021 (quoting father of a murder victim as saying "I hope whatever you get, you get it good" to his daughter's killer before sentencing); Evelyn Larrubia, *Killer of 2 Women Gets 2 Life Terms*, LOS ANGELES TIMES, Oct. 6, 1999, at B3, *available at* WL 2184021 (reporting that the defendant was forced to listen as the relatives of two slain women expressed their hatred and rage; quoting the brother of one murder victim as saying "In my mind, I've executed you over 1,000 times." The brother said "[p]ersonally, I won't have complete closure or peace until you are extracted from the prison system in a body bag"); Evelyn Larruba, *Killer of 2 Women Given Life in Prison*, LOS ANGELES TIMES (Valley Edition), Oct. 6, 1999, at B1 *available at* WL 2184021 (quoting the brother of a murder victim saying that he decided to leave the defendant's fate in God's hands, but

itself therapeutic for some victims,[63] providing them the sense of inclusion that many victims need.

As discussed above, the right of allocution serves many purposes: it allows victims (or surviving family members) the opportunity to participate; it provides them the opportunity to have their day in court; and, it allows them to face the person who altered their lives. While the opportunity to be heard may appear to some a "meaningless gesture,"[64] those who have witnessed an allocution statement and its impact have come to realize the importance of allowing victim participation in the prosecutorial process.[65]

C. *Legislative History of Article 42.03, section 1(b)*

The Texas Legislature gave victims the right to make an allocution statement by enacting Article 42.03, section 1(b) in 1991.[66] The initial version of the bill allowed victims to make a statement after the assessment of punishment but before the pronouncement of the sentence—however the bill was modified before enactment allowing only a post-sentence statement.[67] The reason for the modification was the fear that a judge would be unfairly prejudiced against a defendant after hearing an emotional allocution statement and perhaps alter the sentence.[68]

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that he prays every night that the defendant's "death comes with Godspeed and at the hands of another, so [he] knows what it feels like").

62. *See The Quality of Mercy*, AUSTIN AM.-STATESMAN, Nov. 10, 1999, at A14, *available at* WL 7431427 (quoting Dennis Shepard, Matthew Shepard's father as saying, "I give you life in the memory of one who no longer lives. May you have a long life, and may you thank Matthew every day for it").

63. *Debate on Tex. H.B. 520 Before the Senate Comm. on Crim. Justice*, 72 Leg., R.S. (May 21, 1991) (tapes available from the Senate Staff Services Office). According to Professor Paul G. Cassell:

> For some victims, making a statement helps restore balance between themselves and the offenders. Others may consider it part of a just process or may want "to communicate the impact of the offense to the offender." This multiplicity of reasons explains why victims and surviving family members want so desperately to participate in sentencing hearings, even though their participation may not necessarily change the outcome.

Cassell, *supra* note 33, at 496–97 (footnotes omitted); *see also* United States v. Smith, 893 F. Supp. 187, 188 (E.D.N.Y. 1995) (noting that the right of allocution "also may act as a catharsis, facilitating quicker dissipation of bitterness over the assault on the victim's dignity"); United States v. Hollman Cheung, 952 F. Supp. 148, 151 (E.D.N.Y. 1997) ("[T]he opportunity to speak provides catharsis for the victim.").

64. Ken Anderson, *The Last Word: A Victim's Right To Be Heard*, VISION, Spring 1999, at 6, 6.

65. *See id.* at 6–7.

66. TEX. CODE CRIM. PROC. ANN. art. 42.03, § 1(b) (Vernon Supp. 2001).

67. *Compare Hearings on Tex. H.B. 520 Before the House Comm. on Crim. Juris.*, 72d Leg., R.S. (Feb. 26, 1991), *with Hearings on Tex. H.B. 520 Before the House Comm. on Crim. Juris.*, 72d Leg., R.S. (Mar. 12,1991); *see, e.g.*, Nicholson, *supra* note 14, at 1114–15.

68. Nicholson, *supra* note 14, at 1115 (stating that House Bill 520, which eventually became Article 42.03, section 1(b), was amended to move the victim's statement

Article 42.03, section 1(b) has been amended only one time since 1991. A 1995 amendment expanded the right of allocution by specifically allowing victims to address defendants directly.[69] The amendment also placed a restriction on victims, however, by prohibiting them from asking the defendant questions.[70] This restriction was imposed perhaps in response to opponents of victim allocution who argued that allowing victims to address defendants after sentencing harmed the dignity of the courtroom by turning it into a theater.[71]

D. *Opposition to the Right of Allocution*

Opponents of the victim's right of allocution contend that Article 42.03, section 1(b) "gives victims an unnecessary right, at the expense of the legal system"[72] and the defendant's right to a fair and speedy trial.[73] They also view Article 42.03, section 1(b) as "inconsistent with the objectives behind Texas penal laws,"[74] claiming that it is a form of punishment that cannot be justified by retributive or utilitarian objectives.[75]

Opponents of the right of allocution, while creative, fail to justify the abolition of the victim's right of allocution with these contentions. First, the victim's statement does not deny the defendant's right to a speedy trial because, in Texas, the statement must be delivered *after the trial is over*.[76] It unfairly delays the trial process no more than any post-trial motion does. Second, victims' statements are not hour-long speeches; on average, they take approximately ten minutes.[77] While

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to after the pronouncement of sentence, rather than before, "to alleviate the risk that victim statements made pursuant to Article 42.03 [section 1(b)] would affect the partiality of the court").

69. *See* TEX. CODE CRIM. PROC. ANN. art. 42.03, § 1(b) (Vernon Supp. 2001). Prior to this amendment, victims could only address the court, not the defendant directly. *See* interview with Jana Freelove, Mother of Murder Victim (on file with the Texas Wesleyan Law Review). Ms. Freelove is a Victim's Assistance officer, Tarrant County, and accompanies victims to court. *Id.* She is also a "close relative of a deceased victim"—her daughter, Channing Freelove, was murdered in 1993. *Id.*

70. TEX. CODE CRIM. PROC. ANN. art. 42.03, § 1(b) (Vernon Supp. 2001).

71. *See generally* Donald J. Hall, *Victims' Voices in Criminal Court: The Need for Restraint*, 28 AM. CRIM. L. REV. 233 (1991); Nicholson, *supra* note 14, at 1128. Some courtrooms, however, become theaters even if victims do not make statements. *See* Douglas P. Shuit & Jack Leonard, *Deputies Thwart Courtroom Attack*, LOS ANGELES TIMES, Dec. 2, 1998, at B1, *available at* WL 18899672 (reporting of the mayhem that occurred after the sentence was pronounced).

72. Nicholson, *supra* note 14, at 1113–14.

73. *Id.* at 1131 (arguing that any benefit victim allocution provides "does not . . . justify the prolonging of the criminal process").

74. *Id.* at 1121.

75. *Id.* at 1122; *see* Schlosser, *supra* note 15, at 47.

76. *See* TEX. CODE CRIM. PROC. ANN. art. 42.03, § 1(b)(1)–(3) (allowing statement at sentencing, which necessarily follows the trial).

77. Brenda O'Quin notes that while the length of the statements varies, the estimated average of victim allocution statements is approximately ten minutes. *See* Interview with Brenda O'Quin, Leader, North Texas Chapter of Parents of Murdered

the speedy trial argument lacks merit, there are legitimate concerns over the amount of time allocution statements may take and whether they will "bog down" Texas courts.[78] Addressing this concern, Representative Pete Gallego, sponsor of House Bill 520 (enacted as Article 42.03, section 1(b)), admitted that allocution statements may "bog down" courts; however, he reiterated the need to allow victims to participate and be heard despite the amount of court time allocution statements may take.[79]

For the same reasons a victim allocution statement does not deny a defendant the right to a speedy trial, a victim allocution statement does not deny a defendant the right to a fair trial. If the trial is over and a sentence has been pronounced, any statement made by a victim will not affect the outcome of the trial. Therefore, it could not possibly affect the fairness of the trial. This argument is relevant only to statutes, unlike Article 42.03, section 1(b), that allow victims to make statements *before* sentencing.[80]

The argument that victim allocution cannot be justified by the retributive or utilitarian theories[81] misses the point of the statute from the very beginning. These theories focus on the justifications of punishing the *defendant*.[82] Article 42.03, section 1(b) focuses on the *victims* and their need to participate in the criminal justice process.[83] The underlying purpose of Article 42.03, section 1(b) is to benefit vic-

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Children, in Fort Worth, Tex. (Sept. 10. 1999) (on file with the Texas Wesleyan Law Review). In her official capacity, Ms. O'Quin has witnessed or become aware of over fifty victim allocution statements.

78. *Hearings on Tex. H.B. 520 Before the House Comm. on Crim. Juris.*, 72d Leg., R.S. (Feb. 26, 1991) (tapes available from House Committee Services) (expressing concerns of Representatives Cook and Ovar that victim's statements may "bog down" the courts).

79. *See id.*

80. The fear that sentences will be inconsistent, depending on whether or not a victim speaks, is the main reason that Article 42.03, section 1(b), just before it was passed into law, was changed to allow the statement after sentencing, as opposed to before sentencing. *See* Nicholson, *supra* note 14, at 1115.

81. *See* Nicholson, *supra* note 14, at 1119–21.

82. Briefly, the retributive theory looks backward, justifying punishment on the idea that wrongdoers deserve to be punished. *See* 1 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW 13, §§ 2–4 (15th ed. 1993). The Utilitarian theories of deterrence and rehabilitation look forward, justifying punishment as a means of benefiting society. *See id.*

83. *See generally Hearings on Tex. H.B. 520, supra* note 77. As Professor Cassell states:

> [I]t is important to underscore that the critics generally fail to grapple with one of the strongest justifications for admitting victim impact statements: avoiding additional trauma to the victim. . . . [G]ross disparity between defendants' and victims' rights to allocute at sentencing creates the risk of serious psychological injury to the victim. As Professor Douglas Beloof has nicely explained, a justice system that fails to recognize a victim's right to participate threatens "secondary harm"—that is, harm inflicted by the operation of government processes beyond that already caused by the perpetrator.

tims, not to punish the defendants. Therefore, the right of allocution need not be justified under *any* theory of punishment.

Supporters of victim allocution statements[84] insist that allowing victims to participate in this manner furthers three very important objectives. First, it is therapeutic for victims because it might be their only chance to be heard.[85] This is true particularly when the victim speaks after a plea bargain has been accepted.[86] The second objective is that victim allocution statements can be rehabilitative for defendants as it is probably the only time defendants will ever see their victims again and know of the impact the offense has had on the victim or their families.[87] Finally, victim allocution serves a third purpose—it is beneficial to prosecutors.[88] Victims who know they will have the opportunity to speak at sentencing or after a plea are more cooperative and supportive of prosecutors, making their job a little easier.[89]

Because victim allocution statements could benefit victims, defendants, and prosecutors, the strongest argument against victim allocution remains the concern with the court's time. The gravity of this concern, however, is best put into perspective when one realizes that only one in every five victims ever exercise their opportunity to make a statement.[90] Regardless of the number of victims who do choose to make a statement, one can hardly argue that court time is *wasted* by hearing from the injured party.

E. *Lack of Case Law Concerning the Right of Allocution*

There is no case law in Texas specifically addressing the enforcement of a victim's right of allocution,[91] probably because most victims

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Cassell, *supra* note 33, at 496 (footnote omitted). See DOUGLAS E. BELOOF, VICTIMS IN CRIMINAL PROCEDURE 10–18 (1999), for a discussion of the concept of secondary harm.

84. *See, e.g.*, Cassell, *supra* note 33, at 486–97 (supporting the victims' right of allocution). *But see, e.g.*, Susan Bandes, *Reply to Paul Cassell: What We Know About Victims Impact Statements*, 1999 UTAH L. REV. 545 *passim* (criticizing victim allocution statements).

85. *Debate on Tex. H.B. 520 Before the Senate Comm. on Crim. Justice*, 72 Leg., R.S. (May 21, 1991) (tapes available from the Senate Staff Services Office) (quoting Judge Chuck Miller, Texas Court of Criminal Appeals, noting that the opportunity to speak is "therapeutic for the victim[s]").

86. *Id.*

87. *Id.*

88. *Id.* (reflecting Carol Darby's testimony on behalf of Voters Organized To Ensure Rights & Safety (VOTERS)).

89. *Id.*

90. *Id.* (emphasizing Judge Miller's comment that four out of five victims do not want anything to do with the criminal justice system, thereby reducing the number of victims who want to make an allocution statement).

91. After an exhaustive search, no cases concerning the enforcement of Article 42.03, section 1(b) were located. An example of an enforcement case can be found in Arizona, although it deals with a different statutory right. *See* Arizona *ex rel.* v. Ariz. Bd. of Pardons & Paroles, 875 P.2d 824 (Ariz. Ct. App., 1993) (reporting that the state attorney brought a special action petition on behalf of a rape victim who was not

are unaware of anything they *can* do when their right to make a statement is denied or overlooked. There are at least two cases, however, that acknowledge the victim's right of allocution as a statutory *right*.[92] In *Blevins v. State*, the court acknowledged that the mother of a murder victim had the *right* to give unrecorded testimony following the assessment of punishment and pronouncement of the sentence.[93] In *Fryer v. State*, the court distinguished the victim impact statement from the victim's right of allocution, and referred to the right of allocution as "post-sentencing testimony."[94] *Fryer* is a victory for victims because it recognizes that a victim's views about what type of sentence the defendant should receive can be included in the victim impact statement form that judges must consider before imposing a sentence.[95]

Because the few cases that mention the right of allocution have not addressed enforcement of the right or the possible remedies available when this right is not provided, this comment proposes mandamus as a remedial method of enforcement that is available to victims in Texas whose allocution rights are denied or overlooked.

IV. THE LEE FAMILY—HOW ONE TEXAS FAMILY BECAME VICTIMS OF THE CRIMINAL JUSTICE SYSTEM

Patsy and Don Lee are the parents of Melinda Lee. On October 14, 1994, Melinda Lee became a victim of crime when Wayland Leroy Lamb, Jr. ("Lamb"), a drunk driver with a 0.22 blood alcohol level (over twice the legal limit at the time), collided with the car that Melinda was traveling in.[96] Don and Patsy Lee watched helplessly as Melinda fought for her life in I.C.U. for fifty-four days.[97] Melinda's fight ended on December 7, 1994, when, after suffering a stroke due to

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informed of her rights under the Victim's Bill of Rights and, as a result, was not included in the parole proceeding that she had a right to participate in).

92. *See* Fryer v. State, 993 S.W.2d 385 (Tex. App.—Fort Worth 1999, pet. granted) (emphasis added); Blevins v. State, 884 S.W.2d 219 (Tex. App.—Beaumont 1994, no pet.) (emphasis added).

93. *See Blevins*, 884 S.W.2d at 231. Note that in the opinion the court makes the common mistake of calling the mother's testimony the victim "impact statement." *Id.* Many commentators have made this mistake. *See supra* text accompanying notes 47–49.

94. *See Fryer*, 993 S.W.2d at 387.

95. *See id.*

96. Interviews with Don & Patsy Lee, Parents of Murder Victim, Melinda Lee, in Fort Worth, Tex. (Oct. 1 & 13, 1999) (on file with the Texas Wesleyan Law Review) [hereinafter collectively Lee interviews]; Peace Officer's Accident Report no. 94-39749, Lubbock Police Dep't, Lubbock, Tex. (Oct. 14, 1994) (on file with the Texas Wesleyan Law Review).

97. Lee interviews, *supra* note 95; *see also* Ernie Makovy, *1 Year Later, Grave Robbery Painful Mystery to Parents/Authorities in Dallas Still Want to Find Out Who Dug Up the Body of Melinda Lee. The Body Was Later Found, But the Hurt Continues*, FORT WORTH STAR-TELEGRAM, Dec. 13, 1995, at A1, *available at* WL 9307973.

kidney failure, Melinda was removed from life support.[98] Don and Patsy buried her on December 10, 1994.[99]

The Lee family, victimized by a drunk driver, looked to the criminal justice system for justice. What they found was that they were to be victimized yet again. The case of *State v. Lamb* was assigned to the Honorable John McFall of the 237th Judicial District Court in Lubbock County.[100] The Lubbock District Attorney's office advised the Lees of their rights as the parents of a deceased victim except their right to make an allocution statement. It was Susan Bragg, a Dallas representative from Mothers Against Drunk Driving (MADD),[101] who informed the Lees of their right to make an allocution statement after sentencing.[102] Don Lee completed the victim impact statement form, specifically requesting notification of all related court proceedings[103] and the Lees were kept informed as to the status of the case by an "enthusiastic" prosecutor.[104]

A competency hearing declared that Lamb was competent to stand trial[105] and Lamb plead nolo contendere[106] to charges of intoxication manslaughter. A jury sentenced Lamb to twenty years in prison with a $10,000 fine[107]—the maximum possible sentence.[108] As Patsy Lee worked up the courage to deliver the three page statement that she

98. Lee interviews, *supra* note 95; *see* Justin Bachman, *Cemetery Theft Stuns Authorities/Student's Body Stolen; Family's Grief Deepens,* FORT WORTH STAR-TELEGRAM, Dec. 15, 1994, at A1, *available at* WL 4038632.

99. *Death and Funeral Announcements*, DALLAS MORNING NEWS, Dec. 9, 1994, at 36A. Two days after Melinda was buried her body was stolen from the grave. Lee interviews, *supra* note 95. Her body was later recovered, but the crime remains unsolved. Todd Bensman, *Expert Creates Profile of Grave Robber/Aid Sought in Taking of Texas Tech Student's Body*, DALLAS MORNING NEWS, June 21, 1996, at 36A, *available at* 1996 WL 2131127. Stephen G. Michaud, *Difficulty Predicted in Body-Theft Case/Experts Say Grave Robber Will Be Elusive,* FORT WORTH STAR-TELEGRAM, Dec. 20, 1994, at A1, *available at* 1994 WL 4039494.

100. Lamb v. State, 931 S.W.2d 611 (Tex. App.—Amarillo 1996, pet. ref'd).

101. MADD is a national organization that promotes awareness to stop drunk driving, support its victims, and prevents underage drinking. *MADD ONLINE, at* http://www.madd.org/ (last visited Sept. 22, 2000).

102. Lee interviews, *supra* note 95.

103. Victim Impact Statement of Donald R. Lee, Father of Murder Victim, Aug. 15, 1995 (on file with the Texas Wesleyan Law Review) [hereinafter Victim Impact Statement]. For the right to request notification, see TEX. CODE CRIM. PROC. ANN. art. 56.02(a)(3) (Vernon Supp. 2001).

104. Lee interviews, *supra* note 95.

105. *Id.*; Graham Underwood, *Man Found Competent in Traffic Death*, LUBBOCK AVALANCHE J., Aug. 2, 1995, at 1A.

106. Lamb v. State, 931 S.W.2d 611, 612 (Tex. App.—Amarillo 1996, pet. ref'd). Nolo contendere is Latin for "I will not contest it." BLACK'S LAW DICTIONARY 1048 (6th ed. 1990). When used, the defendant neither admits nor denies the charges. *Id. See also* BLACK'S LAW DICTIONARY 1070 (7th ed. 1999).

107. *Lamb*, 931 S.W.2d at 612; Graham Underwood, *Jury Gives Drunk Driver 20 Years in Prison*, LUBBOCK AVALANCHE J., Aug. 5, 1995, at 11A; Lee interviews, *supra* note 95.

108. TEX. PEN. CODE. ANN. § 13.33 (Vernon 1994), § 49.08(b) (Vernon Supp. 2001).

had spent two months preparing,[109] she was told by the prosecutor that the judge would not allow her to read it.[110] The Lees asked the prosecutor to ask the judge again, hoping that he would change his mind, but the judge again denied the prosecutor's request.[111] The judge's reasons for denying Patsy's allocution statement included that the defendant had received the maximum sentence, and that the judge felt that the defendant was too "emotionally upset" to allow the statement.[112]

The judge was concerned that the defendant had been through enough, yet it was the Lee family who had been through enough. It was their daughter who had been killed by a drunk driver. They were the ones who watched her suffer in pain for fifty-four days before losing her life at the age of twenty. If anyone had been through enough, it was the Lee family, but their emotions were not considered. Instead, the judge denied them their statutory right to make an allocution statement, making *them* victims of the *criminal justice system.*

Patsy Lee later expressed her reactions upon being told that she would not be allowed to make her statement saying, "Our emotions were ignored. I was shocked, stunned, and then angered. I had no idea that a judge had that kind of authority. I had never had any experience with the criminal justice system before—other than serving as a juror. [It] was like rubbing salt in the wound."[113]

Unfortunately, there is more to the Lees' story. Lamb's conviction was overturned due to a legal technicality.[114] Lamb returned to Lub-

109. Patsy Lee, Address at a Press Conference regarding the National Crime Victim's Constitutional Amendment Proposal 2 (Apr. 3, 1998) (transcript on file with the Texas Wesleyan Law Review) [hereinafter Lee speech]. Patsy Lee stated, "I spent about two months writing and re-writing this paper—the most important paper I would ever write. This would be my only chance to tell the man that killed Melinda what devastation he had brought to our lives." *Id.* Allocution Statement of Patsy Lee is reproduced in the appendix to this article.

110. Lee interviews, *supra* note 95.

111. Lee speech, *supra* note 109.

112. Lee interviews, *supra* note 95. Patsy Lee explained that the reason the judge felt the defendant was "too emotionally upset" to allow her to read her statement was because the defendant had reportedly attempted to commit suicide that morning in the local jail. *Id.* It seemed to the Lee family that this "attempt" was merely a staged event designed to support the defendant's argument that he was incompetent to stand trial, despite the fact that he had previously been found competent to stand trial. *Id.*; *see also* Lee speech, *supra* note 109. The court's reason for prohibiting the statement, however, adds further support to the argument presented in this paper—if the statement "should" not have been delivered on the particular day in question, why not postpone the delivery of the statement until a later date, one on which the defendant has not demonstrated characteristics of emotional instability? The court should have postponed the statement until the next day or the following week, rather than deny absolutely the Lees' right to make an allocution statement.

113. Lee speech, *supra* note 109.

114. *See* Lamb v. State, 931 S.W.2d 611, 621 (Tex. App.—Amarillo 1996, pet. ref'd); *see also* J.E. "Buster" Brown, *Criminal Law Needs Harmless Error Rule*, SAN ANTONIO EXPRESS-NEWS, Dec. 5, 1996, at 5C, *available at* 1996 WL 11508083; *Man-*

bock for a new trial scheduled for August 1997.[115] It became difficult for the Lees to obtain information concerning the second trial, and a once cooperative prosecutor no longer kept them informed.[116] A quick and unexpected plea bargain occurred and Lamb again plead nolo contendere to intoxication manslaughter.[117] Because the plea occurred quickly, the Lees were not notified of the proceeding until *after* it had occurred.[118] Because the Lees were not present in the courtroom at the time of the sentencing, they did not have an opportunity to request again that Patsy be allowed to read her statement. The Lees' rights were not denied on this occasion, their rights were simply overlooked. This emphasizes the need for a remedy for all victims—not only for those whose rights are denied, but also for those whose rights are simply overlooked.[119]

The first time Patsy Lee's right of allocution was denied, the judge was responsible because he ignored Article 42.03, section 1(b) of the Texas Code of Criminal Procedure. Assigning blame for the second denial is more difficult because the plea agreement occurred quickly and unexpectedly.[120] However, it could be argued that both the prosecutor and the judge were at fault for not considering the possibility that the victim's family would want to be present for the sentencing of the man who killed their daughter. The Lees had been present at all other proceedings and had taken the appropriate steps to receive notification,[121] yet no one bothered to notify them and delay the sentencing so that they could travel to Lubbock from Dallas.[122] The Lees had the right to be present[123] as well as the right to be heard,[124] yet no one acknowledged or even attempted to enforce their rights.

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slaughter Conviction Overturned: Man Faced 20-year Term in Student's Traffic Death, DALLAS MORNING NEWS, May 11, 1996, at 40A, *available at* 1996 WL 2121698.

115. Lee speech, *supra* note 109.

116. *Id.*

117. *Lamb*, 931 S.W.2d at 621.

118. *See* Lee interviews, *supra* note 95. Additionally, the Lees were not notified by the district attorney's office of the judge's refusal to stack Lamb's 20-year sentence for Melinda's death on top of the 10-year sentence Lamb received for intoxication assault on the other passengers in the car. The Lees found out about the ruling from friends in Lubbock who read about the judge's decision in the newspaper. *Id.*

119. In addition to the need to find a remedy for victims whose statutory rights are denied, there is a need to have laws strengthened so as to prevent victims' rights violations. An attempt to fulfill that need resulted in the proposed Federal Victims' Rights Amendment. *See generally* S. REP. NO. 106-254, at 2 (2000).

120. *See* Lee interviews, *supra* note 95.

121. Victim Impact Statement, *supra* note 102.

122. It would not have been an unreasonable request to delay the sentencing proceeding in order to provide the Lees time to travel from Dallas to Lubbock. It is a one-hour flight or a six-hour drive. *See Airline tickets, hotels, cars, vacations: Go Virtually Anywhere with Travelocity.com*, *at* http://www.travelocity.com (last visited Mar. 23, 2001); *Yahoo! Maps and Driving Directions*, *at* http://maps.yahoo.com (last visited Mar. 23, 2001).

123. TEX. CONST. art. I, § 30(b)(2).

124. TEX. CODE CRIM. PROC. ANN. art. 42.03, § 1(b) (Vernon Supp. 2001).

Patsy Lee had the right to make a statement to the court and to Wayland Leroy Lamb, Jr. after the pronouncement of his sentence,[125] and she was twice denied that opportunity.[126] The proper way to correct this violation is to bring the defendant back to the courtroom so that Patsy Lee can finally make her allocution statement. One, and perhaps the only, way to accomplish this is to have a writ of mandamus issued ordering compliance with Article 42.03, section 1(b).[127]

V. MANDAMUS AS A PROPER REMEDY WHEN A VICTIM'S RIGHT OF ALLOCUTION IS DENIED

A. *Interpreting "Shall" as a Pre-requisite to Determining Approach to Mandamus*

Mandamus is an extraordinary remedy that is typically used in one of two situations: (1) to compel performance of ministerial duties,[128] or (2) to correct a clear abuse of discretion when there is no adequate remedy by appeal.[129] Because (1) above is appropriate only when a court does not have discretion, and (2) applies only when a court has discretion but abuses it, it is necessary to determine whether Article 42.03, section 1(b) gives a court discretion over the allowance of victim allocution statements. While Article 42.03, section 1(b) does not expressly state whether a court has discretion, it uses the word "shall," which suggests that the statute is mandatory[130] and not permissive. Either way, courts that do not correctly abide by Article 42.03, section 1(b) should be compelled to reconvene so that the victim may make the allocution statement he is statutorily entitled to make.

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125. *Id.*

126. Lee interviews, *supra* note 95.

127. *See generally* DOUGLAS E. BELOOF, VICTIMS IN CRIMINAL PROCEDURE 260, 693–707 (1999) (discussing mandamus and other remedies for violations of victims' rights); Cassell, *supra* note 12, at 1418–21 (discussing different remedies for the violation of victims' rights, including mandamus).

128. Walker v. Packer, 827 S.W.2d 833, 839 (Tex. 1992).

129. CSR Ltd. v. Link, 925 S.W.2d 591, 596 (Tex. 1996) (quoting Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 917 (Tex. 1985)).

130. When interpreting the word "shall," Texas courts have acknowledged that the term *usually* denotes a mandatory effect. Wichita County v. Hart, 917 S.W.2d 779, 781 (Tex. 1996); Lewis v. Jacksonville Bldg. & Loan Ass'n, 540 S.W.2d 307, 310 (Tex. 1976); Chisholm v. Bewley Mills, 287 S.W.2d 943, 945 (Tex. 1956); *In re* J.L.W., 919 S.W.2d 841, 843 (Tex. App.—El Paso 1996, no writ); Wright v. Ector County Indep. Sch. Dist., 867 S.W.2d 863, 868 (Tex. App.—El Paso 1993, no writ); Harris County Appraisal Dist. v. Consol. Capital Props. IV, 795 S.W.2d 39, 41 (Tex. App.—Amarillo 1990, writ denied); Hunt v. Heaton, 631 S.W.2d 549, 550 (Tex. App.—Beaumont 1982), *aff'd*, 643 S.W.2d 677 (Tex. 1982); Inwood N. Homeowner's Ass'n v. Meier, 625 S.W.2d 742, 744 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ).

B. *Is "Shall" in Article 42.03, section 1(b) Mandatory or Permissive?*

In Texas, the Code Construction Act applies to any provision of the Code of Criminal Procedure enacted by the 60th Legislature or any subsequent legislature.[131] Because Article 42.03, section 1(b) was enacted by the 76th Legislature,[132] the Code Construction Act should be used when interpreting Article 42.03, section 1(b). Section 311.016 of the Code Construction Act states that "shall" imposes a duty unless the context in which the word appears necessarily requires a different construction or unless a different construction is expressly provided by statute.[133] Based on this rule of construction, the word "shall" in Article 42.03, section 1(b) should be interpreted to mean that Article 42.03, section 1(b) is a mandatory provision, imposing a duty on courts to allow victim allocution statements. Despite the guidance given by the Code Construction Act on the interpretation of the word "shall," Texas case law has commented further on the effect of the word.

The general rule established by case law on the interpretation of the word "shall" is that it is imperative or mandatory and should be interpreted as such unless the legislative intent suggests that a permissive (or directory) meaning was intended.[134] "In determining whether the Legislature intended a provision to be mandatory or directory, we consider the plain meaning of the words used, as well as the entire act, its nature and object, and the consequences that would follow from each construction."[135]

The ordinary meaning of the word "shall" has been held to be imperative.[136] This "*requires* the performance of the act that is to be

131. TEX. GOV'T CODE ANN. § 311.002 (Vernon Supp. 2001).

132. *See* TEX. CODE CRIM. PROC. ANN. art. 42.03, § 1(b) (Vernon Supp. 2001).

133. TEX. GOV'T CODE ANN. § 311.016(2) (Vernon Supp. 2000).

134. Albertson's, Inc. v. Sinclair, 984 S.W.2d 958, 961 (Tex. 1999). "We generally construe the word 'shall' as mandatory . . . ." *Id.* (citing Schepps v. Presbyterian Hosp. of Dallas, 652 S.W.2d 934, 936 (Tex. 1983). *See also Hart*, 917 S.W.2d at 781 ("[W]e have noted that the Legislature's use of the word 'shall' in a statute generally indicates the mandatory character of the provision."); *Wright*, 867 S.W.2d at 868 ("The ordinary meaning of 'shall' or 'must' is of a mandatory effect . . . . "); *Harris County Appraisal Dist.*, 795 S.W.2d at 41 ("The ordinary meaning of 'shall' or 'must' is a mandatory effect."); Balios v. Tex. Dep't of Pub. Safety, 733 S.W.2d 308, 310 (Tex. App.—Amarillo 1987, writ ref'd) ("['Shall'] is an imperative term, by ordinary meaning, and requires the performance of the act that is to be performed . . . . Thus, it should be treated as a mandatory term." (citations omitted)). *But see Lewis*, 540 S.W.2d at 311 (holding 'shall' was permissive); *In re* J.L.W., 919 S.W.2d at 843 (holding 'shall' was not mandatory); *Hunt*, 631 S.W.2d at 550 (holding 'shall' is often directory).

135. *Albertson's*, 984 S.W.2d at 961 (citing *Schepps*, 652 S.W.2d at 936).

136. *Balios*, 733 S.W.2d at 310 (citing BLACK'S LAW DICTIONARY 1233 (5th ed. 1979)).

performed."[137] Therefore, the plain meaning doctrine supports a mandatory construction of Article 42.03, section 1(b). Moreover, the statute was placed in the sentencing guidelines, in which the pronouncement of sentence is ministerial.[138] This would also suggest that Article 42.03, section 1(b) is mandatory and not discretionary. Next, the nature and object of this statute is to provide victims with an opportunity to participate if *they* choose.[139] Therefore, a construction of the statute as permissive would be contrary to the purpose of the legislature. For these reasons, it is apparent that the legislature intended the statute to be mandatory.

Further support for this construction can be gleaned from the legislative history. Representative Pete Gallego, explained to the House Committee on Criminal Jurisprudence the intricacies of the bill and addressed the use of the word "shall."[140] In his explanation, Gallego stated that if a victim wants to make a statement, then the court *shall* permit the statement; however, victims are not *required* to make statements.[141] He made it very clear that victims will decide, not the court.[142] Gallego also explained that those victims who are notified of the proceeding and of their right to make a statement but do not show up, essentially waive their right to make a statement.[143]

Consequently, there is an absence of evidence suggesting any intent to make Article 42.03, section 1(b) permissive, and strong evidence supporting a mandatory construction.[144] However, Texas courts have interpreted the word "shall" to be permissive in the past,[145] therefore

137. *Id.* (citing Inwood N. Homeowner's Ass'n, Inc. v. Meier, 625 S.W.2d 742, 743–44 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ) and People v. O'Rourke, 13 P.2d 989, 992 (Cal. Dist. Ct. App. 1932)).

138. *See Hearings on Tex. H.B. 520 Before the House Comm. on Crim. Juris.*, 72d Leg., R.S. (Feb. 26, 1991) (tapes available from House Committee Services). *Id.* (Mar. 5, 1991).

139. *See Debate on Tex. H.B. 520 Before the Senate Comm. on Crim. Justice*, 72 Leg., R.S. (May 21, 1991) (tapes available from the Senate Staff Services Office).

140. *See generally Hearings on Tex. H.B. 520* (Feb. 26, 1991).

141. *See id.*

142. *Id.*

143. *Id.* (responding to Representative Ovar's question, "[s]o basically, they waive their own right if they don't show," Representative Gallego stated, "[t]hat's right").

144. Further support for a mandatory interpretation of the Texas statute lies in determinations that the federal right of victim allocution is mandatory. *See* United States v. Tucker, 104 F.3d 352 (2nd Cir. 1996) (unpublished table decision), *available at* 1996 WL 629737, at *2 (2d Cir. Oct. 31, 1996) ("Rule 32(c)(3)(E) of the Federal Rules of Criminal Procedure requires judges to address the victims of violent crimes directly and allow them to make a statement."); United States v. Smith, 893 F. Supp. 187, 188 (E.D.N.Y. 1995) ("When sentence is to be imposed for a crime of violence, the court must permit the victim to speak."). *See also* United States v. Martinez, 978 F. Supp. 1442, 1452 (D.N.M. 1997); United States v. Naugle, 879 F. Supp. 262, 268 (E.D.N.Y. 1995).

145. *See, e.g.*, Lewis v. Jacksonville Bldg. & Loan Ass'n, 540 S.W.2d 307, 311 (Tex. 1976) (holding "shall" was permissive); *In re* J.L.W., 919 S.W.2d 841, 843 (Tex. App.—El Paso 1996, no writ) (holding "shall" was not mandatory); Hunt v. Heaton,

parties are left to speculate whether the statute is mandatory or permissive until the issue is addressed.[146] Because no determination has been made on the meaning of the word "shall" as it applies in *this* statute, mandamus, as a remedy for the denial of the right of allocution will be discussed under both a mandatory and a permissive construction.

1. Interpretation of "Shall" as Mandatory Means Courts Have a Ministerial Duty to Allow Victim Allocution

Courts have traditionally used mandamus to compel the performance of a ministerial act or duty.[147] The requisites of a common law mandamus action are (1) the legal duty to perform a non-discretionary or "ministerial" act, (2) a demand for performance of the act, and (3) a refusal to perform the act.[148] An act is ministerial, or non-discretionary, when "the law prescribes . . . the duty to be performed [by a judge or official] with such precision and certainty as to leave nothing to the exercise of discretion or judgment."[149] If the basis of the writ is the performance of a legal duty, mandamus will be granted only if the relator[150] shows that he has a clear right to the performance of the duty sought to be enforced.[151] This means a relator must be legally entitled to the requested relief.[152]

If "shall" in Article 42.03, section 1(b) is construed as mandatory, then courts have no discretion in the matter and have a "ministerial duty" to allow victim allocution statements when requested after sentencing. If courts have a ministerial duty to allow victim allocution statements, then mandamus is available as a remedy to victims, like the Lee family, who are denied their right of allocution.

Under the common law test for mandamus above and a mandatory construction of Article 42.03, section 1(b), the Lees would qualify to seek mandamus because (1) the judge had a duty under Article 42.03, section 1(b) to allow Patsy to make her statement, (2) a demand for

631 S.W.2d 549, 550 (Tex. App.—Beaumont 1982) (holding "shall" is often directory), *aff'd*, 643 S.W.2d 677 (Tex. 1982).

146. *See In re* J.L.W., 919 S.W.2d at 844 (Barajas, C.J., concurring).

147. Walker v. Packer, 827 S.W.2d 833, 839 (Tex. 1992).

148. Stoner v. Massey, 586 S.W.2d 843, 846 (Tex. 1979); Dallas County Appraisal Dist. v. Funds Recovery, Inc., 887 S.W.2d 465, 467 n.5 (Tex. App.—Dallas 1994, writ denied); Tex. Dep't of Pub. Safety v. Gilbreath, 842 S.W.2d 408, 413 (Tex. App.—Austin 1992, no writ).

149. State Bar of Tex. v. Heard, 603 S.W.2d 829, 832 (Tex. 1980).

150. If the victim brings an original action seeking a writ of mandamus, the victim will be called the "relator." TEX. R. APP. P. 3.1(f) (Vernon 2000). There is a possibility that the prosecutor may bring the suit for mandamus on behalf of the victim, a possibility that will be discussed later. *See infra* Section V.C.

151. Callahan v. Giles, 155 S.W.2d 793, 795 (Tex. 1941); Ramirez v. Flores, 505 S.W.2d 406, 411 (Tex. Civ. App.—San Antonio 1973, writ ref'd n.r.e.).

152. *See* Fenner v. Brockmoller, 404 S.W.2d 369, 371 (Tex. Civ. App.—El Paso 1966, no writ).

performance was made when the prosecutor asked the judge a second time to allow Patsy to read her statement,[153] and (3) the judge refused.[154]

The test for mandamus is a little different if it is in connection with a criminal matter.[155] Texas case law provides a two-pronged test for appeals courts to use to decide on a writ of mandamus in a criminal matter: "[the relator] must show that he has no other adequate remedy at law and that the act he demands the trial court perform is a ministerial act . . . ."[156] In the event the Lees' case is considered a criminal law matter, the Lees would be able to meet the criminal standard for mandamus because (1) the Lees, as non-parties to the criminal prosecution, have no right to appeal,[157] and (2) they are demanding performance of a ministerial act.

2. Interpretation of "Shall" as Permissive Means Mandamus Is Available Only if a Victim Can Show a Clear Abuse of Discretion with No Adequate Remedy by Appeal

a. *Abuse of Discretion*

An abuse of discretion occurs when an action is "so arbitrary and unreasonable as to amount to a clear and prejudicial error of law."[158] The reviewing court looks at whether the respondent acted clearly "without reference to any guiding rules and principles" or "whether the act was arbitrary or unreasonable."[159] The trial court, however, receives limited deference when mandamus is based on the trial court's interpretation of legal principles.[160] A trial court lacks discretion concerning both the interpretation of the law and the application of the law to the facts.[161] "Because '[a] trial court has no "discretion" in determining what the law is or applying the law to the facts,' erroneous analysis or application of the law 'will constitute an abuse of

153. *See* Lee interviews, *supra* note 95.

154. *Id.*

155. The issue may arise as to whether the suggested suit is criminal or civil. *See* Houston Chronicle Publ'g Co. v. Woods, 949 S.W.2d 492, 495 (Tex. App.—Beaumont 1997, no writ) (differentiating criminal law and civil matters to decide if the court had jurisdiction to hear the case).

156. De Leon v. Pennington, 759 S.W.2d 201, 202 (Tex. App.—San Antonio 1988, no writ).

157. *See* Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973) ("[A] citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution. [A] private citizen lacks a judicially cognizable interest in the prosecution or non-prosecution of another."); *see also* TEX. R. APP. P. 3.2 (Vernon 2000).

158. Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 917 (Tex. 1985).

159. Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 241–42 (Tex. 1985) (citation omitted).

160. Granada Corp. v. First Court of Appeals, 844 S.W.2d 223, 255 (Tex. 1992).

161. Mitchell Energy Corp. v. Ashworth, 943 S.W.2d 436, 437 (Tex. 1997); Trans-American Natural Gas Corp. v. Flores, 870 S.W.2d 10, 12 (Tex. 1994); Walker v. Packer, 827 S.W.2d 833, 840 (Tex. 1992).

discretion, and may result in appellate reversal by extraordinary writ.'"[162]

b. *No Adequate Remedy by Appeal*

As a relator seeking a writ of mandamus, a victim must show that he has no adequate remedy by appeal.[163] Only parties to a suit have the right to appeal;[164] thus, the only people who have a right to appeal a decision made during a criminal prosecution are the defendant and the prosecutor.[165] A victim is not a party to the action and therefore has no right to appeal, even when his statutory rights are not enforced.

If the word "shall" is construed as permissive, then courts will have discretion in allowing victims' allocution statements. This means mandamus would only be available to victims who have had their right of allocution denied and can prove the court abused its discretion—a high standard to meet.

Under the permissive interpretation of Article 42.03, section 1(b), the Lee family, as non-parties to the action, could easily establish that they have no adequate remedy by appeal because it has been determined that they, as non-parties, have no right to appeal.[166] To prove abuse of discretion, the Lees would have to argue that the reasons the judge gave to justify his decision were unreasonable and arbitrary. The reasons given included: (1) the defendant had received the maximum sentence under the law, and (2) the judge was concerned with the defendant's emotional state.[167] Because Article 42.03, section 1(b) was enacted to give the victim a therapeutic opportunity to participate,[168] it is unlikely that (1) the assessment of a maximum sentence, or (2) the immeasurable emotions of the defendant would be determined to be factors a court may consider when deciding whether a victim will be allowed to make a statement. It is therefore arguable that the Lees could succeed even under this stringent standard.

C. *Proper Legislation Could Prevent Victims' Rights Violations*

While mandamus is one method of self-help for victims, mandamus is only available *after* a victim has been denied his rights and become a victim of the criminal justice system. The Texas Legislature needs to enact enforcement procedures that seek to *prevent* the violation of

162. *Granada Corp.*, 844 S.W.2d at 226 (quoting *Walker*, 827 S.W.2d at 840).

163. Canadian Helicopters Ltd. v. Wittig, 876 S.W.2d 304, 305 (Tex. 1994).

164. *See* TEX. R. APP. P. 3.1, 3.2 (Vernon 2000).

165. *See id.* 3.2.

166. *See* Houston Chronicle Publ'g Co. v. Woods, 949 S.W.2d 492, 496 (Tex. App.—Beaumont 1997, no writ).

167. Lee interviews, *supra* note 95; *see also supra* note 110 and accompanying text.

168. *Debate on Tex. H.B. 520 Before the Senate Comm. on Crim. Justice*, 72 Leg., R.S. (May 21, 1991) (tapes available from the Senate Staff Services Office) (quoting Judge Chuck Miller, Texas Court of Criminal Appeals, noting that the opportunity to speak is "therapeutic for the victim[s]").

victims' rights, as the state of Wisconsin recently did when it enacted a statute that imposes a civil penalty on those who fail to enforce victims' rights.[169] Texas crime victims should not become victims of the criminal justice system—*they have already been through enough.*

VI. CONCLUSION

The Texas Constitution, in the Victims' Bill of Rights, provides that crime victims have "the right to be treated with fairness and with respect for the victim's dignity and privacy throughout the criminal justice process."[170] Fairness and respect cannot be found in a system of justice that overlooks victims' rights and fails to make anyone accountable for outright denials of those rights.

The Texas Legislature has also given crime victims the statutory right to make an allocution statement. Because victims are non-parties and cannot thereby protect themselves, it is up to prosecutors and judges to see that victims' rights are enforced. Otherwise, victims will continue to be victimized by the very system that is supposed to protect their interests. Victims can no longer be silenced and any attempt to silence or exclude victims only pours salt in their wounds. Victims and surviving family members have been given the right to speak and it must be respected. Victims earned it when the defendant stole their right to be free from harm, and the parent of a murdered child earned it when they buried their child. No one should take this right from them. If, however, victims find that this right is overlooked or denied, they do not have to remain silent—they can seek an order of mandamus, stand up, and demand to be heard.

Nikki Morton

> "A culture of murder now surrounds us, like a dark, poisonous fog. By looking at the victims of murder and listening to their survivors, we may find a way out."[171]
>
> —Dedicated to the memory of Melinda Ann Lee
> (6/9/74 - 12/7/94)

169. The state of Wisconsin enacted a new compliance procedure imposing a forfeiture of $1,000 on any public official, employee, or agency that intentionally fails to provide a victim his or her statutory rights. *See* WIS. STAT. ANN. § 950.11 (West Supp. 1999). But see WIS. STAT. ANN. § 950.10 (West Supp. 1999), for the general exemption from liability.

170. TEX. CONST. art. I, § 30(a)(1).

171. Schlosser, *supra* note 15, at 39.

APPENDIX

I. VICTIM ALLOCUTION STATEMENT OF PATSY LEE:

July 28, 1995

Honorable John R. McFall
Judge, 237th District Court
Lubbock County Courthouse
904 Broadway
Lubbock, Texas 79401

Your Honor:

I have prayed long and hard for the strength and courage to be here today. It is extremely difficult for me, but as Melinda's mother, it is something I must do.

I want Wayland Lamb to know what a precious life he had destroyed and what he has done to our lives.

I wake up every morning and before I get out of bed, there is that awful dread already gnawing at me. Most days are almost unbearable. I try staying busy, but my concentration is gone. When I go to bed at night, it is with a heavy heart and usually with tears in my eyes.

I was told that time would ease the pain. Melinda has been dead eight months and twenty days. The pain and devastation grow as the days go by.

I lost my mother six years ago. I am an only child and we were very close, but burying a child is another dimension.

I read in a publication from MADD recently that you bury your parents in the cemetery and you bury your child in your heart. That is a powerful statement. Melinda is definitely buried in my heart.

I read another article that said the true measure of a person is not power, prominence or prosperity. The true measure of a person is the mark that person leaves behind. It is that mark I cling to help me get through the days and nights.

I don't think there will ever be joy, happiness, or peace in my life again. God helped me have tremendous strength when Melinda spent those fifty-four days in the Surgical Intensive Care Unit at University Medical Center and then through the events that followed her death. I am now very fragile.

I understand when bodies wear out with age or when disease can't be cured, but this death was Wayland Lamb's fault.

Melinda was a gift given to us temporarily, before being maliciously snatched away. The death Melinda faced was violent. We will never see her face again, touch her hair, hear her singing or laughing or talking, or see those

sparkling emerald green eyes and that ever present smile. She had such a sense of humor and a mischievous nature, a zest for life that I have seldom seen before, and a quick mind. I weep often for the wasteful taking of her life.

Melinda and I had a special bond. We were very close and spent a lot of time together.

I never remember a day not telling her I loved her until she came here to Texas Tech. Then I would tell her during our frequent telephone conversations. I would also tell her frequently how proud I was of her. From that standpoint, I have no regrets.

Melinda was an achiever. She was going places. She would have made quite a mark on this world. She was a junior at Texas Tech. She had made a career decision to pursue a Business Degree with a major in marketing. She was so excited about life in general. She had been elected to the Golden Key National Honor Society. She was a member of Alphi [sic] Chi Omega Sorority where she was their house manager. She was a member of Pi Sigma Beta Business Fraternity and the Texas Marketing Association.

Melinda's life was stolen in a few brief seconds. It haunts me that she will never experience life as an adult. Her dreams were cruelly and senselessly taken from her and from us. Our dreams of watching her graduate from college, have a career, hold her children in our arms are forever gone.

Melinda had quite an impact on the people that knew her. She was mature beyond her twenty years. She had always been mature, even as a child.

Melinda had fun and enjoyed life. When it was time to study, she knew how to apply herself. Her grades reflected that.

Melinda endured fifty-four days in the Surgical Invensive [sic] Care Unit at University Medical Center, never off the critical list. She had five surgeries. After her first surgery that lasted 13 1/2 hours, the next morning she was giving us a thumbs up sign with her right hand, the only part of her body that could move. She was never able to eat food and never able to speak. All the positive qualities she possessed came across to the staff, her faithful friends, and her family. For a person that was unable to speak a word, she made quite an impact. She fought hard. Her doctor called her "West Texas Tough" even though she was from Dallas. She wrote us notes but never complained in those notes. A couple of her first notes were about schoolwork and an upcoming accounting test she was worried about missing.

One of Melinda's nurses returned to God because of Melinda. Another explained the compassion she learned from Melinda and how she was better able to care for other patients because of that. Not many of us could have this impact at the age of twenty, much less flat on our backs unable to speak. This earth became a dimmer place the day Melinda died, but Heaven became

much brighter. I died that same day, but I have to exist on this earth with her in my heart.

Now that this trial is over, I will go back to Dallas. The people in Lubbock are stuck with Wayland Lamb and could be his next victims.

No matter how "all-together" a person is, recovering from a traumatic and unexpected death requires patience and hard work. It is difficult to feel good about myself and be hopeful about the rest of my life. Wayland Lamb not only destroyed Melinda, but damaged the part of me that was previously confident and carefree.

I realize my life is not quite as bright. My values have changed. By having experienced trauma, I may be able to look at life and keep it in perspective better than other people.

A child is a parent's most enduring legacy. Melinda and our other daughter were our contributions to the future.

[Signed Patsy C. Lee]
Patsy C. Lee
Melinda Lee's Mother