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# The Elevation of Victims' Rights in Washington State: Constitutional Status

Ken Eikenberry\*

## I. INTRODUCTION

The pendulum in American law is finally beginning to swing back toward crime victims. Crime victims are regaining their rightful positions in the criminal justice system which, for too long, has ignored their importance.

A crime committed upon an individual often has serious repercussions. The victim's anguish following an attack may continue for years and can be compounded by the way in which the victim is treated by the criminal justice system.<sup>1</sup> In the past, this system too often ignored the victim's personal needs, while the person accused of committing a crime was guaranteed numerous safeguards by federal and state constitutions.

The cooperation of victims in reporting crimes to the police and in testifying for prosecutors is critical.<sup>2</sup> However, until recent-

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1. Gittler, *Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems*, 11 PEPPERDINE L. REV. 117, 117 (1984) (noting that "[t]he victims of crime are truly the forgotten people in the American criminal justice system and are all too often victimized twice—first by the crime and then by the system").

2. PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT vi (Dec. 1982) [hereinafter FINAL REPORT]. "The American criminal justice system is absolutely dependent on these victims to cooperate. Without the cooperation of victims and witnesses in reporting and testifying about crime, it is impossible in a free society to hold criminals accountable." *Id.*

ly,<sup>3</sup> little or no consideration was provided to their needs.<sup>4</sup> Victims frequently were denied information about the criminal justice process, and they rarely received opportunities to describe the impact of a crime. This lack of consideration, participation, and legal standing left victims feeling confused, frustrated, and angry. Many concluded that the results of criminal prosecutions were unfair.

The Washington State Legislature responded to the victims' needs and attempted to correct the imbalance in the criminal justice system by unanimously passing a resolution to elevate the rights of crime victims to a constitutional status.<sup>5</sup> The voters passed the amendment in November 1989 by a seventy-eight percent majority vote.<sup>6</sup> Its passage places Washington among the handful of states that constitutionally posture the rights of both defendants and victims.<sup>7</sup> Moreover, passage of the amendment grants victims of felonies the right to play a meaningful role in the criminal justice process by providing them guaranteed access to the system.

This article describes the shift brought about by the crime victims' movements and Washington's current crime victims laws. It also analyzes the practical effects of Washington's constitutional amendment.

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3. OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, FOUR YEARS LATER: A REPORT ON THE PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME (May 1986) [hereinafter FOUR YEARS LATER].

4. FINAL REPORT, *supra* note 2, at vii.

5. Wash. S.J. Res. 8200, 51st Leg., 1989 Sess., sponsored by Senators Pullen, Talmadge, Thorsness, Newhouse, Madsen, Rasmussen, Benitz, and Nelson, by request of the Attorney General. The text of the amendment reads:

Effective law enforcement depends on cooperation from victims of crime. To ensure victims a meaningful role in the criminal justice system and to accord them due dignity and respect, victims of crime are hereby granted the following basic and fundamental rights.

Upon notifying the prosecuting attorney, a victim of a crime charged as a felony shall have the right to be informed of and, subject to the discretion of the individual presiding over the trial or court proceedings, attend trial and all other court proceedings the defendant has the right to attend, and to make a statement at sentencing and at any proceeding where the defendant's release is considered, subject to the same rules of procedure which govern the defendant's rights. In the event the victim is deceased, incompetent, a minor, or otherwise unavailable, the prosecuting attorney may identify a representative to appear to exercise the victim's rights. This provision shall not constitute a basis for error in favor of a defendant in a criminal proceeding nor a basis for providing a victim or the victim's representative with court appointed counsel.

*Id.*

6. Letter from Mary E. Fairhurst, Assistant Attorney General of Washington, to Beverly A. Reid (Dec. 12, 1989).

7. State constitutions with similar provisions include: CAL. CONST. art. I, § 28; FLA. CONST. art. I, § 16(b); MICH. CONST. art. I, § 24; R.I. CONST. art. I, § 23.

## II. THE VICTIMS' RIGHTS MOVEMENT: ORIGINS THROUGH THE PRESENT

Although an in-depth historical analysis is beyond the scope of this article, a brief review of the history of the victims' involvement in our criminal justice system, the victims' gradual exclusion from that system, and the subsequent growth of the victims' rights movement will provide a useful context in which to consider Washington's constitutional amendment.

### A. *History of the Victim's Involvement in the Criminal Justice System*

The origins of our criminal justice system can be traced to the evolution of the English system.<sup>8</sup> In the middle ages, victims engaged in primitive blood feuds with their criminal offenders.<sup>9</sup> The crime victim organized a group, often comprised of family and friends, to track down the criminal. When caught, the criminal was physically punished and ordered to pay restitution to the victim.<sup>10</sup>

A more civilized system of criminal law emerged during the eleventh and twelfth centuries.<sup>11</sup> To maintain the "king's peace," representatives of the king sometimes participated in both charging and hearing criminal cases. Nevertheless, victims generally retained the role of the prosecutor. The victim, not the king, was seen as the object of the crime. Later, a mechanism for public prosecutions was established, but victims never were denied the right to initiate their own proceedings.<sup>12</sup> Private prosecution continued in England through the middle of the nineteenth century.<sup>13</sup>

At the time of the American Revolution, the colonies were settled largely by the English, who brought with them English legal traditions. These traditions included the criminal law process of private prosecution.<sup>14</sup> During this period, the American criminal system began to diverge from the English model, and public prosecution gradually replaced private prosecution in America. Crime came to be seen

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8. For discussions of the historical role of victims in the evolution of the criminal justice system, see Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL'Y 357, 359-72 (1986); Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 938-42 (1985).

9. Henderson, *supra* note 8, at 938-39.

10. Cardenas, *supra* note 8, at 359.

11. *Id.*

12. *Id.* at 359-60.

13. *Id.* at 360.

14. Gittler, *supra* note 1, at 125-26.

as an offense against society rather than the individual, and criminal prosecutions became the province of public prosecutors.<sup>15</sup>

Victims gradually were excluded from meaningful participation in the criminal justice process. Soon victims were relegated to the roles of reporting crimes to police and serving as witnesses.<sup>16</sup> The inevitable result was the alienation of many victims from the criminal justice system designed to protect them.<sup>17</sup> Rather than viewing the system as responsive, victims came to view it as indifferent. This perceived indifference resulted in a decrease in the number of crime victims willing to cooperate with law enforcement officials.<sup>18</sup> In some instances, the victims' noncooperation has been the primary reason for the dismissal of criminal cases.<sup>19</sup> The criminal justice system's failure to address the victims' needs has spawned the Victims' Rights Movement.

### *B. Emergence of the Victims' Rights Movement*

Although it is difficult to pinpoint the beginning of the Victims' Rights Movement,<sup>20</sup> numerous developments chart its growth. Victimology emerged as a science in the 1940s and 1950s,<sup>21</sup> and, by the late 1950s, international discussion focused on proposals to compensate victims of crime.<sup>22</sup> In 1965, California became the first state to provide such compensation,<sup>23</sup> and today, the federal government, forty-four additional states, the District of Columbia, and the Virgin Islands have established some type of crime victim compensation program.<sup>24</sup>

In the 1970s, the crime rate continued to rise.<sup>25</sup> Many Americans became increasingly frustrated with the criminal justice system, which granted the accused a host of rights while apparently overlooking the victim.<sup>26</sup> Specifically, the courts emphasized rehabilita-

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15. *Id.* at 126-32.

16. Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L.J. 515, 519 (1982).

17. Carrington & Nicholson, *The Victims' Movement: An Idea Whose Time Has Come*, 11 PEPPERDINE L. REV. 1, 4-5 (1984).

18. Cardenas, *supra* note 8, at 357-58; Goldstein, *supra* note 16, at 515, 518.

19. Goldstein, *supra* note 16, at 518; Kelly, *Victims' Perception of Criminal Justice*, 11 PEPPERDINE L. REV. 15, 15-16 (1984).

20. For an excellent discussion of the origins of the Victims' Rights Movement, see Carrington & Nicholson, *supra* note 16; Gittler, *supra* note 1, at 117-25; Henderson, *supra* note 8, at 938-42. For a brief overview of the growth of the Victim's Right Movement, see Comment, *The Victim's Veto: A Way to Increase Victim Impact on Criminal Case Dispositions*, 77 CALIF. L. REV. 417, 422-25 (1989).

21. Comment, *supra* note 20, at 423.

22. *Id.*

23. Carrington & Nicholson, *supra* note 17, at 2.

24. Mertz, *The Illusion of Victim Rights*, STUDENT LAW., Mar. 1989, at 18.

25. Henderson, *supra* note 8, at 948.

26. Goldstein, *supra* note 16, at 518-20.

tion, while recidivism rates suggested its futility.<sup>27</sup> Moreover, the courts disposed of processed cases through plea bargaining,<sup>28</sup> rather than through open court proceedings.

In response, legislatures throughout the country passed tougher sentencing laws, the death penalty was reinstated, and citizens joined together to balance a criminal justice system perceived by many as weighing in the defendant's favor. The women's movement also helped to focus the nation's attention on victims rights by emphasizing the criminal justice system's mistreatment of rape victims.<sup>29</sup> "Mothers Against Drunk Driving" galvanized the nation's concern for victims of drunk drivers.<sup>30</sup> "Parents of Murdered Children" was formed to support parents whose children had been killed.<sup>31</sup>

Shortly after taking office, President Reagan convened a Task Force on Victims of Crime. Its first report, published in 1982, recommended scores of state and federal victim-oriented reforms.<sup>32</sup> It proposed adding language to the sixth amendment to the United States Constitution granting crime victims the right "in every criminal prosecution . . . to be present and to be heard at all critical stages of judicial proceedings."<sup>33</sup>

The next few years witnessed the birth of victim assistance programs at state and local levels.<sup>34</sup> The President, governors, and state officials proclaimed an annual "Crime Victims Week."<sup>35</sup> Forty-four

27. Comment, *supra* note 20, at 422 n.19. "Public awareness of the failure of rehabilitation is evident from recent public opinion data. In 1970, 73% of Americans felt that rehabilitation should be the main emphasis in prisons. By 1982, that figure had declined to 44%." *Id.* (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1983, 261 (1984)).

28. Mertz, *supra* note 24, at 22. "Nearly 90 percent of all criminal cases are resolved through plea bargaining." *Id.* (citing D. AUSTERN, CRIME VICTIMS HANDBOOK (1987)); see Goldstein, *supra* note 16, at 519. Goldstein explains that:

The victim has been left to play a distinctly secondary role. He reports crimes to public officials and leaves it to them to decide whether offenders should be prosecuted and punished. His injury becomes the occasion for a public cause of action, but he has no 'standing' to compel prosecution of the crime against him or to contest decisions to dismiss or reduce the charges or to accept plea bargains.

*Id.* at 519.

29. Henderson, *supra* note 8, at 949.

30. *Id.*

31. *Id.* at 950.

32. See generally FINAL REPORT, *supra* note 2.

33. *Id.* at 114.

34. Carrington & Nicholson, *supra* note 17, at 2.

35. *Id.* at 2-3.

states passed legislation, often labeled the crime victims' "Bill of Rights."<sup>36</sup> Typical statutory components included provisions "mandating victim impact statements at sentencing, assuring the prompt return of seized property, protecting victims from intimidation and harassment, and providing victim restitution."<sup>37</sup>

In 1986, the United States Department of Justice issued a follow-up report on the recommendations of the President's Task Force.<sup>38</sup> This report found that many of the recommendations had been implemented.<sup>39</sup> Meanwhile, Congress addressed several crime victims' concerns by enacting the Victim and Witness Protection Act of 1982,<sup>40</sup> the Comprehensive Crime Control Act of 1984,<sup>41</sup> and the Victims of Crime Act.<sup>42</sup> Currently, victims' rights advocates are focusing their efforts on amending state constitutions to include victims' rights.<sup>43</sup>

### III. WASHINGTON'S CURRENT CRIME VICTIMS LAWS

Washington has been in the forefront of the victim's rights movement. The state's legislature enacted the Crime Victim Compensation Program in 1973<sup>44</sup> and the crime victims' "Bill of Rights" in 1985.<sup>45</sup>

The compensation program's purpose is to provide innocent victims with medical services, payments for lost wages, lump-sum payments

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36. VICTIMS' CONSTITUTIONAL AMENDMENT NETWORK, STRATEGIES FOR ACTION 48 (July, 1988) (citing National Organization For Victim Assistance, November 1987).

37. Comment, *supra* note 20, at 424; see also Comment, *The Victims' Rights Act of 1988, the Florida Constitution, and the New Struggle for Victims' Rights*, 16 FLA. ST. U.L. REV. 811, 812 (1988). "The typical 'Bill of Rights' protects victims and witnesses against intimidation, and guarantees crime victims the right to be informed of the existence of compensation and assistance programs, to be notified of the status of investigations and trial proceedings, and to participate in criminal proceedings involving the offender." *Id.* (citing Anderson & Woodard, *Victim and Witness Assistance: New State Laws and the System's Response*, 68 JUDICATURE 221, 228-31 (1985)).

38. See FOUR YEARS LATER, *supra* note 3.

39. *Id.* at iii.

40. Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (codified as amended at 18 U.S.C. §§ 1512-1515, 3579-3580 (Supp. IV 1986 and FED. R. CRIM. P. 32(c)(2))). This Act "protects victims from intimidation and harassment by making it a crime to threaten them or retaliate against them." Comment, *supra* note 20, at 424.

41. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. 2, 98 Stat. 1976 (codified as amended in scattered sections of Titles 18 and 42 of the United States Code). The Act "contains several victim-oriented provisions, including the Bail Reform Act, which provides that an accused criminal's dangerousness to the community may be considered at bail hearings." Comment, *supra* note 20, at 424.

42. Victims of Crime Act of 1984, 42 U.S.C. § 10602(a)(1) (Supp. IV 1986). The Act established a fund which matches "thirty-five percent of the amounts paid by states in victim compensation awards." Comment, *supra* note 20, at 424.

43. Mertz, *supra* note 24, at 17.

44. WASH. REV. CODE ANN. § 7.68 (Supp. 1989).

45. *Id.* § 7.69 (1985 & Supp. 1989).

for permanent disabilities, and other services for injuries resulting from violent crime. The crime victims' Bill of Rights is designed to grant victims and survivors of crime a more significant role in the criminal justice system, ensure that they are treated with dignity, and guarantee that personal rights are "honored and protected by law enforcement agencies, prosecutors, and judges in a manner no less vigorous than the protection afforded criminal defendants."<sup>46</sup>

While the compensation fund and the crime victims' Bill of Rights provide a statutory base for monetary benefits and meaningful involvement in the criminal justice system, this base must be strengthened if victims' rights are to be guaranteed. Both statutes are necessary, but neither is sufficient.

For example, the crime victims' Bill of Rights states that "[t]here shall be a reasonable effort made to ensure that victims, survivors of victims, and witnesses of crimes"<sup>47</sup> receive the rights enumerated in the statute. Rights subject to reasonable effort are less than guaran-

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46. *Id.* § 7.69.010. Section 7.69.030 sets forth the rights of victims, survivors, and witnesses in pertinent part as follows:

- (1) to be informed by local law enforcement agencies or the prosecuting attorney of the final disposition of the case in which the victim, survivors, or witness is involved;
- (2) to be notified by the party who issued the subpoena that a court proceeding to which they have been subpoenaed will not occur as scheduled, in order to save the person an unnecessary trip to court;
- (3) to receive protection from harm and threats of harm arising out of cooperation with law enforcement and prosecution efforts, and to be provided with information as to the level of protection available;
- ....
- (5) to be provided, whenever practical, a secure waiting area during court proceedings that does not require them to be in close proximity to defendants and family or friends of defendants;
- ....
- (9) With respect to victims and survivors of victims, to be physically present in court during trial, or if subpoenaed to testify, to be scheduled as early as practical in the proceedings in order to be physically present during trial after testifying and not to be excluded solely because they have testified;
- ....
- (11) to submit a victim impact statement or report to the courts, with the assistance of the prosecuting attorney if requested, which shall be included in the files and records accompanying the offender committed to the custody of a state agency or institution;
- (12) With respect to victims and survivors of victims, to present a statement personally or by representation at the sentencing hearing for felony convictions . . . .

*Id.* § 7.69.030.

47. *Id.* § 7.69.030 (Supp. 1989).



teed rights. Reasonable effort is undefined<sup>48</sup> and, thus, efforts made on behalf of some victims may be less than those made on behalf of others.

Similarly, crime victims who submit claims under the compensation fund program are not assured benefits. Although the compensation fund originally was designed and implemented as an entitlement program patterned after the state's workers' compensation program, serious funding problems motivated the legislature to alter the fund significantly. Today, victims must meet more narrow eligibility criteria,<sup>49</sup> thus substantially limiting the benefits victims can receive under the revised program.

The recent retrenchment of victims' statutory rights to compensation, and the broad discretion of prosecutors, judges, and police officers over victim involvement in the criminal justice system underscore the need for victims' rights to receive constitutional status. Statutes are more easily enacted and eviscerated than constitutional mandates. Victims' statutory rights are only as secure as the political will of the state legislators.<sup>50</sup>

In contrast, the defendants' rights are secure. Changes in the composition of state legislatures do not affect them, nor do the budgetary constraints of local prosecutors or crowded court dockets. The defendants' rights are constitutionally guaranteed. The victims' statutory rights have thus been subordinated to the defendants' constitutional rights and to the concerns of some prosecutors, judges, and law enforcement officials processing large volumes of cases. The proposed amendment to Washington's Constitution will enhance the criminal justice system's overall fairness by guaranteeing victims a meaningful role and according them due dignity and respect,<sup>51</sup> while leaving defendants' constitutional rights intact.

#### IV. WASHINGTON'S CONSTITUTIONAL AMENDMENT

##### A. *The Major Provisions and Objectives of the Amendment*

Washington's constitutional amendment guarantees three major rights to victims of felony crimes: (1) the right to be informed of

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48. *Id.* § 7.69.020.

49. *Id.* § 7.68.070.

50. Moss, *New Tack for Victims' Rights*, A.B.A. J., Mar. 1, 1988, at 32. "There is no mechanism by which any legislation is required to be enforced," said Bob Preston of Justice for Surviving Victims in Lighthouse Point, Fla. "All this wonderful legislation is just poetry at this time." *Id.*

51. Wash. S.J. Res. 8200, 51st Leg., 1989 Sess. The proposed amendment contains the following preamble: "Effective law enforcement depends on cooperation from victims of crime. To ensure victims a meaningful role in the criminal justice system and to accord them due dignity and respect, victims of crime are hereby granted the following basic and fundamental rights." *Id.*

court proceedings; (2) the right to attend court proceedings, subject to the discretion of the presiding individual; and (3) the right to make a statement at sentencing and at proceedings in which the defendant's release is under consideration.<sup>52</sup> Additionally, the amendment provides that: (1) the prosecutor may identify a representative to exercise the victim's rights under certain circumstances; (2) the above provisions will not provide a basis for error in favor of defendants; and (3) the above provisions will not provide victims with court-appointed counsel.<sup>53</sup>

The amendment has practical and symbolic effects. First, it confers on crime victims the essential rights of participation. Second, it increases the victims' access to the criminal justice system by granting them an opportunity to see and hear how their cases are handled and to have their concerns heard by decision-makers. Third, it provides a secure base for victims' rights by removing these rights from the political sphere. Symbolically, it places victims on an equal constitutional footing with defendants.

Two characteristics of the amendment deserve special note: first, it leaves intact the constitutional protection guaranteed to defendants; and, second, it limits the discretion of judges and prosecutors while retaining the flexibility necessary for the criminal justice system to function fairly and efficiently.

### *B. Practical Applications: Clause-by-Clause Analysis*

While a primary objective of the amendment is to raise the status of victims in the criminal justice system by affording them constitutionally guaranteed rights, the amendment also provides a framework for the application of those rights. The following clause-by-clause analysis of the amendment explores those practical applications and discusses their effects on the various actors in the criminal justice process.

#### 1. The Victim Must First Notify the Prosecutor

The constitutional amendment grants victims of felony crimes specific rights. However, a victim may often only exercise these rights "[u]pon notifying the prosecuting attorney."<sup>54</sup> This notification clause provides that victims have the initial responsibility of inform-

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52. *Id.*

53. *Id.*

54. *Id.*

ing the prosecutor's office that they want to be involved in the legal proceedings regarding their case. Without notification of such intent, the victims' constitutional rights are neither effective nor enforceable. Thus, it is critical that victims who wish to exercise their constitutional rights notify the prosecutor.

The constitutional amendment does not require that victims become involved in the criminal proceedings or exercise their rights. For example, victims may decline to participate in criminal proceedings when they believe such participation would delay or interfere with the healing process following the trauma of victimization.<sup>55</sup> The constitutional amendment does not state who must inform victims of their constitutional rights. The crime victims' "Bill of Rights" does require a reasonable effort to notify all victims.<sup>56</sup> If victims are not informed of their rights, they may unwittingly forfeit them.

Police departments are likely sources of information for crime victims regarding their constitutional rights and duties, because police officers often are the first representatives of the criminal justice system to interact with the victims. Other possible sources of information include hospital personnel, crisis intervention centers, and shelters for the abused.

## 2. The Crime Must be Charged as a Felony

Under the amendment, the victims' constitutional rights accrue only to the "victim of a crime charged as a felony."<sup>57</sup> This clause has two effects. First, the victims' constitutional rights do not become effective until a decision is made and formally entered, charging the alleged offender with a criminal violation. Thus, victims have no constitutionally guaranteed access to the criminal proceedings that precede formal charging. For example, victims have no constitutional right to attend police lineups. Law enforcement officials, however, may want them to attend.

Second, constitutional rights under the amendment attach to victims of felony crimes only. If a crime is charged as a misdemeanor or a gross misdemeanor, no constitutional guarantees attach. The constitutional amendment places no new responsibilities on prosecutors beyond those already required by statute. However, under Washington's victims' rights statute, reasonable efforts to notify victims of misdemeanor crimes must continue to be made.<sup>58</sup>

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55. For a discussion of victims' mental health concerns and participation in the criminal justice process, see Henderson, *supra* note 8, at 953-64.

56. WASH. REV. CODE ANN. § 7.69.030 (Supp. 1989).

57. Wash. S.J. Res. 8200, 51st Leg., 1989 Sess.

58. WASH. REV. CODE ANN. § 7.69.020(1) (Supp. 1989).

### 3. The Victim Has the Right to be Informed of All Court Proceedings

Under the amendment, victims have the "right to be informed of . . . trial and all other court proceedings the defendant has a right to attend."<sup>59</sup> Thus, they are to receive timely notice of the date, time, and place of trial and all other court proceedings. Other court proceedings include hearings regarding bail, the trial date, suppression of evidence, continuation of trial, sentencing, and probation revocation.

Information regarding the status of court proceedings is meaningful to victims for two reasons. First, because victims are directly harmed by crime, they have a valid interest in knowing about the proceedings.<sup>60</sup> Second, information regarding the offender's sentence or release from custody can alleviate the victim's anxiety and legitimate fear of reprisal.<sup>61</sup>

The constitutional amendment more thoroughly addresses the victims' needs for information than does Washington's present statute. The statute stipulates that a mere reasonable effort must be made to notify the victims.<sup>62</sup> In contrast, the constitutional amendment requires that victims of felonies who have properly notified the prosecutor be informed of trial and other court proceedings.

### 4. The Victim Has the Right to Attend All Court Proceedings

The victim "shall have the right . . . subject to the discretion of the individual presiding over the trial or court proceedings, [to] attend trial and all other court proceedings the defendant has the right to attend."<sup>63</sup> As noted, the amendment's intent is to ensure victims a meaningful role in the criminal justice system. The "right to attend" clause effectuates this intent by granting victims the right to attend trial and all other court proceedings the defendant has a right to attend, subject to the discretion of the presiding judge.<sup>64</sup>

Victims will have the right to attend court proceedings such as hearings, trial, and sentencing. Individuals presiding over such proceedings make crucial decisions affecting the victims' cases, and vic-

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59. Wash. S.J. Res. 8200, 51st Leg., 1989 Sess.

60. FINAL REPORT, *supra* note 2, at 64.

61. *Id.*

62. WASH. REV. CODE ANN. § 7.69.030 (Supp. 1989).

63. Wash S.J. Res. 8200, 51st Leg., 1989 Sess.

64. *Id.*

tims deserve the right to attend, to hear, and to understand the decision-making process.

The amendment does not expand victims' rights to attend noncourt proceedings or proceedings that a defendant does not have the right to attend. Currently, police or prosecutors may ask victims to attend noncourt proceedings such as lineups. The amendment does not affect this practice. Victims still are allowed to attend noncourt proceedings, but only at a law enforcement official's request.

The victims' right to attend court proceedings is subject to the discretion of the presiding officer. In practice, absent extraordinary circumstances, victims will enjoy the right to attend.<sup>65</sup> Defense attorneys and prosecutors, however, often subpoena victims to be witnesses. These victims normally can be excluded from the courtroom until they have testified. This precludes the victims from attending at least part of the trial. If the victims are never called to testify, they would be denied all opportunity to be present.<sup>66</sup>

The amendment changes this scenario. The power of defense attorneys and prosecutors is checked by the individual presiding over the proceedings. If victims are named as witnesses but choose to exercise their rights to attend the proceedings, the individual presiding would balance the arguments and decide whether to allow the victims to attend. The criminal justice system would retain the flexibility to address individual circumstances while protecting the victims' rights.

##### 5. The Victim May Make a Statetment at Any Proceeding Where the Defendant's Release is Considered

This provision expands upon the victims' statutory rights, and allows them to make a statement at any proceeding where the defendant's release is considered. Significantly, such proceedings include both court and administrative hearings. As a result, victims have the

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65. See Colloquy on Wash. S.J. Res. 8200, 51st Leg., 1989 Sess., between Senators Talmadge and Pullen, SENATE JOURNAL 1989 SESSION, Apr. 14, 1989, at 11.558-70 [hereinafter Colloquy].

Senator Talmadge: On page 1, line 34 of the constitutional amendment, it refers to the discretion of the individual presiding at a hearing with regard to the victim's attendance. Does this limit the victim's rights in any respect? Senator Pullen: No, it just states the general rule, that a judge at trial has discretion to control and set limits on behavior and decorum in the courtroom by all persons. Extreme behavior by a victim, defendant or any other person can be controlled by the judge.

*Id.*

66. WASH. REV. CODE ANN. § 7.69.030(9) (Supp. 1989). This section prohibits victims and their survivors from being excluded from the courtroom through the use of this tactic, granting them the right "to be physically present in court during trial, or if subpoenaed to testify, to be scheduled as early as practical in the proceedings in order to be physically present during trial after testifying and not to be excluded solely because they have testified." *Id.*

opportunity to speak not only at sentencing, but also at proceedings regarding bail, work-release, or any other early release from custody. However, victims are not granted the right to make extemporaneous statements, cross-examine witnesses, or otherwise participate as parties to the proceedings.

6. The Victim Shall Enjoy the Same Procedural Rights as the Defendant

This clause elevates victims' procedural rights to the constitutional level currently guaranteed to defendants.<sup>67</sup> If proper procedures are not followed, victims will have grounds for relief. The message to prosecutors, judges, and other participants in the criminal justice system is clear: respect the rights of victims and follow proper procedures to protect these rights.

7. A Representative May Appear on Behalf of the Victim

The amendment provides that "[i]n the event the victim is deceased, incompetent, a minor, or otherwise unavailable, the prosecuting attorney may identify a representative to appear to exercise the victim's rights."<sup>68</sup> This clause grants prosecutors the discretion to identify the most appropriate individual to exercise the victim's constitutional rights. One significant effect of this clause is to prevent individuals from proclaiming themselves a victim's representative, thereby complicating the proceedings and placing added burdens on prosecutors. While the language here is permissive, it is anticipated that the prosecutor normally would appoint a representative.

8. The Defendant May Not Appeal the Victim's Exercise of Rights Under the Amendment and the Victim is Not Guaranteed Court-Appointed Counsel

The amendment states that "[t]his provision shall not constitute a basis for error in favor of a defendant in a criminal proceeding nor a basis for providing a victim or the victim's representative with court appointed counsel."<sup>69</sup> This clause effectively bars the defendants' appeals based upon the victims' exercising of their rights under the amendment.<sup>70</sup> While the amendment does not jeopardize the defend-

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67. Wash. S.J. Res. 8200, 51st Leg., 1989 Sess.

68. *Id.*

69. *Id.*

70. Colloquy, *supra* note 63, at 11.540-56.

ants' constitutional rights, it also does not provide defendants with new avenues of appeal.

In addition, this clause states that the amendment does not constitute a basis for providing victims, or their representatives, with court appointed counsel. It strongly implies, however, that victims have the right to appear with the assistance of counsel. Victims, or their representatives, may choose to retain counsel to protect and represent their rights.

### C. Remedies

Elevating the status of victims' rights to a constitutional level sends a powerful message. The amendment's passage signifies the intent of the populace to accord victims basic rights and due dignity that shall not be diminished by legislative or judicial action. Consequently, participants in the criminal justice system—attorneys, judges, and law enforcement officials—likely will accord victims their rights.

When victims find that their rights have been violated, they will not find specific remedies in the constitutional amendment. However, the constitutional status of victims' rights alone will provide redress. Additionally, Washington might want to consider reasonable remedies to allow enforcement of victims' rights.

A simple declaration to a prosecutor or judge that a victim's rights have been violated may prove sufficient to ensure victim involvement in criminal proceedings. Such declarations have resulted in enforcement of victim rights in states which have elevated victims' rights to the constitutional level.<sup>71</sup> Alternatively, an injunction may prove effective when proceedings have been initiated without first notifying the victim. The injunction can stay a proceeding until victim involvement is obtained, or in the case of a pretrial or post-trial hearing, victims can petition for a rehearing to gain access to the proceedings.

Also, judicial officers who allow victims' rights to be violated can be reported to a judicial conduct commission.<sup>72</sup> Likewise, complaints against deputy prosecutors who do not comply with the amendment's provisions can be registered with their superiors.

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Senator Talmadge: Senator Pullen, Senate Joint Resolution No. 8200, as amended by the House, reads on page 2, line 14, 'This provision shall not constitute a basis for error in favor of a defendant in a criminal proceeding nor a basis for providing a victim or the victim's representative with the court appointed counsel.' Does this sentence provide that no portion of the constitutional amendment shall provide a basis for error in favor of a defendant?  
Senator Pullen: Yes, and in particular to the right of the victim or his representative to attend proceedings and make statements at appropriate times.

*Id.*

71. See *supra* note 7.

72. For a proposal allowing victims denied their rights by judges to report the judges to judicial conduct commissions, see Welling, *Victim Participation in Plea Bargains*, 65 WASH. U.L.Q. 301, 355-56 (1987).

Finally, crime victims may remove their complaints to the political arena. Since judicial officers and prosecutors are elected, victims who are denied their rights by such individuals could raise their complaints publicly, and thus influence election results. These are common legal remedies. Undoubtedly, additional remedies will be advanced by victims and their legal representatives.

#### V. CONCLUSION

In November 1989, the Washington State voters elevated crime victims' rights to constitutional status,<sup>73</sup> thus guaranteeing victims a meaningful role in the criminal justice system and according them basic rights, due dignity, and respect.

Specifically, the amendment guarantees victims the right to be informed of court proceedings, to attend court proceedings subject to the discretion of the presiding individual, and to make a statement at sentencing and at any proceeding in which the defendant's release is considered.

In constitutionally advancing victims' rights under its state constitution, Washington strengthens its commitment to meaningful victim involvement in the criminal justice system. The commitment is total. The integrity of our criminal justice system and the fundamental rights of victims mandate no less.

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73. See *supra* note 6 and accompanying text.



