

12-15-1989

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### Recommended Citation

David L. Roland *Progress in the Victim Reform Movement: No Longer the "Forgotten Victim"*, 17 Pepp. L. Rev. Iss. 1 (1989)

Available at: <https://digitalcommons.pepperdine.edu/plr/vol17/iss1/4>

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# Progress in the Victim Reform Movement: No Longer the "Forgotten Victim"

David L. Roland\*

## I. INTRODUCTION

Historically, crime victims have been forgotten in the criminal justice system. The system, as it evolved, protected the rights of the accused with zeal, while ignoring the victim's plight.<sup>1</sup> In addition to the physical, financial, and emotional trauma caused by the crime itself, the victim often was forced to endure repeated and prolonged questioning, intimidating threats by the accused or his associates, ignorance concerning the status or outcome of the proceeding, lost property or wages, and lack of emotional, financial, and legal support.<sup>2</sup>

In the last two decades, however, there has been an increased pub-

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Research for this article was supported in part through Mothers Against Drunk Driving (MADD). However, the views expressed herein are solely those of the author. The author gratefully acknowledges Anne Conroy for her invaluable assistance in the preparation of this article.

1. Perhaps the principal reason that defendants' rights have progressed at a faster pace and received more attention than victims' rights is that the United States Constitution specifically recognizes and protects rights of the criminally accused. See, e.g., U.S. CONST. amend. VI. In contrast, rights of victims are not specifically protected by the Constitution. See *infra* notes 12-14 and accompanying text.

2. McDonald, *Criminal Justice and the Victim: An Introduction*, in CRIMINAL JUSTICE AND THE VICTIM 17, 19-27 (W. McDonald ed. 1976); P. FINN & B. LEE, SERVING CRIME VICTIMS AND WITNESSES 1-2 (Nat'l Inst. of Justice, U.S. Dep't of Justice 1987). In his 1987 Victims of Crime Week Proclamation, President Reagan focused on the discouraging plight of the victim:

Crime—of any kind—can have a devastating impact on innocent victims and their families. Besides the immediate physical and financial injuries, criminal deeds exact an emotional toll from their victims that can deprive them of their health, their sense of security and control, and even their basic trust in others, the core of our social contract. Many victims desperately and futilely search for the reason a criminal chose them as prey. When they turn to the

lic awareness of the crime victim's problems and needs. By 1980, numerous organizations were advocating and implementing victim assistance programs.<sup>3</sup> In 1981, President Ronald Reagan proclaimed the week of April 19th "National Victims' Rights Week."<sup>4</sup> The growing concern for victims' rights, commonly referred to as the "victims' movement," also prompted President Reagan to establish the President's Task Force on Victims of Crime to examine problems confronted by victims and to suggest improvements in the treatment of victims.<sup>5</sup> In December 1982, the Task Force published its report which included specific proposals that would further the interests of victims and help alleviate the problems encountered by victims when confronting the criminal justice system.<sup>6</sup>

During the same year, Congress passed the Federal Victim and Witness Protection Act of 1982<sup>7</sup> which, among other things, provided for victim restitution, use of victim impact statements at sentencing in federal cases, and victim and witness protection. Two years later, Congress passed the Victims of Crime Act of 1984,<sup>8</sup> which established a victim compensation account funded by fines assessed in federal criminal convictions. As a result of the need for a continuation of these unprecedented achievements in the area of victims' rights, the United States Department of Justice granted funds to the Criminal Justice Section of the American Bar Association to commission a series of articles on victims' rights.<sup>9</sup> Those articles, written by distin-

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wider community for solace and support, they are often ignored, treated insensitively, or, worst of all, blamed for their plight.

Proclamation No. 5638, 3 C.F.R. 50 (1987). For an extensive discussion of the role of the victim through a historical perspective, see S. SCHAFFER, *VICTIMOLOGY: THE VICTIM AND HIS CRIMINAL* 5-29 (1977).

3. Examples of victim assistance programs include: National Organization for Victims Assistance (NOVA), Sunny Von Bulow National Victim Advocacy Center, National Victims of Crime, and Mothers Against Drunk Driving (MADD).

4. Proclamation No. 4831, 3 C.F.R. 18 (1982). The President has proclaimed a Crime Victims Week annually since 1981. See, e.g., Proclamation No. 5797, 53 Fed. Reg. 13,094 (1988); Proclamation No. 5638, 3 C.F.R. 50-51 (1987).

5. The members of the Task Force included: Lois Haight Herrington, Garfield Bobo, Frank Carrington, James P. Damos, Doris L. Dolan, Kenneth O. Eikenberry, Robert J. Miller, Pat Robertson, and Stanton E. Samenow. See *PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT* (1982) [hereinafter *FINAL REPORT*].

6. *FINAL REPORT*, *supra* note 5.

7. Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (1982) (codified as amended at 18 U.S.C. §§ 1512-1515, 3579-3580 (Supp. IV 1986) and FED. R. CRIM. P. 32(c)(2)). See generally Merritt, *Corrections Law Developments: Restitution Under the Victim and Witness Protection Act of 1982*, 20 CRIM. L. BULL. 44 (1984).

8. Victims of Crime Act of 1984, 42 U.S.C. §§ 10601-10604 (Supp. IV 1986). The fund, known as the Crime Victims Fund, is used to compensate victims of federal crimes and to provide assistance for eligible state victim compensation programs and public and private victim assistance organizations. See *infra* notes 44-51 and accompanying text.

9. Carrington & Nicholson, *The Victims' Movement: An Idea Whose Time Has Come*, 11 PEPPERDINE L. REV. 1, 10-12 (Symposium 1984).

guished scholars in the field, were published in 1984 by the Pepperdine University School of Law in a special symposium edition of the *Pepperdine Law Review*.<sup>10</sup> The articles were intended to present "a comprehensive overview of the law as it currently applies to crime victims' rights, and perhaps to give a preview of possible future developments in the law."<sup>11</sup>

Significant progress has been made in the victims' movement since the symposium issue was published in 1984. The purpose of this article is to present a brief survey of the current law governing victims' rights, concentrating principally on state law. The article also will summarize the major progressions of the victims' movement in a variety of areas.

## II. RECENT LEGISLATIVE AND JUDICIAL REFORM MEASURES

### A. *United States Constitutional Amendment*

In its 1982 report, the President's Task Force recommended that the sixth amendment to the United States Constitution be amended to guarantee victims "the right to be present and to be heard at all critical stages of [criminal] judicial proceedings."<sup>12</sup> To date, however, such a constitutional amendment has not been enacted. Furthermore, in January 1986, the National Organization for Victim Assistance (NOVA) held a conference on the Task Force's recommended amendment. The participants of the conference proposed an alterna-

10. See *Victims' Rights Symposium*, 11 PEPPERDINE L. REV. 1 (Symposium 1984). The commissioned articles include: Aynes, *Constitutional Considerations: Government Responsibility and the Right Not to be a Victim*, 11 PEPPERDINE L. REV. 63 (Symposium 1984); Carrington & Nicholson, *supra* note 9; Gittler, *Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems*, 11 PEPPERDINE L. REV. 117 (Symposium 1984); Hudson, *The Crime Victim and the Criminal Justice System: Time For A Change*, 11 PEPPERDINE L. REV. 23 (Symposium 1984); Kelly, *Victims' Perceptions of Criminal Justice*, 11 PEPPERDINE L. REV. 15 (Symposium 1984).

11. Carrington & Nicholson, *supra* note 9, at 10.

12. See FINAL REPORT, *supra* note 5, at 114. The task force recommended that the sixth amendment be amended to read as follows:

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

*Id.* (emphasis added). For an extensive analysis of the task force proposal, see Lamborn, *Victim Participation in the Criminal Justice Process: The Proposals for a Constitutional Amendment*, 34 WAYNE L. REV. 125, 172-200 (1987).

tive constitutional amendment, but elected not to endorse either version.<sup>13</sup> The participants, however, approved a statement urging members of the federal legislature to introduce legislative resolutions on the issue and to call for subcommittee hearings to study the proposals.<sup>14</sup>

### B. State Constitutional Amendments

Although efforts to pass an amendment to the United States Constitution have been previously unsuccessful, advocates of the victims' rights movement have realized better results by proposing amendments to state constitutions. In 1982, California became the first state to amend its constitution to expressly recognize victims' rights.<sup>15</sup> The amendment, enacted by initiative, specifically provides for a victim's right to restitution,<sup>16</sup> safe schools,<sup>17</sup> consideration of

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13. See NATIONAL ORGANIZATION FOR VICTIM ASSISTANCE, VICTIM RIGHTS AND SERVICES: A LEGISLATIVE DIRECTORY 8 (1987) [hereinafter LEGISLATIVE DIRECTORY]. The conference participants proposed a twenty-seventh amendment to the Constitution:

Victims of crime are entitled to certain basic rights, including but not limited to the right to be informed, to be present, and to be heard at all critical stages of the federal and state criminal justice process to the extent that these rights do not interfere with existing Constitutional rights.

10 NATIONAL ORGANIZATION FOR VICTIM ASSISTANCE NEWSLETTER 7 (Mar. 1986) [hereinafter VICTIM ASSISTANCE NEWSLETTER].

14. VICTIM ASSISTANCE NEWSLETTER, *supra* note 13, at 7. The statement read as follows:

First, having met for two days among ourselves and Congressional Representatives and Aides, we have determined that the time has come for the United States Congress to initiate a Constitutional amendment adopting the principles of the amendment proposed by the President's Task Force on Victims of Crime.

Second, we believe that those principles embody the concept of victim participation in all critical stages of the criminal justice process.

Third, we believe that participants of this conference should urge members of the Senate and the House of Representatives to introduce appropriate legislative resolutions and to call for hearings of the appropriate subcommittees of the House and Senate on this issue.

And fourth, having considered the language of both the President's Task Force Report and a recommended alternative, we believe that through the course of hearings, an appropriately-worded amendment can be obtained.

*Id.*

A third proposal for a constitutional amendment was recommended by the Victims' Constitutional Amendment Network (Victims' CAN). As of May 1987, the Victims' CAN proposal read as follows:

Victims of crime are entitled to certain basic rights, including the right to be informed of, to be present at, and to be heard at all critical stages of the criminal justice process, to the extent that these rights do not interfere with the constitutional rights of the accused. The Legislature is authorized to enforce the amendment by appropriate enabling legislation.

2 SUNNY VON BULOW NATIONAL VICTIM ADVOCACY CENTER, NETWORKS 8 (May 1987).

15. CAL. CONST. art. I, § 28; see *Brosnahan v. Brown*, 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982) (upholding constitutionality of amendment).

16. CAL. CONST. art. I, § 28(b).

public safety when setting bail,<sup>18</sup> and unrestricted admissibility of prior felony convictions.<sup>19</sup> Perhaps most importantly, the California amendment also provides the victim with the absolute right to appear at sentencing and parole proceedings.

The State legislature in Rhode Island recently voted to amend that state's constitution to include the rights of victims of crime as follows:

A victim of crime shall, as a matter of right, be treated by agents of the state with dignity, respect and sensitivity during all phases of the criminal justice process. Such person shall be entitled to receive, from the perpetrator of the crime, financial compensation for any injury or loss caused by the perpetrator of the crime, and shall receive such other compensation as the state may provide. Before sentencing, a victim shall have the right to address the court regarding the impact which the perpetrator's conduct has had upon the victim.<sup>20</sup>

In addition, Arizona legislators have recently proposed an amendment to the state constitution which would give a victim the right to be (1) present at all public proceedings in the case; (2) heard at sentencing and parole proceedings; (3) notified, upon request, of the status and disposition of the case; and (4) notified, upon request, when the accused or convicted person in a felony case involving violence is released from custody or has escaped.<sup>21</sup>

Also, legislators in Delaware have proposed a state constitutional amendment which would add the following language: "Victims of crime are entitled to certain basic rights, including the right to be informed of, to be present at, and to be heard at all critical stages of the criminal justice process, to the extent that those rights do not interfere with the constitutional rights of the accused."<sup>22</sup>

A successful proposal to amend the Michigan Constitution recently gave crime victims the right to: (1) be treated with fairness and respect throughout the criminal justice process; (2) timely disposition of the case following arrest of the accused; (3) be reasonably protected from the accused throughout the criminal justice process; (4) notification of court proceedings; (5) attend the trial and all other court proceedings; (6) confer with the prosecution; (7) make a state-

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17. *Id.* § 28(c).

18. *Id.* § 28(e).

19. *Id.* § 28(f).

20. R.I. CONST. art. I, § 23.

21. Lamborn, *supra* note 12, at 133 n.41; see generally *New Track for Victims' Rights*, 74 A.B.A. J., Mar. 1, 1988, at 32 (discussing proposed Arizona amendment, including proposal for victim restitution).

22. Del. S. 266, 134th Gen. Ass. (1987).

ment to the court at sentencing; (8) restitution; and (9) information about the conviction, sentence, imprisonment, and release of the accused.<sup>23</sup>

Furthermore, in November 1989, voters in Washington approved the following state constitutional amendment:

A victim of crime, or the victim's representative, shall have the right to be informed of, to be present at, and to be heard at all criminal judicial proceedings at which the defendant has such rights, subject to the same rules of procedure which govern the defendant's rights. This provision shall not constitute a basis for error in favor of the defendant in a criminal proceeding.<sup>24</sup>

In February 1987, several organizations formed a coalition called the Victims' Constitutional Amendment Network (Victims' CAN).<sup>25</sup> The principal purpose of Victims' CAN is to promote passage of state constitutional amendments implementing rights for victims.

### C. State Legislative and Judicial Changes

#### 1. Victims' Bill of Rights

"Victims' bill of rights" generally refers to state legislation that comprehensively focuses on the rights of victims to participate in the criminal justice process. The Wisconsin legislature enacted the first bill of rights for victims in 1979.<sup>26</sup> In the last eight years, approximately forty-four states have enacted similar statutes.<sup>27</sup> The majority of these statutes address issues such as victim notification, victim impact statements, victim participation in court proceedings, speedy

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23. Mich. H.J. Res. P, 84th Reg. Sess. (1988).

24. Wash. S.J. Res. 8228, 50th Leg., Reg. Sess. (1988). A similar proposal was approved by the voters in Texas on the same day. See generally 4 NATIONAL VICTIM CENTER, NETWORKS 1 (Sept. 1989).

In May 1987, Florida legislators approved the following proposed amendment to the state constitution:

Victims of crime or their lawful representatives, including the next of kin of homicide victims, are entitled to the right to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused.

1987 Fla. Sess. Law Serv. No. 4, A-1, A-2 (West). The proposal was approved by voters in the November 1988 general election. Legislators in Maryland and Ohio also proposed constitutional amendments in 1989. 4 NATIONAL VICTIM CENTER, NETWORKS 1 (Sept. 1989).

25. The coalition originally was formed by members of NOVA's Task Force on Victims. 1 SUNNY VON BULOW NATIONAL VICTIM ADVOCACY CENTER, NETWORKS 1 (Oct. 1986). The coalition initially was named the Constitutional Amendment Steering Committee. *Id.* The Victims' CAN coalition currently includes representatives from, among others, NOVA, Sunny Von Bulow National Victim Advocacy Center, National Center for Missing and Exploited Children, MADD, Childhelp USA, Parents of Murdered Children, Protect the Innocent Victims Advocate Foundation, Justice for Surviving Victims, Justice for Crime Victims of America, Victims of Crime Advocacy League, and the Crime Victims Committee of the American Bar Association.

26. WIS. STAT. ANN. § 950 (West 1982 & Supp. 1988).

27. See LEGISLATIVE DIRECTORY, *supra* note 13, at 6-7. Victims' bill of rights legislation is currently pending in Arizona and Hawaii. *Id.* at 6.

disposition of cases, protection from intimidation, employer and creditor intercession, and information concerning social services.

Victims' bill of rights statutes are most often criticized for failing to include express enforcement mechanisms. For example, the Massachusetts' statute provides that victims shall have the rights enumerated in the statute only "[t]o the extent possible and subject to the available resources."<sup>28</sup> Similarly, the victims' bill of rights enacted in Washington requires only a "reasonable effort" by criminal justice agencies to protect victims' rights under the statute.<sup>29</sup> Furthermore, most victims' bill of rights statutes include a provision which protects a state from litigation initiated by victims arising out of inadequate statutory enforcement. For example, the Michigan statute provides: "[N]othing in this [statute] shall be construed as creating a cause of action for money damages against the state, a county, a municipality or any of their agencies, or instrumentalities, or employees."<sup>30</sup> Thus, the statutes are difficult to enforce and, in effect, are merely guidelines for courts and other criminal justice agencies.

## 2. Victim Restitution

"Victim restitution" generally refers to the court-ordered payment of money or services by a person convicted of a crime as compensation for losses suffered by the victim.<sup>31</sup> Restitution has a long and extensive history in the American judicial system, including its frequent use as a criminal sanction in America during the colonial period.<sup>32</sup> References to the concept of restitution have even been found among the ancient codes of some of the earliest civilizations, including the Code of Hammurabi and early Mosaic law.<sup>33</sup> By the 1950s,

28. MASS. GEN. LAWS ANN. ch. 258B, § 3 (West 1988).

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

30. MICH. COMP. LAWS ANN. § 780.773 (West Supp. 1988). Similarly, a Texas statute states that "[a] judge, attorney for the state, peace officer, or law enforcement agency is not liable for a failure or inability to provide a right enumerated in [the Victims' Bill of Rights statute]." TEX. CODE CRIM. PROC. ANN. art. 56.02(d) (Vernon Supp. 1988).

31. See Gittler, *supra* note 10, at 132. See generally RESTITUTION IN CRIMINAL JUSTICE (J. Hudson ed. 1975) (collection of papers presented at the First International Symposium on Restitution).

32. See generally Jacob, *The Concept of Restitution: An Historical Overview*, reprinted in RESTITUTION IN CRIMINAL JUSTICE, *supra* note 31, at 34.

33. *Id.* The extensive history of the concept of restitution led one commentator to state that "[restitution] to victims of crime is as old as civilization." Childres, *Compensation for Criminally Inflicted Personal Injury*, 39 N.Y.U. L. REV. 444, 444 (1964); see also Laster, *Criminal Restitution: A Survey of Its Past History and an Analysis of Its Present Usefulness*, 5 U. RICH. L. REV. 71, 71-80 (1970).



however, restitution had become an almost forgotten remedy in the American criminal justice system.<sup>34</sup> In recent years, the remedy of court-ordered restitution in criminal cases has been rediscovered by jurists. In view of the highly-publicized problems of the overcrowded and costly prison system, restitution is perceived by many commentators and jurists as an effective alternative to incarceration.<sup>35</sup>

Nevertheless, there are drawbacks to the use of restitution as a remedy in the criminal justice system. The principal disadvantage is that the criminal must first be apprehended and convicted before the victim can recover. Second, a significant percentage of criminal defendants are indigent. Notwithstanding these flaws, a 1983 study estimated that victims would recover an annual sum in excess of \$150 million through restitution.<sup>36</sup>

Although legislators in every state have enacted statutes that provide restitution for crime victims, these statutes have relatively little impact. Because the restitution remedy is grounded in ancient common law principles, judges hearing criminal cases always have had the authority to render sanctions involving restitution. Thus, the lack of progress in providing restitution for crime victims directly results from the failure of the criminal justice system to exercise restitution as a remedy, rather than the lack of its availability.

Currently, twenty-six state statutes require a judge in a criminal case to order restitution unless sufficient cause exists not to issue such an order.<sup>37</sup> Federal statutes mandate that the judge in such a

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34. The establishment of penitentiaries in the late eighteenth and early nineteenth centuries has frequently been cited as the predominant cause of the decline of restitution as a criminal sanction. See, e.g., Gittler, *supra* note 10, at 133. But see D. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC 61-62* (1971) (asserting that post-revolutionary penal and correctional reform movement was principal factor in utilization of incarceration rather than restitution).

35. See, e.g., Newton, *Alternatives to Imprisonment: Day Fines, Community Service Orders, and Restitution*, 8 *CRIME & DELINQUENCY LITERATURE* 109 (1976); see also *People v. Williams*, 57 Mich. App. 439, 225 N.W.2d 798, 799 (1975) (requirement of victims' restitution as a condition to defendant's probation did not violate constitutional rights); *Commonwealth v. Walton*, 483 Pa. 588, 598-99, 397 A.2d 1179, 1184-85 (1979) (trial court had discretion to require restitution payment as a condition of defendant's probation).

36. Hudson, *supra* note 10, at 46 (citing NEW YORK STATE CRIME VICTIMS BOARD, *ESTIMATES OF POTENTIAL VICTIM RECOVERIES FROM RESTITUTION IN NEW YORK STATE* (1983)).

37. See CAL. CONST. art. I, § 28(b); ALA. CODE § 15-18-67 (1982); ARIZ. REV. STAT. ANN. § 13-603(c) (1989); ARK. STAT. ANN. § 16-90-303 (1987); COLO. REV. STAT. § 17-28-101 (1986); DEL. CODE ANN. tit. 11, § 4106 (1987); FLA. STAT. ANN. § 775.089(b) (West 1985 & Supp. 1989); HAW. REV. STAT. § 706-605(1)(d) (Supp. 1987); IDAHO CODE § 19-5304(3) (1987); IOWA CODE ANN. § 910.2 (West Supp. 1989); KAN. STAT. ANN. § 21-4610(4) (1981); KY. REV. STAT. ANN. § 431.200 (Michie/Bobbs-Merrill 1985); LA. CODE CRIM. PROC. ANN. art. 895.1 (West Supp. 1989); ME. REV. STAT. ANN. tit. 17-A, § 1323(1) (Supp. 1989); MICH. COMP. LAWS ANN. § 780.766(3) (West Supp. 1988); MONT. CODE ANN. § 46-18-101(3), (6) (1987); NEV. REV. STAT. § 176.189(3) (1987); N.M. STAT. ANN.

case order restitution unless the judge renders a written statement justifying the decision not to issue the order.<sup>38</sup> Such statutes, however, generally do not require the judge to issue a nondiscretionary restitution order in every case in which the victim suffers a monetary loss.<sup>39</sup> Further, the majority of statutes do not provide mechanisms for the enforcement of restitution orders.<sup>40</sup>

### 3. Victim Compensation

Victim compensation programs are governmental services that provide for the reimbursement of certain costs incurred by victims as a result of crime. Compensation is different than restitution because victims are compensated by the government, rather than the criminal, and the compensation is provided regardless of whether the criminal is apprehended or convicted. As of 1988, forty-four states had enacted victim compensation plans.<sup>41</sup> The significant progress in recent years, however, has not increased the number of available compensation programs, but only has extended the coverage of existing programs.

Prior to 1984, state compensation programs were collectively in a dismal condition. Most programs were insufficiently funded and awarded limited amounts of benefits.<sup>42</sup> In addition, the plans were ineffective because they placed substantial restrictions on probable

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§ 31-17-1(B) (1987); N.D. CENT. CODE § 12.1-32-08 (Supp. 1989); S.C. CODE ANN. § 16-3-1530(d) (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 23A-28-3 (1988); TEX. CRIM. PROC. CODE ANN. § 42.12 (Vernon Supp. 1989); UTAH CODE ANN. § 76-3-201(3)(a)(i) (Supp. 1989); VT. STAT. ANN. tit. 13, § 7043(f) (Supp. 1988); WASH. REV. CODE § 9.94A.120(14) (Supp. 1989); W. VA. CODE § 61-11A-4(a) (1989).

38. See, e.g., 18 U.S.C. § 3579(a)(2) (1982). For a general overview of the restitution provisions of the Victim and Witness Protection Act, see W. WELD, RESTITUTION PURSUANT TO THE VICTIM AND WITNESS PROTECTION ACT (U.S. Dep't of Justice 1987).

39. But see, e.g., CAL. CONST. art. I, § 28(b) (mandates restitution in any case in which loss occurs).

40. But see, e.g., 18 U.S.C. § 3579(h) (1982) (victim has right to enforce restitution order issued by federal court "in same manner as a judgment in civil action"). In addition, victims generally do not have the right to appeal an inadequate restitution order. See *United States v. Franklin*, 792 F.2d 998 (11th Cir. 1986) (victim's appeal dismissed for lack of jurisdiction).

41. LEGISLATIVE DIRECTORY, *supra* note 13, at 1. In addition, the District of Columbia and the Virgin Islands have established compensation plans. *Id.* As of 1988, the six states that had not yet enacted compensation programs were Georgia, Maine, Mississippi, New Hampshire, South Dakota, and Vermont. *Id.* at 2. See generally Smith, *Victim Compensation: Hard Questions and Suggested Remedies*, 17 RUTGERS L.J. 51 (1985) (discussing problems of victim compensation programs).

42. U.S. DEPARTMENT OF JUSTICE, VICTIMS OF CRIME ACT OF 1984: A REPORT TO CONGRESS BY THE ATTORNEY GENERAL 20 (1988) [hereinafter REPORT TO CONGRESS]. According to a 1983 survey, over 50% of the existing compensation programs reported

compensation candidates and forced eligible victims to wait months, or even years, before claims were paid.<sup>43</sup>

The enactment of the Victims of Crime Act of 1984<sup>44</sup> (VOCA) was a major catalyst in improving compensation programs. VOCA established a Crime Victims' Fund, a substantial part of which provides grants to "eligible" state victim compensation programs.<sup>45</sup> In order to become eligible for VOCA funding, the state plans must:

- (a) offer compensation to victims of crime and survivors of crime victims for medical expenses, including mental health counseling, loss of wages, and funeral expenses;<sup>46</sup>
- (b) promote cooperation with the reasonable requests of law enforcement authorities;<sup>47</sup>
- (c) not use grants to supplant state funds otherwise available for crime victims' compensation;<sup>48</sup>
- (d) compensate nonresident victims on the same basis as resident victims;<sup>49</sup>
- (e) compensate victims of federal crimes on the same basis as victims of state crimes;<sup>50</sup> and
- (f) provide any information regarding the program as required by the Attorney General.<sup>51</sup>

To date, all but one state meets the VOCA grant eligibility standards, and many have exceeded the standards.<sup>52</sup> For example, Colorado's compensation program permits an award to be made to cover

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problems of insufficient funding. D. MCGILLIS & P. SMITH, COMPENSATING VICTIMS OF CRIME: AN ANALYSIS OF AMERICAN PROGRAMS 190 (Nat'l Inst. of Justice 1983).

43. In 1983, only 40% of existing victim compensation programs were able to process compensation claims within four months. D. MCGILLIS & P. SMITH, *supra* note 42, at 190. Approximately 37% of the programs took over seven months to process a claim, and 7% of the programs were not able to process a claim within one year. *Id.*

44. Pub. L. No. 98-473, 98 Stat. 2170 (1984) (codified as amended at 18 U.S.C. §§ 1501, 1512, 3013, 3671, 3672 (Supp. V 1987) and 42 U.S.C. §§ 10601-10604 (Supp. IV 1986)).

45. See 42 U.S.C. § 10602(b) (Supp. IV 1986). Of the first \$100 million deposited into the fund in any single fiscal year, up to 49.5% is available for grants to state compensation programs. 42 U.S.C. § 10601(d)(2) (Supp. IV 1986). During the 1986 fiscal year, approximately \$31 million was available for state compensation program grants. REPORT TO CONGRESS, *supra* note 42, at 15. The remainder of the victims' fund is allocated as follows: (a) 45% for grants to states for victim assistance; (b) 1% for training and technical assistance grants to eligible victim assistance programs; and (c) 4.5% for Child Abuse Prevention and Treatment grants under the Children's Justice Act. 42 U.S.C. § 10601(d)(2) (Supp. IV 1986). The principal sources of revenue for the victims' fund are federal criminal fines, proceeds of forfeited appearance bonds, bail bonds, and collateral profits of crime, and proceeds of the sale of literary or other rights arising out of criminal acts by federal defendants. See *id.* § 10601(b)(1); see also REPORT TO CONGRESS, *supra* note 42, at 9.

46. 42 U.S.C. § 10602(b)(1) (Supp. IV 1986).

47. *Id.* § 10602(b)(2).

48. *Id.* § 10602(b)(3).

49. *Id.* § 10602(b)(4).

50. *Id.* § 10602(b)(5).

51. *Id.* § 10602(b)(6).

52. LEGISLATIVE DIRECTORY, *supra* note 13, at 2. Nevada's compensation plan still bans nonresident victims from eligibility; thus, Nevada's plan is ineligible for the federal grant. *Id.*; see NEV. REV. STAT. § 217.220(d) (1987).

broken doors, windows, and locks,<sup>53</sup> while New York's plan allows emergency payments for the replacement of indispensable personal property<sup>54</sup> such as glasses and hearing aids.

The progress in state compensation programs has not been limited solely to the expansion of coverage. The average amount of each award to victims also has grown at an equally dramatic pace. A recent survey of twenty-eight states revealed that, between fiscal years 1985 and 1986, the total amounts awarded to crime victims rose from \$49,495,178 to \$89,499,346.<sup>55</sup> Perhaps the most startling rate of growth occurred in West Virginia, where total victim compensation awards rose from \$182,000 to \$1,762,000 between the fiscal years of 1985 and 1986—an increase of over 800%.<sup>56</sup> The increased awards most likely resulted from states raising their maximum award limits for their compensation programs. Since 1985, a total of fifteen states have raised their award limits.<sup>57</sup> Additionally, growth has taken place in the number of victim compensation awards. In California, for instance, the number of awards increased from 6,518 to 24,132 in a one-year period.<sup>58</sup> Nationwide, the total number of awards increased approximately 108% between the fiscal years of 1985 and 1986.<sup>59</sup>

While much progress has been made in the area of victim compensation, it is apparent that many state programs continue to be inadequate in several important respects. The utilization of the "household exclusion" provision is perhaps the most glaring deficiency in a large number of programs. This exclusion generally prohibits recovery of compensation by persons who are victimized by their own household or family members.<sup>60</sup> Although the exclusion was originally intended to safeguard against compensating the crimi-

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53. COLO. REV. STAT. § 24-4.1-102(8.5) (1988).

54. N.Y. EXEC. LAW § 630(2) (McKinney Supp. 1989).

55. REPORT TO CONGRESS, *supra* note 42, at 24.

56. *Id.* at 24.

57. *Id.* at 32. For example, Wisconsin raised its maximum benefit level from \$10,000 to \$40,000. *Id.* Although increases in maximum benefit levels display a definite improvement in the compensation programs, such improvements will not adequately benefit the average victim. In fiscal year 1986, the average award nationally was a meager \$1,864. *Id.* at 1. The average compensation award in cases involving crimes such as murder usually will not exceed \$8,000. *Id.* at 32.

58. *Id.* at 24.

59. *Id.* The number of awards increased from 21,590 in 1985 to 44,850 in 1986. *Id.*

60. *See, e.g.*, MD. ANN. CODE art. 26A, § 5(b)(1) (1987). The Maryland statute states that "a person who is criminally responsible for the crime upon which a claim is based or an accomplice of such person or a member of the family of such persons shall not be eligible to receive an award with respect to [the compensation] claim." *Id.*

nal rather than the victim,<sup>61</sup> the harsh impact of the exclusion is that abused spouses and children are often barred from recovering compensation.<sup>62</sup>

Surprisingly, the household exclusion still exists in the majority of state compensation programs.<sup>63</sup> Many states, however, have attempted to minimize the severity of the exclusion's restrictions. As of 1988, at least twelve states had amended the restriction to allow waivers of the exclusion on a case-by-case basis.<sup>64</sup> Also, five states exclude abused children from the household restrictions.<sup>65</sup> Nevertheless, as a whole, relatively little progress has occurred in changing this unnecessary and unfair exemption.

A second exclusion typically found in the states' victim compensation plans prohibits compensating victims of automobile crashes caused by drunk drivers. These "drunk driving exclusions" originally were intended to protect the states' compensation funds against depletion and possible bankruptcy.<sup>66</sup> The fears of bankruptcy, however, have proven to be unfounded. According to a study conducted by

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61. H. EDELHERTZ & G. GEIS, PUBLIC COMPENSATION TO VICTIMS OF CRIME 269 (1974). Another rationale favoring the household exclusion is that a relatively high number of crimes occur in a domestic setting; thus, eliminating claims by spouses or children of offenders will greatly decrease the cost of the state's compensation program. *Id.* One would assume, however, that the high frequency of domestic-related crimes would strengthen the arguments *against* the exclusion. The goal of a compensation program should be to aid as many needy victims as possible. To exclude a class of victims merely because the class is proportionately large directly contravenes the very purpose of the programs. *Id.* at 270.

62. The potential hardship associated with the household exclusion is illustrated by the following case summary by the Maryland Criminal Injuries Compensation Board:

Claim filed on behalf of the two infant claimants by their mother. Claimants' mother was first wife of their father, the victim. Claimants' father was shot and killed by his second wife, the infants' step-mother. Section 5(6)(b) and 2(d)(1) of Article 26A of the Maryland Annotated Code together exclude members of the family of a person who is criminally responsible for a crime of becoming eligible to receive an award under our statute. Since the infant claimants are within the third degree of affinity to the assailant, we find the infants not to be eligible to receive an award growing out of this claim. The claim is, therefore, disallowed.

*Id.* at 269 (citing MARYLAND CRIMINAL INJURIES COMPENSATION BOARD, FIRST ANNUAL REPORT (1969) (Case summary 42-D-69)).

63. Only five states—Alaska, Arizona, Minnesota, Oregon, and Texas—have abolished the household exclusion from their victim compensation programs. LEGISLATIVE DIRECTORY, *supra* note 13, at 2.

64. See KAN. STAT. ANN. § 74-7305(b) (1985); KY. REV. STAT. ANN. § 346.050(2) (Michie/Bobbs-Merrill Supp. 1988); LA. REV. STAT. ANN. § 46.1809(B)(3)(c) (West 1982); MD. ANN. CODE art. 26A, § 5(b)(2) (1987); MO. ANN. STAT. § 595.020(2) (Vernon Supp. 1989); MONT. CODE ANN. § 53-9-125(2) (1987); N.C. GEN. STAT. § 15B-11(a)(3) (1983); R.I. GEN. LAWS § 12-25-6(c) (Supp. 1988); S.C. CODE ANN. § 16-3-1220(2) (Law. Co-op. 1985); W. VA. CODE § 14-2A-14(c) (Supp. 1989); WIS. STAT. § 949.08(2)(c) (1982); WYO. STAT. § 1-40-106(b) (Supp. 1989).

65. LEGISLATIVE DIRECTORY, *supra* note 13, at 3.

66. *Id.*

Mothers Against Drunk Driving (MADD) of states that have abolished the drunk driving exclusion, less than five percent of the total compensation claims filed were related to drunk driving crash victims.<sup>67</sup> The majority of states currently permit such victims to recover compensation. As of 1988, thirty-six states had abolished the drunk driving exclusion.<sup>68</sup>

Some state victim compensation programs contain "financial means" provisions. These provisions generally require that a victim must fall below a certain income bracket or demonstrate legitimate financial hardship as a prerequisite to recovering victim compensation.<sup>69</sup> Such a provision unfairly discriminates against victims who cannot satisfy the financial need test, but who still require financial assistance to pay for medical services or property damage resulting from the criminal act.<sup>70</sup> Since 1984, only two states, New York and Texas, have modified or eliminated the financial need requirement in their programs.<sup>71</sup> Nine states, however, continue to enforce financial

67. *Id.* The study also revealed that less than 10% of the total compensation awards are given to drunk driving crash victims. *Id.*

68. *See id.* Since the Victims of Crime Act of 1984 was enacted, nine states have repealed the drunk driving exclusion. REPORT TO CONGRESS, *supra* note 42, at 34.

69. *See, e.g.,* KAN. STAT. ANN. § 74-7305(d)(1) (1985). The Kansas statute reads as follows:

Reparations may be awarded only if the board finds that unless the claimant is awarded reparations the claimant will suffer financial stress as the result of economic loss otherwise reparable. A claimant suffers financial stress only if the claimant cannot maintain the claimant's customary level of health, safety and education for self and dependents without undue financial hardship.

*Id.*

70. *See generally* H. EDELHERTZ & G. GEIS, *supra* note 61, at 271-72. One commentator described the inequities associated with financial need tests as follows:

Such tests of financial need cannot be justified on either philosophical or practical grounds. . . . If victims are to be compensated because they bear the burden of society's failure to prevent crime, it makes little sense to compel them to deplete their resources in order to qualify for benefits. If victim compensation is only another form of welfare, it is difficult to understand why victims of crime should be favored over others also in need. . . . [Victim Compensation] Boards and their investigators have better uses for their time, energy, money, and good will than conducting these essentially irrelevant probes into the private affairs of crime victims.

*Id.*

71. In 1987, Texas amended its victim compensation program to eliminate the financial need requirement. TEX. REV. CIV. STAT. ANN. art. 8309-1 (Vernon Supp. 1989). In 1986, New York eliminated its financial hardship requirement for emergency awards and designated awards under \$2,000. N.Y. EXEC. LAW § 631(6) (McKinney Supp. 1989). Excerpts from past annual reports of the New York Crime Victims Compensation Board indicate that a modification of the New York Financial need requirement was inevitable:

The most difficult problem [for the Board] still continues to be determining the question of serious financial hardship. Many of the elderly people who

need provisions in their victim compensation plans.<sup>72</sup>

A minimum loss requirement is another controversial provision often contained in compensation programs. Such a requirement typically provides that a victim may not recover compensation unless losses exceed a certain amount—commonly \$100 to \$200—regardless of the financial hardship. Since 1984, four states have modified or repealed their minimum loss requirement.<sup>73</sup> Conversely, in 1985, Michigan legislators raised the state's minimum loss requirement from \$100 to \$200.<sup>74</sup> Compensation programs in nine states still contain minimum loss provisions.<sup>75</sup>

Although victim compensation programs are not flawless, the programs are an important step in providing for the needs of victims. State legislators are refining and improving their respective programs, mostly prompted by the motivations provided by VOCA. Even so, problems continue to exist in the form of administrative delays and unnecessary and unfair restrictions on recovery.

#### 4. Victim Notification Laws

Surveys indicate that the most important need for a victim during the criminal justice process is the need to be kept informed of the

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are retired, who have worked many years, have been frugal and have saved money to take care of them in their declining years represent one group that the Board feels should be reimbursed for their medical expenses. However, the statute makes no distinction and, therefore, if they have substantial savings the statute does not permit an award to these elderly persons.

Another segment of our society is the middle income man who has supported his family, has been gainfully employed and is not only a respectable but responsible citizen. This claimant feels that having been a law-abiding citizen who has worked hard and paid taxes, he is entitled to receive his unreimbursed medical expenses and his loss of earnings within the limitations allowed by the statute. The Board continues to feel that these two classes of individuals should be compensated.

H. EDELHERTZ & G. GEIS, *supra* note 61, at 59 (citing FOURTH ANNUAL REPORT OF THE NEW YORK CRIME VICTIMS COMPENSATION BOARD 11 (1971)).

72. See FLA. STAT. § 960.13(7) (1985); KAN. STAT. ANN. § 74-7305(d) (1985); KY. REV. STAT. ANN. § 346.140(3) (Michie/Bobbs-Merrill 1983); LA. REV. STAT. ANN. § 46:1809(A), (B)(4)(6) (West 1982); MD. ANN. CODE art. 26A, § 12(f)(1) (Supp. 1988); MICH. COMP. LAWS ANN. § 18.361(5) (West Supp. 1989); NEB. REV. STAT. § 81-1822(6) (1987); NEV. REV. STAT. § 217.220(5) (1987); N.Y. EXEC. LAW § 631(6) (McKinney Supp. 1989) (New York's financial means test pertains only to awards of \$2,000 and over). In addition, the District of Columbia continues to have a financial means requirement. D.C. CODE ANN. § 3-403(c) (1988).

73. See KY. REV. STAT. ANN. § 346.130(3) (Michie/Bobbs-Merrill Supp. 1988) (eliminated \$100 minimum); LA. REV. STAT. ANN. § 46.1810 (West Supp. 1989) (permits waiver of minimum loss requirement and eliminates minimum loss requirement if the victim is over the age of 60); N.D. CENT. CODE § 65-13-06(7) (Supp. 1987) (repealed \$100 minimum loss requirements); OR. REV. STAT. § 147.015(1) (Supp. 1987) (reduced minimum loss requirement from \$250 to \$100).

74. See MICH. COMP. LAWS ANN. § 18.354(3) (West Supp. 1989).

75. LEGISLATIVE DIRECTORY, *supra* note 13, at 3.

status of the proceedings.<sup>76</sup> In many situations, however, the victim is notified only when the victim's testimony is required. Consequently, the victim remains ignorant of any additional facts concerning events such as bail, plea bargains, or parole.

The Victim and Witness Protection Act,<sup>77</sup> enacted in 1982, required the Attorney General to develop and implement a comprehensive framework of victim notification requirements called the Guidelines for Fair Treatment of Crime Victims and Witnesses.<sup>78</sup> Under these guidelines, federal officials must notify victims and witnesses of scheduled changes in proceedings and, if a relatively serious crime occurred, the time and place of all major proceedings in the criminal process.

Since 1985, the number of states that have enacted comprehensive victim notification laws has more than doubled. To date, forty-three states have enacted laws which require public officials to keep victims informed of criminal proceedings.<sup>79</sup> The notification statutes vary in their requirements. For example, some statutes provide for notification *before* the event occurs, while others require notification only *after* the event has occurred.

While it is important for the victim to be notified of the status of

76. See, e.g., J. HERNON & B. FORST, *THE CRIMINAL JUSTICE RESPONSE TO VICTIM HARM* (Nat'l Inst. of Justice 1985); Hagan, *Victims Before the Law: A Study of Victim Involvement in the Criminal Justice Process*, 73 J. CRIM. L. & CRIMINOLOGY 317, 317-29 (1982). An issue of growing importance that is closely related to victim notification statutes, but with potentially fatal implications, involves the rights of victims to be informed if their offender tests HIV positive for the AIDS virus. See 4 NATIONAL VICTIM CENTER, NETWORKS 6 (Sept. 1989). The U.S. Department of Justice Office for Victims of Crime is in the process of completing a study to examine "the advisability of additional sanctions against people who have been convicted of drug offenses or sex crimes who test HIV positive—people who knowingly, and willingly, expose others to the virus." *Id.* (quoting Dr. Jane Burnley, Executive Director of the Office for Victims' of Crime).

77. Pub. L. No. 97-291, 96 Stat. 1248 (1982) (codified as amended at 18 U.S.C. §§ 1512-1515, 3579-3580 (Supp. IV 1986) and FED. R. CRIM. P. 32(c)(2)).

78. For a description of the guidelines, see *United States v. Welden*, 568 F. Supp. 516, 520-25 (N.D. Ala. 1983), *modified sub nom. United States v. Satterfield*, 743 F.2d 827 (11th Cir. 1984), *cert. denied*, 471 U.S. 1117 (1985).

79. Greengard, *Crime After Crime*, 15 BARRISTER 22 (Winter 1988). Most states include notification provisions in their comprehensive victim bill of rights statutes. See, e.g., R.I. GEN. LAWS § 12-28-3 (Supp. 1988). State statutes differ as to when information should be conveyed to the victim and how much information is required to comply with the notice provision. Compare ARIZ. REV. STAT. ANN. §§ 12-253(4) (notify victim of sentencing proceedings), 31-351 (notify upon release of defendant), 31-411 (notify of release of defendant on parole) (Supp. 1988) with NEB. REV. STAT. §§ 29-120 (notify victim of plea bargain agreement), 81-1848 (notify victim upon final disposition of case, schedule changes in proceedings, release of offender) (1985).



the victim's particular case, it is equally important that state officials inform the victim of the existence and procedures of all applicable victim assistance services.<sup>80</sup> It is relatively common for the victim to remain uninformed of available services, such as the existence of the victim compensation program. A 1981 study revealed that in New York, only thirty-five percent of all victims who reported crimes to the police had heard of the compensation program.<sup>81</sup> Although New York law required the police to inform victims of available services, only three percent of the victims surveyed stated that they were informed of the compensation program by the police.<sup>82</sup> As a result, most states have recently enacted statutes requiring either police officers, hospital officials, or victim compensation officials to inform victims or their dependents of the availability of assistance programs.<sup>83</sup> Some states also require these officials to inform and educate victims on the application processes for the services.<sup>84</sup>

### 5. Victim Impact Statement Laws

Victim impact statements are reports by crime victims of the physical, psychological, and financial harm caused by the perpetrator's act. In recent years, such statements have become one of the most controversial topics in the area of victims' rights. The controversy centers on whether victim impact statements should be used by judges or juries at the sentencing of the criminal offender. The victim's statement usually takes the form of a report prepared by the probation department<sup>85</sup> and is presented to the court prior to sentencing. The report's content varies, depending on the particular state and the preparer of the statement. Many reports contain quotes from the victim or the victim's family members.<sup>86</sup>

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80. See generally Anderson & Woodard, *Victim and Witness Assistance: New State Laws and the System's Response*, 68 JUDICATURE 221, 229-30 (1985).

81. A PILOT SURVEY OF CRIME VICTIMS IN NEW YORK STATE 39-40 (1981), reprinted in NEW YORK STATE CRIME VICTIMS COMPENSATION BOARD, *THE CRIME VICTIM AND THE CRIMINAL JUSTICE SYSTEM: A REPORT TO THE GOVERNOR AND THE LEGISLATURE ON THE STATE OF THE RIGHTS, NEEDS AND INTERESTS OF CRIME VICTIMS IN THE CRIMINAL JUSTICE SYSTEM* (1982).

82. *Id.*

83. See, e.g., N.Y. EXEC. LAW § 625-a (McKinney 1982 & Supp. 1989); N.C. GEN. STAT. § 15B-20 (1983); R.I. GEN. LAWS § 12-28-3(9) (Supp. 1988).

84. See, e.g., NEB. REV. STAT. § 81-1848(4)-(5) (1987); WIS. STAT. ANN. § 950.04(4)-(5) (West 1982).

85. Although the usual practice is for a probation official to prepare the report, several states require the victim to prepare the statement. See Young, *A Constitutional Amendment for Victims of Crime: The Victims' Perspective*, 34 WAYNE L. REV. 51, 62 (1987).

86. See, e.g., Booth v. Maryland, 487 U.S. 496, 500 (1987) (describing victim impact statement). For an extensive discussion of the various forms and contents of victim impact statements, see McLeod, *An Examination of the Victim's Role at Sentencing: Results of a Survey of Probation Administrators*, 71 JUDICATURE 162 (1987).

As of 1988, forty-seven states permitted the use of a victim's impact statement at sentencing.<sup>87</sup> In addition, the Victim and Witness Protection Act amended the Federal Rules of Criminal Procedure to require pre-sentence reports to include victim impact statements.<sup>88</sup>

In 1987, the United States Supreme Court, by way of a 5-4 decision in *Booth v. Maryland*,<sup>89</sup> ruled that a Maryland statute was unconstitutional because it required the use of victim impact statements at sentencing. *Booth* involved the sentencing of a defendant convicted of murdering an elderly couple. In accordance with the Maryland statute,<sup>90</sup> the probation office prepared a pre-sentence report containing a victim impact statement. The statement included interviews of the couple's son, daughter, son-in-law, and granddaughter, along with descriptions of the various emotional problems the family members

87. LEGISLATIVE DIRECTORY, *supra* note 13, at 9; see Greengard, *supra* note 79, at 22. As of 1988, Alabama, Hawaii, District of Columbia, and New Hampshire still did not allow victim impact statements. New Hampshire, however, expressly permits the use of a victim "statement of opinion." N.H. REV. STAT. ANN. § 651:4-a (1986). A statement of opinion is a written opinion by the victim relating to the sentence to be ordered by the court. See generally LEGISLATIVE DIRECTORY, *supra* note 13, at 9. The New Hampshire statute also permits victim "allocution," whereby the victim is allowed to orally address the court at the sentencing hearing. N.H. REV. STAT. ANN. § 651:4-a (1986).

88. FED. R. CRIM. P. 32(c). Rule 32(c) was amended to read as follows:  
Report. The presentence report shall contain:

.....  
information concerning any harm, including financial, social, psychological, and physical harm, done to or loss suffered by any victim of the offense; and any other information that may aid the court in sentencing, including the restitution needs of any victim of the offense.

*Id.* Several state courts have held that the evidence contained in victim impact statements is relevant to a determination of the appropriate sentence to be rendered. See, e.g., *Sandvik v. State*, 564 P.2d 20, 23 (Alaska 1977); *Lodowski v. State*, 302 Md. 691, 740-42, 490 A.2d 1228, 1253-54 (1985), *vacated on other grounds*, 475 U.S. 1078 (1986). But see *Booth v. Maryland*, 482 U.S. 496, 502-03 (1987) (holding that victim impact statements are irrelevant to sentencing in capital murder case).

89. 482 U.S. 496 (1987).

90. The Maryland statute stated:

- (3) A victim impact statement shall:
- (i) Identify the victim of the offense;
  - (ii) Itemize any economic loss suffered by the victim as a result of the offense;
  - (iii) Identify any physical injury suffered by the victim as a result of the offense along with its seriousness and permanence;
  - (iv) Describe any change in the victim's personal welfare or familial relationships as a result of the offense;
  - (v) Identify any request for psychological services initiated by the victim's family as a result of the offense; and
  - (vi) Contain any other information related to the impact of the offense upon the victim or the victim's family that the court requires.

MD. ANN. CODE art. 41, § 4-609(c)(3) (1986).

suffered as a result of the murders.<sup>91</sup> At trial, the court overruled the defense counsel's objection that the statement was irrelevant, and the statement was read to the jury. After deliberation, the jury returned the death sentence. The Maryland Court of Appeals affirmed the conviction.<sup>92</sup>

The Supreme Court, however, reversed the court of appeals' decision and held that the eighth amendment prohibited a victim's statement in a capital murder case.<sup>93</sup> The Court, noting that a jury's proper focus should be solely on the defendant, held that the statement was irrelevant because it impermissibly focused on the victim's character and reputation and the effect of the crime on the victim's family.<sup>94</sup> Justice Powell, writing for the majority, concluded that the statement should not have been admitted into evidence because it "creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner."<sup>95</sup>

In persuasive dissent, Justice White argued that the statement should have been admissible because the jury was entitled to hear all testimony regarding the degree of harm caused by the defendant's actions.<sup>96</sup> Justice White further asserted that a complete description of the harm the murder caused to the victim's family is relevant in determining the defendant's blameworthiness.<sup>97</sup> Although the Court expressly limited its opinion to the use of victim impact statements in a capital sentencing hearing, the decision was viewed by many commentators as an unfortunate setback for the victims' rights

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91. *Booth*, 482 U.S. at 499-500 n.3.

92. *Booth v. Maryland*, 306 Md. 172, 507 A.2d 1098 (1986), *vacated in part and remanded*, 482 U.S. 496 (1987).

93. *Booth*, 482 U.S. at 509.

94. *Id.* at 502-03.

95. *Id.* However, the Court went on to say:

Our disapproval of victim impact statements at the sentencing phase of a capital case does not mean, however, that this type of information will never be relevant in any context. Similar types of information may well be admissible because they relate directly to the circumstances of the crime. Facts about the victim and family also may be relevant in a non-capital criminal trial.

*Id.* at 507 n.10. The Court's opinion further states:

We note, however, that our decision today is guided by the fact death is a "punishment different from all other sanctions," . . . and that therefore the considerations that inform the sentencing decision may be different from those that might be relevant to other liability or punishment determinations. At least 36 States permit the use of victim impact statements in some contexts, reflecting a legislative judgment that the effect of the crime on victims should have a place in the criminal justice system. . . . Congress also has provided for victim participation in federal criminal cases. . . . We imply no opinion as to the use of these statements in noncapital cases.

*Id.* at 509 n.12 (citations omitted).

96. *Id.* at 515-19 (White, J., dissenting). Justice White was joined in his dissent by Chief Justice Rehnquist and Justices O'Connor and Scalia. *Id.* (White, J., dissenting).

97. *Id.* at 516 (White, J., dissenting).

movement.<sup>98</sup>

## 6. Victim Participation Statutes

Surveys indicate that victims are extremely dissatisfied with their level of participation in the criminal justice system.<sup>99</sup> A report published in 1984 determined that fifty-nine percent of the victims surveyed felt they should have been allowed greater participation in the court process.<sup>100</sup> Additionally, a National Institute of Justice study found that victims obtain a significantly increased level of satisfaction with the criminal justice system when they are afforded a higher level of participation in the system.<sup>101</sup>

In recent years, state legislators, perhaps influenced by the numerous studies and efforts by victims' rights advocates, have extended the degree of victim involvement in every stage of the criminal justice process. The following is a brief summary of legislative progress in the area of victim participation.

### a. Plea Bargaining

It is a common practice in criminal law for the defendant to enter a guilty plea as a result of plea bargaining.<sup>102</sup> Negotiation sessions between the prosecutor and defense counsel are often the most important proceeding in the criminal process.<sup>103</sup> During these bargaining sessions, the prosecutor freely chooses to drop or reduce charges against the defendant.<sup>104</sup> Although the necessity and sometimes

98. See, e.g., Recent Development, *Constitutional Law: Victim Impact Statements and the Eighth Amendment*—Booth v. Maryland, 11 HARV. J.L. & PUB. POL'Y 583 (1988); Comment, *Constitutional Law—Cruel and Unusual Punishment—Eighth Amendment Prohibits Introduction of Victim Impact Evidence at Sentencing Phase of Capital Murder Trial*—Booth v. Maryland, 19 RUTGERS L.J. 1159 (1988). But see Comment, *Constitutional Law—Cruel and Unusual Punishment—Eighth Amendment Prohibits Introduction of Victim Impact Evidence at Sentencing Phase of Capital Murder Trial*—Booth v. Maryland: Another View, 19 RUTGERS L.J. 1175 (1988) (decision was based upon "sound constitutional principles").

99. See, e.g., Hagan, *supra* note 76, at 328-29.

100. Kelly, *Delivering Legal Services to Victims: An Evaluation and Prescription*, 9 JUST. SYS. J. 62, 73 (1984).

101. J. HERNON & B. FORST, *supra* note 76.

102. See J. BOND, PLEA BARGAINING AND GUILTY PLEAS § 1.07(2), at 13 (1978). Approximately 90% of all criminal prosecutions are disposed of by guilty pleas. Interviews with Thomas A. D'Amore and Patrick T. Kirlin, Assistant District Attorneys, Dallas, Texas (Jan. 22, 1989).

103. See *Blackledge v. Allison*, 431 U.S. 63, 71 (1977); *Santobello v. New York*, 404 U.S. 257, 260-61 (1971).

104. Plea bargaining may be defined as any process whereby, in exchange for a guilty plea, a prosecutor agrees to either: (1) charge a crime less serious than the facts

questionable motivations underlying the plea bargaining process are beyond the scope of this article,<sup>105</sup> it is important to realize that the victim has a vital interest in the outcome of the bargaining session.

Despite the potential impact of the plea bargaining process on the victim, statutes permitting the victim's participation in the process were virtually nonexistent until the early 1980s. By 1988, however, at least twenty-one states had enacted laws requiring the prosecutor to consult with or to notify the victim regarding the plea bargaining negotiations.<sup>106</sup> Thus, although the victim's opinion is never binding on the prosecutor, the victim is effectively allowed to contribute to the negotiating process.<sup>107</sup>

#### *b. Court Attendance*

Ordinarily, one might assume that the victim unquestionably would have the absolute right to attend the trial of the defendant. After all, such an assumption would be logical because the victim, as a member of the general public, enjoys the right to attend any public hearings, including criminal trials. Furthermore, the victim undeniably has a substantial interest in the proceedings. Nevertheless, victims traditionally have not been permitted to attend and observe the trial. A reason frequently given for the exclusion is that the victim's presence may unfairly influence the jury.<sup>108</sup> A more practical and accurate reason, however, is that the victim is generally a testifying witness in the case. As a basic rule, the only time a witness in a criminal trial is permitted in the courtroom is during the witness's

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may warrant; (2) reduce or dismiss a charge already issued; (3) not issue additional charges; or (4) make a sentence recommendation. Fine, *Plea Bargaining: An Unnecessary Evil*, 70 MARQ. L. REV. 615, 616 (1987).

105. Plea bargaining is one of the most controversial topics in the area of criminal law. See, e.g., Fine, *supra* note 104; Foley, *Plea Bargaining is: No Bargain!*, 64 MICH. B.J. 505 (1985); Smith, *The Plea Bargaining Controversy*, 77 J. CRIM. L. & CRIMINOLOGY 949 (1986). For an in-depth view of the plea bargaining process, see Weninger, *The Abolition of Plea Bargaining: A Case Study of El Paso County, Texas*, 35 UCLA L. REV. 265 (1987).

106. See ARIZ. REV. STAT. ANN. § 12-253(4) (Supp. 1988); CONN. GEN. STAT. ANN. § 54-203(g) (West Supp. 1989); FLA. STAT. ANN. § 960.001(e) (West 1985 & Supp. 1989); ILL. REV. STAT. ch. 38, para. 1404 (Supp. 1988); IND. CODE ANN. § 35-35-3-5 (Burns Supp. 1984); MICH. COMP. LAWS ANN. § 780.756 (West Supp. 1988); MINN. STAT. ANN. § 611A.03 (West 1987); MO. ANN. STAT. § 557.041 (Vernon Supp. 1988); MONT. CODE ANN. § 46-24-104 (1987); NEB. REV. STAT. § 29-120 (1985); N.J. REV. STAT. ANN. § 52:4B-44(b) (West Supp. 1989); N.M. STAT. ANN. § 31-24-5(C) (1987); N.Y. EXEC. LAW § 647 (McKinney Supp. 1989); N.D. CENT. CODE § 12.1-34-02 (Supp. 1989); OHIO REV. CODE ANN. § 180-9.3 (Purdon Supp. 1988); PA. STAT. ANN. tit. 71, § 180-9.3 (Purdon Supp. 1989); R.I. GEN. LAWS § 12-28-4.1 (Supp. 1988); S.C. CODE ANN. § 16-3-1530(C) (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 23A-7-8 (1988); TENN. CODE ANN. § 8-7-206 (1988); W. VA. CODE § 61-11A-6 (1989).

107. See generally Heinz & Kerstetter, *Pretrial Settlement Conference: Evaluation of a Reform in Plea Bargaining*, 13 L. & SOC'Y REV. 349 (1979).

108. See LEGISLATIVE DIRECTORY, *supra* note 13, at 18.

own testimony.<sup>109</sup> This rule of exclusion is intended to guard against fabrication and to ensure independent testimony.<sup>110</sup> As a result, the victim, as a testifying witness, is often excluded from the trial.

The Federal Rules of Evidence recognize three exceptions to this rule of exclusion.<sup>111</sup> First, a witness is permitted to attend trial if also a party to the action.<sup>112</sup> Second, a witness is allowed to attend if designated as a representative of an entity which is a party to the case.<sup>113</sup> The last exception involves a witness "whose presence is shown by a party to be essential to the presentation of the party's cause."<sup>114</sup> Because the victim is not a designated party in a criminal trial nor a representative of a party, only the last exception would seemingly permit the attendance of the victim. The victim is often the principal, and sometimes only, witness for the prosecution. Thus, one can logically assume that such a witness's presence would be "essential" to the presentation of the prosecutor's case.<sup>115</sup>

In 1983, Alabama passed the initial state "court attendance" statute.<sup>116</sup> Such statutes generally grant the victim a conditional right to attend all proceedings and exempt the victim from the witness exclusion rules. As of 1988, fifteen states had enacted court attendance statutes.<sup>117</sup>

### *c. Parole Proceedings*

The current overcrowding of the prison system has had a signifi-

109. FED. R. EVID. 615. See generally 6 J. WIGMORE, EVIDENCE §§ 1837-1842 (Chadbourn Rev. 1976).

110. J. WIGMORE, *supra* note 109, at § 1838.

111. FED. R. EVID. 615.

112. *Id.* at 615(1).

113. *Id.* at 615(2).

114. *Id.* at 615(3).

115. See, e.g., *Government of the Virgin Islands v. Edinborough*, 625 F.2d 472, 474-76 (3d Cir. 1980) (allowed victim and victim's family to stay in courtroom); *Dunn v. Alaska*, 653 P.2d 1071, 1086-87 (Alaska Ct. App. 1982) (held victim to be a person whose presence in the courtroom was essential to presentation of prosecutor's case); *Nebraska v. Eynon*, 197 Neb. 734, 738, 250 N.W.2d 658, 661 (1977) (permitted victim to stay in courtroom).

116. ALA. CODE §§ 15-14-50 to -57 (Supp. 1988).

117. See *id.*; CAL. PENAL CODE § 1102.6 (West Supp. 1989); GA. CODE ANN. § 38-1703.1 (Supp. 1988); MD. ANN. CODE art. 27, § 620 (1987); MICH. COMP. LAWS ANN. § 780.761 (West Supp. 1988); MISS. CODE ANN. § 99-36-5(2) (Supp. 1988); N.M. STAT. ANN. § 31-24-5(C) (1987); N.D. CENT. CODE ch. 12.1-34-02(11) (Supp. 1989); OR. REV. STAT. § 40.385 (1988); S.C. CODE ANN. § 16-3-1530(c)(8) (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 19-14-29 (1987); TEX. CODE CRIM. PROC. ANN. art. 56.02(b) (Vernon Supp. 1989); WASH. REV. CODE ANN. § 7.69.030(9) (Supp. 1989); ARK. R. EVID. 616; N.H. R. EVID. 615; UTAH JUDICIAL COUNCIL RULES—RULE ON VICTIMS & WITNESSES.

cant effect on the criminal justice system. Present-day convicted felons are less likely to face imprisonment or to receive a maximum sentence. Furthermore, because early parole has become a common practice, felons are less likely to serve a full sentence under state custody.

Thus, the victim has an understandable interest in the parole decision-making process. Currently, thirty-eight states have enacted statutes permitting the victim to participate in some manner during the parole hearing.<sup>118</sup> Approximately twenty of these states have enacted their statutes since 1985.<sup>119</sup> In most of these states, the victim is allowed to prepare a statement describing the background and circumstances of the criminal offense, including a description of the injuries caused by the perpetrator. Furthermore, approximately thirty-one states allow the victim to actually address the parole board at the hearing.<sup>120</sup>

Parole hearings normally are closed to the public. In 1982, however, President Reagan's Task Force on Victims of Crime recommended that parole hearings be made open to the public.<sup>121</sup> Additionally, since 1982, at least seven states have enacted statutes which effectively require public parole hearings.<sup>122</sup>

## 7. Victim Intimidation

A study completed in 1981 revealed that up to forty-eight percent of all complaining victims are threatened by the defendant or others on the defendant's behalf.<sup>123</sup> In 1980, the Criminal Justice Section of the American Bar Association prepared a model statute confronting victim/witness intimidation. State legislators soon responded to the problem by enacting intimidation statutes. Many of these early statutes, however, made it almost impossible for law enforcement agencies to arrest the offender or otherwise protect the victim/witness. Most statutes required an excessively high level of proof that intimidation or threats actually occurred, and many required that a crime

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118. LEGISLATIVE DIRECTORY, *supra* note 13, at 11.

119. *Id.*

120. *Id.*

121. FINAL REPORT, *supra* note 5.

122. LEGISLATIVE DIRECTORY, *supra* note 13, at 11-12.

123. Hudson, *supra* note 10, at 53 n.146 (citing VICTIM SERVICES AGENCY, WITNESS INTIMIDATION: AN EXAMINATION OF THE CRIMINAL JUSTICE AGENCY'S RESPONSE (1981)). The 1981 study revealed that victim/witnesses routinely were confronted with gestures, verbal threats, notes, phone calls, destruction of property, display of weapons, and physical attacks. *Id.* at 54 n.151. Approximately 70% of the threats occurred at the victim's home or place of work. *Id.* In felony cases, 26% of the threats occurred at the courthouse. *Id.* Furthermore, these threats were carried out in 25% of the cases. *Id.* An even more startling fact is that police officials made arrests in only 3% of the 220 reported intimidation cases. *Id.* at 54 n.152. The police made no response to the reported act of intimidation in approximately 23-38% of the cases. *Id.*

actually be committed in furtherance of the threat. These ineffective statutes led to a generally inadequate response by investigators, law enforcement agencies, and prosecutors.<sup>124</sup>

Recently, however, state statutes have been refined in an attempt to remedy the problem of victim intimidation. As of 1988, forty-six states had enacted legislation to protect victims against intimidation and threats.<sup>125</sup> Many of the statutes allow a judge to issue a protective order similar to the temporary restraining order used in domestic violence situations.<sup>126</sup>

### 8. "Son of Sam" Laws

In 1977, a series of murders took place in New York City over a period of several months. The media repeatedly referred to the killer as "Son of Sam."<sup>127</sup> After the murderer, David Berkowitz, was captured and convicted, the crime became the subject of numerous articles and interviews. Berkowitz's notoriety eventually led to a book contract between Berkowitz, an author, and a publisher.

As a result of the "Son of Sam" scenario, and others like it, forty-two states<sup>128</sup> enacted laws to prevent convicted criminals from profiting financially at the victim's expense. "Son of Sam" statutes typically provide that royalties owed to the criminal pursuant to a contract with a publisher, author, or other media representative must instead be available for victim restitution, reimbursement of prosecution costs, and contributions to state crime victim compensation programs. However, if criminal charges against the accused are later dismissed, the statutes normally provide that the accused shall receive all of the funds under the contract.<sup>129</sup>

124. *Id.* at 54.

125. LEGISLATIVE DIRECTORY, *supra* note 13, at 15.

126. See generally VICTIM/WITNESS LEGISLATION: AN OVERVIEW 11 (U.S. Dept. of Justice 1984).

127. See Winfrey, "Son of Sam" Case Poses Thorny Issues for Press, N.Y. Times, Aug. 22, 1977, at 1, col. 1. The press used the term after a note signed "Son of Sam" was discovered at the scene of a murder. *Id.*

128. LEGISLATIVE DIRECTORY, *supra* note 13, at 15. As of 1988, the only states that had not yet enacted such a statute were Maine, New Hampshire, North Carolina, North Dakota, Vermont, Virginia, West Virginia, and Wyoming. See *id.* at 15-16.

129. See generally Snider, *My Life of Crime: Coming Soon to a Theater Near You*, 7 CAL. LAW. 28 (Apr. 1987); Note, *Criminals Selling Their Stories: The First Amendment Requires Legislative Reexamination*, 72 CORNELL L. REV. 1331 (1987); Note, *Crime Doesn't Pay: Authors and Publishers Cannot Profit From a Criminal's Story*: Fasching v. Kallinger, 55 U. CIN. L. REV. 831 (1987).



### III. CONCLUSION

In the last five years, victims and their advocates have witnessed numerous changes in the area of victims' rights. States finally are taking the initiative by building the foundations of a system which will eventually treat victims of crime with the compassion and respect they deserve. State and federal legislators have made great strides in the areas of victim compensation, notification, and participation. The basic legislative framework evolving in each of these areas generates optimism and, after minor renovations are made in the future to resolve practical difficulties and to refine procedures, the system should become quite effective.

Many problems, of course, still exist and continue to plague victims. One of the major flaws in the current legislation is that the victim is rarely given any means to enforce the "rights" granted by statute. The entire system is predicated on the government agencies' timely cooperation in providing effective assistance for the victim. If, however, the agencies' assistance is neither timely nor effective, the victim generally is left without a remedy. Thus, while the statutes do grant rights to victims, they fail to provide a means of enforcing those rights.

In his Crime Victims Week Proclamation Ceremony in 1981, President Reagan described victims of crime as the "forgotten persons of our criminal justice system."<sup>130</sup> Fortunately, his description is no longer completely accurate. Society has demanded a response to the needs of victims and, in recent years, federal and state officials are finally recognizing and responding to those needs.

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130. Crime Victims Week 1981, 3 C.F.R. § 18 (1982).