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The Crime Victim and the Criminal Justice System: Time for A Change

PAUL S. HUDSON*

The failure of the present criminal justice system to provide meaningful participation for victims of crime has launched crime victim reform measures to the forefront of the legislative agenda. This article explores current reform measures and proposes new programs to increase the quantity of victims' rights and enhance the quality of victim involvement.

I. INTRODUCTION: THE PROBLEM

As ably researched and presented by William F. McDonald, the crime victim once played a central role in the American criminal justice system.¹ From colonial times until the early 19th century—which brought the correctional institution, public prosecutors, and professional police force—the victim's role often involved the apprehension and prosecution of the criminal.² But even before the times of these early American reforms, governments began to assume a greater role in the control of theft and violence. The transition from citizen and victim participation to public responsibility for criminal justice has been a gradual one. It began with the search for a substitute for the medieval blood feud.³ This was followed by the emergence of a professional police force instead of private prosecution and citizen action.⁴ Public prosecution became the norm. Restitution and fines payable to

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1. McDonald, *Towards a Bicentennial Revolution in Criminal Justice*, 13 AM. CRIM. L. REV. 649 (1976).

2. *Id.* at 651-54.

3. *Id.* at 654-56; S. SCHAFER, *RESTITUTION TO VICTIMS OF CRIME* 3 (1960).

4. See generally 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* 14-18, 53 (1982) [hereinafter cited as CV/CJS]; Lamborn, *Remedies for the Victims of Crime*, 43 S. CAL. L. REV. 22 (1970).

the victim were replaced by remedies administered by the state.⁵ Even with this change in the nature of fines, incarceration has become the dominant form of criminal sanction.⁶

Accompanying these trends were some basic ideas that can be characterized as the modern ideology of criminal justice:

1. An act of violence or theft is primarily an offense against the government and public order, rather than a private wrong.⁷

2. The government and its officials, because it acts for the good of all the people, cannot be held accountable for its mistakes, negligence, or inefficiency in the administration of criminal justice.⁸

3. Specially trained and charged professional officers are better at controlling crime and seeing that justice is done; hence, private citizens should leave the operation of the system to professionals.⁹

4. The victim is useful to the system primarily as an information source and a witness, and his interests (e.g., retribution, to be made whole) are not important to the operation of the system. Consideration of those interests could interfere with the ideals of justice, as well as efficient administration of the system.¹⁰

5. Because of the great power of the state and the potential for abuse, as well as the potentially unjust impact on the accused if a mistake is made, persons accused or suspected of committing

5. Lamborn, *supra* note 4, at 25.

6. *Id.* at 48; CV/CJS, *supra* note 4, at 14-18 (notes of Prison Congress).

7. F. WHARTON, CRIMINAL LAW 19-21 (14th ed. 1978). As such, the government must take the lead in adjudicating the matter and punishing the offender. *Id.* Indeed, the power to define crime belongs to the legislature. In the exercise of this power the governing body can say what acts shall, and what acts shall not constitute crime and can prescribe punishment for prohibited acts. *Ex parte* United States, 242 U.S. 27 (1916); *Lawton v. Steele*, 119 N.Y. 226, 23 N.E. 878, *reh'g denied*, 119 N.Y. 661, 23 N.E. 1151 (1890), *aff'd*, 152 U.S. 133 (1894).

8. The doctrine of sovereign immunity still holds sway in the area of government accountability to victims. Even where sovereign immunity has been waived by statute, the general rule is that government owes no duty to protect individual citizens absent a special relationship or gross negligence. *Massengill v. Yuma County*, 104 Ariz. 518, 456 P.2d 376 (1969); *Riss v. City of New York*, 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1968); Annot., 5 A.L.R. 4TH 773 (1981); Annot., 76 A.L.R. 3D 1176 (1977); Annot., 46 A.L.R. 3D 1084 (1972); Annot., 22 A.L.R. FED. 903 (1975).

9. McDonald, *supra* note 1, at 663-67. See also STANDARDS FOR CRIMINAL JUSTICE 1-2.2, 1.31, 3.6, 3.12, 3.44, 3.47 (2d ed. 1978).

10. In written comments submitted to the New York State Crime Victims Compensation Board on a proposed Crime Victims Bill of Rights in 1981, a view of the proper place of the victim in the criminal justice system was expressed by a prominent New York prosecutor as follows: "The American system is founded on the principle that violations of penal laws are an affront to society as a whole, the presence or absence of an individual victim who has been harmed by the accused's conduct is irrelevant." Written Comments of Thomas Sullivan, Richmond County District Attorney and President of the New York State District Attorneys Association in CV/CJS, *supra* note 4, at 10 app. B (Mar. 17, 1981).

crimes need to be cloaked with a great array of procedural rights, privileges, and safeguards.¹¹

Older ideas about criminal justice have fallen into disuse or have been largely subordinated to the ideology of the modern criminal justice system. These older ideas include: (1) the notion that government owes a duty to protect its citizens and visitors from violent attack and theft,¹² and (2) the belief that citizens have a right and duty to protect themselves from the criminal acts of others.¹³ Finally, the important belief that crime victims have the right to be made whole for their losses has suffered greatly from the operation of our modern criminal justice system.¹⁴ The

11. This important tendency to recognize and protect the rights of the accused developed significantly in the last generation and has been termed the "innocent man syndrome." In full recognition of this tendency it has also long been recognized that there are other elements equally necessary in the criminal justice balance. See *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923).

Our dangers do not lie in too little tenderness to the accused. Our procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays and defeats the prosecution of crime.

Id. (L. Hand, J.).

12. For instance, the New York Penal Law, in acknowledging this broadly defined duty, states as one of its goals: "To insure the public safety by preventing the commission of offenses through the deterrent influences of the sentences authorized and the rehabilitation of those convicted, and their confinement when required in the interests of public protection." N.Y. PENAL LAW § 1.05(6) (McKinney 1982).

13. For instance, the second amendment to the United States Constitution provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II.

This amendment only relates to those arms necessary to bolster or maintain a state militia and is not a blanket mandate supporting a general right to bear arms. In effect, the second amendment is inapplicable to purely private conduct. *United States v. Cruikshank*, 92 U.S. 542, 553 (1876). Thus, while some courts embrace a broad acceptance and application of this right within certain accepted contexts, like the protection of the home (*see, e.g., State v. Nickerson*, 126 Mont. 157, 247 P.2d 188 (1952)), most courts have held this right to be less than absolute (*see Stearnes v. United States*, 440 F.2d 144 (6th Cir. 1971)), and clearly subject to the police power. See *United States v. Decker*, 446 F.2d 164 (8th Cir. 1971); *United States v. McCutcheon*, 446 F.2d 133 (7th Cir. 1971).

14. The oldest known legal code, the Code of Hammurabi, dating from about 2380 B.C., provided for victim restitution. In addition, "if a robber has not been caught . . . the city and the governor [in] whose district and territory the robbery was committed, shall replace for him [the victim] his lost property." Also, "if it was a life that was lost, the city and governor shall pay one mina of silver to his heirs." C.H. GORDON, *HAMMURABI'S CODE: QUIANT OR FORWARD LOOKING?* 4-6 (1960). Other ancient societies that recognized the victim's right to be made whole through restitution from the offender or communal compensation included Mosaic

result of the change between these older ideas and the “modern ideology” of criminal justice is that the victim is being ignored.

II. POLICY CONSIDERATIONS IN EVALUATING VICTIM REFORMS

A. *Growing Problems in Criminal Justice Parallel Renewed Interest in Crime Victims*

In the last fifteen years, a general awakening has occurred with respect to the unfortunate plight of the crime victim in the present day criminal justice system.¹⁵ In the past five years, a virtual explosion of interest has occurred concerning the rights of the crime victim.¹⁶ This has been followed by increased legislative attention to the role of the victim in the administration and operation of the criminal justice system.¹⁷

However, this renewed interest in the crime victim's rights has occurred at the same time as some rather negative and disturbing trends in crime rates and law enforcement effectiveness have been noted. Crime, particularly violent crime in urban areas, has greatly increased over the past three decades. Most statisticians

Law, the Greek and Roman Penal Codes, and Anglo Saxon Law. See S. SCHAFER, *supra* note 3, at 306; CV/CJS, *supra* note 4, at 14.

15. Since 1965, all but 14 states have enacted crime victim compensation statutes for monetary compensation to violent crime victims. D. MCGILLIS & P. SMITH, *COMPENSATING VICTIMS OF CRIME: AN ANALYSIS OF AMERICAN PROGRAMS passim* (1982). Starting in the mid-1970's, victim/witness assistance and service programs were established in many localities. These programs provide victims and criminal justice agencies with such services as counseling and “crisis intervention,” witness management, information on case status, security information and assistance, assistance in dealing with the criminal justice system and government bureaucracy, transportation, day care, and relocation assistance. As of 1983, there were nearly 100 victim service programs in New York State, and an estimated 500 programs nationally. For details of programs in New York, see CV/CJS, *supra* note 4, at 81-98 & app. D.

At least one state—New York—has established a comprehensive state agency, the Crime Victims Board, to administer all state programs dealing with crime victims and to actively “advocate the rights and interests of crime victims” before other units of government. N.Y. EXEC. LAW § 623(15) (McKinney 1982).

16. This interest is measured by the large increase in the number of articles and books published on crime victims such as the ABA Hearings on Victim/Witness Intimidation, a President's Task Force on Victims of Crime, at least six Congressional Committee hearings, and establishment of a Victims Committee by the American Bar Association.

17. Eighteen months after the American Bar Association Section of Criminal Justice published *VICTIM/WITNESS LEGISLATION* in September 1981 summarizing current state legislative initiatives, the National Organization for Victim Assistance (NOVA) published *VICTIMS RIGHTS AND SERVICES: A LEGISLATIVE DIRECTORY* (1983) [hereinafter cited as *NOVA LEG. DIRECTORY*]. Seventy-four new victims' rights statutes were listed, enacted by states from 1981 to the first quarter of 1983, as well as a major new federal law: the Victim and Witness Protection Act of 1982. During 1983, in New York alone, over 120 victim-related bills were introduced and about two dozen new victim rights laws were enacted, far surpassing the total of previous years.

believe that today's rate is between three and five times the crime rate of the mid-1950's.¹⁸ For example, approximately one in three Americans is victimized by crime each year. In large urban areas, violent crime strikes one in thirty-five each year.¹⁹ Homicide has become one of the ten leading causes of death for all American men and is now the leading cause of death of black American men under the age of forty-four.²⁰

The ability of the criminal justice system to meet this challenge has failed to keep pace. Apprehensions of persons committing crimes have fallen faster than the crime rate has increased.²¹ Convictions, in proportion to arrests, have also fallen²² while punishments, measured by incarceration time for persons committing serious offenses and capital punishment, have become more lenient.²³ Plea bargaining based on a negotiated settlement between the public prosecutor and defense counsel with judicial approval, rather than trial by jury, has become the norm in American criminal court cases.²⁴ Perhaps not surprisingly, the cost of operating the criminal justice system has also increased to such an extent that the public resists further expenditures.²⁵

18. U.S. DEP'T OF JUSTICE, MYTHS AND REALITIES ABOUT CRIME (1978) [hereinafter cited as MYTHS]; M.J. HINDELANG, CRIMINAL VICTIMIZATION IN EIGHT AMERICAN CITIES (1976); F.B.I., UNIFORM CRIME REPORTS 11 (1975), 39 (1978), 40 (1979); C.B. KALISH, CRIMES AND VICTIMS (1974). For example, in New York City reported robberies increased from under 7,000 in 1960 to over 120,000 in 1981. New York State, Criminal Justice Annual Report 1982, 5 (1982).

19. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE U.S.: 1982-83 (1983).

20. VERA INSTITUTE OF JUSTICE, FELONY ARRESTS: THEIR PROSECUTION AND DISPOSITION IN N.Y.C.'S COURTS (1977) [hereinafter cited as VERA INSTITUTE].

21. *Id.*

22. *Id.*

23. Probation, parole, and "good time credits" substantially reduce the actual incarceration time of criminal offenders. In New York, according to testimony presented recently at hearings held by State Senator Alfonse D'Amato, the average incarceration time for murder in New York is 7 years, and the average time served for all felony offenders is less than three years. Use of the death penalty in the United States has declined steadily from a high of 891 in 1935-39 to 10 in 1965-69, after which its use essentially ceased. See H.A. BEDAU, THE DEATH PENALTY IN AMERICA table 2-3-1 (1982). However, death penalty laws have recently been re-established in many states. There are now over 700 prisoners under death sentences. *Id.* at table 2-3-5.

24. For example, in 1980 in New York City, only 1.5% of all criminal cases were tried, while in smaller cities and rural areas in New York State, 2% were tried. REPORT OF THE CHIEF ADMINISTRATOR OF THE COURTS, STATE OF NEW YORK, 1980, 24, 40, 42, 44, 46 (1981).

25. From 1971 to 1979, total criminal justice expenditures increased by 147%. U.S. DEP'T OF JUSTICE, JUSTICE EXPENDITURE AND EMPLOYMENT IN THE UNITED

Recent studies have also cast doubt on the effectiveness of massive new government law enforcement programs.²⁶ It appears that crime victims and citizen witnesses are responsible for the successful solution of the great majority of crimes that are solved.²⁷ When victims choose not to cooperate with the criminal justice system, whether in failing to report a crime, assist police in their investigation, or assist in the prosecution as a witness, the success rate of the government in apprehending, convicting, and punishing persons committing crimes becomes negligible.²⁸ Indeed, the conclusion has become nearly inescapable: a criminal justice system that ignores the interests of or ill treats the victim runs the risk of alienating the person upon whom its success as an institution depends. Moreover, a massive lack of participation by citizens in the government's criminal justice system runs the risk of seriously damaging the present constitutional ideals of criminal justice, as well as permanently undermining the government's crime control function.²⁹

B. Rationales for Enhanced Victim Involvement and Reform

The interest in increased victim involvement in the criminal justice system and enhancement of the victim's rights has been largely a matter of legislative and popular political interest. At least at the higher appellate levels, judicial responses have often been negative.³⁰ It is therefore not surprising that the rationales

STATES 1979, 1 (1983). Prison construction bond issues have been defeated by the voters recently in Michigan, New York, and several other states. *New York Times*, Mar. 4, 1981, § 2, at 1, col. 6; May 12, 1982, § 2, at 1, col. 6; Oct. 16, 1981, at 1, col. 5.

26. For example, increased police manpower does not seem to result in effectively reducing crime, and increased court participation does not necessarily translate into a proportionate increase in incarceration of criminal offenders. P.W. GREENWOOD, J. CHAIKEN & J.R. PETERSILA, *THE CRIMINAL INVESTIGATION PROCESS* (1977). See also J. CHAIKEN, *WHAT'S KNOWN ABOUT THE DETERRENT EFFECTS OF POLICE ACTIVITIES* (Rand Corp. ser. 1977).

Moreover, the experience of high recidivism has led many states to conclude that rehabilitation of offenders does not work, leading them to reinstitute determinate sentencing.

27. P.W. GREENWOOD, *supra* note 26.

28. Non-cooperation has become a major problem. *MYTHS*, *supra* note 18, at 10-11 (one-third to one-half of felony crimes are not reported); *ANNUAL REPORT OF NEW YORK STATE CRIME VICTIMS BOARD* (1981-82) [hereinafter cited as *ANNUAL REPORT*] (one third of all claims rejected for non-cooperation with Board or criminal justice system); R.C. DAVIS, *THE ROLE OF THE COMPLAINING WITNESS IN AN URBAN CRIMINAL COURT* 2, 9 (1980) (greatest single cause of failure of prosecution is non-cooperation of witnesses).

29. *ANNUAL REPORT*, *supra* note 28.

30. *Id.* Recent cases include *German-Bey v. Amtrak*, 703 F.2d 54 (2d Cir. 1983) (no duty of Amtrak employees to protect victim against attack by drunken passenger); *but see* *Payton v. United States*, 679 F.2d 475 (5th Cir. 1982); *Weiner v. Metropolitan Transp. Auth.*, 55 N.Y.2d 175, 433 N.E.2d 124, 448 N.Y.S.2d 141 (1982) (public transit authority cloaked with same immunity as police, meaning no duty to pro-

for enhancement of victim's rights in the criminal justice system most frequently proceed from a non-legal base. The following rationales are ten of the most frequently articulated. Some, those without explanation or comment, are basically popular reactions to the heavily burdened criminal justice system. Others, those with explanation or comments, are analytical justifications for change. Both types, however, deserve attention.

1. There are serious injustices in the present system, because it ignores victim interests and often treats victims unfairly.³¹

2. The present system harbors the inequity of elaborate procedural rights for the accused, but denies the victim standing in the criminal justice process and grants him very few procedural rights.³²

3. Enhancement of the rights and privileges of crime victims will encourage victim cooperation within the criminal justice system. The result of improved effectiveness of the criminal justice system in apprehending and convicting criminals will deter crime and lower the overall crime rate.³³

As previously noted, the failure of victims to report crimes or actively cooperate with the police and prosecution when crimes are reported is an alarming trend.³⁴ As crime has become an every day fact of life for Americans, there have been more unfavorable encounters with the criminal justice system. With an overall arrest rate of about 20% of the crimes reported or perhaps 10% of the crimes committed, the reasonable person begins to understand that the chances of the police catching a criminal perpe-

tect passengers absent special relationship). See generally Carrington, *Victims' Rights Litigation: A Wave of the Future?*, 11 U. RICH. L. REV. 447 (1977); Comment, *Negligence Liability for the Criminal Acts of Another*, 15 J. MAR. L. REV. 459 (1982).

31. U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME, FINAL REPORT 22, 90-91 (1981). See also PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 2 & *passim* (1982) [hereinafter cited as PRESIDENT'S TASK FORCE]; CV/CJS, *supra* note 4, at 99; OFFICE OF CALIFORNIA ATTORNEY GENERAL GEORGE DEUKMEJIAN CRIME PREVENTION CENTER, REMEMBERING FORGOTTEN VICTIMS 20-21 (1980); H. BROWNELL, THE FORGOTTEN VICTIMS OF CRIME, *reprinted in* FORGOTTEN VICTIMS: AN ADVOCATE'S ANTHOLOGY (G. Nicholson, T. Conduit & S. Greenbaum, eds. 1981); Goldstein, *Defining the Role of the Victims in Criminal Prosecution*, 52 MISS. L.J. 515, 515-16 (1982); New York State Crime Victims Comp. Bd. & Hudson, *A Bill of Rights for Crime Victims*, 5 VICTIMOLOGY: AN INT'L J. 428 (1980). See also McDonald, *supra* note 1.

32. See *supra* note 31.

33. *Id.*

34. See *supra* note 28.

trator are often slight. Moreover, millions of victims who are called upon each year to be complaining witnesses come to experience financial loss, inconvenience, intimidation, outrage and/or emotional pain. For many—44% according to one survey—this “close encounter” proves too much and they vow never to become involved with the system again.³⁵

As the number of disillusioned citizens who have opted out of any involvement with police or prosecutors increases, the ability of law enforcement to apprehend and prosecute diminishes. The criminal justice system must break out of this destructive downward spiral by showing the public, and particularly crime victims, that it is sensitive to victim needs and is appreciative of the essential civic services which citizens perform. As with other government services, criminal justice must include justice for the individual victims of crime if it is to command the respect, support, and cooperation of those whom it is supposed to protect and serve.

One need not idealize the modern Chinese example of “hue and cry” methods of criminal apprehension to notice the stark contrast of the “deaf, dumb, and blind” witness often experienced by urban law enforcement officers.³⁶ Imagine a situation where victims do not willingly report crimes or become witnesses. In such societies government law enforcement officers would be relegated to a “bystander” role, restricted to prosecuting petty or public offenses. Prosecutors would be confronted by criminal offenders whose testimony must be coerced or purchased with threats or promises of harsh or favorable treatment. On the other hand, should victims begin to report crimes quickly and accurately, actively assist police in their investigations, and willingly offer testimony in prosecutions, apprehension and conviction rates would likely increase. This should, in turn, have a deterrent effect on criminal conduct in general.

Another aspect of victim involvement is voluntarism, a key feature in the pre-1800 American criminal justice system.³⁷ While no one today advocates a return to the days when citizens and victims were responsible for apprehension and actually paying for prosecution of criminal offenders, victim-citizen involvement in crime prevention programs, neighborhood patrols, neighborhood watch programs, and volunteer auxiliary police units have the po-

35. L. HARRIS & ASSOCIATES, INC., A PILOT SURVEY OF CRIME VICTIMS IN NEW YORK STATE 17-20 (1981), reprinted in CV/CJS, *supra* note 4, app. C.

36. Cannavale & Falcon, *Witness Cooperation*, INST. OF L. & SOC. 1, 9 (1976) (stating inconvenience, predisposition, and fear of reprisal). *See also* VERA INSTITUTE, *supra* note 21, at 35.

37. *See supra* notes 31, 35.

tential for filling out and extending the resources of tightly budgeted professional police agencies.

4. If legislators are to find more funds for law enforcement, corrections, and other criminal justice system programs, it is politically important for the public to feel that the system is working for them, not just for the rights of the accused, convicted, or institutional interests.

This rationale recognizes that the criminal justice system is increasingly held in low public esteem.³⁸ The problem is more than one of poor public relations. Unlike the 1960's when the criminal justice system was sometimes criticized for oppressive, unconstitutional, punitive or over-zealous law enforcement practices, there is now a growing feeling that the system is plagued with underzealousness, leniency, inefficiencies, and an excess of technical legal procedures.³⁹ For example, victim/witness assistance programs in district attorneys' offices are often justified on the basis of public relation and cost-saving grounds, as well as witness management and efficiency grounds.⁴⁰

5. What can be collectively termed humanitarian and social welfare rationales are often cited for the establishment of state-funded victim compensation, victim/witness assistance, and counseling programs.⁴¹ Such rationales generally describe the government service as a benefit bestowed as a matter of legislative or executive grace, rather than a right or entitlement.

6. A "social contract" rationale is also often used, based on the natural law idea that the government's monopoly on the use of force carries with it the duty to protect its citizens from attack and theft.⁴² While this rationale has seen scant success in litigation seeking to hold the government liable in damages for failure

38. See *supra* notes 31, 35 and accompanying text.

39. See *supra* note 31 and authorities cited therein. This author has had occasion to interview a growing number of New York City area police officers wounded and disabled in the line of duty. The all-too-prevalent attitude appears to be that police officers feel the public does not really support them, so "why stick your neck out?"

40. NEW YORK CITY VICTIM SERVICES AGENCY, SELECTED SAVINGS GENERATED BY VSA SERVICES 5 (1982) (indicates annual savings of \$14 million to the city).

41. N.Y. EXEC. LAW § 620 (McKinney 1982); MCGILLIS, *supra* note 15, at 5, 46; M. FRY, ARMS OF LAW 124 (1951). A humanitarian rationale would be that society has a moral duty to assist crime victims who suffer financial hardship and have been abused.

42. J. LOCKE, SECOND TREATISE *passim* (1690). See also CV/CJS, *supra* note 4, at 23.

to protect particular crime victims,⁴³ the social contract theory is used as a policy argument for increasing the level of government protective services and victim rights, particularly in jurisdictions which restrict or discourage citizens from possessing or carrying weapons. The social contract concept of the government's duty to protect may also be used to justify a variety of subsidiary rights for victims including compensation, witness protection and, at least, limited governmental civil liability for negligence.⁴⁴

7. Victim rights reforms are largely non-punitive, non-repressive, constitutional, politically popular, and fiscally inexpensive, unlike many other legislative proposals on the criminal justice agenda. In contrast, controversial proposals include such items as death penalty laws, expanded prison construction and operating budgets, changes in the rules of evidence, and determinate sentencing with the restriction or abolition of parole.⁴⁵

8. The "we-have-tried-everything-else" argument. Beginning in the late 1960's and early 1970's, a succession of federal and state initiatives were aimed at enhancing the capacity of professional law enforcement to apprehend, prosecute, and convict criminals. For a variety of reasons, many of these initiatives had fallen into disfavor by the late 1970's. For example, the major federal program in this "War on Crime," the Law Enforcement Assistance Administration, was phased out and de-funded beginning in 1980.⁴⁶

9. Some victim reforms have correctional value in themselves

43. CV/CJS, *supra* note 4, at 56-62.

44. *See supra* note 41.

45. For the most part, victim advocates have avoided more controversial punitive measures directed against offenders such as the death penalty, which would arguably benefit victims. Consequently, victim reform measures have usually enjoyed bi-partisan political support in state legislatures. For example, in New York, State Senator Ralph Marino (a conservative Republican and chairman of the Senate Crime and Correction Committee) has co-sponsored a significant number of victim rights proposals with Assemblyman Richard Gottfried (a liberal Democrat and Chairman of the Assembly Task Force on Crime Victims). Liberals often support victim reform based on social welfare or social contract theories, while political conservatives often express their support in terms of enhancing crime control as a matter of equity and counterbalance to the rights of criminal defendants.

The potential cost of a national program to compensate violent crime victims was estimated at \$144 to \$261 million in 1977. J. GARAFALO & L.P. SUTTON, COMPENSATING VICTIMS OF VIOLENT CRIMES 9 (LEAA 1977). However, the total monies paid to victims from compensation programs in 1982 from 34 state programs was \$49 million. PRESIDENT'S TASK FORCE, *supra* note 31 (testimony of R. Zweibel). Recent studies by the New York State Crime Victims Board show that because of inflation and statutory maximum award limitations, the real value of victim compensation has slightly declined since 1978.

46. The Law Enforcement Assistance Administration (LEAA) program was criticized on a variety of grounds, including waste, ineffectiveness (crime rates continued to soar), and intrusion of federal government into the state and local criminal justice responsibilities and jurisdiction. The program was killed in 1980

and are more cost-effective than the alternative of longer incarceration. For instance, victim restitution has been shown to be less expensive than incarceration. Many authorities have recommended restitution for its correctional benefits to the offender, such as promoting a sense of responsibility for the crime and reduction of incarceration time.⁴⁷

10. The time has come after twenty years of judicial decisions and statutory enactments fully implementing the constitutional rights of criminal defendants, for the theoretical remedies of crime victims to receive practical implementation. This rationale focuses on the perceived inequity between a fully articulated system of procedural rights for criminal defendants and the virtually non-existent procedural rights of victims. Restitution, civil recovery, and elementary due process rights for victims, while increasingly recognized as appropriate, are presently at a stage roughly equivalent to the pre-1960 status of the constitutional rights of state criminal defendants.⁴⁸

Existing victim remedies of restitution, civil recovery, and crime victim compensation must be made legally and administratively practical for the typical crime victim, not merely for the exceptional or egregious situation. In the past twenty years, there has been a virtual revolution in the practical application of the Bill of Rights to criminal defendants by the criminal justice system. It is, without a doubt, both legally and administratively feasible for a similar process to implement existing legal rights and principles affecting the victims of crime.

when President Carter's budget message announced that the program had served its purpose and recommended no funding for fiscal year 1980-81.

47. CV/CJS, *supra* note 4, at 18-20, 34-38; Galaway & Hudson, *Restitution and Rehabilitation: Some Central Issues*, 18 CRIME AND DELINQUENCY 403, 410 (1972); Schafer, *Victim Compensation and Responsibility*, 43 S. CAL. L. REV. 55 (1970); Eglash, *Creative Restitution*, 48 J. OF CRIM. LAW, CRIMINOLOGY, POL. SCI. 619 (1958).

48. Criminal defendants had constitutional rights prior to the federal judiciary's implementation of the exclusionary rule; however, notifying the accused of his rights was relatively rare. Under existing laws, victims generally have no legal right—as that term is normally understood—to restitution, governmental protection from crime, notification or information of criminal justice proceedings, and financial assistance and services. Nor are they legally entitled to a secure waiting area in courthouses, protection from intimidation, superior property rights in property held by law enforcement agencies, a speedy trial or disposition, or legal services. Victims have very limited rights to victim assistance services, few—if any—rights to adequate witness compensation in state courts, and very limited state-funded compensation. See CV/CJS, *supra* note 4, at 13 & *passim*. See also Hudson, *supra* note 31, at 428-33.

C. Goals for Crime Victim Legal Reforms

In many respects, reformers in the victim's rights field are fortunate to be able to draw on the experiences, both positive and negative, of other recent legal reform movements. The following list of five goals for legal reform is by no means exclusive. However, it is submitted that all are important for crime victims and quite achievable within present legal and political contexts. If specific victim rights proposals are measured against these overall goals, the potential pitfalls and contrary arguments discussed later may be avoided or minimized.

1. Make the criminal justice system work for victims.

The plight of victims is not so much that they are ignored, but that they are kept out of the mainstream of the legal process. The policy behind such modern legal practice is based on ideas traceable to late 18th and early 19th century reform efforts that established government funding and control of the criminal justice process.⁴⁹ The idea that victim interests interfere with or are irrelevant to the government's efforts to do justice and control crime must be replaced with a new idea. That new idea is that *justice cannot be done without taking the victim's interest into account*, and that far from being irrelevant, *victim participation in and support of the criminal justice system is essential for the system to operate effectively*.

Some observers have suggested that police and prosecutors should think of victims as their "clients" or "customers."⁵⁰ Another possibility is to view the crime victim as a "consumer" (along with the criminal perpetrator) of criminal justice services provided by the government.⁵¹ These analogies, while not perfectly fitted to the criminal justice process, are useful in defining an appropriate new role for the crime victim in the criminal justice system.

Another traditional idea that must be discarded in order to make the criminal justice system work for the victim is the legal fiction that the state, rather than the victim, is the injured party in a criminal case. As stated by victims themselves: "The State of New York was not kidnapped, beaten, and raped. I was."⁵² This legal fiction enrages crime victims and forms a legal barrier to vic-

49. CV/CJS, *supra* note 4, at 53, 69.

50. See CV/CJS, *supra* note 4, at app. D.

51. *Id.*

52. See New York State Crime Victims Comp. Bd., *supra* note 31, at 436 (testimony of crime victim at New York state public hearing held February 1981, on proposed Bill of Rights for Crime Victims).

tim rights reform efforts. While some retention of this legal principle may be necessary, a reformulation and reformation is long overdue.

2. Protection of public safety from crime should be established as a duty the government owes its citizens. For protection to be effectively implemented, legal incentives for crime prevention, and at least limited governmental liability for negligent acts causing harm to crime victims, should be mandated.

A duty owed to everyone but not enforceable as to any particular person or group of persons is a duty owed to no one.⁵³ The "no duty" doctrine of law enforcement toward individual victims and citizens is justified almost entirely on fiscal grounds and is repugnant to injured crime victims.⁵⁴ The requirement of a special relationship has often been attacked by victim plaintiffs, but so far has yielded only slightly to the demands of victims for protection and damages.⁵⁵

Courts regularly bar, on grounds of sovereign immunity, negligence actions by victims against governmental entities for the most egregious official negligence and resulting victim injuries.⁵⁶ In contrast, private entities such as landlords or tavern owners, who have no law enforcement powers or duties, are held to standards approaching strict liability by some courts.⁵⁷ In New York, a

53. *Riss v. City of New York*, 22 N.Y.2d 579, 585, 240 N.E. 860, 862, 293 N.Y.S.2d 897, 901 (1968) (Keating, J., dissenting) (summarizing the position of the City of New York).

54. *Id.*

55. *See supra* note 30.

56. *Martinez v. California*, 444 U.S. 277 (1980); *Taylor v. State*, 36 A.D.2d 878, 320 N.Y.S.2d 343 (1971).

57. Modernly, innkeepers are held to a duty just short of being an insurer of their guests' safety. *See Garzilli v. Howard Johnson's Motor Lodges, Inc.*, 419 F. Supp. 1210 (E.D.N.Y. 1976). *See also* Annot., 43 A.L.R. 3d 331 (1972); Annot., 70 A.L.R. 2d 628 (1960). A similar duty to protect is usually found between a carrier and passenger, landowner and public or business invitee, custodian and charge. *See generally* RESTATEMENT (SECOND) OF TORTS §§ 315-320 (1965). The employer-employee relationship is another in which there is some duty to protect. *Lillie v. Thompson*, 332 U.S. 459 (1947). The employer also has a growing duty to protect third persons from attacks by its employees. *Tobin v. Slutsky*, 506 F.2d 1097 (2d Cir. 1974); *Thahill Realty Co. v. Martin*, 88 Misc. 2d 520, 388 N.Y.S.2d 823 (1976). While the general rule is still that landlords have no duty to protect their tenants absent a special relationship or duty (*Kline v. 1500 Mass. Avenue Apartment Corp.*, 439 F.2d 477, 481 (D.C. Cir. 1970)), a growing number of lower court cases

citizen injured by tripping over a pothole in the street stands a better chance of civil recovery against the government than a crime victim injured by an escaped or improperly released felon.⁵⁸ Criminal defendants and prison inmates presently have thousands of federal and state civil rights lawsuits pending in the courts, most demanding sizeable monetary damage awards. As a result of the threat of such lawsuits, criminal justice agencies have generally become positively meticulous in the treatment of criminal suspects, defendants, and inmates, particularly if compared to the practices of twenty years ago.

3. Victims should be given limited standing in the criminal justice process and accorded elementary due process rights.

“Justice” in the American criminal justice system, has more often than not been equated in the law with a fair procedure by which substantive decisions are made.⁵⁹ Elementary due process has been defined as notice and the opportunity to be heard.⁶⁰

Crime victims at present lack these elementary rights at virtually every significant stage of the criminal justice process.⁶¹ Even where such rights are recognized in the law, there exist generally no sanctions against governmental agencies for failure to comply.⁶²

find liability for attacks in common hallways or where there is defective security, especially if in violation of a tenant security ordinance. 439 F.2d at 477. Tavern owners, by statute, also have a special duty not to serve liquor to intoxicated patrons who may attack others. *E.g.*, N.Y. GEN. OBLIG. LAW § 11-101 (McKinney 1978) (Dram Shop Act).

58. Compare *Sobel v. City of New York*, 9 N.Y.2d 187, 173 N.E.2d 771, 213 N.Y.S.2d 36 (1961) and *Jediny v. City of New York*, 368 F.2d 523 (2d Cir. 1966), with *Taylor v. State*, 36 A.D.2d 878, 320 N.Y.S.2d 343 (1971) and *Santangelo v. State*, 103 Misc. 2d 578, 426 N.Y.S.2d 931 (1980) (any substantial evidence supporting release of parolee is sufficient to shield Parole Board from liability of releasee's acts, applying a gross negligence standard).

59. Justice has been formally defined as “the constant and perpetual disposition of legal matters to render every man his *due*.” BLACK'S LAW DICTIONARY 776 (5th ed. 1979) (emphasis added).

60. In cases involving an individual's liberty or property interest, as protected by the fourteenth amendment, the United States Supreme Court has described rudimentary due process as notice and an opportunity to be heard. *Paul v. Davis*, 424 U.S. 693, 707 (1976) (citing *Wisconsin v. Constantineau*, 400 U.S. 433, 434 n.2 (1971)); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *Goldberg v. Kelly*, 397 U.S. 254, 256 (1948); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914).

61. See *supra* note 48.

62. For example, in New York state every violent crime victim is required by statute to be notified of the victim compensation program by the person receiving the crime report (i.e., the police officer). However, the status of this victim “right” is vitiated by the final clause of the statute: “No cause of action of whatever nature or kind arising out of a failure to give or receive the notice required by this section

Monitoring and enforcement of such requirements is weak to non-existent.⁶³ By way of contrast, the exclusionary rule is enforced by reversals of convictions or dismissals of indictments. The constant threat of civil damage actions also engenders in law enforcement agencies a very alert attitude toward the due process rights of criminal defendants.⁶⁴

4. The crime victim should be made whole with monetary recovery and support services.

This goal is an ideal that can never be fully realized. However, there is every reason to believe that in a society where government provides rights to tort recovery and/or "no fault" social insurance programs for the victims of industrial accidents, automobile accidents, natural disasters, unemployment, and hazards of all sorts, that same government can provide for a similar level of financial assistance to victims of crime. The responsibilities of government in the criminal justice field where it has largely pre-empted private action by citizens is certainly as great as in those mentioned above. It would appear that the three basic forms of victim monetary recovery—civil tort actions, restitution (a criminal sanction ordered by a court after conviction), and government-funded compensation—could be expanded and strengthened to provide at least a basic safety net of financial protection for the crime victim.⁶⁵

Contrary to some popular beliefs, studies show that the most

shall accrue to any person against the state or any of its agencies or local subdivisions, or, any police officer or other agent. . . ." N.Y. EXEC. LAW § 625-a(1), (2) (McKinney 1983).

63. L. HARRIS, *supra* note 35, at 39-40 (only 3% of crime victims learned about the New York Crime Victim Compensation Board from the police when crime reported; 65% of victims were unaware of the program).

64. Nearly 5,000 federal civil rights violation cases were pending against New York State in 1982 (information provided by the Attorney General's Office, Litigation Bureau, New York State Department of Law).

65. As most crime victim losses are not trivial (L. HARRIS, *supra* note 35 (estimating an average loss of \$1,400 for index crimes)), it is not impractical for restitution and violent crime victim compensation to provide compensation to at least 10-15% of the victim population. Where third party negligence has contributed to or is responsible for the crime-related loss, recovery should also be available. Such cases should represent a small number of the crimes committed.

A significant proportion of the remaining property crimes would be covered by private insurance. While a large number of crime victims would still be uncompensated, a basic "safety net" would be provided for those in most serious need. The financially capable negligent third parties and criminal offenders would bear the cost of crime-related losses to a much higher degree than at present.

deeply felt need for most crime victims is not revenge but to be made whole.⁶⁶ This need also includes support services such as psychological counseling, legal services, and prompt return of property held by law enforcement agencies.⁶⁷

5. "Streamlining" of the criminal justice system, while including legitimate victim rights and interests, is an important goal in itself and should be realized wherever feasible in victim reforms.

An already over-burdened system that functions in many jurisdictions with extra-legal shortcuts such as plea bargaining may have severe difficulty in absorbing new rights for crime victims without further deterioration in the quality of justice. This goal implies that victim rights should be integrated into existing procedures where possible. Any additional cost or delay in implementing a victim rights proposal should be balanced wherever feasible by an increase in revenue or a productivity gain for the overall operation of the criminal justice system.⁶⁸

In current conditions of fiscal restraint and government retrenchment, reforms need to pay their own way. Moreover, since criminal justice system delay, complication, and excessive cost are major complaints of crime victims, any reform which adds burdens to the system without a counterbalancing benefit may, in the long run, be viewed as counter-productive. Where a specific reform may arguably have a serious negative administrative or budgeting impact on the criminal justice system, a test or experimental reform can be implemented prior to full implementation or endorsement of the reform.

Ideally, a successful enhancement of the victim's role in the criminal justice system should reduce the delay inherent in legal and administrative procedures, promote greater efficiency in the use of both victim and government resources, and reduce the cost

66. L. HARRIS, *supra* note 35, at 35-44.

67. For example, one study found that the remedies complainants sought most from the court (in cases where the defendant was a stranger) were restitution and protection of self and society in 33% of the cases, and punishment in 31% of the cases. R.C. DAVIS, *supra* note 28, at table 2.6.

68. For example, notification and involvement of crime victims in plea bargaining at pre-disposition conferences has speeded rather than delayed disposition of cases. Heinz & Kerstetter, *Victim Participation in Plea-Bargaining: A Field Experiment*, in PLEA BARGAINING 167 (LEAA 1982). See also *supra* note 40. It must also be remembered that delay in the system is a major complaint of victims and witnesses. D.P. Kelly, *Victims' Reactions to the Criminal Justice Response*, table 16 (paper delivered at 1982 meeting of Law and Justice Society Ass'n, Toronto, Can.).

burden on the taxpayer of operating the criminal justice system while improving the overall quality of criminal justice.

D. Arguments Against Victim Reforms

While many proposed victim reforms generate unique arguments in opposition, there are two major contentions that are frequently raised. The first is that proposed reform is too costly. It is hard to envision a crime victim reform in the criminal justice system that is not required to deal with cost issues. Even in the area of judicial decisions, the cost arguments against victim recovery from the governmental entities are no doubt a powerful influence on judicial decision-making.

In the legislative process, the "fiscal impacts" of new legislation are usually developed by budget analysts for the executive and legislative committees. Such analyses are often little more than educated guesswork.⁶⁹ Often legislative fiscal projections for victim programs exaggerate the cost of proposed legislation. This has often been true for the state crime victim compensation programs which are the oldest and most expensive victim reforms enacted to date.⁷⁰ Yet these programs, which currently operate in 36 states and three non-state American jurisdictions,⁷¹ have not experienced runaway costs over the past decade, unlike some social programs. Victim compensation programs have generally not increased their benefit levels and claims volume sufficiently to keep pace with rising crime levels and general inflation.⁷²

Opposition arguments based on excessive cost may often be neutralized by raising new revenues from non-general revenue fund sources to cover the expected costs of the reform.⁷³ Still an-

69. An unpublished study of the New York State Crime Victims Board shows a strong tendency to overstate fiscal costs by assuming unrealistic participation rates, no integration of new procedures and duties into existing administrative structures, failure to take into consideration collateral benefits or compensating savings, and a general feeling that it is better to be "conservative" (i.e., err on the side of over-estimating rather than under-estimating the cost). New York State Crime Victims Board, *Validation of Fiscal Impact Estimates of Crime Victim Legislation* (unpublished study 1981).

70. PRESIDENT'S TASK FORCE, *supra* note 31 (testimony of R. Zweibel).

71. MCGILLIS, *supra* note 15, at 46, Table I.

72. PRESIDENT'S TASK FORCE, *supra* note 31 (testimony of R. Zweibel).

73. Recent examples include "penalty assessment" laws enacted in a majority of states with victim compensation programs. These statutes impose a small "assessment," "penalty," or "fine" (\$10-\$250) on all criminal convictions, including traffic offenses in some states. For example, see CAL. GOV'T CODE § 13967(b)

other approach where there is disagreement on cost projections is to place a budget "cap" or "ceiling" on the overall amount that can be spent on a program.

The second major argument against victim reform is that the proposed reform places an undue and unnecessary administrative burden on criminal justice agencies already overburdened with high case volumes. The key issues in such an argument are usually: (1) the actual, rather than the feared, administrative burden; and (2) by what definition is the burden deemed "undue" or "unnecessary." Recent surveys of jurisdictions enacting major new victims' rights legislation have discovered few, if any, examples of undue or excessive burdens on criminal justice agencies as a result of victim reforms.⁷⁴

Sometimes administrative burdens mandated by victim legislation or programs have beneficial side effects on the administration of the agency involved. An example is victim/witness notification programs operating in many district attorneys offices for court appearances. Such programs have not only saved time for witnesses and reduced unnecessary trips to the courthouse, but have reduced police overtime costs and freed prosecutors from many non-legal "witness management" duties.⁷⁵

Another example is found in the mandatory posting of victim compensation information in hospital emergency rooms in New York State. This is a small, additional administrative burden on hospitals, but one that is more than compensated for by the increased hospital revenue generated by compensation claims from crime victims who might otherwise have been unaware of the crime victim compensation program and would have difficulty in paying for their medical treatment.

This second argument is extended to include a fear that enhancement or further involvement of victims in the criminal justice system will reduce the overall effectiveness of the already "overburdened" system. As one chief assistant district attorney—with one of the largest criminal court dockets of any prosecutor's office—remarked to this author after a tour of what is considered a model victim/witness program: "We depend on a certain attrition rate to process our case load. I don't know what we would do

(West Supp. 1984). Funds so generated are used to fund crime victim compensation and other victim services. *Id.*

Another example is proposed federal legislation which would use a combination of fines, forfeitures, penalty assessments, and handgun tax revenues to create a Crime Victims Assistance Fund. Fifty percent of the funds collected would be distributed to "qualifying state crime assistance funds." See S. 704, 98th Cong., 1st Sess. (1983); PRESIDENT'S TASK FORCE, *supra* note 31, at 43-47.

74. See *infra* notes 136-44 for discussion of Victim Impact Statement Laws.

75. See New York City Victim Services Agency, *supra* note 40, at 6-9.

if all victims participated and became involved in the process."⁷⁶

Victim interest could, if reasonable bounds are exceeded, result in undue influence upon or even outright control of public prosecutions. The public's interest in fair and equal enforcement of the criminal law must be kept paramount in the criminal justice system. To permit undue influence or control by victims of prosecutions could interfere with successful prosecutions and reduce the public's esteem for the public prosecutor and the judge as the chief arbiters of the criminal justice system. It is sometimes stated by those that would keep victims at arm's length that the criminal justice system should not become a collection agency for victims or a tool for their vengeance. While the victim interest should receive consideration in criminal legal proceedings, the public interest must dominate. Moreover, manipulation or abuses of the process by victims would no more serve the interest of justice than some of the manipulations commonly practiced by criminal defendants or their counsel under the current system.

E. Current Legal Barriers to Victim Rights Reform

While a burgeoning number of legislative enactments and program developments since 1980 have significantly advanced the legal rights of victims,⁷⁷ an array of legal barriers remains. Probably the most formidable barrier to a broad extension of victim rights in the criminal justice process is that the legal basis for most victim rights is statutory rather than constitutional. While some recent commentators would find a constitutional base for victim rights in the equal protection clause of the fourteenth amendment⁷⁸ or in natural law, the fact remains that crime victims are not explicitly mentioned in the United States, or most state constitutions.⁷⁹

Until victims have constitutional standing, the type of judicial development and amplification which has occurred in other areas

76. Statement of Chief Assistant District Attorney, Kings County, N.Y. (Oct. 1980). The obvious answer to this dilemma, more easily stated than achieved, is that victim reforms must not only avoid further undue burdening of the criminal justice system with new forms of legal process, but should lighten and expedite the process wherever feasible.

77. See *supra* note 17.

78. See Aynes, *Government Responsibility and the Right Not to be a Victim*, in this symposium.

79. The major exception is California, where CAL. CONST. art. I, § 28 (1982), was enacted by initiative.

of law must be rated as unlikely.⁸⁰ Statutes providing rights or benefits to victims are usually specific, limited, and strictly construed by courts.⁸¹ Where the rights of victims conflict with the basic constitutional rights of criminal offenders, it is likely that offender rights will prevail.⁸²

California has enacted by initiative an amendment to its state constitution, denoted "The Victims' Bill of Rights," which includes victim rights to restitution, safe schools, and consideration of public safety in setting bail.⁸³ Some other states may follow the California approach in utilizing the initiative and/or referendum process.⁸⁴ The President's Task Force on Victims of Crime has also recommended an amendment to the United States Constitution which would grant crime victims the right to be present and to be heard at all critical stages of judicial proceedings.⁸⁵ However, as of this writing, constitutional amendments concerning victim rights are newly proposed and, with the notable exception of California, have yet to be enacted.

Aside from having no generally recognized constitutional basis, victim rights also have no basis in the common law and practice of the modern criminal justice system.⁸⁶ The victim's major common law right, to bring a tort action against the criminal perpetrator, is usually empty of practical significance.⁸⁷ The government, which has pre-empted the field of criminal process, is shielded from liability and affirmative responsibility toward the victim.⁸⁸

80. For example, in *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973), a private citizen (victim) "lacks a judicially cognizable interest in the prosecution or non-prosecution of another." *Id.* at 619. See also Goldstein, *supra* note 31, at 550-58.

81. *Regan v. Crime Victim Comp. Bd.*, 57 N.Y.2d 190, 441 N.E.2d 1070, 455 N.Y.S.2d 552 (1982). See generally NAT'L ASS'N OF ATTORNEYS GENERAL, LEGAL ISSUES IN COMPENSATING VICTIMS OF VIOLENT CRIME (1976); 21A AM. JUR. 2D *Criminal Law, Compensation to Victim of Crime* §§ 1051-59 (1981).

82. *McClendon v. Rosetti*, 460 F.2d 111 (2d Cir. 1972) (ordinance regulating property taken from arrested persons unconstitutional, but victims must meet some restrictions to obtain return of property); *State v. Champe*, 373 So. 2d 874 (Fla. 1978) (penalty assessment for victim compensation unconstitutional if applied to civil as opposed to criminal fines); *State v. Bausch*, 83 N.J. 425, 416 A.2d 833 (1980) (restitution as condition of probation unlawful where defendant did not have opportunity to question amount of loss or show his inability to pay).

83. CAL. CONST. art. I, § 28. See *supra* note 79; see also *Brosnahan v. Brown*, 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982).

84. See, e.g., National Victims of Crime, Initiative Petition for Reform of the Criminal Justice System, proposed for the 1984 ballot in Massachusetts.

85. PRESIDENT'S TASK FORCE, *supra* note 31, at 113.

86. See *supra* note 79.

87. CV/CJS, *supra* note 4, at 53-63. See also McDonald, *supra* note 1, at 29.

88. See *supra* notes 30, 43. As mentioned earlier, the common law doctrine of sovereign immunity generally prevents crime victims from recovering civil damages from governmental entities where negligence is involved. Another basic common law rule holds that the police, absent some special relationship with the victim, owe no duty of protection to an individual citizen. See *supra* notes 30, 43,

In the area of state-funded victim compensation, a major legal barrier to recovery is that benefits have been made a matter of legislative and executive grace, rather than an entitlement.⁸⁹ Since there is no general duty of protection owed by the state to crime victims, victims are not able to recover under Court of Claims statutes which waive sovereign immunity for most negligent acts by governmental entities.⁹⁰ Most welfare statutes set out general policies that have often been judicially construed as requiring that certain benefit levels be maintained; federal courts have found that minimum, standard requirements for prison or mental hospital inmates have a constitutional basis.⁹¹ In contrast, crime victim compensation benefits are available only to those crime victims (currently less than 1% of all victims) who meet narrow eligibility criteria.⁹² In cases of doubt, the courts are apt to construe such statutes strictly as in derogation of the common law and, therefore, against the victim's right to compensation, rather than liberally as remedial statutes.⁹³ Even where victims meet eligibility requirements of state compensation statutes, awards may be delayed or never paid due to inadequate funding.⁹⁴

86. Without a duty of protection being owed by the government to specific individuals, there can, in general, be no recovery against the government when victims are injured by acts of a third party; i.e., the criminal.

Even where sovereign immunity is not a factor, the third party defendant who admittedly owes a duty of protection to the victim, may defend on the grounds that the criminal act was not foreseeable or reasonably preventable. *Weiner*, 55 N.Y.2d 175, 433 N.E.2d 124, 448 N.Y.S.2d 141 (1982). See also *Atamilan v. Supermarkets Gen. Corp.*, 146 N.J. Super. 149, 369 A.2d 38 (1976); *Taylor v. State*, 36 A.D.2d 878, 320 N.Y.S.2d 343 (1971). Vicarious liability, outside of the products liability area, is increasingly being restricted by the courts. *Kalechman v. Drew Auto Rental, Inc.*, 33 N.Y.2d 397, 308 N.E.2d 886, 353 N.Y.S.2d 414 (1973); *Bibergal v. McCormick*, 101 Misc. 2d 794, 421 N.Y.S.2d 978 (1979).

89. See *supra* note 81 and authorities cited therein. See also N.Y. EXEC. LAW § 620 (McKinney 1982).

90. See *supra* notes 43, 49.

91. *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1948).

92. For example, New York, which has one of the largest state programs, issues about 3,000 awards annually, while the number of crimes is over 1.5 million and the number of violent crimes is estimated at 250,000 annually. CV/CJS, *supra* note 4, at 10; New York State, Crime and Justice Report, *supra* note 19, at part I.

93. *Regan v. Crime Victim Comp. Bd.*, 57 N.Y.2d 190, 441 N.E. 1070, 455 N.Y.S.2d 552; but see *Criminal Injuries Comp. Bd. v. Gould*, 273 Md. 486, 331 A.2d 55 (1975).

94. For example, in New York funds for payments to victims were delayed for up to four months because the program exhausted its funding months into fiscal year 1983. Other states which have had past problems funding compensation

In the area of victim restitution, several legal barriers inhibit wider use of this remedy for making the victim whole. First, it must be noted that restitution in the American criminal justice system is not a right accorded to a victim, but a criminal sanction imposed in the discretion of the court.⁹⁵ Even jurisdictions which by statute mandate consideration of or express a policy favoring victim restitution generally do not grant the victim a legal right to restitution.⁹⁶ The concept of the *partie civile* followed in several European countries, where the victim may implead his civil damages into the criminal case, is unknown in American jurisdictions.⁹⁷

Aside from the fact that restitution is not a victim right *per se*, a host of other legal barriers limit a substantial expansion in the use of restitution practice. The list includes: (1) lack of administrative sources to enforce judicial restitution orders by the courts; (2) the payment of fines by financially capable criminal offenders to the state rather than to the victim; (3) compounding statutes which make it a crime in most states for a victim to accept restitution in exchange for an agreement not to prosecute;⁹⁸ (4) federal and state statutes which restrict the sale of prison-made goods or the use of prison labor, thereby discouraging the creation of viable prison industries that could be used to pay wages for restitution purposes;⁹⁹ and (5) arbitrary restriction of restitution orders by statute or court decision in cases where it would otherwise be considered as part of a sentence.¹⁰⁰

In addition to the above enumerated legal barriers, practitioners seeking implementation of new statutes expanding the use of

awards to victims include New Jersey, Washington, Florida, Texas, and Tennessee. Interview with F.A. Zweibel, chairman, New York State Crime Victims Board.

95. CV/CJS, *supra* note 4, at 25-30.

96. 18 U.S.C. § 3651 (1982); ARIZ. REV. STAT. ANN. § 13-603c (1979 & Supp. 1983); IOWA CODE ANN. § 910 (West Supp. 1983) (repealed). The exception may be California which mandates restitution in all cases where loss occurs. CAL. CONST. art. I, § 28(b) (1983).

97. Goldstein, *supra* note 31, at 547. The *partie civile* type procedure is presently used in France, West Germany, Sweden, and Israel. A victim's damage claims are appended to the criminal action and are adjudicated after the defendant has been convicted of the criminal charge. A prosecutor usually represents the victim's interest. *Id.*

98. See, e.g., N.Y. PENAL LAW § 215.45 (McKinney 1975). Compounding is present if the following elements exist: (1) agreement not to prosecute; (2) knowledge of the crime; and (3) receipt of consideration. W. LA FAVE & H. SCOTT, HANDBOOK ON CRIMINAL LAW 526 (1972).

99. Chesney, Hudson & McLagen, *A New Look at Restitution: Recent Legislation, Programs and Research*, 61 JUDICATURE 348, 354 (1978).

100. See, e.g., N.Y. PENAL LAW § 60.27 (McKinney Supp. 1984) (restitution limited to \$1000 for misdemeanors and \$5,000 for felony convictions). See generally Goldstein, *supra* note 31, at 532-41; Harland, *Compensating the Victims of Crime*, 14 CRIM. L. BULL. 203 (1978).

victim restitution must cope with the fact that judicial standards are still in the formative stages. A host of practical problems attending the wider use of restitution is presented, including ascertaining the various types of victim losses, the appropriate amount of restitution, who shall determine the amount of restitution, the timing of payment, and the proper sanctions for cases of non-payment.¹⁰¹ As formal legal barriers to victim rights and involvement in the criminal justice process fall, the importance of detailed administrative or "implementation barriers" take on increasing importance. A bare legal right (e.g., a victim's right to file a tort action against a criminal offender, or a criminal suspect's pre-*Miranda* right to be informed of his constitutional rights) without an effective means of enforcement and administration may be little better than no right at all.

III. SELECTED VICTIM REFORM MEASURES

A. *Restitution—New Approaches to Reviving an Ancient Remedy*

It does indeed seem odd that if I hit you with my automobile I am . . . required to make you whole again, whereas if I hit you with a club or with a bullet from my gun I go to jail, leaving you to fend for yourself. If I am required to return you to the prior status quo in the former case, then *a fortiori* I ought to be required to do so when I intentionally harm you.¹⁰²

This quote is, of course, not theoretically true as one victimized in most criminal cases has a civil remedy for damages. In practice, however, it summarizes accurately the typical irony faced by most crime victims who wish to be made whole for their crime-related losses.

Restitution can be defined as a sanction imposed by a court on a person convicted of a crime which requires the convicted person to make a monetary payment to the victims or, sometimes, to donate his labor for the benefit of the community.¹⁰³ While certainly not a panacea, the remedy of court-ordered restitution is receiving increased attention nationally, not only for its potential to make victims whole and serve a correctional function, but also for its potential as a cost-effective alternative to more frequent and more lengthy incarceration of criminal offenders.

101. Goldstein, *supra* note 31, at 532-41; Harland, *supra* note 100.

102. Pilon, *Criminal Remedies: Restitution, Punishment, or Both?*, 88 ETHICS 348, 349 (1978) (emphasis added).

103. CV/CJS, *supra* note 4, at 14.

From the victim's viewpoint, restitution is beneficial because it helps make whole the victim's crime-related loss. As a criminal court sanction, the victim's right to sue in tort is not impaired. Furthermore, if the restitution is adequate, the victim may be spared the time and expense of bringing a lawsuit or a compensation claim, as well as the emotional strain of enduring a second trial.

While the point is often made that restitution cannot be used in most criminal cases because the criminal is usually not apprehended, and if apprehended is indigent, this does not mean that victim restitution does not have a significant role to play in the modern criminal justice system. First, it must be remembered that existing state compensation programs and civil tort actions provide recoveries to less than 1% of crime victims.¹⁰⁴ In New York state, it has been estimated that should restitution be used in only 1% of the crimes reported, victims would receive recoveries in excess of \$15 million annually or approximately double the recovery presently received by victims through the state-funded compensation program.¹⁰⁵ Nationally, victim restitution has a potential for victim recovery in excess of \$150 million annually, well in excess of the present or expected expenditure levels for state-funded compensation programs.¹⁰⁶

The potential savings that widespread use of restitution could produce for the correction system itself is also enormous. Several studies have shown that the annual cost of restitution to the government is a small fraction of the cost for an offender's incarceration.¹⁰⁷ Moreover, restitution is widely viewed as having correctional value for the offender, apart from any direct benefits paid to crime victims.¹⁰⁸

In the past several years the federal government and several states have been actively legislating an expanded role for victim restitution in the criminal justice system. A broad, sweeping type of restitution legislation, as of April 1983, has been enacted in several states and requires judges or parole boards to give considera-

104. With over 12 million index crimes reported annually, victim compensation reaches less than 25,000 victims. Civil court actions are estimated to number in the low thousands. *See supra* note 94; *see also supra* note 4.

105. New York State Crime Victims Board, *Estimates of Potential Victim Recoveries from Restitution in New York State* (1983) (unpublished study).

106. *Id.*

107. *CV/CJS, supra* note 4, at 38.

108. *Id.* at 18-19. It is argued that working to "make good" the consequences of one's criminal acts helps the criminal offender accept personal responsibility for his acts and may keep the offender from the evil of idleness and association with other criminals in prisons. *Id.*

tion to victim restitution.¹⁰⁹

B. Statutes that Prevent Enrichment of Criminals at the Expense of Crime Victims—"Son of Sam" Laws

No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, . . . or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes.¹¹⁰

These principles were originally applied to the situation of an heir who murders a donor and then attempts to claim an inheritance.¹¹¹ Statutes first enacted in New York in 1977,¹¹² and now adopted in at least seventeen other states,¹¹³ have become known as "Son of Sam" laws¹¹⁴ and have applied these basic principles

109. See *supra* note 96 and authorities cited therein.

110. *Riggs v. Palmer*, 115 N.Y. 506, 511-12, 22 N.E. 188, 190 (1889).

111. *Pertie v. Chase Manhattan Bank*, 33 N.Y.2d 846, 307 N.E.2d 253, 352 N.Y.S.2d 194 (1973).

112. N.Y. EXEC. LAW § 632-a(1) (McKinney 1982).

113. ALA. CODE §§ 41-9-80 to -84 (1982); ALASKA STAT. § 18.67.165 (1981); ARIZ. REV. STAT. ANN. § 13-4202 (1978); GA. CODE ANN. § 27-3401 (Supp. 1983); IDAHO CODE § 19-5301 (1979); ILL. ANN. STAT. ch. 70, §§ 401-410 (Smith-Hurd Supp. 1982); IND. CODE § 16-7-3.7 (1983) (shall pay 90% of the money that would be owed to the responsible party); KY. REV. STAT. § 346.165 (1983); MASS. GEN. LAWS ANN. ch. 258A, § 8 (West Supp. 1983); MINN. STAT. ANN. § 299B 17 (West Supp. 1984); MONT. CODE ANN. § 53-9-104(e) (1983); NEB. REV. STAT. § 81-1835 (1981); OKLA. STAT. tit. 22, § 17 (Supp. 1983); S.C. CODE ANN. §§ 15-59-40 to -80 (Law. Co-op Supp. 1982); TENN. CODE ANN. §§ 29-13-201 to -208 (1980); TEX. STAT. ANN. art. 8309-1, §§ 16-18 (Vernon Supp. 1982); WASH. REV. CODE ANN. § 7.68.200 (Supp. 1983).

114. During the summer of 1977, New York City was terrorized by multiple random shootings of young women and their companions committed by a killer known in the media as "Son of Sam." N.Y. Times, Aug. 11, 1977, at 1, col. 6. While the murderer was still at large, speculations arose that a taped interview of his "story" would be purchased by the media for over \$200,000. Audio tapes were, in fact, made of interviews with the murderer, David Berkowitz, shortly after his capture and formed a major part of the basis for a book contract between Berkowitz, an author, and McGraw-Hill as publisher. Legislation introduced in the New York State Legislature by State Senator Emanuel R. Gold, was soon enacted into law to protect the interest of the victims of such crimes. The legislation was amended in 1978 and 1981, and now provides:

Every person . . . contracting with any person . . . accused or convicted of a crime in this state, with respect to the reenactment of such crime, by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, live entertainment of any kind, or from the expression of such accused or convicted person's thoughts, feelings, opinions or emotions regarding such crime, shall . . . pay over to the [Crime Victims] Board any moneys which would otherwise . . . be owing to the person so accused or convicted or his representatives.

N.Y. EXEC. LAW § 632-a(1) (McKinney 1982).

The New York State Crime Victims Board is required to place such funds in an

to the situation where a notorious criminal seeks to profit from his crime by selling his crime story to a publisher, author, movie producer, or other commercial media representative.

Under these modern "Son of Sam" laws, the government acts as an escrow agent or stakeholder. The royalty monies of the criminal are not confiscated; the criminal retains legal title to the funds until they are paid out to victim, judgment creditors, or other creditors.¹¹⁵ Should the victim be unsuccessful in obtaining money judgments, or should criminal charges against the accused be dismissed, the government is required to immediately pay over the escrowed funds to the formerly accused criminal.¹¹⁶ These statutes are in many ways analogous to civil attachment statutes whereby a putative judgment creditor in a civil lawsuit may obtain an order of attachment of a defendant's assets where fraud, waste, concealment, flight, or assignment is threatened and such assets are needed to satisfy the expected judgment.¹¹⁷ Stakeholder laws authorize a government agency to enforce the attachment on behalf of victims who would otherwise rarely have adequate notice or legal resources to pursue a civil attachment.¹¹⁸

To increase the effectiveness of these statutes, for example, New York's one year statute of limitations for intentional tort actions is revived by the stakeholder statute for five years from the date an escrow account is established by the Crime Victims Board.¹¹⁹ This important provision recognizes the fact that the medial exploitation of a criminal's story may occur well after the ordinarily short statute of limitations for intentional torts or wrongful death actions. Crime victims are thereby spared this expensive and usually futile exercise of filing and pursuing a civil action against an indigent criminal perpetrator, based upon only a slight possibility of the accumulation of future assets to satisfy a judgment.

Attachment statutes must, under United States Supreme Court decisions, accord the owner of the property being attached or es-

escrow account for the benefit of any victim of the accused or convicted person. The victim, in order to recover funds from such an account, must file a civil action against the criminal and recover a monetary judgment. *Id.*

115. *See, e.g.*, N.Y. EXEC. LAW § 632-a(3), (4), (11) (McKinney 1982).

116. *See, e.g.*, N.Y. EXEC. LAW § 632-a(4) (McKinney 1982) (five years must elapse from establishment of the escrow account before the money is payable to the convicted person).

117. *See, e.g.*, N.Y. CIV. PROC. LAW §§ 6201-66 (McKinney 1980).

118. In states without a special statute, the author is unable to find any instance where the profits from the crime story of notorious criminals have actually been paid to the victims. Since enactment of Executive Law § 632-a in New York, movie and book profits have been escrowed or frozen in seven cases. *See infra* note 125.

119. N.Y. EXEC. LAW § 632-a(1) (McKinney 1982).

crowded rights of due process of law.¹²⁰ Pre-judgment attachment statutes must include notice and opportunity for a hearing.¹²¹ In the New York law, procedural due process is provided by the administrative rules implementing the "Son of Sam" law.¹²² These rules initially require the Crime Victims Board, after investigation, to issue a Proposed Determination and Order. This order is served on the accused or convicted criminal, as well as on other interested parties informing them of their right to a hearing if they object to the Proposed Determination and Order.¹²³ A Final Determination and Order is issued after all objecting parties have been granted an opportunity to present evidence and argument at an adjudicatory hearing as regulated by the State Administrative Procedure Act. Where an interested party disagrees with a Final Order of the administrative agency, the right to judicial review of the agency decision is available.¹²⁴

These statutes have proven to be successful in preventing criminal perpetrators from receiving profits from the sale of their crime stories to the media. In seven cases where the statute has been applied since 1977 in New York, the criminal has yet to receive any income under such contracts at the expense of crime victims.¹²⁵ The statutes have proven less successful, however, in providing prompt monetary recoveries to the victims of the contracting criminal. The principal reason why only three victims have received a monetary recovery during the seven years the New York law has been in effect, is due to the lengthy delays experienced by crime victims in obtaining judgments in state civil

120. *Arnett v. Kennedy*, 416 U.S. 134 (1974).

121. *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972).

122. 9 N.Y. ADMIN. CODE tit. 9, § 576.1 (1982).

123. *Id.*

124. *Id.* In emergency cases where waste, flight, or transfer of monies out of the jurisdiction is imminent, the Chairman of the Crime Victims Board is authorized to issue an "emergency determination and order" authorizing seizure of monies prior to a hearing. *Id.*

125. The cases include John Wojtowicz, bank robber, on whose crime story the motion picture "Dog Day Afternoon" was based (*Barrett v. Wojtowicz*, 66 A.D.2d 604, 414 N.Y.S.2d 350 (1979)); David Berkowitz, who sold the literary rights of his crime story to McGraw-Hill resulting in the book *SON OF SAM* (*In re Johnsen*, 103 Misc. 2d 823, 430 N.Y.S.2d 904 (1979)); Salvador Agron ("Cape Man" murderer); and Jack Henry Abbott, who sold the movie rights to his life and the book he authored *IN THE BELLY OF THE BEAST* (*Adan v. Abbott*, 114 Misc. 2d 735 (1982)).

courts.¹²⁶ In addition to the long delays endemic to obtaining a judgment, contracting criminals, who generally have full access to civil as well as criminal legal representation, have vigorously defended against lawsuits brought by victims.¹²⁷

Some commentators have expressed the concern that the "Son of Sam" laws infringe on first amendment rights of free speech.¹²⁸ The principal argument is that such statutes will have a chilling effect on the exercise of free speech by the accused or convicted person in that he may not receive certain profits from media contracts until victim claims are settled.¹²⁹ The argument is also made that a disincentive is created by the statute for any convicted criminal to reveal the background and motivation for the crime. This disincentive, in turn, interferes with the public's right to know.¹³⁰ However, the courts have thus far upheld these statutes against constitutional challenge.¹³¹

Such first amendment arguments tend to ignore two salient points. First, the New York statute and other statutes patterned after it are essentially neutral in the sense that they do not encourage or discourage the making of contracts between criminals and media representatives. While it can be argued that the statute acts as a disincentive to the criminal, this has not prevented nearly a dozen such contracts from being signed since the New York statute was first enacted. Notorious criminals, presently incarcerated, may be more concerned with future parole considerations than monetary profits. Reputable publishers may actually be more likely to enter into contracts with notorious criminals because the regulation of the state, coupled with the fact that most monies will eventually be paid to the victims, tends to remove the moral stigma and negative publicity that might otherwise result from entering into such contracts.¹³² The statutory stakeholder

126. Delays of two to five years are typical. *See generally* VERA INSTITUTE, *supra* note 21, at 6-12.

127. *See, e.g.*, *Barrett v. Wojtowicz*, 94 Misc. 2d 379, 404 N.Y.S.2d 829 (1978), *aff'd*, 66 A.D.2d 604, 414 N.Y.S.2d 350 (1979) (victim filed complaint January 1978; defendant appealed denial of motion to dismiss).

128. Inz, *Compensating the Victim from the Proceeds of Criminal's Story—The Constitutionality of the New York Approach*, 14 COLUM. J.L. & SOC. PROBS. 93, 105 (1978); Comment, *Criminals Turned Authors: Victims' Rights vs. Freedom of Speech*, 54 IND. L.J. 443 (1979).

129. Inz, *supra* note 128, at 108.

130. *Id.* at 109.

131. *Barrett v. Wojtowicz*, 66 A.D.2d 604, 414 N.Y.S.2d 350 (1979); *In re Johnsen*, 103 Misc. 2d 823, 430 N.Y.S.2d 904 (1979); *Agron v. Crime Victims Comp. Bd.*, 90 A.D.2d 998 (1982) (statute not unconstitutional as impairment of obligation of contracts).

132. For example, the book *SON OF SAM*, published by McGraw-Hill in 1979, contained a statement on the book jacket that the proceeds of the book would be paid to the victims. L. KLAUSNER, *SON OF SAM* (1981).

does not take title to the property. It merely preserves the property until a neutral civil court determines its ultimate disposition.¹³³ The New York statute even grants the criminal limited access to the escrowed funds for legal expenses whereas the victims are required to bear their own legal expenses.¹³⁴

Second, even assuming some indirect impairment of free speech rights, the states have a strong public policy interest in preventing unjust enrichment of criminals profiting from the media exploitation of their criminal acts.¹³⁵ The states also have a substantial public policy interest in deterring other criminally inclined persons from criminal conduct upon learning that certain heinous crimes can produce fame and wealth. Finally, the states have a strong interest in preserving public respect and support for the criminal justice system and the criminal law. It is difficult to understand how such respect could be preserved if multiple murderers, bank robbers, or assassins were permitted to acquire and spend instant riches after their apprehension, while their victims faced broken lives and financial hardship.

C. *Victim Impact Statement Laws*

Of all recent victim rights reforms, none has been as quickly accepted as the use of "victim impact statements" prepared for the consideration of a court in sentencing the criminal offender. Since 1978, twelve states and the federal government have enacted victim impact statement laws¹³⁶ and, as of May 1983, similar legislation was pending in at least eight other jurisdictions.¹³⁷

Such laws provide that information concerning the victim's economic losses, the physical or psychological injuries, and crime-caused changes in employment should be included in a report. Some laws also include the victim's version of the crime, the opin-

133. New York Executive Law requires victims to obtain a judgment from a court of competent jurisdiction prior to receiving any payment. The accused or convicted criminal is granted the full due process rights of any civil defendant. N.Y. EXEC. LAW § 632(a)(1), (12) (McKinney 1982).

134. N.Y. EXEC. LAW § 632-a(8) (McKinney 1982).

135. *Id.*

136. The states are Arizona, California, Connecticut, Illinois, Indiana, Kansas, Maryland, Nevada, New Hampshire, New Jersey, New York, and Ohio. New Mexico requires victim impact statements as a matter of judicial policy. NOVA LEG. DIRECTORY, *supra* note 17, *passim*.

137. Legislation is pending in Hawaii, Michigan, Nebraska, Oregon, Pennsylvania, Virginia, and Wisconsin. *Id.* at 12.

ions of the victims related to sentencing, and the amount of restitution sought. The written victim impact statement is then presented to the court prior to sentencing the offender. Written reports are usually prepared by the probation department or the prosecutor.¹³⁸ Some statutes also permit victims the right to make an oral statement to the sentencing court or parole board (known as a right of allocution).¹³⁹

Victim impact statement laws sidestep the touchy issue of victim standing in judicial or quasi-judicial criminal proceedings. They merely recognize the victim's interest while retaining the modern role of the victim as an information source.¹⁴⁰

A recent telephone survey by the New York Crime Victims Board of the states with victim impact laws provides a preliminary review of these laws.¹⁴¹ The survey covered the following areas: (1) measurements of compliance by criminal justice agencies; (2) whether an increase in restitution orders was experienced; (3) whether incarceration time increased; (4) the fiscal impact of the laws; (5) the additional administrative burden for criminal justice agencies; (6) opinions of victims and criminal justice officials; and (7) other problems or suggested changes. The survey found that fiscal impact and administrative burdens were uniformly reported as minimal or nonexistent. No increase in incarceration time was reported by any state except Ohio, which indicated a possible increase for violent crime, particularly homicide and rape. The opinions of victims and criminal justice officials were uniformly reported as favorable, positive, or very favorable.¹⁴² Suggested improvements ranged from computerization of notification and location of victims to efforts aimed at obtaining more detailed and accurate information on victim losses.¹⁴³

138. *See, e.g.*, 1982 N.Y. LAWS ch. 612 which amends § 1.05 of the Penal Law to provide that sentencing must include consideration "of the consequences of the offense for the victim, including the victim's family, and the community." *Id.* The vehicle for this new consideration of the victim is the pre-sentence report which should contain "an analysis of the victim's version of the offense, the extent of injury or economic loss or damage and the amount of restitution sought by the victim," as well as information on the offender's financial and employment status and skill. *Id.*

139. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-253.4 (Supp. 1983); CONN. GEN. STAT. ANN. § 54-91(c) (West Supp. 1983).

140. The statutes speak in terms of the need of the court to receive information on victim impact, not the interest or standing of the victim in retribution and restitution. However, states permitting victim allocution would appear to be approaching limited party status for the victim. *See supra* note 139.

141. New York State Crime Victims Board, A Quick Assessment and Evaluation of Victim Impact Statement Laws (May 1983) (unpublished study).

142. *Id.* at 3.

143. *Id.*

One shortcoming pointed out by the survey is that most states are neither presently collecting data on the degree of compliance with the new laws nor systematically studying the effects of this victim-oriented procedure on the criminal justice system. The one state which does maintain statistics on victim impact statements is Maryland. During the six-month period of July through December 1982, 23% of all pre-sentence investigations (823 cases) contained a victim impact statement.¹⁴⁴

It may be several years before the effects of victim impact laws on the criminal justice system can be accurately assessed. However, the rapid adoption of this innovation by many jurisdictions and the favorable responses from victims and professionals alike, augurs well for this reform. Ideally, victim impact statements should present to the sentencing court both the opinions and feelings of the victims, as well as an objective account of economic, physical, and material losses suffered by the victim. When this information is coupled with information on the employment, education, skill level, and financial status of the criminal offender, a sentencing court or parole officer should have the data necessary to make an informed decision on sentencing alternatives such as restitution to the victim, as well as information relevant to the other typical dispositions of incarceration, fine, or release under supervision.

D. Victim/Witness Intimidation Laws

Most states have criminal statutes prohibiting coercion, harassment, or tampering with witnesses.¹⁴⁵ However, recent studies have shown that the problem of victim/witness intimidation is more serious than most criminal justice professionals have realized¹⁴⁶ and may represent a major reason for the disaffection and non-cooperation of crime victims and witnesses.¹⁴⁷ Studies con-

144. *Id.* at 1.

145. *See, e.g.*, N.Y. PENAL LAW §§ 240.25, .30 (McKinney 1980) (harrasment), §§ 135.60, .65 (McKinney 1975) (coercion), § 120.15 (McKinney 1975) (menacing), § 195.05 (McKinney 1975) (obstructing governmental administration).

146. F. CANNAVALE & W. FALCON, IMPROVING WITNESS COOPERATION 11 (1976) (INSLAW study found 28% of witnesses in Washington, D.C.'s Superior Court were threatened). *See also* Victim Services Agency, Witness Intimidation: An Examination of the Criminal Justice Agency's Response 1-3 (1981) (unpublished paper) [hereinafter cited as VSA Study]; Victim Services Agency, Witness Intimidation in the Brooklyn Criminal Court (1976) (unpublished paper) (26% of witnesses threatened).

147. F. CANNAVALE & W. FALCON, *supra* note 146, at 17. However, the study con-

ducted in various American jurisdictions have reported that anywhere from 8% to 48% of all complaining witnesses are intimidated by threats from the defendant, or by someone acting on his behalf.¹⁴⁸

Existing state criminal laws have gaps and loopholes that may prevent or hinder prosecution and do not generally include court orders of protection or pre-trial release standards.¹⁴⁹ A model statute prepared and issued by the American Bar Association in 1980 has provided the guidance for new legislation enacted in seven states and by the federal government.¹⁵⁰ While the enactments are too recent for any studies to be completed on the effect of these reforms, at least one study done in the New York City court system in 1981 indicates that much more than a new statute will be required.¹⁵¹ This study indicates the need for higher penalties, admonishments, orders of protection, bail revocations, relocation services, security of waiting areas and, most importantly, prosecution and investigation of reported intimidation on a systematic basis.¹⁵² Present levels of prosecution are so low, and response of many police agencies to reported threats is so inadequate (i.e., nothing can be done unless a crime is committed or until the defendant takes overt action to carry out his threats),¹⁵³ that major efforts by the criminal justice system would be required to restore a sense of deterrence in criminal de-

cluded that fear of reprisal, in the context of the study, did not appear associated or correlated with the prosecutor's decision to regard a given witness as non-cooperative. *Id.* at 11.

148. VSA Study, *supra* note 146, at 14-17.

149. The greatest problem with existing laws is that they operate after the fact and require law enforcement agencies to file new criminal charges with proof beyond reasonable doubt that the defendant has coerced or threatened a complaining witness. Since proof is difficult, law enforcement resources are already over-burdened, and the defendant often has nothing to lose and everything to gain, existing laws are rarely enforced and have little effect on criminal defendants. VSA Study, *supra* note 146, at 33-39.

150. REDUCING VICTIM/WITNESS INTIMIDATION: A PACKAGE, 1981 [ABA SEC. CRIM. JUSTICE].

151. VSA Study, *supra* note 146. The study found that victim/witnesses were regularly intimidated with gestures, verbal threats, notes, phone calls, theft or destruction of property, display of weapons, and physical attacks. Over 70% of the threats occurred at the victim's home or workplace. In felony cases, 26% took place in the courthouse. Of those who were intimidated, the threats were carried out in one quarter of criminal court cases (property destruction—17%; physical attacks—7%). *Id.* at 19-28A.

152. *Id.* at 33-39. Police made arrests in only 3% of 220 reported intimidation cases, yet none of the arrests were for threats or witness tampering. Other common responses included doing nothing (23-38%), admonishment of the defendant (16%), and protection (5%). Judicial responses largely consisted of admonishment and issuance of orders of protection. *Id.* at 35.

153. For example, in the VSA Study, although threats by phone were the most common form of intimidation, of 221 cases studied no phone taps or traps were installed by the police. *Id.* at 19-33.

fendants and a sense of confidence in victims.¹⁵⁴

E. Victim Notification Laws

A primary right of due process accorded to an interested party in a legal proceeding is notice.¹⁵⁵ Knowledge of a criminal proceeding or its outcome, or even the existence of a right or benefit, is generally a prerequisite to any further involvement in the criminal justice process. Crime victims who are not notified of their rights to compensation are unlikely to file claims. Violent crime victims who are not informed of the release of their assailants can hardly be expected to take precautions for their protection. Victims who are never informed or contacted concerning the possibility of restitution are unlikely to inform a sentencing court of their financial and non-financial losses. Finally, theft victims who are not informed by law enforcement agencies that their property has been recovered are unlikely to claim or ever retrieve their property. One remedy to all these problems is a victim notification law.

While there is presently a series of piecemeal measures lacking effective enforcement or monitoring,¹⁵⁶ comprehensive victim notice laws are increasingly being proposed and adopted by the states.¹⁵⁷ The federal Guidelines for Fair Treatment of Crime Victims and Witnesses has thus far taken the most comprehensive

154. Such actions should include investigation and arrests for witness tampering and intimidation, provision for protective services in serious cases, and revocation of bail based on a probable cause standard. *Id.* at 69-81.

155. See *supra* note 60 and accompanying text. Notification and information on case status is also one of the most frequently suggested improvements made by victims. See D. Kelly, *supra* note 68, at 26; L. HARRIS, *supra* note 35, at 35.

156. CV/CJS, *supra* note 4, at 73; Hudson, *supra* note 31, at 430 (for existing New York laws). See also 1983 N.Y. Laws ch. 77 (mandatory posting of victim notices in police stations).

157. Adopted statutes include: ARIZ. REV. STAT. ANN. § 12-253.4 (Supp. 1983) (victim notification of parole proceedings); ARK. STAT. ANN. § 43-289 (Supp. 1983) (victim notice and impact at parole hearings); CAL. PENAL CODE §§ 1191.11, 3043 (West 1982); CAL. WELF. & INST. CODE § 1767 (West Supp. 1984) (notice to victims of sentencing and parole proceedings); NEB. REV. STAT. § 81-1848 (1981); N.Y. CRIM. PROC. LAW § 440.50 (McKinney 1983) (notice of final disposition when requested); 1980 N.Y. Laws ch. 549, § 3(b) (notice to victim of release of criminally insane); WASH. REV. CODE ANN. § 7.69 030 (Supp. 1983); WISC. STAT. ANN. § 950.04 (West 1982). Nine states had Victims Bills of Rights including victim notification laws pending in 1983: Delaware, Hawaii, Illinois, Maryland, Massachusetts, New York, Oregon, and Pennsylvania. NOVA LEG. DIRECTORY, *supra* note 17.

approach.¹⁵⁸ Under the federal guidelines, victims and witnesses are to be given notice of scheduling changes in proceedings, and, in serious crimes, to receive notice of the initial appearance, arraignment, pre-trial release, and all pre-trial and post-trial proceedings involving the accused.¹⁵⁹

A few states have proposed or enacted comprehensive victim notification laws since 1981.¹⁶⁰ These comprehensive proposals would require that, upon so electing, the victim be kept informed and receive appropriate notice at every stage of the criminal justice process from police investigation to final release of the offender.¹⁶¹ Such notice requirements are seen as the victim's due process counterpart to the notification rights of the accused which are so freely available and strictly enforced by the criminal justice system. One such proposal in New York would integrate victim notification into the criminal process by providing for a victim notice which would attach to the case record and follow the case through every stage of the criminal justice process.¹⁶²

In the recently enacted federal law, a more flexible guideline approach to victim notification is used.¹⁶³ This scheme, enacted in late 1982 and not yet tested, sets out relatively specific standards for criminal justice agencies which are implemented by rules promulgated by the Attorney General or another high criminal justice official.¹⁶⁴ Enforcement will presumably involve monitoring by the promulgating authority and inter-government agency discipline and comity. The legal standing of victims to enforce compliance with such guidelines is unclear.

One other type of victim notification law that has been in operation for over five years requires law enforcement agencies to notify violent crime victims of state compensation programs.¹⁶⁵ The experience in New York and most other states with these statutes is that while helpful, problems exist with law enforcement agency

158. Victim and Witness Protection Act of 1982, *see supra* note 17 and accompanying text.

159. *Id.* at § 4.

160. *See supra* note 88 and authorities cited therein. *See also* Hudson, *supra* note 31; CV/CJS, *supra* note 4, at 68-80.

161. For example, see a New York legislative proposal, The Victim Notification Act. CV/CJS, *supra* note 4, at app. A.

162. One area of proposed victim notification that has proven to be controversial with some prosecutors and defense lawyers involves notification of victims prior to acceptance of a plea bargain. The expressed concern is that victim involvement in plea bargaining would be time consuming, lead to harsher plea bargains, and infringe on prosecutorial discretion. Evaluation of the operation of statutes requiring comprehensive victim notice of criminal proceedings is not possible at this time due to the very recent nature of the enactments.

163. *See* Victim and Witness Protection Act of 1982, *supra* note 158, at § 5.

164. *Id.*

165. *See, e.g.,* N.Y. EXEC. LAW § 625-a (McKinney 1982 & Supp. 1983).

compliance. In New York, for example, only 25% of claimants for victim compensation learn of the program from the police.¹⁶⁶ A 1981 survey of victims who reported crimes to police in New York state found that only 35% of victims had heard of the compensation program. Of those who had heard of the program, only 3% reported they were informed by the police.¹⁶⁷

One major weakness of most victim notification laws is that criminal justice agency action is in fact voluntary. There are few or no monitoring or enforcement mechanisms for criminal justice agency compliance. One remedy for this weakness would be to repeal the hold harmless clauses in such statutes which prohibit victims or any other person from bringing legal actions against a criminal justice agency for failure to notify victims.¹⁶⁸ The possibility of lawsuits and civil damages for failure to comply with victim notice laws could have a salutary effect on law enforcement agency compliance levels.

F. Some New Ideas for Victim Reform

The following proposals are as yet untested and most have not been enacted or implemented in any jurisdiction. However, all appear to be promising and several are likely to be implemented or enacted in some jurisdictions in the next year.

1. Speedy Trial Laws for Victims.

The victim of a crime needs to have input into the decision as to when a criminal case is brought to trial. The tendency of the criminal justice process to involve excessive continuances, adjournments, and other various and innumerable delays is a chronic problem for victims, as well as for the administration of criminal justice. At the present time, the average felony case in New York City requires over seven appearances to reach disposition.¹⁶⁹ While some continuances and delays are necessary, the practice of some courts in granting continuances for the convenience of the prosecutor and defense attorney, and the tactic used by many defense lawyers of delaying a case indefinitely, needs to be checked.

166. New York State Crime Victims Board Statistics (1983) (unpublished study).

167. L. HARRIS, *supra* note 35, at 39-40, table 14.

168. *See, e.g.*, N.Y. EXEC. LAW § 625-a(2) (McKinney 1982).

169. VERA INSTITUTE, *supra* note 21, at 15.

An imbalance exists in the scales of justice with respect to speedy trial laws. The defendant has a constitutional right to a speedy trial and, under modern speedy trial statutes, can obtain a dismissal of the charges against him where the prosecution delays beyond certain specified periods.¹⁷⁰ However, it is generally in the defendant's interest to delay a case, particularly when he is on pre-trial release. Witnesses can be "worn out," die, or move away. Crucial evidence can be lost, memories and anger will fade. Under current law, victims have no right to a speedy trial and, therefore, no standing or right to request one.

This reform proposal recognizes that the victim also has an interest in a speedy trial of the accused. The proposal would allow a victim to file a request with the court expressing a desire that the charges against the defendant be brought to a speedy conclusion. The court would still allow for legitimate delays when justice so demands. Once the victim's speedy trial request was filed, however, the party requesting a delay would be required to present "compelling reasons of law or justice" in justification of the request, and the court would be required to so find.¹⁷¹

Such legislation is not represented as a panacea for delays in the criminal justice process. Its purposes would be to spur the system and help ensure that unnecessary delays in adjudication do not unfairly penalize the victim—as well as safeguarding the public interest in the speedy resolution of criminal cases.

2. Review of Prosecutor's Decision Not to Prosecute.

Most American jurisdictions vest in prosecutors a nearly unreviewable discretion with regard to decisions not to prosecute an accused criminal offender.¹⁷² It is eminently arguable that crime victims as complaining witnesses should have the right to seek review of a local prosecutor's decision not to prosecute an accused to the state Attorney General or, in federal cases, to the United States Attorney General. The victim's goal in such reviews would not be to second guess a local prosecutor, but to prevent miscarriages of justice or selective nonprosecution of the criminal laws of the jurisdiction. Where a local prosecutor was found to have erred in such a case, the reviewing prosecutorial

170. See, e.g., N.Y. CRIM. PROC. LAW §§ 30.20, 30.30 (McKinney 1981) (requiring dismissal of charges against persons accused of crimes unless prosecution brings defendant to trial within fixed time periods of 6 months for felony and 60-90 days for misdemeanor).

171. See CV/CJS, *supra* note 4, at app. A (Study Bill #9); Oklahoma Bill of Rights (not enacted).

172. Goldstein, *supra* note 31, at 554-58. This current situation of basic unreviewability appears to have developed largely by historical accident. *Id.*

authority would have the power to appoint a special prosecutor or to refer the matter back to the local prosecutor for prosecution.

Another approach to this problem would involve coordinate prosecution by the federal government. In the civil rights field, the federal government has prosecuted homicide and assault cases under federal civil rights statutes where local authorities failed to act, or where a clear miscarriage of justice has occurred in the state case. Coordinate prosecution has also been used by the federal government in cases of local government corruption or organized crime activities where local prosecution has been lacking or ineffective. A logical extension of this approach would be for the United States Attorney's offices to prosecute cases of serious violent crime as federal civil rights law violations where there has been a failure of state prosecution which would otherwise result in a miscarriage of justice.

3. Legal Assistance for Crime Victims.

In light of the current situation in the legal profession, which some observers have characterized as a surplus or glut of lawyers, it may seem ironic that even the most rudimentary legal assistance to victims of crime is often unavailable.¹⁷³ This is particularly true for lower income victims.¹⁷⁴

When crime victims in New York were asked as part of a major Needs Assessment Survey what victim services were most important to them, legal assistance ranked second to compensation for medical expenses as the most important service that government could provide.¹⁷⁵ Seventy-eight percent of victims responded that legal assistance was very important.¹⁷⁶ Except for prosecutorial

173. Many attorneys are unfamiliar with victim rights and, perhaps more importantly, most victims expect that the government will provide whatever legal assistance they need. Harland, *Monetary Remedies for the Victims of Crime: Assessing the Role of the Criminal Courts*, 30 UCLA L. REV. 53, 54-55 (1982).

174. Legal services offices generally do not represent low income victims because they do not usually handle fee generating cases: i.e., cases with potential damage judgments are considered fee generating. Also, some legal services programs (e.g. The Legal Aid Society of New York) who represent indigent criminal defendants, regularly reject otherwise qualified victim clients on grounds of conflict of interest. Moderate or low income crime victims who do not meet the strict poverty requirements of legal services programs often have difficulty in finding attorneys who are both familiar with crime victims' rights and willing to accept cases that may only generate modest fees.

175. See L. HARRIS, *supra* note 35, at 35.

176. *Id.*

services, however, neither government agencies nor independent victim/witness programs are providing victims with legal services.¹⁷⁷ The number of attorneys in the nation who spend a major part of their professional time providing nonprosecutorial legal services to victims can be counted on one hand.

Some victim rights advocates have argued that victims need legal counsel at rape and other trials where an attack on the reputation, integrity, or competence of the victim is a major element in the defense of the accused.¹⁷⁸ The need for legal assistance to crime victims, however, goes well beyond this one rather dramatic example. As the use of restitution increases, legal assistance is increasingly needed to help crime victims file the appropriate information and requests.

Victims need legal assistance and counseling in pursuing claims with state crime victim compensation and other public benefit programs, as well as determining whether civil recovery is possible in actions against the criminal offender or a negligent third party.¹⁷⁹ Prosecutors, who are the only attorneys most victims come in contact with, rarely advise victims of their rights in civil matters and may, on occasion, actively discourage victims from pursuing civil remedies.¹⁸⁰ Where civil actions are a realistic avenue of recovery, victims need legal representation.

In order to partially fill the enormous gap in legal services, the following proposals might be quite useful:

1. creation of legal victim ombudsmen or counsel in major prosecution offices and victim service programs to provide a basic level of legal information and counsel to crime victims. Such attorneys would not represent victims but could provide basic legal information, advice, and referral services to the private bar;
2. creation of networks of private attorneys to provide free initial consultation and low-cost or *pro bono* representation in civil matters;
3. creation of law school-based legal clinics to provide legal assistance and representation to victims;¹⁸¹

177. Of 30 victim assistance programs funded by the New York State Crime Victims Board in 1982, none included legal assistance beyond providing basic legal information. *Id.*

178. Hudson, *supra* note 31, at 435.

179. Only a tiny percentage of crime victims with potentially viable civil actions against criminal offenders or third parties actually undertake such suits. Statutes of limitations are generally short for victim actions—one year or less—foreclosing civil actions for most victims who delay in obtaining legal counsel.

180. The prosecutor's interest is in public prosecution of the crime. Victims who file civil actions while the criminal case is pending may interfere with such prosecutions and are, therefore, sometimes discouraged.

181. The Victims Legal Assistance Organization (VALOR) has recently formed

4. increased use of subrogation rights by state victim compensation programs to bring civil lawsuits against criminal offenders and responsible third parties to recover award monies paid out by state programs, as well as recoveries for crime victims;¹⁸²

5. creation of victim advocacy offices at the state and federal level to advocate the rights and interests of crime victims before other units of government;¹⁸³

6. remedy basic unfamiliarity in the legal profession with victim's rights by inclusion of crime victim rights as a topic in bar-sponsored continuing legal education curricula, as well as in law school courses.

IV. CONCLUSION AND RECOMMENDATIONS

There can be little doubt that significant changes are being proposed and enacted which enhance the role of the victim in the criminal justice system. The failure of the present system to cope with rising crime or to meet the needs and expectations of crime victims, as well as the general public, has propelled crime victim reform measures to the forefront of the criminal justice legislative agenda.

In general, the government needs to recognize its basic duty to protect citizens from violent crime and theft. This duty requires abolition of the sovereign immunity or no duty doctrines and acceptance by the government of liability for negligent performance of law enforcement duties. Recognition of the duty to protect also requires the modification of the legal fiction that a crime is solely a wrong against the state. It must be acknowledged that justice cannot be done in a criminal case unless the wrong committed against the victim is also taken into account.

Due process rights for crime violations, particularly notice and

such a clinic at the University of Virginia Law School ("V-Rep"). The University of the Pacific, McGeorge School of Law in Sacramento, California has announced the creation of a Victims Resource Center to provide legal services to crime victims and their families.

182. For example, New York now encourages victims receiving compensation awards to file lawsuits against criminal offenders and third parties, and is developing a program of affirmative litigation where the state has a subrogated interest. N.Y. EXEC. LAW § 634 (McKinney 1983); N.Y. Times, July 16, 1982, § 2, col. 1.

183. See, e.g., N.Y. EXEC. LAW § 623(15) (McKinney 1982). That law mandates the Crime Victims Board "[t]o advocate the rights and interests of crime victims of the state before federal, state and local administrative, regulatory, legislative, judicial and criminal justice agencies." *Id.*

opportunity to be heard, are central to any enhancement of the victim's role in the criminal justice system. Accordingly, victims should be granted limited party status at each stage in the criminal justice system where their interests are at stake. Courtesy and voluntary consideration of the victim and his interest by criminal justice agencies are likely to have only limited effect. Victim rights should be enforceable as are other legal rights, preferably with constitutional bases, and cannot depend solely on voluntary compliance by criminal justice agencies. Full party status or private prosecution for victims is not recommended as the potential for abuse, corruption, and delay would appear to outweigh any expected benefits. The need to be made whole demands an expansion of restitution. Government compensation and victim assistance programs can and should be expanded to provide a basic social safety net and minimum level of service to crime victims.

Overall, greater involvement by victims and enhancement of victim rights is not a panacea for all that troubles the criminal justice system. Nor is it likely that such reforms, standing alone, will result in a large increase in victim satisfaction with the criminal justice system. However, victim involvement and victim rights reforms do hold out the promise of a criminal justice system that is more effective, more just, and more respected. A criminal justice system which ignores the rights and interests of victims is likely to continue on a path of declining effectiveness, as more and more victims choose not to cooperate with a system that promises justice, but fails to deliver.