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Constitutional Considerations: Government Responsibility and the Right Not to be a Victim

Richard L. Aynes*

Within a democratic society, citizens are provided with certain rights and liberties. Among those rights and liberties is the right not to be a victim. In this article, the author examines and analyzes the growing concern for the protection of victims of crimes. Recent legislative enactments have been designed to alter the role of the victim in the civil and criminal justice systems by defining and implementing a series of "victims' rights." The author concludes by recognizing that one of the most important duties of government is to provide for the physical safety of those within its jurisdiction. To implement this duty, the interest and consequential standing of the victim must be recognized within the American court system.

I. INTRODUCTION

In an era of increasing concern over crime and the growth of government agencies into bureaucratic institutions which may not readily respond to individual needs, support for legislative and private actions to establish and protect the rights of the victims of criminal acts has blossomed. These actions generally fall into two categories: those which are directed at making the victim "whole" by compensation, medical aid, and other similar pro-

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Use of the pronoun "he" is for convenience and was a Pepperdine editorial decision. Reference is meant to include both genders.

grams; and those directed at requiring government employees, including prosecutors, police officers, and judges to share more information with the victim, to involve the victim in the criminal justice process, and to treat the victim in a more courteous and dignified manner.¹

These concerns appear to have originated in modern times as a result of the women's rights movement and its efforts to protect the welfare of rape victims.² Such efforts were often initiated in the form of private help-groups that offered counseling, shelter, and support. These efforts quickly expanded to include public actions such as reform in the manner in which rape cases were "processed"³ and the enactment of rape/shield laws establishing limitations on cross-examination about past sexual experiences.⁴

With the movement to protect rape victims as a guide, concern for the victims of crimes spread to include other identifiable groups, particularly the elderly and victims of domestic violence, causing the enactment of similar private and public programs.⁵ These types of programs convinced many that there was a need to

1. "Such services may be summed up concisely as treating the victim like a human being and not merely as a witness in some future criminal proceeding." Carrington, *Victims' Rights Litigation?: A Wave of the Future*, 11 U. RICH. L. REV. 447, 451 (1977).

2. Sources giving credit to the women's rights movement for this accomplishment are voluminous. See, e.g., Kneedler, *Sexual Assault Law Reform in Virginia—A Legislative History*, 68 VA. L. REV. 459, 461 and sources cited at n.5 (1982).

3. For example, the reform of the laws pertaining to sexual assault in Virginia was said to have been obtained as a result of a seven year "grassroots" citizens' effort initiated by the Virginia Committee on Sexual Assault Reform and carried on by the Virginia State Crime Commission's Task Force on Criminal Sexual Assault. See generally *id.*

However, many of the private efforts received financial support from the federal government through Law Enforcement Assistance Administration grants. See A.B.A. Section of Criminal Justice, *Bar Leadership on Victim Witness Assistance* 6 (1980) [hereinafter cited as *Bar Leadership*]. Indeed, the Justice System Improvement Act of 1979, 42 U.S.C. § 3701, amended the Omnibus Crime Control and Safe Streets Act of 1968 and specifically authorized the Law Enforcement Assistance Administration (LEAA) to make grants in the witness/victim area for the purpose of "[d]eveloping and implementing programs which provide assistance to victims, witnesses, and jurors, including restitution by the offender, programs encouraging victim and witness participation in the criminal justice system, and programs designed to prevent retribution against or intimidation of witnesses by persons charged with or convicted of crimes." 42 U.S.C. § 3741(a)(12) (1979).

4. Since 1974, forty-six states have enacted "rape shield" statutes which place limitations upon the admission of evidence concerning past sexual conduct. Kneedler, *supra* note 2, at 488-89. See also FED. R. EVID. 412. These changes are consistent with policy adopted by the ABA House of Delegates at the Mid-Year Meeting in February of 1975 calling for "[r]evision of the rules of evidence relating to cross-examination of the complaining witness. . . ." The full resolution is reprinted in ABA Section of Criminal Justice, *Victim/Witness Legislation: Considerations for Policymakers* 86 [hereinafter cited as *Considerations*].

5. "Special victim" legislation has included protection for the elderly, chil-

offer greater protection to *all* victims of crime. In recent years this concern has resulted, not only in a number of legislative enactments dealing with matters such as victim compensation,⁶ but also in more comprehensive bills at both the state⁷ and federal⁸ levels designed to significantly alter the role of the victim in the civil and criminal justice systems by defining and implementing a series of "victims' rights." Those legislative enactments are commendable because they attempt to bring about long over-due reforms. As positive as those efforts may be, however, they overlook, and may even obscure, the most fundamental right of all: the right not to be a victim. "It is all very well to counsel and compensate a victim who has been hit on the head, but the chances are that he would rather not have been hit on the head in the first place."⁹ It is that right, and the remedies for its violation, that this article seeks to explore.

II. INITIAL CONSIDERATIONS

It should be axiomatic that everyone has a "right" not to be victimized. Both criminal and civil law proscribe certain conduct. The violation of a law is not only an offense against society but is also an invasion of the personal rights of the victim. Consequently, it would be surprising if anyone would contest the assertion that when one is victimized he has the right to seek vindication under the law. In the context of criminal law, this principle is recognized under the general theory that the state, as the surrogate for the victim, may initiate prosecution. In the civil context, this is recognized by the right to institute civil action to

dren, women, the handicapped, teachers, and police. This type of legislation is surveyed in *Considerations*, *supra* note 4, at 59-76.

6. Compensation programs for the victims of violent crimes currently exist in thirty-four states. An overview of these programs can be found in *Considerations*, *supra* note 4, at 2-16. See also Clark & Webster, *Indiana's Victim Compensation Act: A Comparative Perspective*, 14 IND. L. REV. 751 (1981) (comparing statutes of Indiana, New York and Minnesota); Hoelzel, *A Survey of 27 Victim Compensation Programs*, 63 JUD. 485 (1980); Annot., 20 A.L.R. 4th 63 (1983).

7. "Cluster" legislation to provide comprehensive assistance to victims and witnesses is surveyed in *Considerations*, *supra* note 4, at 25-28. Topics covered are: (1) victim/witness notification; (2) protecting witnesses from intimidation; (3) property return; (4) ombudsman for the victim; (5) counsel for the victim; (6) victim impact on criminal justice proceedings; (7) use of depositions; (8) witness compensation; and (9) employers' obligations.

8. Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (1982).

9. Carrington, *supra* note 1, at 468.

seek compensation for injuries. There is now a growing trend in the civil context to seek recovery from third parties whose negligence may have given the criminal the opportunity to commit the crime, as well as from the actor who committed the offense.¹⁰

What may not be quite so clear is that just as each individual has a duty not to violate the criminal and civil laws, the government has a separate and independent duty to protect those under its jurisdiction from becoming the victims of crime. As an abstract proposition, almost everyone might agree that police forces are established to protect the people and that one of the first duties of any government is to offer adequate physical protection to its constituents. Yet courts have been reluctant to translate that theory into practice. Frequent examples exist where the courts hold that there is no enforceable duty on the part of the government to protect those living under its jurisdiction.

The Court of Appeals for the District of Columbia, for example, has held that the "government and its agents are under no general duty to provide . . . police protection to any particular individual citizen."¹¹ The Supreme Court of California has held that where there was no "special relationship" between the police and a victim, the police are under no duty to warn the victim of potential danger.¹² Perhaps the boldest declaration of this kind is by the United States Court of Appeals for the Seventh Circuit: "But there is no constitutional right to be protected by the state against being murdered by criminals or madmen."¹³

Victims have been no more successful in securing satisfaction from reluctant government actors. Attempts to resort to judicial remedies to force unwilling government employees to arrest or prosecute those who are alleged to have violated the rights of a victim have been uniformly unsuccessful. For example, in *Linda R.S. v. Richard D.*,¹⁴ the United States Supreme Court held that the mother of a child did not have a sufficient interest to obtain standing to require the prosecutor to prosecute the child's father for failure to support the child. In the course of its holding, the

10. *E.g.*, Comment, *Negligence Liability for the Criminal Acts of Another*, 15 J. MAR. L. REV. 459 (1982); Carrington, *Victims' Rights: A New Tort*, 14 TRIAL MAG. 39 (June 1978).

11. *Warren v. District of Columbia*, 444 A.2d 1, 3 (App. D.C. 1981) (en banc) quoting with approval the decision of the trial court below which is also reproduced, in part, as an appendix to the court's opinion. The quoted portion of the district court's opinion appears at 444 A.2d at 4.

12. *Davidson v. City of Westminster*, 32 Cal. 3d 197, 649 P.2d 894, 185 Cal. Rptr. 252 (1982).

13. *Bowers v. Devito*, 686 F.2d 616, 618 (7th Cir. 1982). *See also* *Weiner v. Metropolitan Transp. Auth.*, 55 N.Y.2d 175, 433 N.E.2d 124, 448 N.Y.S.2d 141 (1982).

14. 410 U.S. 614 (1973).

Court concluded that "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."¹⁵ Victims have been equally unsuccessful in preventing the release of offenders who are thought to be dangerous, or in recovering damages from state officials when such released individuals commit further crimes.

An examination of the response of victims to the current results of the American system of justice shows discontent. Increasing numbers of suits against law enforcement agencies and their employees for the failure to provide protection;¹⁶ suits against third parties who failed to take precautions that would have prevented crimes;¹⁷ suits against governmental agencies for the release of prisoners and mental patients who subsequently commit crimes;¹⁸ and an increasingly militant victims' rights movement are all indications of public discontent with the present system.

While some may suppose that the enactment of legislation to guarantee the "rights" of victims will address their major concerns, such legislation may not affect the underlying problem. In spite of the oft-repeated complaint that accused defendants have rights and the victims have none, the victims' rights movement has not, to any great extent, addressed itself to the perpetrator of the crime.¹⁹ In certain instances there may be calls for increasing

15. *Id.* at 619.

16. *E.g.*, Warren v. District of Columbia, 444 A.2d 1 (App. D.C. 1981); DeLong v. County of Erie, 89 A.D.2d 376, 455 N.Y.S.2d 887 (1982).

17. *E.g.*, Comment, *supra* note 10; Smith, *The Landlord's Duty to Defend His Tenants Against Crime on the Premises*, 4 WHITTIER L. REV. 587 (1982); Note, *Tort Law—Merchant's Duty to Protect Invitees from Third Party Criminal Acts*, 4 CAMPBELL L. REV. 411 (1982); Winter, *Hinckley's Life*, Time Mag., Mar. 28, 1983 at 21; Note, *Professional Obligation and the Duty to Rescue: When Must a Psychiatrist Protect His Patient's Intended Victim?*, 91 YALE L.J. 1430 (1982); see also Bradley Center, Inc., v. Wessner, 296 S.E.2d 693 (Ga. 1982) (criminal act of mental patient was foreseeable and death was proximately caused by private hospital's negligence in issuing an unrestricted weekend pass).

18. Holmes v. Wampler, 546 F. Supp. 500 (E.D. Va. 1982) (former mental patient stabbed plaintiff five weeks after release from institution); Martinez v. California, 444 U.S. 277 (1980) (plaintiff's decedent, a 15 year-old girl, was killed by parolee five months after release).

19. This conclusion is based not only upon an analysis of the state and federal legislation enacted, *supra* notes 4-8, but also upon the major writings in this area. A notable exception is Frank G. Carrington's *THE VICTIMS* (1975), which argues for increased protection by advocating more stringent penalties for convicted criminals and for a reversal of certain Supreme Court interpretations of the Constitution such as those requiring the exclusion of evidence illegally seized and giving a suspect "warnings" about his constitutional rights prior to interrogation. See Mapp v. Ohio, 367 U.S. 643 (1961) (exclusionary rule) and Miranda v. Arizona, 384

penalties for specific crimes or for crimes against certain classes of victims, but so far the most significant change affecting the status of the convicted criminal has been the prevention of the criminal from profiting from the crime by writing books, selling movie rights, or other similar activities.²⁰

Instead, most complaints are directed against agents of the government itself. For example, in attempting to identify the "problem," one ABA section included among eight examples of the "average" witness'/victim's experience with the criminal justice system the following:

1. Official indifference; 2. Adverse questioning by law enforcement officers who may feel that the victim is responsible for his victimization; 3. "Perfunctory, summary and insensitive interviewing by prosecutors who also may feel that the person has somehow 'asked' to be victimized; . . ."
4. Improper accommodations at the police station or court house; and 5. Lack of clear explanations concerning the proceedings and decisions made concerning the case.²¹

The belief is that "[c]ontrary to a current cliché, victims are not so much forgotten by our criminal justice system as they are used by it."²²

U.S. 436 (1966) (*Miranda* warnings). Consideration of what has been termed a "good faith" exception to the exclusionary rule was the issue raised by the Court when it set reargument in *Illinois v. Gates*, No. 81-430. But, "with apologies to all," a decision was rendered in that case without reaching the issue. 103 S. Ct. 2317 (1983). Recently certiorari was granted in other cases which raise this issue. *E.g.*, *Massachusetts v. Sheppard*, 387 Mass. 488, 441 N.E.2d 725, *cert. granted*, 103 S. Ct. 3534 (1983); *United States v. Leon*, 701 F.2d 187 (9th Cir.), *cert. granted*, 103 S. Ct. 3535 (1983).

20. *E.g.*, Comment, *Alabama's Anti-profit Statute: A Recent Trend in Victim Compensation*, 33 ALA. L. REV. 109 (1981).

21. *Bar Leadership*, *supra* note 3, at 1. Elsewhere reference is made to "indifferent, coldly bureaucratic, and arrogant treatment of victims and witnesses." *Id.* at 9. That same document talks of "shabby and indifferent treatment for crime victims and witnesses" and speaks of the need to ensure "that all who work within our criminal justice institutions are frequently reminded that they are public servants and that victims and witnesses are treated as 'clients' of the criminal justice system." *Id.* See also *id.* at 16 ("arrogant scheduling practices").

22. *Id.* at 2. The effects of dealing with government agencies *after* the crime is often referred to as "secondary victimization." See, *e.g.*, Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L.J. 515, 524 (1982).

Many of those advocating reform to increase the status of victims in the justice system offer as at least one of the reasons for such reform that it will increase victim cooperation in the prosecution of crime. *E.g.*, *id.* at 518, 526, 528 (1982). See also *Bar Leadership*, *supra* note 3, at iii, 9, 31. Many of the statutory provisions concerning victims seem to be based upon this goal.

For example, the proposal of the National Conference of Commissioners on Uniform State Laws' Uniform Crime Victims Reparation Act provides that generally an award will not be made unless the incident was reported to "a law enforcement officer" within 72 hours after the occurrence, and further, that the amount of any reward may be reduced or denied if the victim fails to "fully" cooperate with law enforcement agencies. Unif. Crime Victim's Rep. Act §§ 5(a), 5(e), *reprinted in Considerations*, *supra* note 4, at 76 (1981). Many of the statutes providing for medical examination and treatment of victims of sexual offenses stipulate that such services are available only when they are rendered in connection with gathering

Thus, the bulk of the victims' rights legislation has been to improve the victim's status *vis-a-vis* the government itself, and not with respect to the criminal. This is significant because it mirrors the fact that the bulk of witnesses' complaints do not involve the laws which make certain conduct criminal, the sanctions for violating such laws, or, to a large extent, even the punishment ultimately meted out to the one convicted. Rather, the complaints focus on the treatment that the individual receives from the government employees who are, at least in democratic theory, his own employees.

Professor Kelly's study of the reaction of certain rape victims to their experience in the criminal justice system provides comments that are instructive: "[T]hey should have let me participate. It happened to me. I'm furious they never had the decency to let me say anything about what I wanted."²³

I was treated like a nonentity . . . the U.S. Attorney took the case and moved me right out of the picture. He didn't even ask me my opinion. He told me what he had decided. I felt like the criminal, like I was cluttering the picture with this rape.²⁴ What the offender has done to the individual is swept under the rug. The only reason they took my case was because he had a record and because they were worried about what he might do to "society." What about me? What did they do to help me? Nothing!²⁵

While anecdotal, these concerns appear to be representative of the feelings of many victims.

Moreover, although not expressed in those terms, these feelings on the part of victims reflect a deeper problem than lack of participation. They reflect a problem that the victim may instinctively feel and yet, because of the evolution of our society, may not be able to articulate. That feeling can be intellectualized and histori-

information about a crime for subsequent prosecution. *Id.* at 74. Similarly, the newly enacted Federal Victim and Witness Protection Act of 1982, while apparently decrying the fact that victims are often "simply used as tools to identify and punish offenders" begins with a finding that "[w]ithout the cooperation of victims and witnesses, the criminal justice system would cease to function." Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 2(a)(1), 96 Stat. 1248 (1982).

It is possible that these are simply identifications of incidental effects from victim legislation or even that the benefit of victim cooperation is being used as a "selling point" to those who may be otherwise reluctant to endorse or enact such legislation. However, it is also possible that the concern is still with using the victim as a "tool" for state policy, rather than a concern for the victim as a person.

23. Kelly, *Victims' Reaction to the Criminal Justice Response* 7 (June 6, 1982) (paper prepared for delivery at the 1982 Annual Meeting of the Law and Society Association).

24. *Id.* at 24.

25. *Id.* at 27.

calized in the following terms: If I were living in a more primitive society I would have taken steps to protect myself from this crime and, failing in that attempt, to punish the offender who harmed me. But the government assured me that I need not defend myself by carrying a weapon, and indeed may have made this illegal, by living in a fort, or by acting with others to form feudal alliances for self-defense. Further, I was assured that an injury to me was also an injury to society and that consequently the government would vindicate my rights by punishing anyone who injured me. Now, having failed to protect me from injury, the government fails to redress *my* injury because it apparently feels that its own injury has not been that great, and it uses its criminal law to prohibit me from resorting to self-help.

Professor Kelly's description of what happens once the crime is reported to the authorities has a double meaning which describes not only the victim's actual experience, but also the historical progression under which the victim lost control of the punishment of the assailant: "[W]hat was once a personal, private matter becomes the business of strangers, to be handled mainly as they see fit."²⁶

This articulation of a theory of justification for the underlying discontent of victims suggests a final legal conclusion: that the government and its employees may have breached the "social contract" with the people within its jurisdiction. The continuing breach of this contract during a time of rising concern over crime can only result in an increasing escalation of private responses to crime. In times of perceived ineffective law enforcement American culture has historically produced vigilante action. While such illegal activity may be seen as simply a contest between "good guys" and "bad guys," the government's breach of the social contract may provide a more sophisticated justification for such actions: by failing to live up to its part of the bargain the government releases the people from any moral obligation to adhere to its laws or processes.²⁷

Indeed, those arguing that the second amendment confers a personal right to bear arms for the purposes of self-defense often

26. *Id.* at 2.

27. Thomas Hobbes indicated that when internal war resulted in "no farther [sic] protection of Subjects in their loyalty; then is the Common-wealth DIS-SOLVED, and every man at liberty to protect himself by such courses as his own discretion shall suggest unto him." T. Hobbes, *LEVIATHAN* (J. Plamontz, ed.), pt. II, ch. 29 at 178 (1651; 1914 edition; 1940 reprint.)

See also *United States v. Rhodes*, 27 F. Cas. 785 (C.C. Ky. 1866) (No. 16,151): "Where crime is committed with impunity . . . those unprotected by other sanctions . . . [are] compelled . . . to rely upon physical force for the vindication of their natural rights. There is no other remedy and no other security."

cite cases such as *Warren v. District of Columbia*²⁸ as examples of the government's lack of liability for the failure to provide protection. This failure on the government's part leads to the conclusion that the citizens must necessarily have the right to preserve their own lives by using weapons in self-defense.²⁹

One indication of a movement in this direction can be seen by the rise of relatively benign citizens' anti-crime groups such as the "Guardian Angels."³⁰ There are also reports of about-to-be victims using deadly force to prevent crimes, even in situations where the law does not authorize such force.³¹ Similarly, a significant increase in the development and use of private security forces has been noted.³²

Although not completely explainable in these terms it does seem that the existence of such citizen groups, and the rise in illegal self-help remedies, are in proportion to the perception that the government is not properly fulfilling its role as the protector of the innocent and the punisher of the criminal. While not suggesting that we are near the return of widespread vigilante action such as existed at certain times in our history, or as is alleged to exist in certain other countries today, it should be recognized that it is a small step from the lawful use of citizens groups to aid law enforcement officials to illegal actions by such groups to punish perceived offenders.³³

28. 444 A.2d 1 (D.C. App. 1981) (en banc).

29. E.g., Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 7 OKLA. CITY U. L. REV. 65, 93 n.136 (1983); Gardiner, *To Preserve Liberty—A Look at The Right To Keep And Bear Arms*, 10 NO. KY. L. REV. 63, 65-66, n.11 (1982).

30. See generally Comment, *Municipal Liability for Torts Committed by Volunteer Anti-Crime Groups*, 10 FORDHAM URB. L.J. 595-98 (1982) (for references to the increase in such activity and an account of the Guardian Angels in New York City).

31. E.g., Hoiles, *Alleged shoplifter slain by store owner*, Akron Beacon J., Feb. 24, 1983, at 1, col. A-1. It was reported that a man who attempted to walk out of a neighborhood grocery store without paying for \$9.98 worth of groceries was stabbed several times by the store owner with a knife from the meat counter. The owner was charged with murder. See also *Street Sentence, Vigilante Justice in Buffalo*, Time Mag. 15 (August 15, 1983) (man suspected of sodomizing a ten year old girl was stabbed and beaten by her father and neighbors).

32. *People v. Zelinski*, 24 Cal. 3d 357, 365-66, 594 P.2d 1000, 1004-05, 155 Cal. Rptr. 575, 579-80 (1979).

33. Though the prevention of such illegal activity may be one of the by-products of improving the status of the victim, it is not presented here as the motivation for such action. Rather, the discussion which follows advocates the changes as part of the legal right of the victim as a person and not merely as a strategy to forestall illegal activity.

III. THE VICTIM'S INTEREST: SUFFICIENT FOR STANDING

A starting point for unraveling the underlying problem is a realization that there is a fundamental inconsistency between reality and the Supreme Court's assertion that the victim of a crime has no "interest" in the punishment of the one who violated the law. Section IV of this article sets forth, in some detail, the basis for the belief that the government has a duty to protect those within its jurisdiction. Such a conception may be based upon a social contract theory, natural law, or the fourteenth amendment. Of course, the social contract may have been rewritten, and there may be disputes as to whether the natural law of the eighteenth century is the natural law of the twentieth. Compliance with the fourteenth amendment, however, still stands as the constitutional obligation of the state. If one accepts the view that the fourteenth amendment places upon the state a duty to protect its inhabitants, then the government's duty to protect cannot be abandoned without a constitutional amendment.

It is not disputed that in the early penal systems "the course of justice was the exclusive domain of the victim himself or his clan."³⁴ The state's initial intrusion into the system was often to regulate such private vengeance, not displace it.³⁵ Trial by combat, as a substitution for unregulated combat, might exemplify such regulation.³⁶ As the state took more and more control over the criminal process, it told the victim that the injury was to both the victim and the state and that the state would act as the surrogate of the victim.³⁷ Indeed, even some of the relatively modern literature speaks of the view that "harm to the victim is also harm to the state."³⁸

Today, however, the courts find the injury is solely to the state. By a subtle transformation, that which was once the exclusive province of the victim became the joint province of the victim and the state and most recently was transformed into the exclusive province of the state.³⁹ Such a view may, in social contract terms,

34. Sebba, *The Victim's Role in the Penal Process: A Theoretical Orientation*, 30 AM. J. COMP. L. 217, 225 (1982).

35. *Id.*

36. *See id.* at 228.

37. For example, Blackstone indicated that: "treason, murder, and robbery are properly ranked among crimes; since, besides the injury done to individuals, they strike the very being of society, which cannot possibly subsist, where actions of this sort are suffered to escape with impunity." 4 W. BLACKSTONE, COMMENTARIES 5 (1st ed. 1769; facsimile reprint 1979).

38. N. MORRIS, *THE FUTURE OF IMPRISONMENT* 56 (1974).

39. One ultimate question may be what is the goal of the state? Is the state attempting to provide a more efficient and safer mechanism through which the objectives of the victim can be accomplished? Or is the state attempting to displace the victim and pursue its own goals?

be seen as a breach of the initial agreement under which the state was made a partner in the criminal justice process. It also ignores the very real personal interest the victim has in both receiving protection from the state and in having his rights vindicated by the criminal process.

Of even greater importance, this view ignores the fact that the interests of state employees conducting the case and those of the victim may be drastically different:

[The] conflict between the state's and the victim's interest is frequent and real. Prosecutors are more closely aligned with police, judges, and defense attorneys than with victims. These actors share similar goals, namely, to minimize the uncertainty of outcomes and dispose of as many cases as fast as time and justice will allow. To do this, charges are dropped, cases are dismissed, delays freely granted. Plea bargaining becomes the rule, full charges and trial the exception. In this push to dispense justice with minimal time and resources, victims' interests are often sacrificed. As the National District Attorney's Association put it, "Prosecutors are typically too pressed by time, heavy case loads, and crises to reflect long on the situation of the crime victim."⁴⁰

Because of these dual interests, it ignores reality to suggest, as the Supreme Court has done, that the victim does not have sufficient interest to sue on the basis of the lack of protection or enforcement.⁴¹ The Court should, quite simply, admit its error and recognize the standing of victims in such situations. In the event of its failure to do so, there should be "little doubt" that standing could be conferred by legislative action.⁴² Both Congress and state legislatures should act promptly to do so.

40. Kelly, *supra* note 23, at 3 (footnotes omitted). This same point is made by Goldstein, *supra* note 22, at 519, 555-56. It should nevertheless be recognized that many prosecutors, such as Milwaukee's Michael McCann, have made great contributions to and taken leadership roles in the protection of victims' rights.

41. Seven members of the present Court have expressed a great deference to the interest of the victim in criminal proceedings. A majority composed of Chief Justice Burger and Justices White, Powell, Rehnquist, and O'Connor, recently held that "in the administration of criminal justice, *courts may not ignore the concerns of victims*." *Morris v. Slappy*, 103 S. Ct. 1610, 1617 (1983) (emphasis added). Justice Brennan and Justice Marshall have indicated that while the "interests" of a victim in a particular case are not relevant to a decision on enforcing an established constitutional right, *id.* at 1625 n.10, they are relevant to utilizing a court's supervisory power to reverse on an error that was deemed to be harmless. *United States v. Hasting*, 103 S. Ct. 1974, 1984 n.7 (1983) (Brennan and Marshall, J.J., concurring in part and dissenting in part).

Though these cases involved consideration of the interest of the victim in avoiding a retrial, those same concerns should apply *a fortiori* to the question of compelling prosecution. Certainly a victim has a greater interest in securing *some* prosecution of an offender than in avoiding a re-prosecution which may nevertheless result in a new conviction.

42. Goldstein, *supra* note 22, at 552.

The fact that a constitutional obligation may exist, however, does not necessarily mean that it will be enforced by judicial process even if victims have standing. Early decisions of the Supreme Court held that even though the Constitution created a clear obligation on the governor of a state to extradite a fugitive from justice,⁴³ judicial remedies were unavailable to enforce such a duty.⁴⁴

However, the application of this principle to the duty of protection based upon the fourteenth amendment would seem particularly inappropriate. Congressman John Bingham, author of the relevant section of the fourteenth amendment, frequently articulated the abolitionist legal theory that while the Bill of Rights was applicable to the states prior to the adoption of the fourteenth amendment,⁴⁵ the Constitution was defective because it provided no enforcement mechanism against the states.⁴⁶ He cited *Barron v. Baltimore*⁴⁷ and indicated that he made the last revision of the fourteenth amendment with that case in mind and with the intent of making up for this deficiency by providing for enforcement against the states.⁴⁸

The only remaining theory that could be utilized to properly deny victims a judicial remedy is the political question doctrine.⁴⁹ Although there may be political remedies for some of these violations,⁵⁰ issues concerning the breach of the duty of protection, or prosecution, would not seem to come within the political question doctrine because such determinations are not committed to another branch of government, they are capable of judicial resolution using normal tort principles, and they are the very type of issue normally resolved by the courts.

Finding standing and justiciable issues simply means that the matter may be litigated in the courts. It does not, of course, determine who shall prevail in any given lawsuit or what standards of liability should apply. Obviously the latter are particularly important because they may have an effect upon the day-to-day performance of government actors. Risks in the implementation of these duties and rights include: (1) diversion of scarce resources

43. U.S. CONST. art. IV, § 2, cl. 2, providing for the extradition of fugitives.

44. *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 107-10 (1860); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 615-16 (1842).

45. CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866).

46. *Id.* at 2511.

47. 32 U.S. (7 Pet.) 243 (1833).

48. CONG. GLOBE, 42d Cong., 1st Sess. 84 (1871) (speech during debate on enforcement act explaining drafting of fourteenth amendment five years earlier).

49. For a summary of this doctrine see *Baker v. Carr*, 369 U.S. 186 (1962). See also L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 71-79 (1978).

50. See discussion, *infra*, in the text accompanying notes 193-99.

away from protection and into litigation; (2) creating incentive for the violation of rights of criminal defendants; and (3) creating disincentive to taking jobs as members of law enforcement. The standards set forth below attempt to avoid these problems and, at the same time, to provide an effective remedy for the victims whose rights have been violated.

Because one's view of the government's duty to protect specific individuals may drastically affect the victim's remedies when such protection has not been forthcoming, the historical basis for believing that the government does have a duty to protect those under its jurisdiction will be examined. The implications of such a duty in assessing remedies against state actors will then be explored in the following categories: (1) physical protection; (2) arrest; (3) investigation; (4) prosecution; and (5) custody of offenders. Finally, because the implementation of victims' rights in these areas necessarily involves state government, the doctrine of sovereign immunity will be examined.

IV. THE GOVERNMENT'S DUTY OF PROTECTION

A. Allegiance, Protection, and Reciprocity

The concept that the government owes a duty of protection to its citizens is ancient. In a feudal society, the lord would offer military protection to his vassals. The theory of social contract was premised, in part, upon the view that in exchange for surrendering certain natural rights to society, the individual gained certain protections from society.⁵¹

The government's duty to protect was the *quid pro quo* for a citizen's duty of allegiance. This idea was prominent in abolitionist thought⁵² and played a significant role in legal theory of the 1860's and 1870's. For example, in 1862, Lincoln's Attorney General, Edward Bates, issued an opinion which was largely devoted to a dis-

51. See generally SOCIAL CONTRACT; ESSAYS BY LOCKE, HUME AND ROUSSEAU (E. Barker ed. 1962). See also Art. X, *A Constitution or Form of Government for the Commonwealth of Massachusetts* (1780), reprinted in 14 SUFFOLK U. L. REV. 841 (1980) [hereinafter cited as *Massachusetts Const. of 1780*] where it is stated that an individual has a right to be protected by society and that "consequently" each individual also "is obliged" to contribute towards that protection. See also N.H. CONST. art. X (1784), reprinted in R. PERRY & J. COOPER, SOURCES OF OUR LIBERTIES 383 (1959) [hereinafter cited as PERRY], and VT. CONST. art. X (1777) 365. For a modern treatment of the concept of social contract see R. DWORKIN, TAKING RIGHTS SERIOUSLY 150-83 (1977).

52. See generally J. TENBROEK, EQUAL UNDER LAW 48, 84-88, 317-18 (1965).

cussion of "the duty of allegiance and the right of protection . . . [which] are correlative obligations, the one the price of the other."⁵³ A year later President Lincoln, in his order threatening retaliation for the mistreatment of black soldiers by the Confederacy, began with the proposition that "[i]t is the duty of every government to give protection to its citizens, of whatever class, color, or condition, and especially to those who are duly organized as soldiers in the public service."⁵⁴

These concepts often received judicial sanction. In *Minor v. Happersett*,⁵⁵ Chief Justice Waite, speaking on behalf of a unanimous Court, indicated: "Allegiance and protection are . . . reciprocal obligations. The one is a compensation for the other; allegiance for protection and protection for allegiance."⁵⁶ Similar sentiments have been reiterated in modern Supreme Court cases.⁵⁷

Without mentioning any specific provisions of the Constitution, the Supreme Court has, in other contexts, referred to a duty of government to provide protection for its citizens. Justice White called this the "most basic function of *any* government."⁵⁸ The adverse effect of the Fair Labor Standards Act upon the availability of police and fire protection was one of the major considerations in *National League of Cities v. Usery*,⁵⁹ which resulted in the conclusion that the tenth amendment prohibited application of that act to state governmental functions. Similarly, in *Foley v. Connelie*,⁶⁰ the Court, in explaining that police officers were at the heart of the state governmental function, indicated that "police functions [fulfill] a most fundamental obligation of government to its constituency."⁶¹ Thus, even without consideration of

53. 10 Op. Att'y Gen. 382, 395 (1862). This opinion of Bates, as well as the significance of the order of President Lincoln discussed below, was first brought to my attention upon a reading of Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U. L. REV. 651, 672 n.110 (1979).

54. VI THE COLLECTED WORKS OF ABRAHAM LINCOLN 357 (R. Basler ed. 1953).

55. 88 U.S. 162 (1875).

56. *Id.* at 166. See also the introductory portions of the North Carolina Constitution of 1776 indicating that "allegiance and protection, are in their nature, reciprocal, and the one should be refused when the other is withdrawn." This idea may have had its antecedents in *Calvin's Case*, 7 Co. Rep. 1a, 4b, 77 Eng. Rep. 377, 382 (1608): "as the subject oweth to the King his true and faithful ligeance and obedience, so the sovereign is to govern and protect his subjects." *Id.*

57. *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 345 (1954); *United States v. Schwimmer*, 279 U.S. 644, 649 (1929). See also *Plyler v. Doe*, 457 U.S. 202, 211 n.10 (1982) (citing *United States v. Wong Kim Ark*, 169 U.S. 649, 693 (1898)).

58. *Miranda v. Arizona*, 384 U.S. 436, 539 (1966) (White, J., dissenting).

59. 426 U.S. 833 (1976). "[I]t is functions such as these which governments are created to provide. . . ." *Id.* at 851.

60. 435 U.S. 291 (1978).

61. *Id.* at 297. The relevancy of *National League* and *Foley* came to my attention through a reading of Willing, *Protection by Law Enforcement: The Emerging*

the requirements of the fourteenth amendment, there is substantial support for the proposition that both the state and federal governments owe a duty of protection to those within their jurisdictions.

B. The Fourteenth Amendment's Requirement of Protection

Section one of the fourteenth amendment contains the provision that no state shall "deny any person within its jurisdiction the equal protection of the laws." It is true that Justice Holmes once deprecated the efficacy of the equal protection clause by denominating it the "usual last resort of constitutional arguments."⁶² Since the 1950's, however, the equal protection clause has become "an extremely viable constitutional tool of considerable range and impact," and has been resorted to more frequently than any other constitutional provision protecting individual rights.⁶³ Nevertheless, the emphasis has generally been upon the "equal" application of state policy to individuals in similar situations. While equal treatment was certainly an important concern of those who framed the fourteenth amendment, the clause also speaks of "*the equal protection of the laws.*"⁶⁴ It is this aspect of the equal protection clause which has particular relevance to the victims of crime.

The framers of the fourteenth amendment had before them a lengthy history of the idea that governments have a duty to protect citizens. For example, Section 3 of the Virginia Bill of Rights

Constitutional Right, 35 RUTGERS L. REV. 1 (1982). Although the title of that article would suggest a kinship to the present writing, Mr. Willing does not canvass any possible remedies for an individual who believes that his rights to protection were not honored by government actors. Rather, his thesis is that "truly extreme state-created rights of criminal defendants may violate the United States Constitution" because they may hamper law enforcement efforts to provide a minimal level of protection. *Id.* at 19, 21-22, 85, 99.

62. *Buck v. Bell*, 274 U.S. 200, 208 (1927).

63. P. KAUPER AND F. BEYTAGH, *CONSTITUTIONAL LAW, CASES AND MATERIALS* 875 (5th ed. 1980). See, e.g., *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Regents v. Bakke*, 438 U.S. 265 (1978).

64. U.S. CONST. am. XIV (emphasis added). Implicit in the prohibition of the fourteenth amendment that no state "shall deny to any person within its jurisdiction the equal protection of the laws" are two ideas: (1) the duty of government to protect all persons in their civil rights, and (2) the equality of all persons before the law. HARRIS, *THE QUEST FOR EQUALITY* 1 (1968).

For a summary of the debates of Congress on the meaning of the "protection" aspect of the fourteenth amendment's equal protection clause see Avins, *The Equal 'Protection' of the Laws: The Original Understanding*, 12 N.Y.L.F. 385 (1966).

of June 12, 1776, indicated that “[g]overnment is, or ought to be instituted for the common benefit, *protection*, and *security* of the people, nation, or community; . . .”⁶⁵ The most widely quoted portion of the Declaration of Independence provides not only that all men are created equal, but also that the purpose of government is to “secure” inalienable rights which include life, liberty, and the pursuit of happiness.⁶⁶ This obligation on the part of government was reiterated in the early Constitution of Massachusetts: “Government is instituted for the common good; for the *protection, safety*, prosperity and happiness of the people”⁶⁷ “Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty, and property, according to standing laws.”⁶⁸ While not universal, similar sentiments were written into the early constitutions of many states.⁶⁹

Other state constitutional provisions suggest a duty of protection, although they may be read as placing more emphasis upon “equality” than upon “protection.” One provision for religious freedom, which sometimes appeared, provided that all Christian denominations “shall be equally under the protection of the law.”⁷⁰ Similarly, other provisions indicated that a subject “ought to find a certain remedy, by having recourse to the laws, for all in-

65. PERRY, *supra* note 51, at 311 (emphasis added).

66. Thomas Jefferson was even more explicit about the government's duty to protect one from criminal acts:

Whereas, it frequently happens that wicked and dissolute men, resigning themselves to the domination of inordinate passions, commit violations on the lives, liberties and property of others, and, the secure enjoyment of these having principally induced men to enter into society, *government would be defective in its principal purpose, were it not to restrain such criminal acts.* . . .

THE WRITINGS OF THOMAS JEFFERSON 218 (A. Lipscomb ed. 1903) (from the preamble to the Bill for Proportioning Crimes and Punishments in Cases Heretofore Capital, 1788) (emphasis added).

67. MASS. CONST. art. VII (1780), *reprinted in* PERRY, *supra* note 51, at 375 (emphasis added). However, note that the same article proceeds to conclude that: “Therefore the people alone have an incontestible, unalienable, and indefeasible right to institute government; and to reform, alter or totally change the same, when their protection, safety, prosperity and happiness require it. . . .” When read in its entirety, this could be interpreted to support the view that the framers of the provision contemplated a political, rather than a judicial, remedy for any breach of the duty of protection. Similar provisions appear in N.H. CONST. art. X, (1784), *reprinted in* PERRY, *supra* note 51, at 383, and in VT. CONST. art. VI (1777), *reprinted in* PERRY, *supra* note 51, at 365.

68. MASS. CONST. art. V (1780), *reprinted in* PERRY, *supra* note 51, at 375.

69. N.H. CONST. art. XII (1784), *reprinted in* PERRY, *supra* note 51, at 383; PA. CONST. art. VIII (1776), *reprinted in* PERRY, *supra* note 51, at 330; VT. CONST. art. XIII (1777), *reprinted in* PERRY, *supra* note 51, at 365.

70. MASS. CONST. art. III (1780), *reprinted in* PERRY, *supra* note 51, at 375. Identical language appears in the N.H. CONST. art. VI (1784), *reprinted in* PERRY, *supra* note 51, at 383. A variation of that theme is found in the Maryland Constitution of 1776 which provided that all Christians “are equally entitled to protection

juries or wrongs which he may receive in his person, property, or character."⁷¹

In *Marbury v. Madison*, Chief Justice Marshall indicated that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. . . ."⁷² In the early and oft-quoted case of *Corfield v. Coryell*,⁷³ interpreting the interstate privileges and immunities clause,⁷⁴ Justice Bushrod Washington listed as one of the general headings of such privileges "[p]rotection by the government."⁷⁵ President Jackson's veto message of the bill to recharter the national bank indicated that "every man is equally entitled to protection by law."⁷⁶

Borrowing, as they did, from concepts of natural rights and equality contained in the Declaration of Independence, it is not surprising that the pre-Civil War abolitionists placed great emphasis upon the duty of protection by the government. This is especially true because a number of the leading grievances which

in their religious liberty." MD. CONST. art. XXXIII (1776), reprinted in PERRY, *supra* note 51, at 349.

It is, however, often difficult to make distinctions between concepts of "equality" and concepts of "protection." For example, Judge Chase, presiding on the circuit in the trial of John Fries, leader of the "Fries Rebellion" in Pennsylvania was no doubt stating a commonly-held belief when he told the prisoner, prior to sentencing: "Your government *secures* to every member of the community . . . an equal security for his *person and property*" Case of Fries, 9 F. Cas. 826, 932 (C.C.D. Pa. 1800) (No. 5,127) (emphasis in original). Of course, Justice Chase indicated that the government "*secures*," rather than it has a *duty* to secure, these rights. However, the more relevant inquiry is whether the government could "equally secure" such protection by offering *no* protection?

71. MASS. CONST. art. XI (1780), reprinted in PERRY, *supra* note 51, at 376. See also N.H. CONST. art. XIV (1784) reprinted in PERRY, *supra* note 51, at 384 and MD. CONST. art. XVII (1776), reprinted in PERRY, *supra* note 51, at 348.

72. 5 U.S. (1 Cranch) 137, 163 (1803). This might be interpreted to indicate support for an affirmative duty to pass laws to protect one from injury. However, later the Chief Justice indicated that his concern was with a situation in which "the laws furnish no remedy for the violation of a *vested legal right*." *Id.* (emphasis added). Read in this context, it would appear that Justice Marshall was speaking of the duty of the government to vindicate rights established by law and not a duty to enact laws to protect rights.

73. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

74. U.S. CONST. art. IV, § 2 provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

75. 6 F. Cas. at 551.

76. S. Doc. No. 180, 22d Cong., 1st Sess. 13 (1832). Note that the language is "equally entitled to *protection*" and not "entitled to *equal protection*."

abolitionists harbored were directed against all governments, both state and federal, in their failure to offer protection.

As stated by abolitionist theoretician Theodore Dwight Weld, the rights denied to the abolitionists included:

the right to petition ravished and trampled by its constitutional guardians . . . "the right of peaceably assembling" violently wrested— the rights of minorities, rights no longer— free speech struck dumb—free men outlawed and murdered—free presses cast into the streets and their fragments strewn with shoutings, or flourished in triumph before the gaze of approving crowds as proud mementoes of prostrate law.⁷⁷

The rights of free blacks which were said to have been violated included "the right to be secure in their persons, houses and property, that is to receive protection of the laws, courts, and public officials against lynch mobs, private violence, fraud, and calumny. . . ."⁷⁸ Consequently, even in the northern states, "[t]he immediate need of the abolitionists . . . was for protection against riot, arson, assault, and murder."⁷⁹

It was for these reasons that the statement in the Declaration of Independence, that one of the purposes of government was to "secure" the natural rights of life and property, played such a prominent role in the speeches of abolitionist leaders such as Ohio Congressman Joshua J. Giddings.⁸⁰ The Declaration of Independence's theme of protection was adopted word-for-word in the platforms of the Republican Party in 1856⁸¹ and 1860.⁸²

77. Quoted in J. TENBROEK, *supra* note 52, at 125-26.

78. J. TENBROEK, *supra* note 52, at 125.

79. *Id.* at 37.

80. See *id.* at 144 n.8. Although William L. Garrison and Henry Ward Beecher were prominent abolitionists, Joshua Giddings is perhaps one of the better known "political abolitionists," i.e., abolitionists who saw politics as a method of treating the evil. He served in Congress from 1838 to 1859 and was one of the small band of Congressmen supporting John Quincy Adams in his fight against the "gag" rule. Upon the death of Adams he was the generally recognized leader of the anti-slavery forces in the House until the formation of the Republican party. In his last speech in the House, where he traced the history of the anti-slavery struggle, he indicated that members of the Republican Party believed "that the object and duty of governments are to protect every human soul in the enjoyment of life, liberty, and happiness." CONG. GLOBE, 35th Cong., 2d Sess. Part 1, 343 (1859).

81. PROCEEDINGS OF THE FIRST THREE REPUBLICAN NATIONAL CONVENTIONS OF 1856, 1860 AND 1864, 43 (C.W. Johnson ed. 1893) [hereinafter cited as PROCEEDINGS]. The second resolve quotes the "all men are created equal" and "to secure these rights" portions of the Declaration. Inclusion of these provisions is generally attributed to Congressman Giddings who was a member of the platform committee. See, e.g., G. JULIAN, THE LIFE OF JOSHUA R. GIDDINGS 335 (1892); J. TENBROEK, EQUAL UNDER LAW 136-37, 141 n.5 (1965).

82. PROCEEDINGS, *supra* note 81, at 131. Unlike the convention of 1856 where these principles were adopted with seeming unanimity, there was controversy over their adoption at the 1860 Chicago convention. It was only after Joshua Giddings had walked out of the convention in protest and debate was reopened that resolution number two, quoting the same language from the Declaration, was adopted. *Id.*, at 135-42; D. HOWE, THE POLITICAL CULTURE OF THE AMERICAN WHIGS 179 (1979).

In the 1856 Philadelphia Convention, the Republican list of grievances included the fact that "[m]urders, robberies, and arson have been instigated or encouraged, and the offenders have been allowed to go unpunished."⁸³ The "National Administration" was "arrang[ed]" for its inaction and the Republicans announced their "fixed purpose to bring the actual perpetrators of these atrocious outrages and their accomplices to a sure and condign punishment hereafter."⁸⁴ Similar ideology was expressed in the call for the improvement of rivers and harbors of a national character, which was said to be "justified by the obligation of Government to protect the lives and property of its citizens."⁸⁵ In the 1860 Convention, when addressing the rights of naturalized citizens, the Republican Party platform indicated the Party was "in favor of giving a *full and efficient protection* to the rights of all classes of citizens."⁸⁶

It was this concept of "protection" that the framers of the fourteenth amendment sought to enact into fundamental law. In the words of one influential scholar who analyzed the connection between abolitionists' views and the fourteenth amendment:

Freemen, all men, were entitled to have their natural rights protected by government. Indeed, it was for that purpose and that purpose only that men entered society and formed governments. . . . The equal protection of the laws is thus a command for the full or ample protection of the laws. It is basically an *affirmative command to supply the protection* of the laws.⁸⁷

83. PROCEEDINGS, *supra* note 81, at 44.

84. *Id.*

85. *Id.*

86. *Id.* at 132 (resolution number 14).

87. J. TENBROEK, *supra* note 52, at 193-94 (emphasis added). Because the duty of protection was thought to belong to all governments, the federal government had a duty to protect these same natural rights. For example, in arguing that Congress should abolish slavery in the District of Columbia because the failure to do so denied the slave the right of property in one's self, abolitionist activist James G. Birney argued that: "Congress is bound immediately to protect every person in the district, in the enjoyment of everything that is his." *Philanthropist*, Mar. 4, 1836, at 3, col. 4, from *Human Rights*, an abolitionist periodical (quoted in Graham, *The Early Antislavery Backgrounds of the Fourteenth Amendment, II Systemization, 1835-37*, WIS. L. REV. 610, 643 (1950)).

Similar views were echoed in Congress almost thirty years later by Senator Trumbull in announcing his intention to introduce a bill to enlarge the powers of the Freedmen's Bureau. He indicated that the purpose of the bill was to "secure freedom to all persons within the United States, and protect every individual in the full enjoyment of rights of person and property and furnish him with means for their vindication." As to Congress' role in such protection, Senator Trumbull indicated: "I consider that under the constitutional amendment [thirteenth amendment] Congress is bound to see that freedom is in fact secured to every person throughout the land; he must be fully protected in all his rights of person

In analyzing the equal protection clause, the same author concluded that protection is part of the "universal correlative of the allegiance and obligation of obedience which the constitutional system exacts."⁸⁸

The equal protection of the laws is violated fully as much, perhaps even more, by private invasions made possible through failure of government to act as by discriminatory laws

The two parts of the phrase are . . . inseparable. *Every violation entails both an absence of protection and a denial of equality, at least where fundamental rights are at stake The states are forbidden to fail to carry out their primary duty of protection; and, when carrying it out, are forbidden to fail to adhere to the standard of equality.*⁸⁹

These concepts were codified in the Civil Rights Act of 1866 which provided, in part, that "citizens . . . of every race and color . . . shall have the same right, in every State and Territory in the United States . . . to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens. . . ."⁹⁰

These concerns were in the minds of the framers of the fourteenth amendment when it was debated in Congress. As Professor Soifer has noted, the "political thought of the time" included a widely held belief "that government owed a duty to afford remedies" for the violation of natural rights.⁹¹ In reporting to Congress the evils then existing, the Joint Committee on Reconstruction found that:

The feeling in many portions of the country towards emancipated slaves, especially among the uneducated and ignorant, is one of vindictive and malicious hatred. This deep-seated prejudice against color is assiduously cultivated by the public journals, and leads to acts of cruelty, oppression and murder, which *the local authorities are at no pains to prevent or punish.*⁹²

Thus, whatever the legal efficacy of the government's affirmative duty to protect prior to the fourteenth amendment, it seems reasonably clear that one of the effects of that amendment was to constitutionalize this doctrine. Indeed, Joseph Tussman and Jacobus tenBroek opened their influential article on the equal protection clause with the observation that "the equal protection

and property. . . ." CONG. GLOBE, 39th Cong., 1st Sess. 77 (1865-1866) (quoted in J. TENBROEK, *supra* note 52, at 194-95).

88. J. TENBROEK, *supra* note 52, at 118.

89. *Id.* at 119 (emphasis added). According to tenBroek the same obligations were thought to arise under the concept of due process. "[D]ue process was viewed not merely as a restraint on governmental power but as an obligation imposed upon government to supply protection against private action." *Id.* at 121.

90. 14 Stat. 27, ch. 31, § 1 (1866). See 42 U.S.C. §§ 1981, 1982 (1976).

91. Soifer, *supra* note 53, at 674.

92. *Report of the Joint Committee on Reconstruction, XVII 39th Cong., 1st Sess. (1866)* (quoted in Dimond, *Strict Construction and Judicial Review of Racial Discrimination Under the Equal Protection Clause: Meeting Raoul Berger on Interpretist Grounds*, 80 MICH. L. REV. 462, 477 (1982)) (emphasis added).

clause was designed to impose upon the states *a positive duty to supply protection* to all persons in the enjoyment of their natural and inalienable rights—especially life, liberty, and property—and to do so equally.”⁹³

This interpretation is also supported by the statutes subsequently passed to enforce the fourteenth amendment. In the debate over the Civil Rights Acts of 1871,⁹⁴ repeated references were made to the failure of the states to offer protection. Senator Pool stated the belief that the incidents of citizenship included the “absolute . . . right to personal liberty, personal security and personal property . . . the protection of which is the prime object for which all governments are established.”⁹⁵ In speaking of the duty to protect those rights Senator Pool indicated: “It is made, primarily, the duty of the States to give the protection. Upon their failure the national Government must intervene with its authority in defense of the rights of its citizens.”⁹⁶

According to Ohio’s Representative Perry:

Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not In the presence of these gangs all the apparatus and machinery of civil government, all the processes of justice, skulk away as if government and justice were crimes and feared detection [The Fourteenth Amendment] means, then, that the people of a State, with more or less definite political and governmental relations, shall neither abridge nor permit to be abridged those rights, deny nor fail to afford the equal protection of the laws to any persons.⁹⁷

In supporting passage of the act, James Garfield, then a member of the House of Representatives, indicated:

I think the provision that the States shall not “deny the equal protection of the laws” implied that they shall afford equal protection [E]ven where the laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them.⁹⁸

It may be suggested that the fourteenth amendment and its implementing legislation were directed at the evil of discrimination against protected classes, or the exercise of fundamental rights. A careful analysis, however, will reveal that both the explicit lan-

93. Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949) (emphasis added).

94. 17 Stat. 13 (1872).

95. CONG. GLOBE, 42d Cong., 1st Sess. 607 (1871).

96. *Id.*

97. CONG. GLOBE, 42d Cong. 1st Sess. 78, 80 (1871).

98. *Id.* at 153.

guage of many of the authorities and the underlying rights provided, at the very least, for security of person and property.

The framers of the fourteenth amendment would not have been satisfied with the claim that the state government could be equally negligent in failing to protect the lives of all citizens. Indeed, in one of the early cases interpreting the fourteenth amendment, Judge Woods, later to become a United States Supreme Court Justice, held in *United States v. Hall*⁹⁹ that the fourteenth amendment:

prohibits the states from denying to all persons within its jurisdiction the equal protection of the laws . . . [by] the omission to protect, as well as *the omission to pass laws for protection*. The citizen of the United States is entitled to the enforcement of the laws for the protection of his fundamental rights, *as well as the enactment of such laws*.¹⁰⁰

These views of the fourteenth amendment are consistent with modern legal thought. For example, the *ABA Standards Relating to the Urban Police Function*,¹⁰¹ endorsed by the Executive Committee of the International Association of Chiefs of Police,¹⁰² indicate that "[t]he highest duties of government" include the duty to "preserve life and property."¹⁰³ A similar sentiment was expressed by Senator Strom Thurmond and recently quoted with apparent approval by Attorney General William French Smith: "[T]he primary purpose of government is to protect its citizens against foreign and domestic enemies—and domestic 'enemies' include the common criminal."¹⁰⁴ It thus seems that there is a consensus that there is an affirmative duty upon government to protect those under its jurisdiction. The implementation of that duty is analyzed in the following sections.

V. PHYSICAL PROTECTION

As recognized by the *ABA Standards Relating to the Urban Police Function*,¹⁰⁵ "[m]ajor current responsibilities" of the police include giving "aid [to] individuals who are in danger of physical harm. . . ."¹⁰⁶ There should be no doubt that a police officer who

99. 26 F. Cas. 79 (C.C.S.D. Ala. 1871) (No. 15,282).

100. *Id.* at 81 (emphasis added). *Accord* *United States v. Mall*, 26 F. Cas. 1147 (C.C.S.D. Ala. 1871) (No. 15,712).

101. 1979 Approved Draft, I ABA STANDARDS FOR CRIMINAL JUSTICE (1982).

102. *Id.* at 22. This information appears within "Commentary on the Introduction of the Supplement" entitled STANDARDS RELATING TO THE URBAN POLICE FUNCTION containing the 1973 Approved Draft and published in 1973. However, it is not contained in the 1974 issue of STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE nor the 1979 Approved Draft.

103. *Id.* at §§ 1.52 - 2.4(9).

104. Smith, *Remarks of the Attorney General on Law Day*, 34 S.C. L. REV. 247, 248 (1982).

105. Approved Draft, 1979, *supra* note 101.

106. *Id.* at §§ 1.30, 1-2.2 (c).

has the ability to rescue a person from physical harm and fails to do so is personally liable for monetary damages. The courts, however, have been generally unwilling to recognize any civil liability on the part of law enforcement officers for failure to protect the victim of a crime, even when there was a reasonable opportunity to do so. It is generally thought that an officer's duty to enforce the law is owed only to the general public and "that the breach of such duty accordingly creates no liability on the part of the officer to an individual who was damaged by the lawbreaker's conduct."¹⁰⁷

Perhaps one of the most widely known cases of recent origin is *Warren v. District of Columbia*,¹⁰⁸ in which a rooming house was broken into by two male intruders. The intruders entered the room of one victim who was raped and forced to engage in sodomy.¹⁰⁹ The other two women, who had been asleep in a room on the next floor, heard screams and called the police dispatcher who told them to remain quiet and assured them that the police would arrive. The officers came to the scene, but failed to enter the house to investigate and left when there was no answer to the knock on the door. The two victims then placed a second call to the police station. Although they were assured that the police were on their way, this call was merely recorded as "investigate the trouble" and no police were dispatched to the scene.¹¹⁰

Ultimately, the remaining two women were discovered by the intruders. All three victims were taken to the apartment of one of the intruders. Their ordeal there was described by the court of appeals in the following terms: "For the next fourteen hours the women were held captive, raped, robbed, beaten, forced to commit sexual acts upon each other, and made to submit to the sexual demands [of the captors]."¹¹¹

A civil suit against the officers and the District of Columbia was predicated on negligence in the failure to assign a proper priority to their first call; the failure of the police on the scene to follow properly designated police procedures in investigation; and the dispatcher's failure to send police in response to the second call. The majority held there was no liability under the theory that "a

107. Annot., 41 A.L.R. 3d 700, 702 (1972).

108. 444 A.2d 1 (D.C. App. 1981) (en banc).

109. *Id.* at 2.

110. *Id.*

111. *Id.*

government and its agents are under no general duty to provide public services, such as police protection, to any particular citizen."¹¹²

Unfortunately, this case is not an unusual one. In many jurisdictions recovery for police negligence is denied under the theory of immunity.¹¹³ More often, however, liability is denied under the theory that while the police may owe a "general" duty to protect the public, that duty does not attach to allow any specific individual to claim such protection unless a "special relationship" has been established. Under this view it has been held that there is no liability where: police on a stakeout at the scene of several stabbings failed to warn a woman when they spotted a suspect who subsequently stabbed the woman;¹¹⁴ when police officers failed to stop individuals from illegally drag racing and the plaintiff was subsequently injured when those individuals collided with his automobile;¹¹⁵ when a detective failed to order four boys in front of a shop to disperse and they later fire-bombed the store;¹¹⁶ and where there was a "tardy" response to a call for help by a victim of a sexual assault.¹¹⁷ It has also been held that there is no duty to warn motel employees of suspicious persons in a motel parking lot;¹¹⁸ or to protect a woman from threats from her estranged boyfriend.¹¹⁹

112. *Id.* at 3, quoting with approval the decision of the trial court below.

113. *E.g.*, *Jamison v. City of Chicago*, 25 Ill. App. 3d 326, 323 N.E.2d 118, *rev'd*, 48 Ill. App. 3d 567, 363 N.E.2d 87 (1974) (individual's son warned police of father's irrational behavior on several occasions and requested that the father be arrested; no police action was taken and father later killed the plaintiff's decedent); *Trezzi v. City of Detroit*, 120 Mich. App. 506, 328 N.W.2d 70 (Mich. Ct. App. 1982) (city operated a "911" emergency number; victims called for help but, because an unjustifiably low priority was assigned, police were not dispatched until one-and-one-half hours later after the couple received injuries that resulted in their deaths).

114. *Davidson v. City of Westminster*, 32 Cal. 3d 197, 649 P.2d 894, 185 Cal. Rptr. 252 (1982).

115. *Trautman v. City of Stamford*, 32 Conn. Supp. 258, 350 A.2d 782 (1975).

116. *Commercial Union Ins. Co. v. City of Wichita*, 217 Kan. 44, 536 P.2d 54 (1975).

117. *Doe v. Hendricks*, 92 N.M. 499, 590 P.2d 647 (1979).

118. *Sapp v. City of Tallahassee*, 348 So. 2d 363 (Fla. Dist. Ct. App. 1977).

119. *Ross v. City of New York*, 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1968).

There are cases in which such a special relationship has been found. *E.g.*, *DeLong v. County of Erie*, 89 A.D.2d 376, 455 N.Y.S.2d 887 (1982) (reliance on emergency "911" operator's statement that police would respond so that she did not summon help from village police or neighbors was enough to establish special relationship); *Florence v. Goldberg*, 44 N.Y.2d 189, 375 N.E.2d 763, 404 N.Y.S.2d 583 (1978) (police assumed duty of providing school crossing guard and on the day they failed to do so mother's child was struck by taxi cab); *Silverman v. Fort Wayne*, 171 Ind. App. 415, 357 N.E.2d 285 (1976) (allegation that police promised store owner protection against riot, provided it for a short time, and then withdrew protection is enough to state a claim alleging special relationship); *Schuster v. City of New York*, 5 N.Y.2d 75, 180 N.Y.S.2d 265, 154 N.E.2d 534 (1958) (decedent

These decisions are premised upon a number of erroneous assumptions which, if corrected, would find a duty of protection and resolve the issue of liability upon questions of breach of duty and proximate cause. Many of the aforementioned cases are premised upon the view that the government has no duty to any specific citizen to offer protection. Given the history of the fourteenth amendment, this is assuredly incorrect.¹²⁰ Rather, the history of that enactment shows that the failure to offer protection to the individual was one of the evils that the amendment was designed to correct. Consequently, it is clear that the obligation, which extends to everyone within the jurisdiction of the government, was intended for the vindication of individual rights.

Such a concept should come as no surprise. Normal tort principles often begin with a duty which is owed to the whole world. For example, everyone owes a duty not to assault anyone else. The fact that the same duty is owed to the whole world does not mean that when it is breached towards a single individual recovery cannot be had. Similarly, the owner of property that may present an attractive nuisance, such as a gravel pit, owes a duty to the whole world to place certain protections around the danger. The fact that such a "general" duty exists does not mean that when an individual suffers injury he cannot invoke the protections of the law.

Second, the cases often indicate that the individual cannot recover because he did not "rely" upon the police in a specific situation.¹²¹ Yet this ignores the "social contract" and its everyday reenactment. Without quibbling over the facts of specific cases, it can be safely said that people express reliance upon the established police authorities to protect them every day when they fail to carry weapons; fail to travel on the streets only with "allies" who would protect them; and fail to take other similar defensive

who gave police information which led to arrest of dangerous fugitive, who received threats on his life which he communicated to police and who was not given police protection and subsequently killed, had "special relationship" extending duty of protection to him). *But see* *Morgan v. District of Columbia*, 350 F. Supp. 465 (D.C. 1982), *vacated*, appellant's petition for rehearing granted, 452 A.2d 1197 (1982) (warnings by wife of police officer that he had threatened her with revolver, coupled with officer's past conduct, made department negligent when it failed to investigate threats and liable when officer killed his father-in-law, and wounded wife, son, and a fellow officer).

120. *See supra* notes 51-104 and accompanying text.

121. *Davidson v. City of Westminster*, 32 Cal. 3d 197, 649 P.2d 894, 185 Cal. Rptr. 252 (1982).

action. To utilize an analogy to the television Western, the act of giving up one's guns at the city limits is predicated upon the assurance that the town marshal will offer protection against unprovoked violence.¹²²

Third, an underlying fear in all of these cases is that if suits were allowed, the treasuries of the various governmental units would be adversely affected. For example, one of the reasons advanced by the Illinois Appeals Court in *Jamison v. City of Chicago*,¹²³ in finding that police action was protected by the state immunity statute, was that a finding otherwise would mean that "municipalities would be exposed to limitless liabilities."¹²⁴ Similarly, the District Judge in *Warren v. District of Columbia*¹²⁵ indicated that the plaintiff's theory of liability would lead to results that were "staggering."¹²⁶ Apparently the results the court had in mind included a belief that too much time and money would be expended in the litigation of private claims and that employees of the government would leave its service.¹²⁷

While these arguments are apparently of importance to the courts, they should be unpersuasive in denying a victim recovery. A simple question of policy is involved: who should bear the loss; the government which was negligent in its protection or the victim who was completely innocent? In the rhetoric of the nineteenth century, to ask the question is to propound the answer: since it is the government which could have prevented the loss but failed to do so, it is the government which should bear the loss.

Furthermore, the observations of the Supreme Court of Arizona in *Ryan v. State*¹²⁸ may be instructive. The court recalled that in

122. The fact that the government has assumed the responsibility of offering police protection may give rise to another theory of liability. In a number of different contexts it is well established that even though one may not initially have a duty to take a certain action, once one voluntarily assumes the duty, he is required to perform the task in a non-negligent fashion. See Note, *Torts - Liability of Water Company to Individuals for Failure to Furnish Water*, 26 TEMPLE L.Q. 214 (1952); *Cain v. Meade County*, 54 S.D. 540, 223 N.W. 734 (1929) (county which contracts with state to repair highway liable for failure to maintain even though state had duty to maintain highway); *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916) (third-party beneficiary to contract).

123. 48 Ill. App. 3d 567, 363 N.E.2d 87 (1977).

124. *Id.* at 570, 363 N.E.2d at 89 (quoting Justice Burman's concurring opinion in *Jamison v. City of Chicago*, 25 Ill. App. 3d 326, 330, 323 N.E.2d 118, 122 (1977)).

125. 444 A.2d 1 (D.C. App. 1981) (en banc).

126. *Id.* at 8 (quoting *Massengill v. Yuma County*, 104 Ariz. 518, 523, 456 P.2d 376, 381 (1969)).

127. 444 A.2d at 9. The dissenting opinion of Judge Kelly indicates that he would recognize liability in this case, but that his theory still recognizes principles of fault, proximate cause, and foreseeability which would not result in an opening of the "floodgates of litigation." *Id.* at 12 (Kelly, J., dissenting).

128. 134 Ariz. 308, 656 P.2d 597 (1982) (holding that governmental immunity is

1947 it recognized liability of members of the state highway patrol for torts caused by negligence in the performance of their duties, but that "law enforcement officers continue to perform their duties."¹²⁹ It indicated that when sovereign immunity was abolished in 1963 there were "dire predictions" of the consequences to the state, but "Arizona survived."¹³⁰ It is entirely possible that these fiscal concerns may prove exaggerated here as well.

Such an approach would make neither law enforcement officers nor the agencies they work for insurers of the public safety. But it would require officers and agencies to act reasonably in discharging an acknowledged duty to protect individuals from crime.¹³¹ Application of such principles of negligence to the *Warren* case may be instructive.

Had the crime been committed instantaneously, no claim of liability would arise. The duty to protect citizens from crimes does not mean that a police officer must be at each residence to protect its occupants. Similarly, if the calls had come to the police station and the police had arrived at the scene after the commission of the crime, no liability would attach. The police cannot be expected to do the impossible and their prompt arrival on the scene would have been reasonable to the utmost extent; and thus, no breach of duty would be found. Under the allegations in *Warren*, however, it was claimed that the police were negligent in three respects: failure to assign proper priority to the call for help; failure to investigate properly at the scene of the crime; and failure to dispatch help in response to the second call. If the trier of fact had found that any of these allegations were true, there would be a breach of the duty of protection.

necessary to avoid a severe hampering of a governmental function of thwarting of established public policy).

129. *Id.* at 309, 656 P.2d at 598 (citing *Ruth v. Rhodes*, 66 Ariz. 129, 185 P.2d 304 (1947) (state highway patrol officer negligently collided with truck while responding to a call)).

130. *Id.*

131. This approach is consistent with the understanding gleaned from the legislative history. For example, in discussing the Ku Klux Klan Act ch. 22, 17 Stat. 13, ch. 22 (1872), Senator Edmonds indicated:

[T]he duty of the Government to protect its citizens is not absolute in the final sense; its duty to protect is that it will exhaust all the resources of its power, by diligent and faithful and vigorous effort to preserve the liberties and the rights of its citizens; and when it has done that it has performed the full function of government . . .

CONG. GLOBE, 42d Cong., 1st Sess. 691 (1871) (quoted in Avins, *The Equal "Protection" of the Laws: The Original Understanding*, 12 N.Y.L.F. 385, 421-22 (1966)).

As noted in the dissent in *Riss v. New York*,¹³² however, this does not end the question. There still must be a showing that this breach proximately resulted in injury to the plaintiff—had the police acted reasonably they would have been able to prevent the crime. In *Warren*, taking the allegations of the complaint as true, this would seem to have the following results: no liability for failure to stop the initial breaking and entering; no liability to the one victim who was initially assaulted in the home; but liability would attach for the subsequent crimes which could have been prevented if the police had arrived promptly and adequately investigated the situation.

These standards, deriving as they do from general principles of tort law, can be readily implemented in most states by judicial decision. In those states where immunity statutes exist, amendments to those statutes to allow victim recovery is warranted. On the other hand, it may be that liability predicated upon state action, or inaction, already exists under the implementing statutes of the fourteenth amendment, primarily 42 U.S.C. §§ 1983 and 1986.¹³³

Case law already exists which establishes that a law enforcement officer who is on the scene of a crime will be liable for damages under 42 U.S.C. §§ 1983 or 1986 if he acquiesces in the crime by refusing to protect the victim.¹³⁴ There are also a few cases in the state courts suggesting that the state will be liable for a breach of its duty to protect.

For example, in *Hansen v. City of St. Paul*,¹³⁵ the city had received complaints that vicious dogs were roaming the neighborhood and biting people. Upon receiving the last of these

132. 22 N.Y.2d 579, 586, 240 N.E.2d 860, 863, 293 N.Y.S.2d 98 (1968) (Keating, J., dissenting).

133. See *Symkowski v. Miller*, 294 F. Supp. 1214 (D. Wis. 1969). Liability may also be predicated on 42 U.S.C. §§ 1985 or 1986. See *Robeson v. Fanelli*, 94 F. Supp. 62 (S.D.N.Y. 1950).

134. See C. ANTIEAU, *FEDERAL CIVIL RIGHTS ACTS*, 438-39 (2d ed. 1980). See also *Green v. Williams*, 541 F. Supp. 863 (E.D. Tenn. 1981), *aff'd*, *Green v. Francis*, 705 F.2d 846 (6th Cir. 1983). In *Francis*, a sheriff and two deputies were charged with failure to render assistance and then failure to investigate the incidents; although the civilian defendants appealed, the sheriff and deputies did not. State action for the civilian defendants was found because they were "sufficiently connected" with the official defendants. 705 F.2d at 850. It is difficult to determine whether the liability of the official defendants was premised upon a failure to act under § 1986 or as co-conspirators under § 1983.

Compare apparently inconsistent cases under the Federal Torts Claims Act: *Liuzzo v. United States*, 565 F. Supp. 640 (E.D. Mich. 1983) (no liability on part of FBI informant or the government for failure to prevent assault); *Bergman v. United States*, 689 F.2d 789 (8th Cir. 1983) (FBI's actions within "discretionary function" exception under Federal Tort Claims Act).

135. 298 Minn. 205, 214 N.W.2d 346 (1974).

complaints, the dog wardens began an investigation and were actually in the field, albeit upon their lunch break, when the plaintiff was bitten. Nevertheless, the court held that because the city had notice of the dangerous situation and because it could have taken reasonable steps to correct it before the incident, the city would be liable to plaintiff. While the court specifically disclaimed any application of its decision to the enforcement of the criminal laws, it would seem that if a citizen has a right to expect protection against dogs it should follow, *a fortiori*, that he can expect protection against those who would commit a crime.¹³⁶

In other contexts the courts have frequently held that the government has a duty to protect certain individuals. For example, in *Logan v. United States*,¹³⁷ the Supreme Court held, in deciding whether mob violence violated a federally protected right, that because the United States government had a right to detain prisoners, it had "an equal duty to protect them, while so held, against assault or injury from any quarter."¹³⁸ Further, the decision expressed the opinion that "[a]ny government" holding a prisoner "must have the power and the duty" to protect that prisoner.¹³⁹ Numerous cases exist establishing that the eighth and fourteenth amendments require the state to provide for the "personal safety" of prison inmates, not only from actions by non-prisoners, but also from injury from other inmates.¹⁴⁰

136. However, the court in *Hansen* specifically limited its decision:

This decision specifically relates to tort liability for failure to maintain a safe sidewalk in the face of an inherently dangerous condition to human beings created by nonhuman animals, not by other human beings. It would be a misconstruction of this decision to interpret it as a basis for restraint upon persons using the public streets or sidewalks under the belief or misbelief that tort liability may be imposed upon the city for allowing other human beings to use or misuse their rights upon the public streets and sidewalks. For example, in *Lamont v. Stavanaugh*, 129 Minn. 321, 152 N.W. 720 (1915), the municipality's duty to provide safe streets and sidewalks did not extend to the moving hazard of a policeman with a known violent temper who assaulted the plaintiff with a billy club.

Id. at 210-11, 214 N.W.2d at 350.

137. 144 U.S. 263 (1892).

138. *Id.* at 284. *See id.* at 285, 294 (providing similar expressions). One theory for such a requirement is that the prisoners have been deprived of the means of defending themselves. *Id.* at 295.

139. *Id.* at 294.

140. *E.g.*, *Smith v. Wade*, 103 S. Ct. 1625 (1983) (prison guard liable for failure to protect prisoner from harassment, beatings, and sexual assault by other inmates); *Williams v. Bennett*, 689 F.2d 1370 (11th Cir. 1982) (prisoner assaulted by fellow inmate); *Grubbs v. Bradley*, 552 F. Supp. 1052, (M.D. Tenn. 1982). *See generally* Annot., 41 A.L.R. 3d 1021 (1972).

Equally noteworthy are the results of a recent decision of the United States Court of Appeals for the Eighth Circuit.¹⁴¹ In that case a witness in an organized crime trial, with a lengthy criminal record, was relocated under the Federal Witness Security Program. Less than two months after relocation the witness shot and killed an auxiliary police officer during the course of a burglary. The officer's widow sued the government under the Federal Tort Claims Act alleging the United States Marshal's service was negligent in the supervision of the witness. In the course of deciding that the government was not liable, the court concluded:

The Witness Security Program establishes that the marshal's service is responsible for supervising the protection of witnesses. No provision is made in the Department of Justice policy for steps to be taken to protect the public from the witness and the inclusion of any such provision might have been outside the scope of the Witness Security Program statutes.¹⁴²

In each of these instances, there are distinguishing characteristics differing from that of the normal inhabitant who is free in society and becomes a victim of a crime. One might argue that the aspect of custody deprived the prisoner of a full ability to act in self-defense,¹⁴³ and that the government's action in taking the suspect into custody creates a "special" relationship giving rise to an enforceable duty of protection.

Nevertheless, it is somewhat ironic that one suspected or convicted of a crime is said to enjoy the right to receive physical protection from the government while one who is conceded to be a law-abiding resident is said not to be entitled to such protection. This contrast is not presented as argument for lesser protections for those in actual government custody; instead, it is an argument for increased government protection of law-abiding inhabitants under its jurisdiction. In the political rhetoric of the day, the protection due to ordinary people should be elevated at least to the same level provided to suspected or convicted criminals.

This view does not mean that the government is an insurer of the safety of all those within its jurisdiction. The government's only obligation is to act reasonably in order to protect people within its jurisdiction. In the course of litigation, the trier of fact would only determine whether, under the circumstances, the conduct of governmental employees was "reasonable" and taken in good faith. This is similar to the "qualified immunity" standard

141. *Bergmann v. United States*, 689 F.2d 789 (8th Cir. 1982).

142. *Id.* at 795 (footnote omitted).

143. In the prison context, it would appear that any given prisoner should be in approximately as good of a relative position to act in self-defense against another prisoner (though not against a guard) as he would be to act in self-defense against another person if both were free in society. But he would not have the same freedom to avoid any conflict at all by simply running away.

currently utilized in § 1983 actions against state officials.¹⁴⁴ As such, it should protect law enforcement officials from harassment, frivolous suits, and even cases in which their judgment may be fairly questioned. Only in the most egregious of cases would the victim be able to prevail. This would, however, make a difference in cases such as *Warren v. District of Columbia*.¹⁴⁵

VI. ARREST

The power of arrest is largely committed to official police agencies. For misdemeanors, most states provide that a private citizen can make an arrest only if the alleged offense involved a breach of the peace or occurs in the citizen's presence.¹⁴⁶ Such requirements are generally strictly construed, with any arguable question resolved against the validity of the arrest.¹⁴⁷ Citizens are usually authorized to make arrests for felonies based upon probable cause, but even if the opportunity exists for a private individual to arrest one suspected of committing a felony, the personal risk of physical harm provides a significant deterrent. Moreover, the private citizen assumes the risk of civil liability for false arrest if he is mistaken.¹⁴⁸ As a practical matter the number of accused felons arrested by private citizens is infinitesimal.¹⁴⁹ As a result, almost all arrests are made by members of official police agencies.

Most states have statutes which specifically require the police to enforce the criminal statutes by arresting the offending party,¹⁵⁰ and "[p]olice manuals are generally quite clear in impos-

144. S. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES: A GUIDE TO § 1983 at 229-36, 248-53 (1979).

145. 444 A.2d 1 (App. D.C. 1981) (en banc).

146. K. DAVIS, DISCRETIONARY JUSTICE 166 (1969).

147. *E.g.*, *Protective Life Ins. Co. v. Spears*, 231 So. 2d 510 (Miss. 1970).

148. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 132-33 (4th ed. 1971).

149. *See* Hall, *The Role of the Victim in the Prosecution and Disposition of a Criminal Case*, 28 VAND. L. REV. 931, 938 (1975).

150. K. DAVIS, DISCRETIONARY JUSTICE 86 (1969) (citing Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 557-58 (1960)). For a more recent summary of statutes see Allen, *The Police and Substantive Rulemaking: Reconciling Principle and Expediency*, 125 U. PA. L. REV. 62, 71-73 (1976).

By way of contrast, in Israel, the police are said to be specifically vested with the power to refrain from pursuing an investigation for "want of public interest" where the matter is not a felony. Sebba, *supra* note 34, at 219 (citing CRIMINAL PROCEDURE LAW § 53 (1965)).

ing a duty of full enforcement.”¹⁵¹ Indeed, some states have statutes making it a crime for a police officer to fail to make an arrest for an offense committed in the officer’s presence.¹⁵²

Yet it is not only well-known but also well-accepted that the police do not arrest all suspected violators of the criminal laws and that “full” enforcement does not exist.¹⁵³ Indeed, a policeman “assumes he has discretionary power to arrest or not to arrest a violator.”¹⁵⁴

In making the decision as to whether enforcement should be made, the officer may be motivated by a variety of factors. Kenneth Davis, in his influential *Discretionary Justice*, catalogued twenty-one concerns as having a possible bearing upon such a decision.¹⁵⁵ Most of these considerations do not involve the wishes or needs of victims. Though examination of the “shall enforce”

151. K. DAVIS, *supra* note 146, at 86.

152. W. LAFAYE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 78-79 (1965). On the other hand, many states prohibit a warrantless arrest for a misdemeanor unless it occurred in the officer’s presence.

153. *Id.* at 61-152, 492-93. In spite of the clear language of many of these statutes, it has been argued that the legislature could not have intended full enforcement both because it has acquiesced in partial enforcement and has failed to appropriate sufficient resources for full enforcement. K. DAVIS, POLICE DISCRETION 79-97 (1975). Whatever the efficacy of these views for legitimizing activity, the limited resources argument is persuasive at least in this regard: the police cannot be held to be either civilly or criminally liable for the failure to do the impossible.

154. K. DAVIS, *supra* note 146, at 162. See also W. LAFAYE, *supra* note 152, at 110-11, 137-43; ABA STANDARDS RELATING TO THE URBAN POLICE FUNCTION §§ 4.1 & 3.1-3.3 (Approved Draft, 1973).

155. These factors are:

the police believe the legislative body does not desire enforcement, the police believe the community wants nonenforcement or lax enforcement, a policeman believes another immediate duty is more urgent, a policeman interprets a broad term (e.g., “vagrancy”) in his own unique fashion, a policeman is lenient with one who did not intend the violation, the offender promises not to commit the act again, the statute has long been without enforcement but is unrepealed, lack of adequate police manpower is believed to require nonenforcement, the policeman believes a warning or a lecture preferable to an arrest, the policeman is inclined to be lenient to those he likes, the policeman sympathizes with the violator, the crime is common within the subcultural group, the victim does not request the arrest or requests that it not be made, the victim is more likely to get restitution without the arrest, the only witness says he will refuse to testify, the victim is at fault in inciting the crime, the victim and the offender are relatives, perhaps husband and wife, making the arrest is undesirable from the policeman’s personal standpoint because of such reasons as the extra effort required, he goes off duty in ten minutes, the record keeping necessary when an arrest is made is onerous, or he wants to avoid the expenditure of time for testifying in court, the police trade nonenforcement for information or for other favors, the police make other kinds of deals with offenders, the police believe the probable penalty to be too severe, the arrest would harm a psychiatric condition, or the arrest would unduly harm the offender’s status.

K. DAVIS, *supra* note 146, at 82-83. See also W. LAFAYE, *supra* note 152, at 63-152, and Hall, *supra* note 149, at 939-44 for a discussion of many of these factors.

language of the various state statutes might lead one to believe that mandamus or some other extraordinary remedy could be utilized to force the police to arrest an individual who had violated the law, the case law upon the subject is to the contrary.¹⁵⁶ Nor can the victim of a crime recover civil damages against a law enforcement officer for failure to make an arrest.¹⁵⁷ Though the existence of such discretion has occasioned discussion and proposals for reform, the reforms proposed have generally related to establishing criteria for the exercise of such discretion and not its abolition.¹⁵⁸

There is currently no apparent need for a change of the law in this area. To the extent that the victim's need for arrest is predicated upon the need for immediate physical protection, a recognition of the government's duty to protect should vindicate that right. To the extent that the desire for arrest is motivated by a desire to initiate prosecution, that interest can be more properly vindicated by reform of the current view vesting absolute discretion to determine whether prosecution shall go forward or not with the public prosecutor.

VII. INVESTIGATION

One common grievance of victims is that "complaints are often not investigated."¹⁵⁹ As is the case with the decision to take an individual into custody, the decision to investigate is committed to the discretion of the respective law enforcement agencies. Significant differences may nevertheless exist.

A decision not to arrest or not to charge a crime may be based upon a reasoned good-faith judgment that no crime has been committed, that the accused is not the person responsible for the crime, or that the chances of a successful prosecution do not war-

156. *E.g.*, *Moses v. Kennedy*, 219 F. Supp. 762 (D.D.C. 1963); *Pugach v. Klein*, 193 F. Supp. 630 (S.D.N.Y. 1961); *Hassan v. Magistrates Court*, 20 Misc. 2d 509, 191 N.Y.S.2d 238 (Sup. Ct. 1959); *Restivo v. Degan*, 191 Misc. 642, 77 N.Y.S.2d 563 (Sup. Ct. 1948).

157. *See generally* Annot., 41 A.L.R. 3d 700 (1972); Comment, *Crime Victims: Recovery for Police Inaction and Underprotection*, 1970 LAW & SOC. ORDER 279, 286-87.

158. ABA STANDARDS RELATING TO THE URBAN POLICE FUNCTION § 4.1 (Approved Draft, 1973). Indeed, the ABA Standards, as is true of most commentary upon the subject, specifically caution against an "overreliance" upon the formal enforcement of the criminal law and suggest that alternative methods should be considered. *See generally id.* at §§ 3.1-3.4 and accompanying commentary.

159. Goldstein, *Defining the Role of the Victim In Criminal Prosecution*, 52 Miss. L.J. 515, 520 (1982).

rant the expenditures of state funds. Without an investigation, the law enforcement agency may not be aware of all the relevant facts and consequently may not be in a situation to make a reasoned judgment about arrest or prosecution. Yet an investigation may simply produce facts which would lead to a reasoned judgment that no arrest was warranted.

Analogies can be drawn to other areas in which government actors are vested with discretion. For example, in the judicial arena a trial court is required to eventually decide a case. An extraordinary writ of mandamus or procedendo may be utilized to require the court to proceed to judgment. While such writs may be used to require the court to exercise its discretion, they may not be used to require judgment for one side or the other. In effect, the extraordinary remedy may tell the court when to exercise its discretion, but it may not tell the court how to exercise its judgment.

It can be argued that the police should be under a duty to investigate every reported crime. To the extent that police have the discretion to make a decision not to proceed with criminal action against one who has violated a statute, one can argue that such discretion can only be properly exercised after an investigation has produced the relevant facts. The police could be required to investigate, even though they may not be required to prosecute at the conclusion of that investigation.¹⁶⁰

This seems to be the underlying premise of *NAACP v. Levi*,¹⁶¹ which held that a complaint based upon the FBI's failure to investigate an alleged violation of the federal criminal statutes protecting civil rights stated a claim for injunctive and equitable relief. Similar requirements may exist with respect to prosecutors when they are on notice that police agencies have not investigated an alleged crime.¹⁶²

Such an approach is similar to the Ethics in Government Act.¹⁶³ This Act requires the Attorney General to conduct a "preliminary investigation," and to report to the Special Division of the United States Court of Appeals that "there are no reasonable grounds to

160. *State ex rel. Bar Realty Corp. v. Locher*, 30 Ohio St. 2d 190, 283 N.E.2d 164 (1972). See also *People ex rel. Lindgren v. McGuire*, 151 A.D. 413, 136 N.Y.S. 88 (1912).

161. 418 F. Supp. 1109 (D.D.C. 1976). But see *Morgan v. Null*, 117 F. Supp. 11, 15-16 (S.D.N.Y. 1953) (mandamus will not lie to require grand jury to investigate a private person's allegation that his or her civil rights were violated).

162. While recognizing that in most cases the prosecutor will rely upon police agencies to investigate alleged criminal activities, the ABA Standards nevertheless indicate that the prosecutor "has an affirmative responsibility to investigate suspected illegal activity when it is not adequately dealt with by other agencies." ABA STANDARDS RELATING TO THE PROSECUTION AND THE DEFENSE FUNCTION § 3.1(a) (Approved Draft, 1973).

163. 28 U.S.C. § 592 (1978).

believe that no further investigation or prosecution is warranted," or that further investigation or prosecution is warranted and a special prosecutor should be appointed.¹⁶⁴ The failure of the Attorney General to do so will constitute grounds for judicial relief.¹⁶⁵

Of course, the nature of the investigation would depend upon the information supplied. No suggestion is made here that every possible investigative lead must be followed in order for the government to meet its duty. In many cases it may be that the complaint of the victim is all the investigation required to make a reasoned determination that nothing else can be done to locate the perpetrator of the crime. Nor is any suggestion made that the prosecutor may not rely upon past statistical studies concerning the probabilities of success in investigating certain types of crimes given certain limited leads. Further, in an era of scarce resources, the government should be free to exercise a reasoned judgment as to the priority to be utilized in allocating investigative resources.¹⁶⁶ The only requirement is that the effort made be reasonable under the circumstances and supportable by articulated reasons if sought by the victim or required by a reviewing court.

Like other such remedies effecting discretionary actions, the implementation of this remedy would not dictate the result of such an investigation. Rather, it would only require that the investigation be made so that the exercise of discretion would have a reasonable basis upon which to be predicated.

VIII. THE DECISION TO PROSECUTE

The decision to prosecute is usually made after exigencies threatening the victim have passed.¹⁶⁷ Many jurisdictions make

164. *Id.*

165. *Nathan v. Attorney Gen.*, 557 F. Supp. 1186 (D.D.C. 1983).

166. For example, no reasonable person would question that the allocation of resources to investigate a mass-murder should take priority over the investigation of vandalism to a parked car. Similarly, one would surmise that if there were eye-witnesses to the vandalism of the car, such an investigation might take priority over investigation of a burglary where there were no witnesses and no clues as to the identity of the burglar.

167. Since the decision to arrest upon a warrant is generally the result of the same deliberative process as the decision to charge by complaint, or to seek an indictment from the grand jury, it will be included within this section as part of the decision to prosecute.

provision for the use of a complaint, and supporting affidavits, as the basis for invoking the criminal process under which a summons or arrest warrant is to be issued.¹⁶⁸ Most of these provisions set forth no limitations upon who can file the complaint.¹⁶⁹ It is generally thought that any person can initiate such an action with the court.¹⁷⁰ The courts have nevertheless retained the "discretion" to decline to order the issuance of the warrant¹⁷¹ and have done so when they viewed the action as an attempt to circumvent the discretion of the prosecutor.¹⁷²

Although many jurisdictions make provisions for the victim to retain counsel to act as a "private prosecutor,"¹⁷³ such a prosecutor still must act under the supervision and control of the public prosecutor.¹⁷⁴ The ability of privately retained counsel to prosecute an accused is dependent upon the approval of the public prosecutor. As one authority has concluded: "private prosecution is at most a theoretical possibility—certainly in current administration it is not a practical reality—and thus is not an effective control over prosecutor charging discretion."¹⁷⁵ In fact, a creative effort to disqualify the public prosecutor so that privately retained counsel could proceed with a criminal action to which the public prosecutor objected was forestalled upon the grounds that it was interfering with the decision-making power allocated to the public

168. *E.g.*, 29 OHIO REV. CODE ANN. 4(A) (1982). This rule provides that if probable cause exists an arrest warrant or summons "shall be issued." Compare MICH. STAT. ANN. § 764.1(a) (1982).

169. *E.g.*, OHIO REV. CODE ANN. 3 (1982).

170. *E.g.*, *Maynard v. Smith*, 47 Ohio Misc. 47 (Mun. Ct. 1975); see generally Annot., 66 A.L.R. 3d 732 (1975).

171. *Maynard v. Smith*, 47 Ohio Misc. 47 (Mun. Ct. 1975); see also *Miller v. Pennsylvania*, 438 A.2d 653, cert. denied, 103 S. Ct. 131 (1982) (state trial court refused to proceed with criminal process attempted to be initiated by private citizen).

172. *Keenan v. McGrath*, 328 F.2d 610 (1st Cir. 1964). In jurisdictions where this procedure is allowed the ABA Standards suggest that the prosecutor have an opportunity to communicate to the court any objections to prosecution. ABA STANDARDS RELATING TO THE PROSECUTION AND THE DEFENSE FUNCTION § 3.4(c) (1971).

173. See, *e.g.*, *State v. Best*, 280 N.C. 413, 186 S.E.2d 1 (1972); KAN. STAT. ANN. § 19-717 (1981). Although the use of private prosecutors has been uniformly upheld, the practice has been widely criticized, generally upon due process grounds. See Note, *Private Prosecution—The Entrenched Anomaly*, 50 N.C.L. REV. 1171 (1972). For a dated, but more favorable treatment, see also Comment, *Private Prosecution: A Remedy for District Attorney's Unwarranted Inaction*, 65 YALE L.J. 209 (1955). For a modern call for increased use of private prosecutors see Goldstein, *supra* note 22, at 558-60.

174. *People v. Farnsley*, 53 Ill. 2d 537, 293 N.E.2d 600 (1973); *State v. Best*, 280 N.C. 413, 186 S.E.2d 1 (1972); *McKay v. State*, 90 Neb. 63, 132 N.W. 741 (1911); *State v. Kent*, 4 N.D. 577, 62 N.W. 631 (1895). See also *Powers v. Hauck*, 399 F.2d 322, 325 (5th Cir. 1968).

175. F. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 329 (1969).

prosecutor.¹⁷⁶

Like the decisions to arrest and investigate, the decision to initiate prosecution is currently vested almost exclusively in a designated public official. The leeway for decision-making by the public prosecutor is generally described in terms of a discretion which is said to be "exceedingly broad."¹⁷⁷ Though these terms would, by implication, suggest that there is at least some limitation on the discretion of the prosecutor, case law has been to the contrary. A reading of the relevant cases suggests that the decision to prosecute is vested in the "absolute discretion" of the public prosecutor.¹⁷⁸

For example, the courts have uniformly denied extraordinary relief in situations where a private party sought to use judicial process to compel the investigating agency to issue a warrant to initiate criminal process.¹⁷⁹ This is true no matter "how clear the case may seem to the court."¹⁸⁰ Attempts by private parties to use the extraordinary remedy of mandamus to compel the prosecutor to proceed with prosecution have also been uniformly denied.¹⁸¹ Mandamus has sometimes been denied on the theory

176. *People v. Municipal Court*, 27 Cal. App. 3d 193, 103 Cal. Rptr. 645 (1972). In part this decision was founded upon a concern with separation of powers concepts. See also Annot., 66 A.L.R. 3d 732 (1975).

177. *United States v. Bell*, 506 F.2d 207, 222 (D.C. Cir. 1974). See also F. MILLER, *supra* note 175, at 173-78, 283-84; K. DAVIS, *DISCRETIONARY JUSTICE* 188-214 (1969).

178. In 1931, the Wickersham Commission (National Commission on Law Observance and Enforcement) concluded: "[T]he Prosecutor [is] the real arbiter of what laws shall be enforced and against whom." NATIONAL COMMITTEE ON LAW OBSERVANCE AND ENFORCEMENT, *REPORT ON PROSECUTION* 19 (1931).

The ABA STANDARDS RELATING TO THE PROSECUTION AND THE DEFENSE FUNCTION, Introduction 19 (Approved Draft, 1971) concluded that: "[T]he prosecutor is vested with virtually unreviewable power as to the persons to be prosecuted or not." See Ferguson, *Formulation of Enforcement Policy: An Anatomy of the Prosecutor's Discretion Prior to Accusation*, 11 RUTGERS L. REV. 507, 518 (1957). *Smith v. United States*, 375 F.2d 243, 247 (5th Cir.), *cert. denied*, 389 U.S. 841 (1967): "The discretion of the Attorney General in choosing whether to prosecute . . . is absolute."

179. *Restivo v. Dangan*, 191 Misc. 642, 77 N.Y.S.2d 563 (Sup. Ct. 1948).

180. *Id.* at 646, 77 N.Y.S.2d at 568. See also *United States v. Thompson*, 251 U.S. 407, 412-13 (1920); *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 457 (1868). Compare *Ex parte United States*, 287 U.S. 241 (1932), where the Court required the lower court to issue a bench warrant sought by the Attorney General after an indictment had been returned by the grand jury. In that case, where the issuance of the warrant was necessary in order to implement a properly made decision to prosecute, as opposed to being part of the discretionary decision to prosecute, the Supreme Court held the lower court's duty was ministerial rather than discretionary.

181. Annot., 5 A.L.R. FED. 922 (1970). See also *Ross v. United States Att'y's Office*, 511 F.2d 524 (9th Cir.), *cert. denied*, 423 U.S. 831 (1975); *United States v. Cox*,

that the state is the only interested party in a criminal prosecution and that, consequently, the moving party lacks standing.¹⁸²

While injunctive relief has occasionally been obtained against police agencies to require enforcement of the law in certain classes of cases such as domestic abuse,¹⁸³ no cases appear in which such relief has been used to require the public prosecutor to initiate specific criminal prosecutions. Further, civil damages do not appear to be available even where, after a failure to prosecute husbands for spousal abuse, the wives were eventually killed,¹⁸⁴ or where it is alleged that the failure to prosecute was due to prejudice against people of a certain national origin.¹⁸⁵

Consequently, the existing case law seems to firmly indicate that the decision to initiate prosecution is committed totally to the discretion of the prosecutor. Though unbridled discretion has

342 F.2d 167 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965); *State ex rel. Naramore v. Hensley*, 53 N.M. 308, 207 P.2d 529 (1949).

182. *E.g.*, *State ex rel. Skilton v. Miller*, 164 Ohio St. 163, 128 N.E.2d 47 (1955). *But see Miles-Lee Auto Supply Co. v. Bellows*, 26 Ohio Op. 2d 452, 197 N.E.2d 247 (1964) (relator hurt by competitor's failure to comply with Sunday closing laws). While unsuccessful on other grounds, standing was found in *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 378 (2d Cir. 1973). *See also Linda R.S. v. Richard D.*, 410 U.S. 614 (1973). "The Court's prior decisions consistently hold that a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution. . . . [I]n American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Id.* at 619.

183. *See, e.g.*, *Sorichett v. City of New York*, 95 Misc. 2d 451, 408 N.Y.S.2d 219, *aff'd*, 70 A.D.2d 573, 417 N.Y.S.2d 202 (1978); *Bruno v. Codd*, 90 Misc. 2d 1047, 396 N.Y.S.2d 974 (injunctive relief to require law enforcement agencies to protect battered wives), *rev'd*, 64 A.D.2d 582, 407 N.Y.S.2d 165 (1977) (on mootness grounds because of intervening consent decree); Note, *Municipal Law—Negligence—Failure of Police to Provide Protection to the Holder of a Family Court Order of Protection States Valid Cause of Action*, 7 FORDHAM L. REV. 191 (1978). *See also Coalition of Black Leadership v. Cianci*, 480 F. Supp. 1340 (D.R.I. 1979) (referring to prior consent decree establishing procedures for filing, investigation at resolution of civilian complaints against police officers).

184. The Texas Court of Appeals for the Second District, in *Miller v. Curry*, decided on November 25, 1981, held:

Prosecutors who refused to prosecute cases of physical abuse against "battered wives" are absolutely immune from liability in 42 U.S.C. § 1983 action filed by surviving children of two women who were shot to death by their husbands after unsuccessfully seeking protection "in some unspecified form" from their husbands' violent and threatening behavior.

51 U.S.L.W. 3227 (1982); 625 S.W.2d 84 (Tex. App. 1981), *cert. denied*, 103 S. Ct. 60 (1982).

185. The United States Court of Appeals for the Tenth Circuit, in *Dohaish v. Tooley*, decided on February 16, 1982, held:

Father of homicide victim lacks standing to bring 42 U.S.C. § 1983 action against district attorney who allegedly refused to prosecute son's accused murderer because of district attorney's prejudice against Saudi Arabians; moreover, district attorney is absolutely immune from suit for conduct related to discharge of his official duties, including decision not to prosecute.

51 U.S.L.W. 3227 (1982); 670 F.2d 934, *cert. denied*, 103 S. Ct. 60 (1982).

often been condemned in uncompromising terms,¹⁸⁶ no one has proposed that the discretion of the prosecutor be abolished. There have, however, been proposals that guidelines be adopted to standardize the decision-making process and to minimize the range of such discretion.¹⁸⁷

However, these proposals would nevertheless leave the victim, or his family, without any judicial remedy in cases where the prosecutor elected not to prosecute. This has occurred in other situations. For example, in both *Schlesinger v. Reservists Committee to Stop the War*¹⁸⁸ and *United States v. Richardson*,¹⁸⁹ the Court held that the plaintiffs lacked standing to enforce certain provisions of the Constitution. In *Schlesinger* the plaintiffs sought to enforce the incompatibility clause¹⁹⁰ in such a way as to prohibit individuals from simultaneously holding office as members of Congress and as military officers in the United States Reserves. The Court dismissed as irrelevant the argument that if they did not have standing then, as a practical matter, no one would have standing.¹⁹¹ In *Richardson*, the plaintiffs sought to compel disclo-

186. "Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler, some civil or military official, some bureaucrat. Where discretion is absolute, man has always suffered. . . . Absolute discretion . . . is more destructive of freedom than any of man's other inventions." *United States v. Wunderlich*, 342 U.S. 98, 101 (1951) (Douglas, J., dissenting). See also Justice White's opinion concerning the exercise of police power to stop citizens for questioning: "This kind of standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent." *Delaware v. Prouse*, 440 U.S. 648, 661 (1979).

187. *E.g.*, ABA STANDARDS RELATING TO THE URBAN POLICE FUNCTION § 4.2 (Approved Draft, 1973); ABA STANDARDS FOR CRIMINAL JUSTICE, THE PROSECUTION AND THE DEFENSE FUNCTION §§ 3.4(b) - .9(b)(c) (Approved Draft, 1971); K. DAVIS, DISCRETIONARY JUSTICE (1969); Bubany and Skillern, *Taming the Dragon: An Administrative Law for Prosecutorial Decision Making*, 13 AM. CRIM. L. REV. 473 (1976). Some jurisdictions have adopted rules to set forth guidelines in using prosecutorial discretion. Williams, *Police Discretion: The Institutional Dilemma—Who Is in Charge?*, 68 IOWA L. REV. 431, 458-59 n.159 (1983) (citing California District Attorneys Ass'n, *Uniform Crime Charging Standards* 27-40 (1974)).

188. 418 U.S. 208 (1974).

189. 418 U.S. 166 (1974).

190. Art. I, § 6, cl. 2 of the United States Constitution provides:

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased [sic] during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Id.

191. 418 U.S. at 227.

sure of the budget of the Central Intelligence Agency under the requirement of article I, section 9 of the Constitution.¹⁹² The Court found that the lack of standing by anyone to judicially challenge the practices in question might indicate that no judicial remedy was intended.¹⁹³

The Court suggested in those cases that the lack of a judicial remedy did not preclude any relief because the plaintiffs would always have a political remedy. It might be argued that the same is true with respect to the prosecutor's decisions not to prosecute. An "abuse" of discretion might well become a political issue which could affect the ability of a given prosecutor to continue to hold office, whether in a jurisdiction where the prosecutor is elected or appointed.

In certain jurisdictions there are "removal" statutes under which the prosecutor can be removed by judicial process where he has failed to enforce the laws.¹⁹⁴ Similarly, a showing that the failure to prosecute was based upon racial, ethnic, or religious prejudice, or corruption might be sufficient to invoke impeachment and removal. Although there are instances where this process has been successfully invoked when a prosecutor failed to enforce the criminal laws,¹⁹⁵ there appear to be no modern cases in which this was used as a ground for removal.

The effectiveness of these political remedies is open to question. It has been noted that public opinion is unlikely to have any great effect because the policies and day-to-day decisions of the prosecutor are likely to be unknown to the public.¹⁹⁶ Because the public is likely to be informed about only a few sensational trials reported by the media, public opinion "may do little more than encourage the prosecutor to avoid bad publicity by maintaining a low profile and a high conviction record and by refusing to prosecute influential citizens or enforce unpopular laws."¹⁹⁷

192. That provision, in paragraph 7, reads in relevant part: "[A] regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."

193. 418 U.S. at 227.

194. *E.g.*, OHIO REV. CODE § 309.05. (Baldwin 1978); N.Y. CONST., art. XIII, § 13 (McKinney 1952) (removal of district attorney); CAL. GOV'T CODE § 3072 (West 1980) (removal of district attorney).

195. *State ex rel. Johnston v. Foster*, 32 Kan. 14, 3 P. 534 (1884) (failure to prosecute various individuals for violation of state liquor laws); *State ex rel. McKittrick v. Graves*, 346 Mo. 990, 144 S.W.2d 91 (1940) (failure to prosecute liquor, vice, gambling, and election law violations). *But see State ex rel. Gebrink v. Hospers*, 147 Iowa 712, 714, 126 N.W. 818, 819 (1910) (must be a "clear showing of corruption . . . negligence or incompetence . . .").

196. Bubany & Skillern, *Taming the Dragon: An Administrative Law for Prosecutorial Decision Making*, 13 AM. CRIM. L. REV. 473, 488 (1976).

197. *Id.* (footnote omitted).

It is also particularly important to give special consideration to the "poor and powerless" as victims "because their burden of lawlessness and violence is so disproportionately heavy. . . ."¹⁹⁸ A moment's reflection will suggest that these victims are the very ones who are most likely to be dissatisfied with the prosecutor's decisions. Other victims are more likely to gain the sympathy of the prosecutor's office; to establish a better rapport because of the likelihood they are of the same social "class" as the prosecutor; to have their own attorney to negotiate with the prosecutor on their behalf; and, consequently, to have the ability to obtain more responsive action from the prosecutor's office.

Equally as important, these same individuals are also in the best position to bring pressure upon the prosecutor's office if they are dissatisfied. This is true whether such pressure takes the form of publicity, political lobbying, or litigation. In contrast, the poor are not only less likely to receive satisfaction from the prosecutor's office, but are also much more likely to lack both the sophistication and the power to take action against the prosecutor's office—particularly political action in the form of publicity, contesting elections, filing removal actions, or threatening impeachment.

For the majority of victims, then, such political remedies may be entirely illusory. However, victims might have the ability to obtain a lawyer to attempt to vindicate their position against the prosecutor in court if there were any viable remedies available.¹⁹⁹

The prosecutor's "absolute" discretion and "monopoly" over the initiation of a criminal prosecution are not inevitable features of a fair judicial system. The criminal laws of other nations allow the victim to play a much larger role in the determination of whether criminal prosecution shall ensue. In Israel, certain minor offenses may be privately prosecuted unless the public prosecutor intervenes and takes over the prosecution.²⁰⁰ The decision of the po-

198. F. CARRINGTON, *THE VICTIMS* 33 (1975). *See also id.* at 33-35.

199. A number of organizations providing free legal services might be willing to represent indigent victims if there were prospects of success in the courtroom. However, given the present status of the law, the prospects of success are so bleak that it is unreasonable to expect individuals to seek to initiate such suits in any large numbers or to expect many attorneys to agree to participate in such cases.

200. Sebba, *The Victim's Role in the Penal Process: A Theoretical Orientation*, 30 AM. J. COMP. L. 217, 222, 232 (1982) (citing CRIMINAL PROCEDURE LAW § 58 (1965)); Harnon, *Criminal Procedure in Israel—Some Comparative Aspects*, 115 U. PA. L. REV. 1091, 1097 (1967).

lice or public prosecutor not to prosecute major offenses can be appealed to the attorney general and subsequently to the High Court.²⁰¹ In France, the filing of a civil action against the accused will oblige the public prosecutor to proceed with a criminal action even though he would elect not to prosecute if he otherwise could.²⁰² Scotland provides for private prosecution upon authorization by the court after the public prosecutor has refused to prosecute the case.²⁰³ Germany not only authorizes private prosecution in a limited number of cases but also provides that the prosecutor can be compelled to file charges by judicial action initiated by a victim.²⁰⁴

In discussing the possibilities of judicial review of a decision not to prosecute, Leslie Sebba raises an important point:

Most legal systems provide for a mechanism, whether by means of a preliminary hearing or a grand jury, to prevent an arbitrary instigation of prosecution that would subject an innocent suspect to unnecessary suffering. Is the victim also entitled to a controlling mechanism to prevent an arbitrary *non-prosecution* of his complaint?²⁰⁵

Kenneth Davis, in his widely acclaimed *Discretionary Justice*,²⁰⁶ pointed out that while the power to prosecute is "enormous", "the negative power to withhold prosecution may be even greater, because it is less protected against abuse."²⁰⁷ Currently, concepts of judicial review only apply to those instances in which prosecution is actually initiated.²⁰⁸ In cases where prosecution is declined, most jurisdictions provide no remedy.²⁰⁹

Davis contrasts this with the administrative law areas and concludes: "The reasons for a judicial check of prosecutors' discretion are stronger than for such a check of other administrative

201. Sebba, *supra* note 34, at 221 (citing CRIMINAL PROCEDURE LAW § 58 (1965)); Harnon, *supra* note 200, at 1097.

202. Larguier, *The Civil Action for Damages in French Criminal Procedure*, 39 TUL. L. REV. 687 (1965).

203. Comment, *Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction*, 65 YALE L.J. 209, 224 n.77, (citing Normand, *The Public Prosecutor in Scotland*, 54 L.Q. REV. 345, 347-48 (1938)).

204. Jescheck, *Principles of German Criminal Procedure in Comparison with American Law*, 56 VA. L. REV. 239, 245 (1970). See also Jescheck, *The Discretionary Powers of the Prosecuting Attorney in West Germany*, 18 AM. J. COMP. L. 508 (1970); Schram, *The Obligation to Prosecute in West Germany*, 17 AM. J. COMP. L. 627 (1969).

205. Sebba, *supra* note 34, at 221.

206. See *supra* note 150 and accompanying text.

207. K. DAVIS, *supra* note 150, at 188.

208. E.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (use of criminal law for discriminatory enforcement of laundry licensing law). See generally Applegate, *Prosecutorial Discretion and Discrimination in the Decision to Charge*, 55 TEMP. L.Q. 35 (1982). While understandable, it is somewhat ironic that for the vice of general non-enforcement of the law, the remedy is more non-enforcement.

209. But see MICH. STAT. § 28.981 (Callaghan 1982) (authorizing the court to require prosecution).

discretion that is now traditionally reviewable."²¹⁰ Though unbridled discretion is often thought to be a necessary component of our system, Davis effectively refutes that concept by references to other countries, such as Germany, and also to the Michigan practice of allowing judicial review of a prosecutor's decision not to prosecute.²¹¹ In rejecting traditional arguments used to preclude review of prosecutorial decisions, Davis concludes:

Instead of saying that "few subjects are less adapted to judicial review" than prosecutors' discretion, I would say that few subjects are more adapted to judicial review than a protection against abuse. Instead of saying that "it is not the function of the judiciary to review the exercise of executive discretion," I could cite a hundred Supreme Court decisions stating that it is the function of the judiciary to review the exercise of executive discretion. . . .²¹²

It is one thing to accept the fact that some guilty parties will escape punishment because they escape detection or apprehension; it is quite another to accept the fact that parties will escape punishment as a result of the deliberate choice of a government official.²¹³ In large part this result may come from the assumption that unbridled prosecutorial discretion is inevitable. This is an assumption that, as Davis indicates, does not represent "the best thinking of which our society is capable."²¹⁴ While such unthinking assumptions might be acceptable in a society struggling with survival, "[i]n an affluent country, . . . the legal system's answers to such questions . . . should be based upon the most careful deliberation, not on considerations of convenience and economy which gain support from habits and assumptions."²¹⁵

The assumptions used as primary justifications for unbridled prosecutorial discretion are: (1) claims that the decisions to be made by the prosecutor are unsuited for judicial review, and (2) judicial review would, itself, infringe upon the prerogatives of the executive and hence violate the separation of powers doctrine. Neither of these concerns is legitimate.

210. K. DAVIS, *DISCRETIONARY JUSTICE* 211-12 (1969) (emphasis omitted).

211. *Id.* at 191-95, 212.

212. *Id.* at 209-10 (footnote omitted). One of those who has taken the contrary position is Chief Justice Burger. As a judge on the District of Columbia Circuit he wrote: "Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought." *Newman v. United States*, 382 F.2d 479, 480 (D.C. Cir. 1967).

213. K. DAVIS, *supra* note 210, at 230.

214. *Id.*

215. *Id.*

A starting point is to consider what approach is taken with the prosecutorial decision to dismiss charges in criminal proceedings. At common law the power to enter a *nolle prosequi* was vested exclusively in the prosecutor without any judicial restraint.²¹⁶ Yet, by statute or court rule, it is now almost uniformly established that once prosecution is initiated, dismissal can be obtained only with the consent of the court.²¹⁷ This fact bears upon both justifications for the lack of review of prosecutorial decisions.

The entering of a *nolle*, like the decision not to charge at all, results in the lack of criminal process against an alleged criminal. The same factors that may justify a decision not to charge may be utilized later to *nolle* the charges. Hence, both the "standards" of review and the infringement upon executive power are relatively the same. If review of a prosecution decision to enter a *nolle prosequi* can exist in contemporary society without any illegitimate infringement upon executive power and with the application of judicially manageable standards, then review of the decision not to charge can also exist without raising either of these problems.

Second, with respect to the separation of powers, Davis appears to be correct in his assessment that the argument "is so clearly unsound as to be almost absurd."²¹⁸

If separation of powers prevents review of discretion of executive officers, then more than a hundred Supreme Court decisions spread over a century and three-quarters will have to be found contrary to the Constitution! . . . [Otherwise] the courts would be powerless to interfere when executive officers, acting illegally, are about to execute an innocent person!²¹⁹

Third, making decisions about initiating and dismissing cases are relatively similar and hence are already proven to be judicially manageable. Moreover, such considerations are altogether similar to those which judges utilize when determining an appropriate sentence for an offender.

Nor should such considerations be rebuffed because of a feeling that it invades a traditional province of the prosecutor. As set forth above, the "invasion" of the *nolle prosequi* power has had no adverse effect. Further, actions of the Reconstruction Congress indicate that legislators have not always been so deferential of prosecutorial discretion. Most instructive is the Civil Rights Act of 1875.²²⁰ Section three of that Act provided in part:

216. *People v. Municipal Court*, 27 Cal. App. 3d 193, 200, 103 Cal. Rptr. 645, 650 (1972).

217. *Id.* at 201, 103 Cal. Rptr. at 653-54.

218. K. DAVIS, *supra* note 210, at 210.

219. *Id.*

220. 18 Stat. 335 (1875). This act was declared unconstitutional on the grounds

any district attorney who shall willfully fail to institute and prosecute the proceedings herein required, shall, for every such offense, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered by an action of debt, with full costs. . . .²²¹

The same provisions of the statute made failure to enforce the statute a misdemeanor punishable by a fine between \$500 and \$1,000. It provided that either a recovery by the victim-turned-civil-plaintiff or a conviction by the government would bar the alternative action. The obvious effect was to provide the victim with a civil remedy against a federal prosecutor who failed to vindicate his rights by properly invoking criminal process against the alleged criminal. If such an action was constitutional, and there is no reason to suspect that it was not, then a judicial review of a decision not to charge would seem even less intrusive and therefore more acceptable.

The government's duty of protection and the victim's standing to contest governmental action relating to his injury should be sufficient to allow judicial review of the prosecutor's decisions under an abuse of discretion standard. Again, the decisions of the prosecution based upon a reasoned good-faith consideration of the victim's interest should result in judgment for the state. But a showing that the victim's interest was not given consideration, or that the state's interest in non-prosecution could not reasonably outweigh the victim's interest in prosecution, should result in a requirement that the state proceed with the prosecution.

IX. RELEASE OF PERSONS IN STATE CUSTODY

Just as the duty to protect citizens includes not only immediate physical protection, but also the right to have violations of their personal security vindicated by prosecution, it also includes the right to have that safety protected by the punishment of individuals who have committed criminal offenses. The decision as to whether the security of citizens requires the imprisonment of a given individual is subject to the sentencing requirements set by the legislature. However, individuals in the custody of the state,

that it affected private parties, rather than the state, and hence was not within the enforcement power of the fourteenth amendment. *Civil Rights Cases*, 109 U.S. 3 (1883). Compare *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (upholding similar provisions in the Civil Rights Act of 1965 under the commerce power). The section relied on here was not the subject of the constitutional challenge.

221. 18 Stat. 335, 336, § 3 (1875).

either in prison or in mental institutions, often receive early releases by way of parole or through a decision that their mental condition no longer warrants confinement in a mental institution. There are documented instances of cases in which such individuals have committed crimes shortly after their release.

For example, in *Martinez v. California*,²²² an individual with a history of sex offenses was released on parole and subsequently killed a fifteen year old girl. Similarly, in *Holmes v. Wampler*,²²³ a patient who was released from a state mental hospital stabbed an individual five weeks after he was released from the institution. There is respectable support for the proposition that these incidents occur because "those who make the decision as to release far too often err on the side of leniency in the *hope* that the criminal at liberty will not victimize again."²²⁴ It is difficult to assess the accuracy of this view, however, because there is no empirical data on the subject. It is entirely possible that parole boards actually err on the side of non-release, and the instances which are documented are either aberrations or mistakes made notwithstanding the bias against release.²²⁵

There is debate among the federal circuit courts as to whether parole boards enjoy absolute or qualified immunity against a civil rights suit filed under 42 U.S.C. § 1983.²²⁶ A recent Ninth Circuit case, while finding absolute immunity from suits filed by potential parolees, specifically reserved the question as to the immunity, if any, that the board would enjoy from § 1983 suits initiated by persons injured by a dangerous parolee.²²⁷ However, the Supreme Court for the State of Arizona has held that the parole board may be liable for a grossly negligent or reckless release of highly dangerous prisoners.²²⁸ One commentator who analyzed the cases in this area came to the conclusion that the government should be liable for reckless conduct but that government actions should be

222. 444 U.S. 277 (1980). For an example of other instances of parolees committing serious crimes and some indication of resulting litigation in which victims recovered, see F. CARRINGTON, *THE VICTIMS* at 176-77, 181 (1975).

223. 546 F. Supp. 500 (E.D. Va. 1982).

224. F. CARRINGTON, *supra* note 198, at 176.

225. Justice Blackmun recently emphasized that there is information suggesting that professionals may tend to "overpredict" tendencies for future violence either out of fear of being responsible for an early release or from improper generalizations based upon contacts with past offenses. *Barefoot v. Estelle*, 103 S. Ct. 3383, 3409 n.4 (1983) (Blackmun, J., dissenting).

226. See S. NAHMOD, *CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: A GUIDE TO* § 1983, § 8.15, at 262-63 (1979).

227. *Sellars v. Procnier*, 641 F.2d 1295 (9th Cir.), *cert. denied*, 454 U.S. 1102 (1981).

228. *Grimm v. Arizona Bd. of Pardons and Paroles*, 115 Ariz. 260, 564 P.2d 1227 (1977).

protected by a qualified immunity.²²⁹

The application of such a standard would appear to be a salutary one. An example of how it would work might be illustrated by contrasting the parolee releases documented in Frank Carrington's *The Victims*.²³⁰ One example indicates that an individual who had been sentenced to four years for grand theft was paroled after seven months. Subsequently, he shot and killed another man who was trying to protect the parolee's sister from being beaten by the parolee. Based upon these facts, it appears that the parolee had no prior crime of violence and that there was no reason for the parole board to believe he would commit a violent offense. Under these circumstances, assuming the board had conducted a proper investigation and exercised a good faith belief that he could return to society without jeopardizing anyone's safety, liability should not attach.

In contrast, consider the case of Arthur St. Peter who, with a record of forty felonies, seventeen escapes and escape attempts, and a life sentence, was allowed to participate in a program outside the penitentiary, called "Take-A-Lifer-To-Dinner."²³¹ Mr. St. Peter participated in that program and made a successful escape. Later, during an armed robbery, he killed a shop owner and wounded the shop owner's wife. At trial, a jury returned a verdict of \$186,000 against the warden in favor of the victim-plaintiff. The results should be the same under the above proposed test.

The warden could be faulted on two separate grounds. One, there was no statutory authorization to initiate such a program or to allow people sentenced to a life term to leave prison. Second, even had such authorization existed, allowing a man with such a record to participate in the program would seem to amount to gross negligence.

Another example that might produce liability would be where a prisoner not granted parole is mistakenly released. Liability could also attach if there was a failure to properly investigate the prisoner's background; where due to negligence in compiling records the parole board did not have accurate knowledge about the prisoner's actual sentence or prior record or some other important matter. This would create liability in instances in which it

229. Comment, *Victims Suit Against Government Entities and Officials for Reckless Release*, 29 AM. U.L. REV. 595, 631 (1980).

230. See *supra* note 198, at 177.

231. *Id.* at 181.

could be documented that the parole board was actually mistaken and that such mistakes were due to their negligence.

On the other hand, a "but for" test would not be adequate under a qualified immunity standard, e.g., but for the release the crime would not have been committed. In matters of judgment, the parole board's demonstration of good faith action should be enough to insulate it from liability. This should give incentive for accuracy in the work of the parole board and prison officials without threatening the good faith use of their own judgment. It should provide a remedy in those situations in which the parole board's negligence resulted in injury to a victim. At the same time, it would not infringe on the board's discretion to release those who, in its judgment, can make a successful transition back to society.

X. CIVIL LIABILITY AND SOVEREIGN IMMUNITY

If, as set forth above, the state does have a duty to protect its citizens from physical harm and harm to their property, what remedy does, or should, exist when that duty is breached? One possibility is that the citizen should always have the right to recover damages from the government itself.

One possible objection to this approach of the government's duty to protect would be that the government or its officials would be liable every time a crime was committed.²³² Though this might not be good policy, there is probably no constitutional impediment against this result. To the contrary, there is respectable precedent for the proposition that the government can be made the "insurer" of the security of those within its jurisdiction and that government officials can be held strictly liable for the performance of their duties.

For example, at common law, the American sheriff was often required to post a bond to secure the faithful performance of his²³³ office. The sheriff was held to be absolutely liable for the continuous custody of his prisoners. While the law recognized certain limited exceptions to this strict liability,²³⁴ the general theory

232. This very view was argued in Congress in the debates on the Ku Klux Klan Act. James R. McCormick, a Democrat from Missouri, argued that "no State ever did and no State ever can give equal protection of its laws. Every person who suffers an outrage in person or property the law has failed to protect him; and if the violators of law escaped from the limits of the State, its authorities may even fail to punish the authors of the crime." CONG. GLOBE, 41st Cong., 1st Sess. 139 (1871).

233. At this time all sheriffs were male.

234. For example, where the County Commissioners refused the sheriff's request to appropriate enough money to build a secure jail, the sheriff was held not

was that if a prisoner escaped, circumstances existed which justified the forfeiture of the sheriff's bond without any showing of fault.²³⁵

A second example, also of ancient lineage²³⁶ and established by statute in several states in the 19th century,²³⁷ makes a local government organization absolutely liable to individuals injured as a result of riotous conduct within the boundaries of the governmental unit. Such a provision, generally referred to as the Sherman Amendment,²³⁸ was proposed and passed by the United States Senate²³⁹ as part of its effort to provide for enforcement of the fourteenth amendment. A modified version of this proposal was suggested by the House and Senate Conference Committee.²⁴⁰ In the debates upon the propriety of enacting such a bill it was referred to as a form of "insurance" under which the inhabitants of

to be strictly liable for the escape of prisoners. Rather, it appears that a negligence standard was utilized.

235. See also *Ryan v. State*, 134 Ariz. 308, 656 P.2d 597 (1982) (civil liability for negligent supervision of four-time escapee from the Arizona Youth Center which led to serious and permanent injuries to victim of subsequent robbery).

236. It is said that such a statute was adopted in England immediately after the Norman conquest. *Monell v. Department of Social Serv.*, 436 U.S. 658, 667 n.17 (1978).

237. It is said that such liability was common in the New England States and that similar statutes existed in Kentucky, Maryland, Massachusetts, and New York. *Monell*, 436 U.S. at 668 n.17. However, the Sherman bill was criticized as being a deviation from these statutes because it appeared, unlike those statutes, to impose liability even without negligence. *Id.* at 657 & n.18. Although Senator Sherman maintained that liability would not attach without fault, other proponents of the bill claimed that it would and this is apparently the reading of the proposal by the Court. *Id.* at 692-93 n.57.

238. The sponsor of the amendment was Senator John Sherman of Ohio, the brother of General William T. Sherman. He represented Ohio in the House of Representatives for six years (1855-1861) and in the United States Senate for 32 years (1861-1877 and 1881-1897). He served as Secretary of the Treasury (1877-1881) under President Hayes and Secretary of State (1897-1898) under President McKinley. BIOGRAPHICAL DIRECTORY OF THE AMERICAN CONGRESS, 1774-1971 (1971). The legislative history of this proposal is traced in *Monell*, 436 U.S. at 666-89.

239. The provision as passed by the Senate is reproduced in *Monell*, 436 U.S. at 702-03. This proposal made the "inhabitants of the county, city, or parish in which any of the said offenses shall be committed" liable "to pay full compensation" to the injured parties or their survivors. *Id.* (emphasis added).

240. The provision is set forth in *Monell*, 436 U.S. at 703-04. This substitute proposal made the governmental entity itself liable: "in every such case the county, city or parish in which any of the said offenses shall be committed shall be liable to pay full compensation. . . ." The act made specific provision for the execution of judgment against the government. But it also provided that the government could then recover against the party directly causing the injury. *Id.*

any given community would mutually guarantee the security of each other's property.²⁴¹ While it is true that some raised arguments about the constitutionality of creating such liability,²⁴² and the proposal was eventually rejected by the House of Representatives, the prevailing view seems to be that the rejection was premised upon considerations of policy and not constitutional law.²⁴³ Indeed, according to Justice Douglas, the constitutionality of the proposal was "vigorously debated with *powerful arguments advanced in the affirmative*."²⁴⁴

Moreover, statutes imposing liability upon municipalities for mob violence exist in several states.²⁴⁵ Despite the fact that the statutes vary somewhat in the terms under which liability has been imposed, they have uniformly withstood constitutional challenge.²⁴⁶ Their operation appears to result in the municipality becoming an "insurer" against misconduct under its jurisdiction, because a requirement that the municipality receive prior notice of the potential disorder is said to be inoperative if it was impossible to give such notice,²⁴⁷ and because the impossibility of preventing the injury is not a defense.²⁴⁸

Third, contrary to the apparent assumptions of certain courts, it is not unusual for government employees to be held liable for

241. According to Representative Butler, whose home state had such a statute, the purpose was not punitive, but rather "[i]t is a mutual *insurance*." CONG. GLOBE, 42d Cong., 1st Sess. 792 (1871) (emphasis added).

242. See *Moor v. County of Alameda*, 411 U.S. 693, 709, *reh'g denied*, 412 U.S. 963 (1973); *Monroe v. Pape*, 365 U.S. 167, 190 (1961). As the Supreme Court noted in *Monell*, 436 U.S. at 676, the constitutional argument against the Sherman amendment "was clearly supported by precedent—albeit precedent that has not survived." Thus, those arguments, even if otherwise pertinent, would have no application now.

243. *Monroe*, 365 U.S. at 190. See also Brief for Petitioners at 62-65, *Monell*, 436 U.S. 963 (reproduced in 105 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 125-28 (P. Kurland & G. Casper eds. 1979)), suggesting that in many instances the law enforcement power was vested in the state, not the local government, and that it would be unfair to make the local government liable for that over which it had no corrective power. However, from the excerpts of the Congressional Globe relied upon it is difficult to determine whether the defect was the lack of municipal power or the lack of municipal duty. It could be argued that in the view of some, the fourteenth amendment applied only to the state and not the municipal government. See also *Monell*, 436 U.S. at 670-71 n.21, 673.

244. *Monroe*, 365 U.S. at 190 (1961) (emphasis added) (footnote omitted). Though it was not speaking of vicarious liability, the Court has found no tenth or eleventh amendment impediment to municipal liability. *Monell*, 436 U.S. at 690 n.54.

245. For a summary of the statutes see Note, *Municipal Liability for Riot Damage*, 81 HARV. L. REV. 653 (1968).

246. Annot., 26 A.L.R. 3d 1142, 1149 (1969). See also, Annot., 26 A.L.R. 3d 1198 (1969).

247. *Id.* at 1150.

248. *Id.*

negligence in failing to protect citizens.²⁴⁹ Indeed, as part of its enforcement power under section five of the fourteenth amendment, Congress has specifically declared that any state officer having knowledge of certain conspiracies to deprive citizens of their constitutional rights, and who have the power to stop such injury but fail to do so, will be liable for damages.²⁵⁰ If one accepts the view that the fourteenth amendment imposes a general duty of protection upon the state governments, then it necessarily follows that a civil cause of action could be implied under the amendment²⁵¹ or enacted by Congress.

Fourth, it appears that many of the victim compensation statutes are premised, at least in part, upon the belief that there is "an obligation to compensate those citizens whom the government has promised but failed to protect."²⁵² Thus, there should

249. *E.g.*, OHIO REV. CODE § 2307.44 (Baldwin 1983) (making administrators, employees, or faculty members of state universities liable for "hazing," when they knew or reasonably should have known about it and failed to make a "reasonable attempt to prevent it"). *Id.*

250. 42 U.S.C. § 1986 (1976).

251. *E.g.*, *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971). Though *Bivens* was a civil suit based on the fourth amendment, the Supreme Court has allowed "direct action" suits to be brought under the fifth amendment, *Davis v. Passman*, 442 U.S. 228 (1979), and the eighth amendment, *Carlson v. Greene*, 446 U.S. 14 (1980). The rationale of these cases would seem to allow such suits upon all amendments. Prior to *Monell v. Department of Social Serv.*, 436 U.S. 658 (1978) (which rendered the issue moot), certain federal courts had recognized direct actions suits based on the fourteenth amendment against cities in order to avoid the holding of *Monroe v. Pape*, 365 U.S. 167 (1961) (a city was not a person and therefore could not be sued under 42 U.S.C. § 1983).

252. *Considerations, supra* note 4, at 2. Carrington, *Victims' Rights Litigation: A Wave of the Future?*, 11 U. RICH. L. REV. 447, 452 (1977). "[Victim compensation] legislation is premised upon the duty of the state to protect its citizens. The rationale is that if a citizen is victimized, the state has by definition failed in its duty, and thus should compensate the injured party." *Id.* Comment, *Alabama's Anti-Profit Statute: A Recent Trend in Victim Compensation*, 33 ALA. L. REV. 109 (1981): "The belief that society is partly to blame for the losses suffered by victims of crime has motivated many states to enact measures designed to make reparations for at least a portion of the victim's loss." *Id.* (footnote omitted).

See also Clark & Webster, *Indiana's Victim Compensation Act: A Comparative Perspective*, 14 IND. L. REV. 751, 753 n.23 (1981) (citing Goldberg, *Equality and Governmental Action*, 39 N.Y.U. L. REV. 205, 224 (1964)) and Note, *Compensation for the Criminally Injured Revisited: An Emphasis on the Victim*, 47 NOTRE DAME LAW. 88, 93 (1971)).

It would appear, however, that these authors are referring to a "moral" rather than a legal obligation. If compensation statutes were based upon a legal obligation then they should not be limited to compensation for personal injuries and should include injuries to property. Yet it appears that no American jurisdiction authorizes such recovery. Clark & Webster, *supra* at 753. However, restitution is often used in such situations. Similarly, in order to make the victim whole there

be no general constitutional objection to imposing civil liability upon the government, or its employees, for a breach of their constitutional duty of protection. However, some may wonder whether the concept of sovereign immunity, as protected by the eleventh amendment, may not stand as a barrier to these proposals. The eleventh amendment was early interpreted to protect the sovereign immunity of the states. Many of the proposals outlined above may be viewed as a threat to such immunity and consequently prohibited by the amendment. However, while one may disagree upon the desirability of these proposals, there should be no disagreement with the proposition that the eleventh amendment places no barrier to their implementation.

It has been recognized that there is a tension between the eleventh amendment grant of sovereign immunity to the states and the fourteenth amendment's imposition of duties upon the same states. Under general principles of construction, since the fourteenth amendment is the later amendment, there is, to the extent that any conflict exists, an implicit repeal of the conflicting effects of the eleventh amendment.

On many occasions these conflicts are not direct conflicts between the amendments themselves, but rather conflicts between Congress's attempt to act pursuant to section five of the fourteenth amendment and the eleventh amendment. The United States Supreme Court, in *Fitzpatrick v. Bitzer*,²⁵³ indicated that where there is a clear intent to utilize section five power to impose liability on the states, suits can be brought directly against the states.²⁵⁴

The fourteenth amendment was designed to place upon the states a duty to provide for the protection of citizens. Under the *Fitzpatrick* rationale, this direct conflict between the amendments should result in an abrogation of sovereign immunity in any case in which it would otherwise defeat the victim's litigation to implement the right to invoke state protection.

Moreover, even if this were not the case, it is clear that the states themselves can provide for remedies in their own courts and can waive sovereign immunity for purposes of allowing litigation in the federal courts.²⁵⁵ In the event of failure to waive this

should be no limitation on compensation to be recovered. *But see* IND. CODE § 16-7-3.6-12(a) (Supp. 1981) (\$10,000 limit). For a summary and criticism of this "social contract" theory for compensation statutes, see Note and Comment, *The 1981 Oklahoma Crime Victim Compensation Act*, 17 TULSA L.J. 260, 268 (1981).

253. 427 U.S. 445 (1976).

254. *Id.* at 456.

255. *Edelman v. Jorden*, 415 U.S. 651, 673, *reh'g denied*, 416 U.S. 1000 (1974) (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909) (requiring that the waiver be made in express language)).

immunity through state legislation, Congress could, as outlined in *Fitzpatrick*, utilize the enforcement power to abrogate sovereign immunity when it interferes with the principles of fourteenth amendment protection for inhabitants against unlawful infringement of their rights.

It has, of course, been long established that a suit against individual governmental officials is not a suit against the state for eleventh amendment purposes.²⁵⁶ It is equally well established that sovereign immunity does not prohibit injunctive and prospective relief.²⁵⁷ Accordingly, there should be no sovereign immunity inhibition to implementing the rights of victims to secure protection against criminal actions.

Given the fact that liability is predicated upon a negligence standard, there should also be no absolute official immunity. However, governments and their officials are recognized to have at least a qualified immunity, which means that they will have no liability as long as they are acting in good faith. This should not make a difference to the outcome of the litigation. The negligence standard of tort law requiring that the government official act reasonably is the mirror image of the qualified immunity standard. Consequently, from whatever view the cases are analyzed, there will be a "good faith" protection for government agencies and their employees.

XI. CONCLUSION

One of the primary and most important duties of government is to provide for the physical safety of those under its jurisdiction and, failing that, for the successful prosecution of those who infringe on that safety. Similarly, one of the most important rights of all inhabitants of a given political entity is to receive protection, or, if the government fails to give that protection, to have that right of protection vindicated by criminal prosecution of the offender.

In order to implement these rights and duties, the interest and consequential standing of the victim must be recognized. While the government cannot do the impossible and should not be considered to be an "insurer," it should be held responsible for acting reasonably in attempting to fulfill its duties of protection and

256. *E.g.*, *Ex parte Young*, 209 U.S. 123, 159-60 (1908).

257. *Id.*

prosecution. In the event of its failure to meet familiar tort standards of conduct, it should be held responsible to victims, both in the form of damages for injury and through equitable relief in requiring investigation and prosecution. Such an approach does not infringe on any right of the government, for it cannot be contended that the government has a "right" to remain passive while its citizens are victimized or to let those who commit crimes avoid prosecution. However, this approach does implement basic and important rights and duties under a regime of law. In the end, by creating incentive for protection and prosecution, by vindicating the rights of victims, and by securing the punishment of those who commit crimes, the government may help secure one of the most fundamental rights of all: the right not to be a victim.