

# Victim Rights: Criminal Law: Remembering the "Forgotten Person" in the Criminal Justice System

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## CRIMINAL LAW — VICTIM RIGHTS: Remembering the “Forgotten Person”<sup>1</sup> in the Criminal Justice System

“My life has been permanently changed. I will never forget being raped, kidnapped, and robbed at gunpoint. However, my sense of disillusionment with the judicial system is many times more painful. I could not, in good faith, urge anyone to participate in this hellish process.”<sup>2</sup>

In recent years, the treatment of victims of crime in the criminal justice system has received increased attention. Commentators have described the treatment which victims receive as the “Great American Scandal.”<sup>3</sup> One basis for this attitude is the belief that the American criminal justice system has lost sight of its fundamental purpose - to protect the innocent and punish the guilty.<sup>4</sup>

This Comment first traces the history of the victim rights movement and the role that government plays in its development. It then discusses the purpose and specific provisions of the Victim and Witness Protection Act of 1982 (VWPA or “the Act”).<sup>5</sup> In addition, the constitutionality of the VWPA is examined. This Comment concludes by urging that more attention should be focused on the coordination of programs between jurisdictions. It further urges that the judiciary remain active in the future development of victim and witness

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1. S. REP. NO. 532, 97th Cong., 2d Sess. 10, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 2515, 2516 (1982) [hereinafter *Senate Report*]. Hearings and studies have repeatedly shown that too often the victim has been the “forgotten person” in the criminal justice system. It has been noted that with few exceptions, victims and witnesses are either ignored by the system or simply used to identify offenders. *Id.*

2. *Id.* at 37, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS at 2543. This is a statement made by a victim testifying at a subcommittee hearing on the Victim and Witness Protection Act of 1982. The victim’s interest in seeing changes occur is clearly articulated by this statement. *Id.*

3. Young, *Victims of Crime: The Great American Scandal*, 23 JUDGES’ J. 8 (1984). See also Herrington, *Victims of Crime: What the Government Can Do*, 23 JUDGES’ J. 17 (1984).

4. Herrington, *supra* note 3, at 17. It has been noted that often the system serves the defendants, attorneys and judges, but ignores victims. *Id.* In some cases, the victims are mistreated and even blamed for the crime. This discourages victims from reporting crimes. As a result, it is estimated that more than 50 percent of violent crimes are not reported to police. *Id.*

5. Pub. L. No. 97-291, 96 Stat. 1248 (1982) (codified in scattered sections of 18 U.S.C. and FED. R. CRIM. P. 32(c)(2)).

rights and that the policymakers pay more attention to the long-term financial and operational impact of these programs on the criminal justice system.

## I. INTRODUCTION

Generally, victim programs and legislation may be grouped in three broad categories.<sup>6</sup> First, some programs provide financial assistance for victims.<sup>7</sup> Second, some programs and statutory provisions focus on the "rights" of victims.<sup>8</sup> Third, some programs and statutory provisions are specialized to protect and benefit certain classes of victims such as battered women and physically abused children.<sup>9</sup>

The VWPA and other federal, state, and local legislative initiatives provide the statutory framework for the current victim programs. In order to understand some of the underlying concerns which legislators and judges have raised in creating victim legislation and applying it in our nation's courtrooms, it is necessary to briefly consider the history and development of victim rights.

### A. History of Victim Rights

Before government began regulating the criminal process, reparation<sup>10</sup> occurred by the victim taking "blood revenge"

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6. Anderson & Woodard, *Victim and Witness Assistance: New State Laws and the System's Response*, 68 JUDICATURE 221, 223 (1985).

7. *Id.* For further discussion of laws providing financial assistance to crime victims, see *id.* at 223-28. At present, 39 states, the District of Columbia, and the Virgin Islands have enacted legislation providing compensation for crime victims. *Id.* at 223.

8. *Id.* at 223. Many states have adopted laws designed to guarantee a meaningful role for victims and witnesses in the criminal justice system. These laws generally focus on keeping victims informed of case developments, increasing their understanding of the criminal justice process, and providing them with the opportunity to participate in the proceedings. *Id.* at 228. See also *id.* at 228-33 and *infra* notes 81-90 and accompanying text.

9. *Id.* at 223. Most states have enacted specialized legislation to protect or benefit certain classes of persons considered to be especially vulnerable to crime. The most common laws of this type are those designed to protect the elderly, sexual assault victims, and victims of domestic violence. *Id.* at 233. See also *id.* at 233-36.

10. The terms reparation and restitution generally refer to a sanction imposed by criminal justice officials which requires offenders to make redress in the form of service or monetary payments to either the direct victims or substitute victims of the crime. J. HUDSON & B. GALAWAY, *RESTITUTION IN CRIMINAL JUSTICE* 1 (1977) [hereinafter *RESTITUTION IN CRIMINAL JUSTICE*].

against the offender.<sup>11</sup> After the state took control of the criminal process, such revenge became, in itself, a criminal act.<sup>12</sup> Restitution, which previously was given by the offender to the victim, began to be used increasingly to help bolster government treasuries in the form of fines.<sup>13</sup> Therefore, victims were often left to recover losses on their own through civil remedies.<sup>14</sup> As a result, crimes became offenses not against the victim but against the state.<sup>15</sup> Despite the distinction now drawn in this area between criminal and civil proceedings, the view that the state should assist victims of crime has historical support.

The idea that a society should assist victims of crime has been traced back to the ancient Babylonian Code of Hammurabi.<sup>16</sup> This Code provided that when a person was robbed or murdered, the city in which the crime occurred would compensate the victim or the victim's heirs for their losses.<sup>17</sup>

Modern law, as noted earlier,<sup>18</sup> draws a distinction between criminal and civil proceedings. This distinction was used in the past to limit the involvement of government in providing assistance to victims.<sup>19</sup> Nevertheless, recent developments in the criminal justice system indicate that despite the fact that this distinction is drawn, the government is taking a more active role in assuring that victims of crime are compensated.<sup>20</sup>

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11. R. ELIAS, VICTIMS OF THE SYSTEM 19-20 (1983) (citing Schafer, *Victim Compensation and Responsibility*, 43 S. CAL. L. REV. 55 (1970)).

12. R. ELIAS, *supra* note 11, at 20.

13. *Id.* at 25.

14. *Id.* at 20.

15. *Id.*

16. LIBRARY OF CONGRESS, CONGRESSIONAL RESEARCH SERVICE, PUB. NO. 1874014, COMPENSATION FOR CRIME VICTIMS 1 (1984) [hereinafter COMPENSATION FOR CRIME VICTIMS]. This ancient Code has been traced back to 2038 B.C. *Id.* See also R. ELIAS, *supra* note 11, at 20 and RESTITUTION IN CRIMINAL JUSTICE, *supra* note 10, at 2.

17. COMPENSATION FOR CRIME VICTIMS, *supra* note 16, at 1.

18. See *supra* text accompanying notes 13-15. For a discussion of the distinction now drawn by the law between criminal and civil proceedings, see COMPENSATION FOR CRIME VICTIMS, *supra* note 16, at 1.

19. This distinction is used by critics of restitution to argue that because restitution compensates victims, it is a civil rather than criminal sanction. Therefore, if restitution is ordered without a full civil trial it is considered inappropriate. Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 HARV. L. REV. 931 (1984).

20. R. ELIAS, *supra* note 11, at 3. See also Note, *supra* note 19, at 935-41.

The victim rights movement gained momentum in the mid-1970's.<sup>21</sup> At that time, the public became more aware of the instances where the criminal justice system had failed. As a result, various "victim rights" organizations were formed.<sup>22</sup> In addition, public support of victim assistance led to the adoption, in many jurisdictions, of public victim compensation programs and legislation which increased funding for programs aimed at meeting the nonfinancial, social, psychological, and advocacy needs of crime victims.<sup>23</sup>

### B. *The Government's Role in Victim Assistance*

Many people feel that the key to successful victim rights programs is the involvement of the state. One of the recent developments in the victim rights movement at the state and national level is the use of government compensation programs.<sup>24</sup> This development provides a good example of some of the conflicting attitudes surrounding government involvement in victim programs.

One of the most controversial issues concerning victim assistance is the extent to which government should provide financial compensation for victims. Proponents of direct gov-

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21. *Senate Report*, *supra* note 1, at 10, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS at 2516.

22. One of the leading victim rights organizations is the National Organization for Victim Assistance (NOVA). It has been promoting a victim-oriented perspective since 1976. Finn, *Collaboration Between the Judiciary and Victim-Witness Assistance Programs*, 69 JUDICATURE 192 (1986). Other organizations advocating victim rights include Mothers Against Drunk Drivers (MADD), Society's League Against Molestation (SLAM) and Protect the Innocent (PTI). These groups have been particularly effective at the state and local levels. Judges have given deference to their suggestions and as a result, many of the reforms sought by these groups have been incorporated into state legislation on victim assistance. Payant, *Victims of Crime: An Introduction to Their Rights*, 23 JUDGES' J. 2 (1984). For a discussion of the history and impact of the victim rights reform movement in the criminal justice system, see generally Abrahamson, *Redefining Roles: The Victims' Rights Movement*, 1985 UTAH L. REV. 517 (1985).

23. RESTITUTION IN CRIMINAL JUSTICE, *supra* note 10, at 5.

24. For a discussion of victim compensation from state or national funds, see R. ELIAS, *supra* note 11, at 22-26. Margery Fry, a British criminal reformer, is usually credited with the development of the first victim-compensation program. *Id.* at 26. There is historical support for the use of government compensation to aid victims of crime. The Torah, the Code of Hammurabi, ancient English and Germanic law, Greek law, and Roman law all contained graduated scales of compensation for crime victims. Note, *supra* note 19, at 933 n.18.

ernment compensation<sup>25</sup> for crime victims advance three main arguments to support their view. First, they argue that society should compensate the victim because society failed to protect the individual from the criminal act.<sup>26</sup> Second, they argue that victim compensation programs lessen the individual citizen's sense of alienation and anger at society and help to encourage citizen cooperation with law enforcement agencies.<sup>27</sup> Third, they contend that if government is interested in the prevention of crime and the apprehension, imprisonment, and rehabilitation of criminals, there should also be an interest in providing assistance to the victims of those criminals.<sup>28</sup>

Generally, opponents of government compensation programs focus on the lack of financial resources available to meet the needs of victims.<sup>29</sup> In addition, opponents emphasize the fact that many crimes are prosecuted at the state level and, since federal government has no responsibility for the enforcement of state crime laws, it has no responsibility to compensate victims of those crimes.<sup>30</sup> Of course, this argument loses its viability at the state level as state government is responsible for the enforcement of its laws. Finally, another argument advanced by opponents is that although victim compensation can be a legitimate government activity, it is essentially charitable and therefore, does not result in an absolute government liability to its citizens.<sup>31</sup>

The arguments advanced by both the proponents and opponents of government compensation are reflected in the legis-

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25. Direct compensation is used here to refer to monetary contributions made out of public funds which are paid directly to the victim. Indirect compensation, on the other hand, consists of governmental programs designed to assist victims of crime. Compensation, in this latter instance, is not paid directly to the victim, but rather it is paid to programs which provide overall assistance to victims.

26. COMPENSATION FOR CRIME VICTIMS, *supra* note 16, at 1-2. This is also referred to as the "strict liability theory." See R. ELIAS, *supra* note 11, at 24-25.

27. COMPENSATION FOR CRIME VICTIMS, *supra* note 16, at 1-2. This is also referred to as the "crime prevention theory." See R. ELIAS, *supra* note 11, at 26.

28. COMPENSATION FOR CRIME VICTIMS, *supra* note 16, at 1-2. There are also several other theories that support government compensation for victims. For a discussion of these theories, see R. ELIAS, *supra* note 11, at 24-26.

29. COMPENSATION FOR CRIME VICTIMS, *supra* note 16, at 2.

30. *Id.*

31. *Id.* For further discussion of the critics' view of victim compensation, see R. ELIAS, *supra* note 11, at 22-24.

lative responses to the victim rights movement.<sup>32</sup> At the moment, despite the fiscal concerns at both the state and national level,<sup>33</sup> the proponents of government involvement in this area are meeting with more success. Legislators have expressed a commitment to correcting the wrongs which have been inflicted on victims for too long.<sup>34</sup> The VWPA and other federal, state, and local legislation are the means by which victim assistance has become a reality in the 1980's. The extent to which this assistance will affect the victim rights movement is not yet known, but there is a strong indication that it will be significant.

## II. THE VICTIM AND WITNESS PROTECTION ACT OF 1982<sup>35</sup>

### A. *The Purpose of the Act*

The primary purpose of the VWPA is to strengthen existing legal protections for victims and witnesses of federal

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32. See *Senate Report*, *supra* note 1, at 9, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS at 2515. While the purpose behind the Victim and Witness Protection Act was to strengthen existing legal protections for victims and witnesses, Congress was careful to state that this would be done within the limits of available federal resources. *Id.* Concern has been expressed that there is reason to doubt that the federal government will be able to accomplish its goals within the limits of available resources. See Note, *Restitution in the Criminal Process: Procedures for Fixing the Offender's Liability*, 93 YALE L.J. 505 (1984). Recent state and national legislation indicates that the legislators realize that to be effective, additional funding for victim programs is necessary. See Finn, *supra* note 22, at 192.

33. At the time this Comment was written, state and federal governments were facing large budget deficits. In response, many programs at both levels were experiencing cutbacks. Of particular concern is the Balanced Budget and Emergency Deficit Control Act of 1985, which is expected to force cutbacks in programs. For the specific provisions of this federal act, see Pub. L. No. 99-177, 99 Stat. 1037 (1985).

34. Legislative commitment to righting victims' wrongs is reflected in the Victim and Witness Protection Act of 1982 and the fiscal commitment made at the state and national level. This fiscal commitment is evident from the 1984 Congressional Acts, the Victims of Crime Act, and the Justice Assistance Act, as well as various pieces of state legislation. See Finn, *supra* note 22, at 192. For an example of one state's efforts in this area, see WISCONSIN DEPARTMENT OF JUSTICE, WISCONSIN VICTIM/WITNESS ASSISTANCE PROGRAM, PROGRAM GUIDELINES (1983) [hereinafter WISCONSIN VICTIM/WITNESS ASSISTANCE PROGRAM] and WIS. STAT. §§ 949.001-.18 & 950.01-.07 (1983-84).

35. Pub. L. No. 97-291, 96 Stat. 1248 (codified in scattered sections of 18 U.S.C. and FED. R. CRIM. P. 32(c)(2) (1982)). See also *Senate Report*, *supra* note 1, at 1-45, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS at 2515-51.

crimes.<sup>36</sup> It also requires the United States Attorney General to develop proposals and guidelines to meet this objective.<sup>37</sup> Although the VWPA does not call for any increase in federal expenditures, the Victims of Crime Act<sup>38</sup> and the Justice Assistance Act,<sup>39</sup> both enacted by Congress in 1984, provide increased funding for victim services.<sup>40</sup>

Through its enactment of the VWPA, Congress recognizes that the criminal justice process has for too long failed to meet the needs of victims and witnesses. Emphasis is placed on the fact that insensitivity and lack of concern for victims and witnesses<sup>41</sup> hurt society as a whole because the criminal justice system cannot function without the cooperation of those individuals.<sup>42</sup>

Additionally, the enactment of the VWPA serves another important function: it acts as a model statute for state and local governments.<sup>43</sup> Since a majority of serious violent crimes fall within the jurisdiction of state and local law enforcement agencies, the Act provides the guidance necessary to strengthen victim programs throughout the United States.<sup>44</sup>

### B. Provisions of the VWPA

The VWPA consists of six key provisions.<sup>45</sup> Together, they provide a comprehensive governmental policy aimed at meeting victim and witness needs in the criminal justice system. Each section is considered separately in this Comment.

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36. *Senate Report, supra* note 1, at 9, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS at 2515.

37. *Id.* at 10, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS at 2515.

38. Pub. L. No. 98-473, 98 Stat. 2170 (codified at 42 U.S.C. § 10601 & 18 U.S.C. §§ 3013 & 3671 (1982)).

39. Pub. L. No. 98-473, 98 Stat. 2077 (codified at 42 U.S.C. §§ 3701-97 (1984)).

40. Finn, *supra* note 22, at 192. *See also* Anderson & Woodard, *supra* note 6, at 222.

41. *Senate Report, supra* note 1, at 10, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS at 2516.

42. *Id.* *See also* *Victims of Crime: What Judges and Lawyers Can Do*, 23 JUDGES' J. 12 (1984) [hereinafter *What Judges and Lawyers Can Do*].

43. *Senate Report, supra* note 1, at 10, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS at 2516.

44. *Id.*

45. *See id.*



## 1. Victim Impact Statements<sup>46</sup>

The first section of the VWPA requires that the presentence report prepared for federal judges include a victim impact statement.<sup>47</sup> Prior to the enactment of the VWPA, no such statement was required in federal courts. The "victim impact statement" consists of verified information which assesses the financial, social, psychological, and medical impact of the crime on the victim.<sup>48</sup> The victim impact statement is regarded as the first step to ensuring that the victim's side is considered in the judicial process.<sup>49</sup>

The following testimony, offered before the Senate Judiciary Committee during its consideration of this legislation, expresses the need for victim impact statements:

The victim of an offense has no standing in the Court beyond the status of a mere witness - he has no right of allocution and is often overlooked in the process of plea negotiation . . . . we should not prosecute, try, and sentence any defendant without at least listening to the victim's offense-related needs. It is essential that a victim impact statement be factual and confirmed; it must be non-inflammatory and non-argumentative. We never want to be guilty of waving the bloody shirt; neither are we to bury the bloody shirt with the victim still in it.<sup>50</sup>

This testimony reflects two distinct yet significant considerations. First, victims deserve to be heard and consulted concerning offense-related needs.<sup>51</sup> Second, the exercise of this right cannot and need not usurp the rights of the accused.<sup>52</sup> Thus, the use of victim impact statements is one way of assur-

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46. *Id.* at 11-14, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS at 2517-20. The Act's provision requiring a "Victim Impact Statement" is codified at FED. R. CRIM. P. 32(c)(2) (1982). *Id.* at 11, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS at 2519.

47. *Id.* at 11, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS at 2519.

48. *Id.* at 13.

49. *Id.*

50. *Id.* at 11, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS at 2517. This statement was made before the Subcommittee on Criminal Law, a part of the Senate Committee on the Judiciary. *Id.*

51. For a discussion of victim needs and the reasons for considering these needs in the criminal justice system, see Kelly, *Victims of Crime: What Do Victims Want? Why Should Their Concerns Be Considered?*, 23 JUDGES' J. 4, 4-7, 52-53 (1984).

52. See *infra* notes 142-49 and accompanying text.

ing that our criminal justice system is fair not only for the accused but for the victim as well.<sup>53</sup>

## 2. Protection of Victims and Witnesses from Intimidation<sup>54</sup>

Prior to the enactment of the VWPA, criminal penalties existed to prevent the intimidation of witnesses.<sup>55</sup> The VWPA now extends these sanctions to protect victims as well.<sup>56</sup> In addition, the penalties for violations are greater and the level of seriousness necessary to constitute a violation is lower under the VWPA.<sup>57</sup> The Act further provides penalties for instances of retaliation<sup>58</sup> and expands the witness relocation and protection statutes.<sup>59</sup> Finally, this section of the Act permits the Attorney General to initiate a civil proceeding in order to prevent or restrain the harassment or intimidation of a victim or a witness.<sup>60</sup>

The widespread and pervasive intimidation of victims is the primary motivation beyond these changes in the law.<sup>61</sup> Without doubt, victim and witness cooperation in the criminal

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53. See *What Judges and Lawyers Can Do*, *supra* note 42, at 12-15.

54. See *Senate Report*, *supra* note 1, at 14-29, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS at 2520-35. This section is codified at 18 U.S.C. §§ 1512 & 3521 (1982). For further discussion of the problem of witness intimidation, see Connick & Davis, *Examining the Problem of Witness Intimidation*, 66 JUDICATURE 439 (1983).

For a discussion of the provision in the Victim and Witness Protection Act of 1982 prohibiting threats of retaliation against government informants as not violating the first amendment, see *United States v. Velasquez*, 772 F.2d 1348 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1211 (1986).

For a discussion of congressional intention in the enactment of the Victim and Witness Protection Act as not meaning that protection of witnesses falls solely under the Act, see *United States v. Rovetuso*, 768 F.2d 809 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 838 (1986) and *United States v. Lester*, 749 F.2d 1288 (9th Cir. 1984).

55. *Senate Report*, *supra* note 1, at 14, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS at 2520.

56. *Id.*

57. *Id.* The new protections for witnesses, victims, or informants apply to offenses which occur before the witness testifies or the informant communicates with law enforcement officials as well as after testifying or reporting information. Protection in the former instance is codified at 18 U.S.C. § 1512 (1982), while the latter is codified at 18 U.S.C. § 1513 (1982). *Id.*

58. *Senate Report*, *supra* note 1, at 20, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS at 2526.

59. *Id.* The witness location and protection provisions, including reimbursement in those instances, are codified at 18 U.S.C. §§ 3521-22 (1982). *Id.*

60. *Id.* The provision allowing civil action to restrain witness or victim intimidation is codified at 18 U.S.C. § 3523 (1982). *Id.*

61. *Id.* at 15, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS at 2521.

justice system is especially influenced by the fear of harassment and intimidation. Therefore, this particular section of the VWPA is an improvement which will help foster greater participation in the system by victims and witnesses.<sup>62</sup>

### 3. Restitution<sup>63</sup>

The restitution provision of the VWPA permits the court to order payment of restitution independently of a sentence of probation.<sup>64</sup> If the court does not order restitution, it must state on the record the reasons for not imposing it.<sup>65</sup>

This provision is the most controversial section of the VWPA. Some commentators<sup>66</sup> and at least one court<sup>67</sup> have stated that the restitution provisions are unconstitutional.<sup>68</sup> Nevertheless, recent court holdings, including one of an appel-

62. In addition to the VWPA, the 1980 ABA approved model statute to reduce victim and witness intimidation has been adopted in some form by at least five states: California, Louisiana, Pennsylvania, Rhode Island, and Wisconsin. Generally, while the states vary considerably in form, each one utilizes a form of court orders. *Id.* at 28-29, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS at 2534-35.

63. *Id.* at 30-33, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS at 2536-39. See also *infra* notes 104-41 and accompanying text. For a definition of the term restitution, see *supra* note 10.

64. *Senate Report, supra* note 1, at 30, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS at 2536. See also 18 U.S.C. § 3579(a)(1) (1982). Prior to the enactment of the VWPA, restitution could only be ordered in federal cases under the federal probation statute, 18 U.S.C. § 3651 (1982). Note, *supra* note 32, at 507 n.5.

65. 18 U.S.C. § 3579(a)(2) (1982). This section provides that "[i]f the court does not order restitution, or orders only partial restitution, under this section, the court shall state on the record the reasons therefor." *Id.*

66. See Note, *The Unconstitutionality of the Victim and Witness Protection Act Under the Seventh Amendment*, 84 COLUM. L. REV. 1590 (1984). See also Project, *Congress Opens Pandora's Box - The Restitution Provisions of the Victim and Witness Protection Act of 1982*, 52 FORDHAM L. REV. 507, 573 (1984).

67. *United States v. Welden*, 568 F. Supp. 516 (N.D. Ala. 1983), modified *sub nom.* *United States v. Satterfield*, 743 F.2d 827 (11th Cir. 1984), cert. denied, 105 S. Ct. 2362 (1985).

The defendants in this case, Carlton Welden, Edward Eugene Satterfield, and Perry Don Allison, were convicted of kidnapping a woman from her home in Georgia and forcing her to accompany them to Alabama. During the commission of this crime, the woman's boyfriend was killed. *Satterfield*, 743 F.2d at 831-32.

In a subsequent case, the court held that "victims of the offense" for purposes of the VWPA include all who are hurt as a result of criminal activity. Thus, not only was the individual who was kidnapped entitled to recover under the restitution provisions of the VWPA, but so was the estate of an individual who was killed during the kidnapping and the owner of an automobile which was damaged during the kidnapping. *United States v. Allison*, 599 F. Supp. 958 (N.D. Ala.), cert. denied, 105 S. Ct. 2362 (1985).

68. *Welden*, 568 F. Supp. at 534-36.

late court reversing the court which had held the restitution provision unconstitutional,<sup>69</sup> uphold the constitutionality of this provision.<sup>70</sup> The constitutionality of the VWPA is discussed in a later section of this Comment.<sup>71</sup>

#### 4. Federal Accountability for Escape or Release<sup>72</sup>

Thomas Whisenhart had been sentenced to twenty years in a federal prison for severely and brutally beating a female victim. He was diagnosed as a paranoid, schizophrenic psychotic and long-term psychiatric treatment was recommended. Nevertheless, his sentence was reduced to ten years and he was released. After his release, he brutally beat and murdered two women and kidnapped, raped, murdered, and mutilated a third woman.<sup>73</sup>

The victims of this crime, the children and husband of the third murdered woman, sued the federal government, contending that the government's release of Whisenhart constituted gross negligence<sup>74</sup> and as a result the government should be held civilly liable.<sup>75</sup>

In order to maintain this action, prior to the VWPA, the victim's claim had to survive a motion for summary judgment based upon the exception to the Federal Tort Claims Act which exempts conduct falling under a "discretionary func-

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69. The *Welden* decision was modified in *United States v. Satterfield*, 743 F.2d 827 (11th Cir. 1984), *cert. denied*, 105 S. Ct. 2362 (1985).

70. See *United States v. Keith*, 754 F.2d 1388, 1392 (9th Cir.), *cert. denied*, 106 S. Ct. 93 (1985); *United States v. Watchman*, 749 F.2d 616, 617 (10th Cir. 1984); *United States v. Brown*, 744 F.2d 905, 911 (2d Cir.), *cert. denied*, 469 U.S. 1089, (1984); and *United States v. Florence*, 741 F.2d 1066, 1068-69 (8th Cir. 1984). These courts have all held that an order of restitution imposed under the VWPA is a criminal, rather than civil, penalty. *United States v. Palma*, 760 F.2d 475, 479 (3d Cir. 1985). Thus, the VWPA has been found by these courts to not violate the jury trial guarantee of the seventh amendment. *Palma*, 760 F.2d at 479-80. See also Note, *The Constitutionality of the Victims' Restitution Provisions of the Victim and Witness Protection Act*, 70 VA. L. REV. 1059 (1984) and *infra* notes 98-149 and accompanying text.

71. See *infra* notes 98-149 and accompanying text.

72. *Senate Report*, *supra* note 1, at 33-37, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS at 2539-43.

73. *Id.* at 35, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS at 2541. For a complete description of this reported case, see *Payton v. United States*, 636 F.2d 132 (5th Cir. 1981).

74. *Payton*, 636 F.2d at 134-35.

75. *Id.* at 135. The civil action was brought pursuant to the Federal Tort Claims Act which is codified at 28 U.S.C. §§ 1346(b) & 2671-80 (1982).

tion" classification.<sup>76</sup> Under the VWPA, there is a specific provision which allows victims or their families to hold the federal government civilly liable for injuries or property losses suffered at the hands of an escaped or released individual.<sup>77</sup> In order to recover, the federal government must still be found to have been grossly negligent.<sup>78</sup>

Despite two major arguments opposing this provision,<sup>79</sup> the overwhelming view of the Senate Judiciary Committee was that victims should have some means of redress. This includes redress by holding the government civilly liable for gross negligence in permitting release or failing to prevent the escape of criminals.<sup>80</sup>

## 5. Federal Guidelines to Victim Rights<sup>81</sup>

Some rights of law-abiding Americans are so fundamental as to cry out for protection . . . they include the right to civilized and compassionate treatment when we have fallen victims to a law-breaker.<sup>82</sup>

Too often, victims in the criminal justice system are treated as little more than sources of information and evi-

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76. *Payton*, 636 F.2d at 134. The Federal Tort Claims Act provides a limited waiver of sovereign immunity in tort actions. *See id.* at 135-44. If conduct is considered a "discretionary function," it is exempt from the Federal Tort Claims Act. In determining whether conduct is within this exemption, the court reviews the nature of the loss imposed by the governmental injury, assesses the nature and quality of the government activity causing the injury, and considers whether the vehicle of a tort suit provides the relevant standard of care, be it professional or reasonableness, for evaluation of the governmental decision. *Id.* at 144-46. In addition, a factor that the court in *Payton* considered was the lack of a federal victim compensation program. *Id.* at 145.

77. *Senate Report*, *supra* note 1, at 33, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS at 2539. This section is codified at 28 U.S.C. § 1346(b) (1982).

78. *Id.*

79. The two arguments against this section of the VWPA are that this provision will lead to a multiplicity of lawsuits and have a chilling effect upon independent parole decisions. *Senate Report*, *supra* note 1, at 36, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS at 2542. As this provision limits liability to cases which constitute gross negligence, it is unlikely that there will be the potential for adverse impact on the government under the multiplicity of lawsuits argument. The chilling effect argument also fails in light of the fact that there is ample room for vigorous government implementation of policies when the limit placed on those actions is measured by a gross negligence standard. *Id.*

80. *Id.*

81. *Id.* at 37-42, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS at 2543-48.

82. *Id.* at 38, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS at 2544.

dence.<sup>83</sup> One of the major complaints victims express about the criminal justice system is that their feelings and needs are rarely taken into consideration.<sup>84</sup> As a result, fewer victims and witnesses are willing to get involved.

In response to the demand for the establishment of some basic guidelines for the treatment of victims and witnesses in the criminal process, Congress, in enacting the VWPA, required the Attorney General to develop and implement guidelines to meet this objective.<sup>85</sup> On July 9, 1983, the Attorney General issued these guidelines.<sup>86</sup>

This section of the VWPA endorses what some current state and local programs already require from law enforcement officials.<sup>87</sup> It also clarifies what will be expected of federal law enforcement officials in the future when dealing with victims and witnesses of crimes.

A key part of this provision is the enactment of legislation in the form of a "victim's bill of rights."<sup>88</sup> The use of a basic bill of rights is justified for two reasons. First, because simple justice demands it;<sup>89</sup> second, because the clarification of the role of victims and witnesses is absolutely essential to a successful criminal justice system that depends so heavily upon the cooperation of those individuals.<sup>90</sup>

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83. Resnick, *The Trauma of Rape and the Criminal Justice System*, 9 JUST. SYS. J. 52 (1984).

84. See Kelly, *supra* note 51, at 5.

85. *Senate Report, supra* note 1, at 37, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS at 2543.

86. For a description of these guidelines, see *United States v. Welden*, 568 F. Supp. 516, 520-25 (N.D. Ala. 1983), modified *sub nom.* *United States v. Satterfield*, 743 F.2d 827 (11th Cir. 1984), cert. denied, 105 S. Ct. 2362 (1985).

87. *Senate Report, supra* note 1, at 38, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS at 2544. For an example of the application of these requirements at the state and local level, see WIS. STAT. §§ 949.001-.18 & 950.01-.07 (1983-84).

88. For an example of a "victim's bill of rights," see WIS. STAT. §§ 950.01-.07 (1983-84).

89. *Senate Report, supra* note 1, at 39, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS at 2545.

90. *Id.*

## 6. Profit by Criminal from Sale of Story<sup>91</sup>

Public awareness of the need for statutory provisions which prevent direct profit from the sale of a criminal's story is a fairly recent phenomenon.<sup>92</sup> The sixth and final provision of the VWPA addresses this situation.

The "criminal turned author"<sup>93</sup> situation is one which often creates feelings of irritation and anger. These feelings are not only felt by victims but by society in general. Many people feel there is something tremendously wrong with a system which allows a criminal to profit financially from a crime which he or she committed while victims of crime go largely uncompensated. While this problem is not the fault solely of the criminal justice system,<sup>94</sup> it is possible for the system to provide some means by which limitations are placed upon the ability of criminals to profit from their illegal activities.

The VWPA requires the Attorney General to present to Congress any laws it believes are necessary to ensure that "no federal felon will profit financially from notoriety directly related to the criminal act until restitution rights of the victim are determined by forfeiture or civil proceeding."<sup>95</sup> Recently, Congress did pass legislation to limit the ability of a criminal to profit from the sale of his or her story.<sup>96</sup> At the state level, at least one jurisdiction has adopted legislation to limit a criminal's ability to profit from illegal acts.<sup>97</sup>

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91. *Id.* at 42-44, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS at 2548-50. For a discussion of the concern that murderers might sell their stories to a publisher as a proper ground for ordering restitution beyond defendants' present and foreseeable ability to pay, see *United States v. Fountain*, 768 F.2d 790 (7th Cir. 1985), modified, 777 F.2d 345 (7th Cir. 1985), cert. denied, 106 S. Ct. 1647 (1986). See also Anderson & Woodard, *supra* note 6, at 227-28 for a discussion of the states' use of escrow accounts for offender's profits.

92. Senate Report, *supra* note 1, at 42, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS at 2548.

93. *Id.*

94. *Id.* The print and broadcast media and paperback journalistic fascination with sensational, true life stories creates a climate in which criminals-turned-authors can flourish. *Id.*

95. *Id.*

96. Pub. L. No. 98-473, 98 Stat. 2175 (codified in 18 U.S.C. §§ 3671-72 (1984)).

97. See WIS. STAT. § 949.165 (1983-84).

### III. CONSTITUTIONALITY OF THE VWPA

The constitutionality of the VWPA has been challenged on first,<sup>98</sup> fifth,<sup>99</sup> sixth,<sup>100</sup> seventh,<sup>101</sup> eighth,<sup>102</sup> and fourteenth<sup>103</sup> amendment grounds. Most of the constitutional questions raised to date involve the restitution provisions of the Act. Therefore, this Comment focuses primarily on the constitutionality of those provisions. In addition, the balancing of the constitutional rights of the accused against those of the victim is considered.

#### A. *Constitutionality of Restitution Provisions in the VWPA*

The restitution provisions of the VWPA<sup>104</sup> require that a federal court, as part of the sentence of each defendant, order the defendant to make restitution to each "victim" or state in the record a legitimate reason for not doing so.<sup>105</sup> In *United States v. Welden*,<sup>106</sup> the United States District Court for the Northern District of Alabama was directly confronted with determining the overall constitutionality of this Act and the restitution provisions contained therein.<sup>107</sup> That court found that the restitution provisions violated the seventh amend-

98. *United States v. Velasquez*, 772 F.2d 1348 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1211 (1986). In *Velasquez*, the issue of whether the retaliation statute, 18 U.S.C. § 1513, a part of the VWPA, violated the first amendment was raised. *Id.* at 1356. That court stated that the first amendment is "remotely if at all involved" in this case. The threats involved did not relate to ideas or advocacy. Therefore, the statute did not violate the first amendment. *Id.* at 1356-58.

99. For a discussion of the challenge to the VWPA based on the fifth amendment, see *United States v. Welden*, 568 F. Supp. 516, 534-35 (N.D. Ala. 1983), *modified sub nom.* *United States v. Satterfield*, 743 F.2d 827 (11th Cir. 1984), *cert. denied*, 105 S. Ct. 2362 (1985). See also *infra* notes 104-13, 128-41 and accompanying text.

100. For a discussion of the challenge to the VWPA based on the sixth amendment, see *Welden*, 568 F. Supp. at 534.

101. For a discussion of the challenge to the VWPA based on the seventh amendment, see *id.* See also *infra* notes 104-27 and accompanying text.

102. For a discussion of the challenge to the VWPA based on the eighth amendment, see *Welden*, 568 F. Supp. at 532-33.

103. For a discussion of the challenge to the VWPA based on the fourteenth amendment, see *id.* at 534-35.

104. Pub. L. No. 97-291, 96 Stat. 1248 (1982). The restitution provisions are codified at 18 U.S.C. §§ 3579 & 3580 (1982).

105. 18 U.S.C. §§ 3579(a)(1) & 3579(a)(2) (1982).

106. 568 F. Supp. 516 (N.D. Ala. 1983), *modified sub nom.* *United States v. Satterfield*, 743 F.2d 827 (11th Cir. 1984), *cert. denied*, 105 S. Ct. 2362 (1985).

107. See *id.*



ment right to a jury trial<sup>108</sup> and the fifth amendment requirements of "due process" and "equal protection."<sup>109</sup> On appeal, the constitutionality of the Act was upheld and the district court's decision reversed.<sup>110</sup> To date, the United States Supreme Court has not made any direct rulings on the constitutionality of the VWPA.

While some commentators have argued that the VWPA, as currently written, is unconstitutional,<sup>111</sup> others have stated that the Act is constitutional.<sup>112</sup> Court rulings indicate that the latter view is correct.<sup>113</sup> This Comment is in accord with the view that the Act is constitutional and finds that the restitution provisions are most properly characterized as criminal, not civil, proceedings.

### 1. Restitution Appropriate in Criminal Justice System

Critics of the restitution provisions argue that the objectives of criminal and civil law are distinct.<sup>114</sup> They claim that the focus of civil law is to compensate for private wrongs, whereas the focus of criminal law is to redress public wrongs and to protect society.<sup>115</sup> Therefore, because restitution is a form of compensation, it does not belong in the criminal jus-

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108. *Id.* at 534. The seventh amendment provides that "the right to a jury trial shall be preserved" in civil cases "where the value in controversy exceeds twenty dollars." U.S. CONST. amend. VII.

In *Welden*, the court held that § 3479(h) turns restitution into a civil proceeding and therefore, hearings must be in compliance with the seventh amendment. *Welden*, 568 F. Supp. at 534.

109. *Welden*, 568 F. Supp. at 534-35. The concern under the fifth amendment is that the statute is subject to arbitrary and uneven exercises of power which make it inconsistent with due process and equal protection considerations. *Id.*

110. See *United States v. Satterfield*, 743 F.2d 827 (11th Cir. 1984), *cert. denied*, 105 S. Ct. 2362 (1985).

111. See *generally* Note, *supra* note 66; see also Project, *supra* note 66, at 573.

112. See Note, *supra* note 19, at 932; see *generally* Note, *supra* note 70.

113. *United States v. Palma*, 760 F.2d 475 (3d Cir. 1985); *United States v. Keith*, 754 F.2d 1388 (9th Cir.), *cert. denied*, 106 S. Ct. 93 (1985); *United States v. Watchman*, 749 F.2d 616 (10th Cir. 1984); *United States v. Brown*, 744 F.2d 905 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 599 (1985); *Satterfield*, 743 F.2d 827; *United States v. Florence*, 741 F.2d 1066 (8th Cir. 1984).

114. Note, *supra* note 19, at 934-35. This distinction must be found to exist if the critics' position, that the restitution provisions of the VWPA are unconstitutional, is to be maintained. See *Florence*, 741 F.2d at 1067.

115. Note, *supra* note 19, at 935.

tice system.<sup>116</sup> In addition, critics argue that restitution may not be ordered unless there is an opportunity for a full jury trial on the question of damages. To allow a sentencing judge to order restitution, they argue, violates due process because there is no right to a jury trial with various procedural safeguards.<sup>117</sup>

The major flaw in the critics' arguments is that they fail to properly categorize restitution. Their assertion that restitution is improper as a criminal sentence depends upon a sharp distinction being drawn between criminal and civil law in this area. In reality, the criminal and civil systems share certain objectives and some areas of the law reflect this overlap.<sup>118</sup>

Restitution is a good example of an area where the civil and criminal systems overlap. Although restitution appears to share with civil law its purpose of compensation, its principal value is its function as a corrective device.<sup>119</sup> Consequently, restitution can play a proper and potentially significant role in the criminal system.

The courts now recognize that the restitution provisions of the VWPA impose criminal and not civil penalties. In *United States v. Satterfield*,<sup>120</sup> the court stated that "[i]n drafting the restitution provisions of the VWPA, Congress made clear in both the language of the statute and its accompanying legislative history that victim restitution would be imposed as a criminal, rather than civil, penalty."<sup>121</sup>

Judges recognize the value of restitution as do legislatures and community service programs.<sup>122</sup> Ordering restitution forces the defendant to acknowledge the harm he has caused in concrete terms.<sup>123</sup> It impresses upon the offender his re-

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116. *Id.* This view only takes into consideration one of the purposes of restitution. The principal value of restitution is its function as a corrective device. *Id.* at 937-41.

117. *Id.*

118. *Id.* at 935-37.

119. *Id.* at 937-41. In addition, restitution, as an aspect of criminal punishment, has a long history that goes back further than either the American or English systems of justice. *Florence*, 741 F.2d at 1067. See also *supra* notes 10-23 and accompanying text.

120. 743 F.2d 827 (11th Cir. 1984), *cert. denied*, 105 S. Ct. 2362 (1985).

121. 743 F.2d at 836; see also *Palma*, 760 F.2d at 479-80 and *supra* note 70.

122. Note, *supra* note 19, at 937-38. The judges and community service groups especially recognize the rehabilitative value of restitution. *Id.*

123. *Id.* at 938 (citations omitted).

sponsibility to others.<sup>124</sup> Restitution can also act as an effective deterrent and may be more effective than fines.<sup>125</sup> Finally, restitution serves the retributive goals of punishment.<sup>126</sup> A civil suit, initiated by a victim, cannot serve these same objectives.<sup>127</sup> Therefore, as restitution not only compensates victims, but also promotes the criminal system's goals of rehabilitation, deterrence, and retribution, it is a proper part of the criminal system and the VWPA provisions are appropriate.

## 2. Restitution at Sentencing Satisfies Due Process Concerns

Critics of restitution argue that not only is the defendant denied his right to a jury trial under the seventh amendment as the proceeding is civil in nature, but also that ordering restitution at the sentencing stage violates the defendant's due process and equal protection rights.<sup>128</sup> They argue that the VWPA is arbitrary and lacks ascertainable standards.<sup>129</sup> They claim that "Congress was not only a poor draftsman, but in many respects it unleashed the courts without providing them standards, such as rules of evidence, rules of discovery, burdens of proof, requirements of notice, requirements of standing, and the like."<sup>130</sup>

The assertion that the Act is unconstitutional because it violates the due process and equal protection rights is without

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124. *Id.*

125. *Id.* Restitution requires that the defendant pay the victim rather than the abstract, impersonal state. This impresses upon the defendant that he or she has a responsibility to others. *Id.* "To the offender's pocket it makes no difference whether what he has to pay is a fine, costs, or compensation. But to his understanding of the nature of justice it may make a great deal." *Id.* at 938 n.54 (quoting M. Fry, *ARMS OF THE LAW* 124 (1954)).

126. *See id.* at 937-41.

127. *See id.* at 941. While a victim may sue an offender after the state has imposed criminal sanctions, the use of restitution provides not only benefits for the victim but for society as a whole. Society may benefit from the correctional effects of restitution. Additionally, because the victim may not find it worthwhile to pursue a civil action, the public benefits of restitution would be lost if it were not part of the criminal system. *Id.*

128. *Id.* at 935 & 941-46.

129. *Restitution Provisions of 1982 Victim Protection Act Challenged*, 23 *JUDGES' J.* at 19.

130. *Id.* For a discussion of the procedural safeguards that are in the VWPA, see *United States v. Florence*, 741 F.2d 1066, 1068-69 (8th Cir. 1984).

merit. Due process cannot be precisely defined. It is a flexible notion which provides for changes to accommodate the specific procedural requirements for each case.<sup>131</sup> Furthermore, the court's authority to order restitution flows solely from a finding of guilt.<sup>132</sup> Restitution does not infringe upon one's right to liberty or property; once a defendant has been convicted, these interests become conditional and their deprivation does not require the same safeguards provided prior to conviction.<sup>133</sup>

In addition, the defendant's qualified right to liberty and property must be balanced against the government's interest in furthering the objectives of criminal law.<sup>134</sup> As one commentator noted:

The government has already provided the defendant a complete jury trial - with greater procedural protections and a more rigorous standard of proof than those required in a civil action - to determine whether punishment may be imposed. Formal procedures, such as jury determination of the amount of restitution or a full civil trial on the issue of damages, would frustrate achievement of restitution's correctional aims by focusing the inquiry on compensation of the victim rather than on correction of the offender. Furthermore, the increased cost and delay of a civil jury trial would threaten the government's ability to impose criminal sanctions effectively.<sup>135</sup>

As restitution under the VWPA serves the dual purpose of compensating victims and acting as a corrective device, due process safeguards cannot be considered solely with regard to the criminal's concerns but must consider society's interests as well.

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131. Note, *supra* note 19, at 943.

132. *Id.* at 944. A civil action, in contrast, typically concerns the relation between two individuals and determines which of the two should bear an existing loss. *Id.*

133. *Id.*

134. *Id.* "Due process involves the balancing of three factors: (1) the nature of the private interest affected; (2) the government's interest, including the administrative and fiscal burdens that various procedures would entail; and (3) the risk of error associated with each conceivable procedural alternative." *Id.* at 943 (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

135. *Id.* at 944-45 (footnotes omitted).

Of course, orders of restitution must meet the same procedural safeguards required by other forms of punishment.<sup>136</sup> At a minimum, this should include notice and a "meaningful opportunity to be heard."<sup>137</sup> The VWPA does have some potential due process problems but as one court stated, "the possibility of due process violations . . . [occurring] in particular cases in the future . . . does not render the statute unconstitutional on its face."<sup>138</sup> The rights delineated by Rule 32 of the Federal Rules of Criminal Procedure, if properly enforced by the sentencing judge, should afford the defendant timely notice and an opportunity to respond.<sup>139</sup>

In addition, the VWPA provides that restitution must be tailored to the individuality of the defendant as this is vital to the rehabilitative goals of sentencing.<sup>140</sup> Thus, the court can order restitution only after it considers the financial resources and earning ability of the defendant's dependents.<sup>141</sup> No such consideration would be provided if this were truly a civil proceeding. This is a further manifestation that restitution is a criminal sanction and not a civil action. It also indicates that restitution can be an effective yet fair tool in the criminal justice system.

### *B. Balancing the Rights of the Accused with the Rights of the Victim*

Victim rights can be accomplished without impairing the constitutional and statutory safeguards provided to all persons charged with a crime.<sup>142</sup> The goal is not to reduce the rights guaranteed to the defendants, but rather to assure that victim and witness rights are also guaranteed.<sup>143</sup> The focus of the

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136. *Id.* at 943-44. For a discussion of the VWPA meeting procedural safeguards, see *Florence*, 741 F.2d at 1066-69.

137. Note, *supra* note 19, at 944 n.92 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971)).

138. *United States v. Satterfield*, 743 F.2d 827, 829 (11th Cir. 1984), *cert. denied*, 105 S. Ct. 2362 (1985).

139. *Id.* at 840-41; see also *Florence*, 741 F.2d at 1068-69.

140. *Satterfield*, 743 F.2d at 836-37.

141. *Id.* Where a court fails to consider the financial needs and earning ability of a defendant's dependents, the restitution order will not be allowed to stand. *United States v. Gomer*, 764 F.2d 1221 (7th Cir. 1985).

142. *What Judges and Lawyers Can Do*, *supra* note 42, at 13.

143. *Id.*

victim rights movement is to see that the system stops "scrupulously defending the rights of offenders" while ignoring the rights of victims and witnesses.<sup>144</sup>

In response to this desire for clarifying the role of victims and witnesses in the criminal justice system, some jurisdictions have drafted and passed legislation which calls for a "victim's bill of rights."<sup>145</sup> Additionally, the judiciary has sought to define the role that it should play in ensuring that victims and witnesses are treated with respect and fairness.<sup>146</sup>

Significantly, the United States Supreme Court recently recognized the legitimate interests and concerns of victims. In *Morris v. Slappy*,<sup>147</sup> the Court stated:

In its haste to create a novel Sixth Amendment right, the [lower] court failed to take into account the interests of the victims of the crimes in not undergoing the ordeal of yet a third trial in this case. Of course, inconvenience and embarrassment to witnesses cannot justify failing to enforce constitutional rights of the accused . . . . But in the administration of criminal justice, courts may not ignore the concerns of victims. Apart from all other factors, such a course would hardly encourage victims to report violations to the proper authorities.<sup>148</sup>

This statement reflects the current attitude toward victims and witnesses in the criminal justice system. While they will not be allowed to usurp the constitutional rights of the defendant, they will not be overlooked any longer either. By providing victims and witnesses with rights in the process, it is likely that victim and witness participation will increase.<sup>149</sup> In turn, the overall attitude toward the criminal justice system will improve.

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144. Anderson & Woodard, *supra* note 6, at 221.

145. See *supra* notes 81-90 and accompanying text. For an example of a "victim's bill of rights," see WIS. STAT. §§ 950.01-.07 (1983-84).

146. See *What Judges and Lawyers Can Do*, *supra* note 42, at 12-15.

147. 461 U.S. 1 (1983).

148. *Id.* at 14.

149. *Senate Report*, *supra* note 1, at 10, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS at 2516.

#### IV. FUTURE CONSIDERATION FOR THE VICTIM RIGHTS MOVEMENT

The victim rights movement has achieved considerable success in recent years, yet the future success of the movement depends upon the coordination of three important aspects of victim assistance programs. First, there must be greater efforts made to coordinate the programs between jurisdictions. Second, the continued active involvement of the judiciary is necessary if the programs are to assure that victim needs are met without infringing on the constitutional rights of the accused. Third, there is a need for the development of a long term program which takes into consideration the operational and financial impact of these programs on the criminal justice agencies responsible for implementing these programs.

##### *A. Victim Rights at the State Level*

"In order to maintain and to strengthen our democratic system of law and order, it is essential that the rights of the victim of a crime should be just as fully protected as the rights of the criminal offender."<sup>150</sup>

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In recognition of the civic and moral duty of victims and witnesses of crime to fully and voluntarily cooperate with law enforcement . . . [the legislative intent of this chapter is] to ensure that all victims and witnesses of crime are treated with dignity, respect, courtesy and sensitivity; and that the rights extended . . . are honored and protected by law enforcement agencies, prosecutors and judges in a manner no less vigorous than the protections afforded criminal defendants.<sup>151</sup>

Many states have passed legislation similar to the above provisions in order to assist victims and witnesses of crime. State legislatures have been especially responsive to the needs of victims and witnesses.<sup>152</sup> Almost every state has some form of victim compensation program.<sup>153</sup> A growing number have

150. WIS. STAT. § 949.001 (1983-84).

151. WIS. STAT. § 950.01 (1983-84).

152. Anderson & Woodard, *supra* note 6, at 222.

153. *Id.* For an example of a state victim compensation law, see WIS. STAT. §§ 949.001-18 (1983-84); see also *supra* note 7.

adopted "victim's bill of rights" legislation.<sup>154</sup> In addition, states have acted aggressively to pass legislation to protect certain classes of victims, such as sexually and physically abused children and women.<sup>155</sup> States view the use of victim assistance as one way to improve the overall effectiveness of the criminal justice system.<sup>156</sup>

Wisconsin was the first state to define by statute some of the government's obligations to victims and witnesses.<sup>157</sup> Wisconsin's basic "bill of rights" is the model statute which most states have used in drafting their own statutes.<sup>158</sup> In addition, the American Bar Association has been very active in the development of victim/witness legislation.<sup>159</sup> This involvement is helpful for the long term considerations of victim rights because it promotes consistency in state legislation.

The future success of these programs will depend upon the development of a consistent and comprehensive approach to victim assistance. Therefore, the coordination of programs between the states as well as between the state and national levels will be an important factor in determining whether the victim rights movement attains nationwide success.

### B. *Judicial Involvement and Victim Rights*

"Justice, though due to the accused, is due the accuser also. The concept of fairness must not be strained til it is a filament. We are to keep the balance true."<sup>160</sup>

Undoubtedly, judges, on their own, can only do so much to assist victims and witnesses of crime. Victim assistance programs can supplement judicial efforts in this area.<sup>161</sup>

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154. See *supra* note 7. For an example of a state statute giving rights to the victims and witnesses of crime, see WIS. STAT. §§ 950.01-.07 (1983-84); see also *supra* notes 81-90 and accompanying text and *supra* note 8.

155. Anderson & Woodard, *supra* note 6, at 233-36; see *supra* note 9.

156. Anderson & Woodard, *supra* note 6, at 244.

157. WISCONSIN VICTIM/WITNESS ASSISTANCE PROGRAM, *supra* note 34, at 1.

158. *Senate Report*, *supra* note 1, at 38, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS at 2544.

159. See *Victim/Witness Legislation: Considerations for Policymakers*, 1981 A.B.A. SEC. CRIM. JUST. 1; see also *Bar Leadership on Victim Witness Assistance*, 1980 A.B.A. SEC. CRIM. JUST. 1.

160. Finn, *supra* note 22, at 196 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934) (J. Cardozo writing for the majority)).

161. Finn, *supra* note 22, at 192.



Judges, because of the unique role they play in the criminal justice system, are in the best position to assure that victim and witness needs are met. As the criminal justice system is composed of separate, independent agencies, the judiciary is in a good position to coordinate activities in order to help victims of crime and better protect society as a whole.<sup>162</sup>

The judiciary, at both the state and national level, is taking an active role in defining the role of judges in victim assistance.<sup>163</sup> Emphasis is not only placed on the need to develop cooperation in the criminal process, but also on the need to explain the reasons for taking this active role in the development of victim assistance programs.<sup>164</sup>

The major reasons given for judicial involvement in this area are: judges stand to benefit in terms of facilitating and expediting court operations; legislative mandates for victim assistance require judicial involvement; and assisting victims allows judges the opportunity to experience the personal satisfaction of aiding individuals in crisis.<sup>165</sup> As the courts are charged with the responsibility to successfully bring offenders to trial, judicial leadership in victim assistance programs is important.

The future success of victim programs depends upon their acceptance in the courtroom. Therefore, judges are a key factor in the long term effects of victim/witness legislation on the criminal justice system. Unless the judicial branch is willing to endorse and implement victim rights in the courtrooms of this nation, it is unlikely that there will be a significant change in attitude toward the system by victims and witnesses. In turn, this will not encourage citizen participation. The benefits which could come from a strong commitment to victim rights will not be realized. Therefore, the judiciary must continue to take an active part in victim rights programs if the programs are to be effective.

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162. *Id.* at 194.

163. *See id.* at 192-98; *see also What Judges and Lawyers Can Do*, *supra* note 42, at 12-15. For one state supreme court judge's view on the victims' right movement, *see Abrahamson*, *supra* note 22, at 517-67. The Honorable Shirley S. Abrahamson serves on the Wisconsin Supreme Court.

164. Finn, *supra* note 22, at 194.

165. *Id.* at 195-97; *see also What Judges and Lawyers Can Do*, *supra* note 42, at 12-15; Herrington, *supra* note 3, at 17-19.

### C. *Impact of Victim Rights on the System*

In order to assure the development of successful nationwide victim and witness programs, it is imperative that state legislatures and other policymakers give attention to the long as well as short range operational and financial implications that these new programs will have for the criminal justice system.<sup>166</sup> This effort to ascertain national and state goals in the development of victim assistance programs must seriously consider a number of concerns which have been expressed.

One concern is that there will not be sufficient resources to meet the demands placed on the system by these programs. Another concern is that the existing procedures in the system are not sufficient to collect and distribute the kind of information necessary to support victim and witness programs and research.<sup>167</sup> The development of long term programs, coordinated between the jurisdictions, can do much to alleviate these concerns. It will be necessary to do so if the victim rights movement is to have a lasting, positive effect on the criminal justice system.

## V. CONCLUSION

In the past decade, there has been much concern expressed as to the treatment of victims and witnesses of the criminal justice system. Recent legislation at both the state and national level has done much to assure that victims of crime are remembered in the criminal process. Constitutional challenges to such legislation have failed. In addition, the judiciary is now actively involved in clarifying the role of victims and witnesses in the courtroom. A strong, nationwide victim/witness assistance movement has achieved remarkable success.<sup>168</sup>

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166. Anderson & Woodard, *supra* note 6, at 244.

167. *Id.* For a discussion of some of the concerns that need to be addressed if the victims' rights movement is to achieve nationwide success, see *id.* at 237-44.

168. *Id.* This remarkable success is evident from the following information. From 1973 to 1983, the number of state-funded victim compensation programs grew from 9 to 39. During that same period, the number of victim service programs grew from a handful of programs to thousands of programs throughout the country. Additionally, statutory rights for victims are now defined in 12 states and at the federal level through the VWPA. Young, *supra* note 3, at 9-10.

Nevertheless, in order for the victim programs to be effective in the long term, there must be an even greater focus placed on the coordination of programs between the states as well as between the state and national levels. Additionally, the judicial branch must continue to take an active role in the development of these programs. This aspect is even more crucial due to the form of criminal justice applied in the United States. The judiciary, from its impartial perspective, is in the best position to assure that the rights of the accused are properly balanced with those of the victim.

Finally, one of the current problems recognized by the victim rights movement is that there has not been sufficient attention paid to the operational and financial impact of the new programs on the criminal justice agencies responsible for implementing the programs.<sup>169</sup> Recent federal and state legislation indicates that there is continued financial support for victim programs.<sup>170</sup> Nevertheless, in order to assure continued support for victim/witness programs, there is a need for the development, at both the state and national level, of a long range program which would address these financial and operational concerns. If such a long range approach is developed for victim assistance programs, the success of the victim rights movement will be evident in the significant and positive impact it will have on the criminal justice system.

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169. *See supra* note 166 and accompanying text.

170. *See supra* notes 38-40 and accompanying text.

