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THE VICTIMS' BILL OF RIGHTS: ARE VICTIMS ALL DRESSED UP WITH NO PLACE TO GO?

What if we discovered, . . . in the victims rights "movement" that victims were politically, all dressed up, but with no place to go? What kind of movement would it be? Would it really be any movement at all?¹

One of the most crucial functions of our Constitution is to guarantee criminal defendants a degree of fairness throughout criminal proceedings.² Although there is no analogous constitutional protection for victims of crime, the federal government has recognized the need to safeguard victims' rights in the criminal justice system.³ In addition, the recent increase in awareness of violent crimes⁴ has caused a majority of states to enact some form of a

¹ Robert Elias, *Which Victim Movement?: The Politics of Victim Policy*, in VICTIMS OF CRIME PROBLEMS, POLICIES AND PROGRAMS 226, 226 (Arthur J. Lurigio et al. eds., 1991) [hereinafter POLICIES AND PROGRAMS].

² See U.S. CONST. amend. IV (search and seizure provision); U.S. CONST. amend. V (providing for grand jury protection against double jeopardy, right against self-incrimination, and due process); U.S. CONST. amend. VI (providing for speedy trial by impartial jury, and the right to confront witnesses); U.S. CONST. amend. VII (right to trial by jury); U.S. CONST. amend. VIII (prohibiting cruel and unusual punishment); see also Ken Eikenberry, *Victims of Crime/Victims of Justice*, 34 WAYNE L. REV. 29, 33 (1987). The Framers of the Constitution drafted these amendments because those accused of crimes at that time were often "mistreated and abused under the authority of the Crown." *Id.*

³ See OFFICE OF JUSTICE PROGRAMS, U.S. DEPARTMENT OF JUSTICE, PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME ii-iii (1986) [hereinafter 1986 TASK FORCE]. In 1982, President Reagan formed a Task Force to investigate issues relating to victims, by increasing the judiciary's responsiveness to victims, and to compensate victims with any profits derived from the crime. *Id.* at ii. The Task Force reported that in order for the criminal justice system to function effectively, victims must be treated humanely so that they are willing to cooperate with the system. *Id.* at 1; OFFICE OF JUSTICE PROGRAMS, U.S. DEPARTMENT OF JUSTICE, PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME (1982); Dean G. Kilpatrick & Randy K. Otto, *Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on the Psychological Functioning*, 34 WAYNE L. REV. 7, 7 (1987). Many of the Task Force's recommendations for state and federal legislation have been enacted or are being actively pursued. See Elias, *supra* note 1, at 232; see also Mario T. Garboursy, *Implementation of Federal Legislation To Aid Victims of Crime in the United States*, in CRITICAL ISSUES IN VICTIMOLOGY: INTERNATIONAL PERSPECTIVE 224, 225 (Emilio C. Viano ed., 1992) [hereinafter CRITICAL ISSUES] (noting government's awareness of problems facing victims of crime). But see J.L. BARKAS, VICTIMS 197 (1978) (although government has given victims "meager financial aid," it has failed to provide victims with counseling, or information about their cases).

⁴ See DIANE SANK & BRIAN SANK FIRSCHEIN, WHY THE CONCERN FOR VICTIMS? 3 (Diane Sank et al. eds., 1992). In 1990, there were more than 34 million victims of crimes. *Id.*

"victims' bill of rights."⁵ The goal of such legislation was to increase the rights of the victim and to provide a substantive role for the victim in the criminal justice system.⁶ As a practical matter, however, these provisions are difficult to enforce, and therefore have been somewhat of a burnt offering to victims of crime.⁷

This Note will explore the current state and federal law regarding victims' rights. First, it will discuss the legislation of the various states which has enacted a victims' bill of rights. Next, it will analyze this legislation and reveal their inherent legal deficiencies. Finally, the federal acts and proposals will be scrutinized and their effectiveness assessed. This Note will conclude that due to the gaps and inconsistencies in state legislation, a "Victims' Rights Amendment" to the Constitution would provide the most effective vehicle for assuring an appropriate measure of protection under the law.

⁵ 136 CONG. REC. H9001, 9030 (daily ed. Oct. 5, 1990). To date, 33 state legislatures have passed victims' bills of rights, 45 states have enacted comprehensive victims' rights legislation, and 46 have victims' compensation programs. *Id.* In recent years, 1,500 laws were passed to confer rights to victims. *Id.*; see also MARGARET O. HYDE, *THE RIGHTS OF THE VICTIM* 64 (1983). In 1981, all 50 states designated April 20-26 as National Victims' Rights Week. *Id.* The National District Attorneys' Association has proposed the following as a "bill of rights" for victims: "You have the right as a crime victim or witness: To be free from intimidation; To be told about compensation available to victims for their injuries; To be told about social service agencies which can help you; To be assisted by your criminal justice agency." *Id.*; Karen L. Kennard, *The Victim's Veto: A Way to Increase Victim Impact on Criminal Case Dispositions*, 77 CAL. L. REV. 417, 417 (1989). If the victim does not participate in the criminal process, then he/she will suffer a second victimization which could cause an increase in vigilantism, failure to cooperate, and more unreported crimes due to the victim's dissatisfaction. *Id.*

⁶ See Lynne N. Henderson, *The Wrongs of Victims' Rights*, 37 STAN. L. REV. 937, 939 (1985). States have granted victims a greater role in certain aspects of the criminal trial, such as bail hearings and sentencing. *Id.* at 948-49; see also *infra* notes 35-45 and accompanying text (discussing victim's role at trial). This is a return to the historic role of the victim. Josephine Gittler, *Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems*, 11 PEPP. L. REV. 117, 125-32 (1984). In colonial America, victims of crime were considered private prosecutors: they investigated, arrested, and prosecuted. *Id.* Criminal prosecution was considered a private matter in which the government rarely partook. Betty Jane Spencer, *A Crime Victim's View on a Constitutional Amendment for Victims*, 34 WAYNE L. REV. 1, 4 (1987); see Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J. L. & PUB. POL'Y 357, 366 (1986) (discussing evolution of victims' rights); James M. Dolliver, *Victims' Rights Constitutional Amendment: A Bad Idea Whose Time Should Not Come*, 34 WAYNE L. REV. 87, 90 (1987) (discussing evolution of criminal justice system); Deborah P. Kelly, *Victims*, 34 WAYNE L. REV. 69, 83 (1987). Eventually, the victim's role in the prosecution was decreased, and the state stepped in to protect the victim to spare him/her the burdens of the prosecution. *Id.*

⁷ See *infra* notes 72-125 and accompanying text (discussing difficulties victims face in their attempt to assert rights granted under states' victims' bills of rights).

I. THE FAILURE OF STATE LAW TO PROTECT VICTIMS' RIGHTS

Historically, states have not provided crime victims with an effective role in the judicial process.⁸ Instead, the state has independently carried the burden of bringing legal proceedings to punish those who have committed crimes against its citizens.⁹ However, in response to a growing cynicism towards the criminal justice system and an increased antagonism towards criminals,¹⁰ many states in the last three decades have enacted legislation which enables victims of crime to participate in the judicial process.¹¹ Today, practically every state has enacted some form of victims' rights legislation.¹² Two types of legislative reform which attempt to

⁸ See John R. Anderson & Paul L. Woodard, *Victim and Witness Assistance: New State Laws and the System's Response*, 68 JUDICATURE 221, 223 (1985). A victim's role in the criminal justice system has always been to supply information necessary for the apprehension of the criminal. *Id.* The system has failed to provide victims with "respect equal to the importance of their roles." *Id.* The traditional criminal justice theory is that crimes are committed against society and not the individual. *Id.* at 230. Therefore, the prosecutor represents the state, not the victim. *Id.*; see also Gittler, *supra* note 6, at 121 (discussing state's usurpation of victim's power). But see Susan Hillenbrand, *Restitution and Victims' Rights in the 1980s*, in POLICIES AND PROGRAMS, *supra* note 1, at 189, 190. In colonial times, prosecution was actually the responsibility of private individuals rather than the state. *Id.* Victims were responsible for investigating the crime and prosecuting the accused. *Id.* As such, they were the beneficiaries of criminal sanctions. *Id.* Once the state assumed the role of the prosecutor the state began to be viewed as the injured party and not the victim. *Id.*; see also STEPHEN SCHAFER, VICTIMOLOGY: THE VICTIM AND HIS CRIMINAL 6 (1977) (individuals made laws and acted as both prosecutor and judge); Eikenberry, *supra* note 2, at 29-36 (discussing victim's role in colonial times).

For a brief history of the American criminal justice system, see Roger Wertheimer, *Preferring Punishment of Criminals Over Providing for Victims*, in TO BE A VICTIM: ENCOUNTERS WITH CRIME AND INJUSTICE 409, 409-21 (Diane Sank & David I. Caplan eds., 1991) [hereinafter TO BE A VICTIM].

⁹ See Deborah P. Kelly, *Victim Participation in the Criminal Justice System* in POLICIES AND PROGRAMS, *supra* note 1, at 172, 173 [hereinafter Kelly, *Victim Participation*]. The author notes that "[t]he judicial branch appeared resistant to provide victims with a role in the process because prosecutors, defense attorneys, and judges operated as a 'work group' sharing mutual goals. *Id.* at 173. It was thought that introducing a fourth party (the victim) into decision making would upset judicial efficiency and slow down an already overcrowded docket." *Id.*

¹⁰ See ROBERT REIFF, THE INVISIBLE VICTIM: THE CRIMINAL JUSTICE SYSTEM'S FORGOTTEN RESPONSIBILITY xi-xiii (1979). Prior to the enactment of victims' rights legislation there was a growing anger toward the criminal justice system. *Id.* at 111. People felt that "[t]he scales of justice [were] unbalanced, heavily weighted on the side of the offender." *Id.*; see also Kelly, *Victim Participation*, *supra* note 9, at 172-73 (many feel that victims' rights movement began as early as late 1960s, when feminists mobilized to increase public awareness of callous treatment which rape victims were subjected to by criminal justice system). For a complete discussion of the evolution of the victims' movement, see Gilbert Geis, *Crime Victims: Practices and Prospects*, in POLICIES AND PROGRAMS, *supra* note 1, at 251, 258.

¹¹ See *infra* notes 32-36 and accompanying text (listing states which have enacted constitutional amendments enabling victims to participate in criminal justice process).

¹² See Anderson & Woodward, *supra* note 8, at 223-27 (state legislatures have actively

broaden the rights of victims of crime are financial assistance programs¹³ and victims' bills of rights.¹⁴

A. *Financial Assistance Programs*

The two dominant types of financial assistance programs are restitution programs and compensation programs.¹⁵ The basic concept of restitution is that an offender should pay money to his victim through private funds, prison wages, or salary earned while on parole.¹⁶ Compensation, on the other hand, is when the state provides funds to victims in need.¹⁷

In 1986, the President's Task Force on Crime reported that twenty-nine states mandated restitution as a part of sentencing.¹⁸

responded to victims' needs); *see also* NATIONAL ORGANIZATION FOR VICTIMS' ASSISTANCE, VICTIMS' RIGHTS AND SERVICES, A LEGISLATIVE DIRECTORY, 1988/1989, at 6-8 [hereinafter NOVA DIRECTORY] (noting legislatures' active response to victims' needs).

¹³ *See e.g.*, FLA. STAT. ANN. §960.05 (West Supp. 1993) (establishing Crime Victims' Service Office to provide financial aid to victims of crime); KAN. STAT. ANN. § 74-7305 (1991) (explaining procedure and qualifications for victim compensation claims); MONT. CODE ANN. §§ 53-9-109 to -133 (1991) (same); *see also infra* notes 30-39 and accompanying text (discussing aid to victims).

¹⁴ *See, e.g.*, CAL. CONST. art I, § 28(b) (creating victims' bill of rights); DEL. CODE ANN. tit. 11 §§ 9401-07 (Supp. 1992) (same); MICH. CONST. art. I, § 24 (same); *see also* Patrick B. Calcutt, *The Victims' Rights Act of 1988, the Florida Constitution and the New Struggle for Victims' Rights*, 16 FLA. ST. U. L. REV. 811, 812 (1988) (suggesting two major categories of victims' rights legislation); *infra* notes 15-29 and accompanying text (discussing victims' bills of rights).

¹⁵ *See* Hillenbrand, *supra* note 8, at 190 (noting other methods through which victims try to obtain financial assistance such as civil suits and private insurance); *see also* Calcutt, *supra* note 14, at 813-14 (in addition to compensation and restitution, many jurisdictions have enacted "Son of Sam" laws which require that money earned by offenders for retelling of their crimes be used to compensate victims of those crimes). *But see* Simon & Schuster, Inc. v. New York State Crime Victims Bd., 112 S. Ct. 501, 509 (1991) (overturning New York's "Son of Sam" laws on constitutional grounds).

¹⁶ *See* Thomas C. Castellano, *Assessing Restitution's Impact on Recidivism: A Review of the Evaluative Research*, in CRITICAL ISSUES, *supra* note 3, at 233, 235. The author notes that restitution is "one of the few concepts in any justice system that receives almost universal support." *Id.*; *see also* Lesley J. Friedsam, *Legislative Assistance to Victims of Crime: The Florida Crime Compensation Act*, 11 FLA. ST. U. L. REV. 859, 866 (1984) ("the appeal of restitution is that the punishment fits the crime"); Hillenbrand, *supra* note 8, at 195. "There are four types of restitution programs today: victims assistance programs, victim/offender reconciliation programs, restitution employment programs, and restitution as a function of routine probation supervision." *Id.*

¹⁷ *See* Rodolphe J. A. de Seife, *Victim Compensation: The Joint Responsibility of the Criminal and Society—A Social Contract Approach*, in TO BE A VICTIM, *supra* note 8, at 436, 438. Victims' compensation programs are based on a 'social contract' theory. *Id.* Society has a contract with each of its members and each of its members has a contract with one another. *Id.* When a criminal violates an individual, then society has breached its duty to that person by not preventing the crime. *Id.*

¹⁸ *See* 1986 TASK FORCE, *supra* note 3, at 4. Since 1982, the number of states which mandate restitution to victims as part of sentencing had increased from 8 to 29 states. *Id.*

In jurisdictions where restitution orders are commonplace, courts exercise a tremendous discretion in determining the amount of the awards.¹⁹ In recent years, victims have received favorable treatment from both federal and state courts deciding restitution issues.²⁰ However, these courts have pointedly noted that the purpose of restitution is to punish the offender and not to aid the victim.²¹ Nonetheless, those states which have enacted statutes making restitution mandatory,²² ensure that victims will receive restitution regardless of the underlying motives of the courts.²³

In 1965, California became the first state to adopt a victim compensation program.²⁴ Today, compensation programs have swept across the United States, and practically every state maintains

¹⁹ See Robert C. Davis et al., *Increasing Offender Compliance With Restitution Orders*, 74 JUDICATURE 245, 245 (1991) (suggesting that one reason for shift to restitution is society's disillusionment with criminal justice system and perceived notion that restitution offers greater "justice").

²⁰ See, e.g., *Kelly v. Robinson*, 479 U.S. 36, 36-37 (1986) (state restitution orders are not "debts" but criminal penalties under Chapter 7 of Bankruptcy Code); *United States v. Woods*, 775 F.2d 82, 83 (3d Cir. 1985) (allowing restitution as condition of probation to exceed amounts in counts charged); see also *Hillenbrand*, *supra* note 8, at 197. In general, the 1980s was a decade of favorable trial court decisions as well as some significant appellate court decisions regarding restitution orders. *Id.* But see *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 553 (1990) (restitution obligations are "debts" subject to discharge under Chapter 13 of Bankruptcy Code).

²¹ See *Hillenbrand*, *supra* note 8, at 195. "While . . . restitution programs imply a goal of recovering victims' monetary losses[,] this is clearly an ancillary goal of most restitution programs." *Id.*; see also *Frederick County Fruit Growers Ass'n v. Martin*, 968 F.2d 1265, 1272 (D.C. Cir. 1992). In *Frederick County*, the court specifically rejected the idea that the purpose of restitution was to restore a victim to the position he formerly occupied. *Id.*; *Griggs v. Bertram*, 466 A.2d 104, 111 (N.J. 1982). "[T]he purpose of restitution or reparation, in the setting of parole is not to make the aggrieved person whole but to assure rehabilitation of the offender and to prevent the recurrence of future criminal conduct." *Id.*; *Commonwealth v. Erb*, 428 A.2d 574, 580-81 (Pa. Super. Ct. 1981). The *Erb* court stated: [A]n order of restitution is not an award of damages. While the order aids the victim, its true purpose, and the reason for its imposition, is the rehabilitative goal it serves by impressing upon the offender the loss he has caused and his responsibility to repair that loss as far as it is possible to do so.

Id. at 581.

²² See, e.g., ALA. CODE § 15-18-71 (Supp. 1992) (ability of court to make restitution condition of parole); ARIZ. REV. STAT. ANN. § 13-603(c) (Supp. 1992) (requiring convicted person to make restitution to victim or to immediate family of victim if victim died); COLO. REV. STAT. § 16-11-204.5 (Supp. 1992) (making restitution condition of probation).

²³ See, e.g., *State v. Barr*, 658 P.2d 1247, 1249 (Wash. 1983). "Though partial compensation may be a concomitant result of restitution, it is not the primary purpose of such an order." *Id.* at 1250; see also *supra* note 21 and accompanying text (discussing motives of courts in awarding restitution).

²⁴ CAL. GOV'T CODE § 13959 (Deering Supp. 1993); see also *Henderson*, *supra* note 6, at 1017 (noting that California's compensation program was "the product of liberal social welfare ideology").

some form of state-funded victim compensation program.²⁵ Many of these programs require a claimant to meet various eligibility requirements.²⁶ In the majority of states, claimants must show financial need to receive a compensation award.²⁷ Additionally, some programs provide for awards to the next of kin if the victim dies as a result of the crime.²⁸ Typical compensation programs however, do not actually redress the wrongs that victims endure because they exclude recovery for pain and suffering.²⁹

B. Victims' Bill of Rights

In response to the demand from victims who wanted a substantive role in the criminal justice system,³⁰ several states enacted a

²⁵ See, e.g., CONN. GEN. STAT. § 54-209-211 (1993) (noting broad victims' compensation rights); FLA. STAT. ANN. § 960.01-13 (West Supp. 1993) (granting government-sponsored financial assistance to victims of crime); MONT. CODE ANN. §§ 53-9-109 to -133 (1991) (same); see also Anderson & Woodard, *supra* note 8, at 223-27 (noting widespread enactment of victim compensation programs); Marlene A. Young, *Survivors of Crime, in TO BE A VICTIM, ENCOUNTERS WITH CRIME* *supra* note 8, at 27, 32 (Maine is only state that does not provide compensation for victims of crime).

²⁶ See, e.g., HAW. REV. STAT. § 351-31 (Supp. 1992) (listing eligibility requirements for compensation rewards); LA. REV. STAT. ANN. § 46:1809 (West 1990) (granting authority to deny or reduce awards of claimants who do not meet eligibility requirements); MONT. REV. STAT. ANN. § 53-9-125 (1991) (listing limitations on compensation awards); NEV. REV. STAT. § 217.220 (1992) (prohibiting compensation under specific circumstances); see also Anderson & Woodard, *supra* note 8, at 223-27 (noting barriers which often prevent victims from receiving compensation); Gilbert Geis, *Crime Victims and Victims' Compensation Programs, in CRIMINAL JUSTICE AND THE VICTIM* 237, 252-55 (William F. McDonald ed., 1976). Unlike restitution, the focus of compensation is clearly on the victim. *Id.* at 252.

²⁷ See, e.g., OKLA. STAT. ANN. tit. 21 § 142.12 (West 1983) (denying compensation where money is received from collateral source); VT. STAT. ANN. tit. 13 § 5326 (Supp. 1992) (requiring claimant to show financial need); see also Calcutt, *supra* note 14, at 812 (discussing problems associated with proving financial need).

²⁸ CAL GOV'T CODE § 13959 (allowing compensation for next of kin if victims dies as a result of crime); IND. CODE ANN. § 12-18-6-12(b) (Burns 1992) (same); see also State v. Barr, 658 P.2d 1247, 1248 (Wash. 1983). In *Barr*, the defendant was forced to pay restitution to the widow of the deceased who was killed because the defendant was driving while intoxicated. *Id.* The court asserted that "Barr's criminal act had consequences above and beyond the death of one man." *Id.*

²⁹ See, e.g., NEB. REV. STAT. § 81-1815-17 (Supp. 1992) (compensation available for actual injury or death but not pain and suffering); MASS. GEN. LAWS ANN. ch. 258A § 1 (West 1992) (same); N.C. GEN. STAT. § 15 B-1-25 (1990) (same); see also Gurley v. Commonwealth, 296 N.E. 2d 477, 480 (Mass. 1973) (noting overall pattern established by legislature to limit and restrict amount of compensation paid as evidenced by statute's exclusion of damages for pain and suffering).

Many victims' service agencies, however, are aided by organizations such as the National Organization for Victims' Assistance (NOVA). See 1986 TASK FORCE, *supra* note 3, at 5. NOVA attempts to aid victims by insuring that they receive aid for necessary services so that they may cope with their pain and suffering. See NOVA DIRECTORY, *supra* note 12, at 8; see also HYDE, *supra* note 5, at 60 (discussing funding services).

³⁰ See MORTON BARD & DAWN SANGREY, *THE CRIME VICTIM'S BOOK* 104 (1962) (many

victims' bill of rights.³¹ The first victims' bill of rights was enacted in Wisconsin in 1980.³² Today, California,³³ Florida,³⁴ Michigan,³⁵ and Rhode Island³⁶ are considered to have the most progressive victims' bills of rights.³⁷ Most victims' bill of rights focus on strengthening the victim's role in courtroom attendance, the plea-bargaining process, and the sentencing process.³⁸ Other common provisions in victims' bill of rights include: requiring that a victim be notified of crucial developments of the case; preventing defendants from profiting from the sales of their stories about their crime; and permitting victims to have a voice in key prosecutorial decisions.³⁹

1. Increasing Courtroom Participation

The defendant's right to remain in the courtroom is guaranteed by the Sixth Amendment to the United States Constitution.⁴⁰ Crime victims, however, do not always have this right.⁴¹ The Fed-

victims feel they deserve an active role in criminal justice system); *see also* Deborah P. Kelly, *Delivering Legal Services to Victims: An Evaluation and Prescription*, 9 JUST. SYS. J. 62, 73 (1984). A survey of 100 rape victims examined their experiences within the criminal justice system. *Id.* A primary concern of these victims was their limited role in the process. *Id.* 59 of the victims felt that they were unjustly denied participation in the handling of their case. *Id.*

³¹ *See, e.g.*, N.J. STAT. ANN. §§ 52:4B-34 to -36 (West Supp. 1993) (declaring that victims deserve greater protection); OR. REV. STAT. §§ 147.405 to .410 (1991) (victims' rights should be protected at all stages of criminal proceedings); TENN. CODE ANN. §§ 40-38-101 to -107 (1990) (same); *see also* EDUARD A. ZIEGENHAGEN, VICTIMS, CRIME AND SOCIAL CONTROL 100 (1977) (some bills are designed to allow victims to participate as judicial consultant).

³² WISC. STAT. ANN. § 950.04 (West Supp. 1992).

³³ CAL. CONST. art. I, § 28(b).

³⁴ FLA. CONST. art. I, § 16(b).

³⁵ MICH. CONST. art. I, § 24.

³⁶ R.I. CONST. art. I, § 23.

³⁷ Calcutt, *supra* note 14, at 812-14 (discussing advent of victims' bills of rights).

³⁸ *See* Anderson & Woodard, *supra* note 8, at 223-27 (discussing focus of various states' victims' bills of rights).

³⁹ *See, e.g.*, DEL. CODE ANN. tit. 11 § 9406 (Supp. 1992) (granting victims right to consult with prosecution concerning their views on dismissal, plea negotiations, and diversion programs); ARIZ. CONST. art. II, § 2.1 (4) (granting victims right to be informed of all criminal proceedings); CONN. GEN. STAT. § 54-218 (1993) (requiring profits derived as a result of crime to go to victim or escrow fund in the name of victim compensation programs). *See generally* Eikenberry, *supra* note 2, at 38-47 (detailing various aspects of victims' bills of rights in different states).

⁴⁰ *See* U.S. CONST. amend. VI. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him" *Id.*

⁴¹ *See* Eikenberry, *supra* note 2, at 41. Victims are often excluded from the courtroom for technical reasons. *Id.* "[I]f a victim or a survivor is called to testify, he may be excluded from the courtroom prior to testifying." *Id.* This often prevents victims from attending

eral Rules of Evidence provide that "[a]t the request of a party the court shall order a witness excluded so that they cannot hear the testimony of other witnesses."⁴² This permits the criminal defendant to exclude any witness, including the victim, from the trial as a matter of right.⁴³ The federal rule of sequestration is utilized in most jurisdictions subject to limited exceptions.⁴⁴ Therefore, victims are often forced to wait outside while the trial is in progress.⁴⁵ Many victims consider it a grave injustice that they are forced to wait in the corridor while the defendant and his family are permitted to remain in the courtroom.⁴⁶ In 1982, the President's Task Force on Victims of Crime recommended that "the victim, in every criminal prosecution [should] have the right to be present at all critical stages of the judicial proceedings."⁴⁷ Alabama was the first state to act on this recommendation by enacting laws which gave victims a plethora of participation rights, including the opportunity to attend all motion hearings, and the right to sit at the prosecutor's table during the trial.⁴⁸ Today, a few progressive states have provided victims of crime with a conditional right to be present in the courtroom after they have testified, subject to the court's discretion.⁴⁹ Furthermore, the Organi-

trials. *Id.*

⁴² FED. R. EVID. 615.

⁴³ JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 1389, at 352-59. Sequestration must be the right of the defendant. *Id.* at 358. To require the defendant to show probable need undermines the purpose of the rule. *Id.*

⁴⁴ FED. R. EVID. 615. An exception is made for "an officer or employee of a party which is not a natural person designated as its representative by its attorney." *Id.* Under this exception a police officer who has conducted an investigation in the case may remain in the courtroom even though he may also be a witness. *Id.*; see *Portomene v. United States*, 221 F.2d 582, 582 (5th Cir. 1955). The *Portomene* court held that excusing a narcotics agent who was also a witness, from the rule of sequestration, and permitting him to hear testimony of other witnesses before he took the stand, was within the discretion of the court. *Id.*

⁴⁵ See Kelly, *Victim Participation*, *supra* note 9, at 180 (noting humiliation of victims who wait in courtroom corridors while criminal defendants attend trial). In addition, if victims are never informed of the trial date they are, in effect, being denied access to the courtroom. See Eikenberry, *supra* note 2, at 41.

⁴⁶ See Spencer, *supra* note 6, at 1 (discussing victim's frustration as result of being kept out of courtroom). But see DEL. CODE ANN. tit. 11 § 9407 (Supp. 1992) (court will provide a waiting room for victim which is separate from defendant to make experience more tolerable).

⁴⁷ 1982 TASK FORCE, *supra* note 3, at 10. A victim's presence at trial would create a sense of fairness in the criminal process. *Id.*

⁴⁸ ALA. CODE §§ 15-14-5 to -49 (Supp. 1992).

⁴⁹ ARIZ. CONST. art. II, § 2.1(4) (granting victims right to be present at all criminal proceedings where defendant has right to be present); FLA. CONST. art. I, § 16(b) (providing victims with right "to be present . . . at all crucial stages of criminal proceedings, to the

zation for a Victims' Constitutional Amendment Network ("VCAN") is working to expand this right throughout the country.⁵⁰

2. Victims' Role in Plea Bargaining

Similarly, the victim's role in the plea-bargaining process has increased in recent years.⁵¹ Prior to 1970, victims' participation in the plea-bargaining process was rarely considered.⁵² In 1987, the Supreme Court ruled that if a criminal defendant posed a specific realistic threat to the safety of a victim, it was within the court's discretion to preclude that defendant from plea bargaining with the prosecutor.⁵³ Several states now allow victims to speak to the prosecutor and address the court on their own behalf during plea bargaining.⁵⁴ In Nebraska, prosecutors are required to consult with victims concerning negotiations if the victim is available.⁵⁵ California prohibits the defense from plea bargaining at all in certain situations.⁵⁶ No state, however, gives victims a veto power

extent that these rights do not interfere with the constitutional rights of the accused."); see also Kelly, *Victim Participation*, *supra* note 9, at 180 (noting these and other progressive reforms). But see James Hagan, *Victims Before the Law: A Study of Victim Involvement in the Criminal Process*, 73 J. CRIM. L. & CRIMINOLOGY 317, 317 (1982) (suggesting that victims are more interested in information about their cases than actual participation).

⁵⁰ See Kelly, *Victim Participation*, *supra* note 9, at 180-81 (noting that VCAN's goal is to have victims present and heard at all stages of criminal trials).

⁵¹ See, e.g., DEL. CODE ANN. tit. 11 § 9406 (Supp. 1992) (granting victims right to consult with prosecution concerning plea negotiations); TENN. CODE ANN. § 40-38-103(2) (1990) (same); see also Eikenberry, *supra* note 2, at 39. The victim has a vital role in participating in a criminal defendant's plea bargain. *Id.* The offender is more likely to be dangerous to the victim than to the community at large. *Id.* at 39-40.

⁵² See Kelly, *Victim Participation*, *supra* note 9, at 176 (commenting on recent changes in plea-bargaining process).

⁵³ *United States v. Salerno*, 481 U.S. 739, 751 (1987). In *Salerno*, Chief Justice Rehnquist asserted that "when the government proves by clear and convincing evidence that an arrestee presents an identified . . . threat to an individual . . . we believe that, consistent with the Due Process Clause, a court may disable the arrestee from executing that threat." *Id.*

⁵⁴ See, e.g., NEB. REV. STAT. § 81-1848(1)(f) (1989) (granting victims of crime the right to ". . . testify before the Board of Parole or submit a written statement for consideration by the board . . ."); R.I. CONST. art. I, § 23. "Before sentencing a victim shall have the right to address the court regarding the impact which the perpetrator's conduct has had upon the victim." *Id.*; W. VA. CODE § 61-11A-3 (1992) (specifically authorizing victim impact statements); see also Sarah Welling, *Victim Participation in Plea Bargains*, 65 WASH. U. L. Q. 340-43 (1987) (states which allow victims to speak during plea bargaining include Indiana, Minnesota, Nebraska, Rhode Island, South Carolina, and West Virginia).

⁵⁵ NEB. REV. STAT. § 29-120 (1989).

⁵⁶ CAL. PENAL CODE § 1192.7(a) (Deering Supp. 1993).

Plea bargaining in any case in which the indictment of information charges any serious felony in which it is alleged that a firearm was personally used by the defendant,

over plea bargains.⁵⁷

3. Sentencing

The victim's function at sentencing has been radically increased by recent legislation.⁵⁸ Prior to the current legislative reform, victims were routinely excluded from sentencing deliberations.⁵⁹ Today, victims' participation in sentencing has been widely endorsed,⁶⁰ and many states currently allow victims to be involved in sentencing proceedings in some capacity.⁶¹ Several courts have ruled that victim impact statements may be considered prior to sentencing.⁶² Recently, in Minnesota, a trial judge allowed a sixty-five-year-old rape victim to choose her assailant's sentence.⁶³ This decision represents the extreme of victim participation in the judicial process.

or any offense of driving while under the influence of alcohol, drugs, narcotics, or any other intoxicating substance, or any combination thereof, is prohibited.

Id.

⁵⁷ See ZIEGENHAGEN, *supra* note 31, at 101 (victims must offer valid reasons to prosecutors in order to prevent them from plea bargaining); see also Kelly, *Victim Participation*, *supra* note 9, at 177 (discussing extent to which victims are permitted to participate in plea bargaining).

⁵⁸ See, e.g., N.J. STAT. ANN. § 52:4B-44 (West Supp. 1993) (granting victim right to consult with prosecutor concerning sentencing); W. VA. CODE § 61-11A-2 (1992) (permitting victim to testify at sentencing hearing); see also Kelly, *Victim Participation*, *supra* note 9, at 178 (discussing recent legislative changes in crime victims' rights to participate in sentencing phase of trial).

⁵⁹ Kelly, *Victim Participation*, *supra* note 9, at 179 (discussing history of victim's role at trial); see also Spencer, *supra* note 6, at 4 (showing instance of victim being excluded from sentencing).

⁶⁰ Kelly, *Victim Participation*, *supra* note 9, at 179 (victims' involvement in sentencing is "endorsed by the American Bar Association, The National Judicial College and the President's Task Force on Crime").

⁶¹ See CAL. CONST. art. I, § 28(b) (California's Victims' Bill of Rights). The California Constitution allows victims to "attend all sentencing proceedings . . . [and] to reasonably express his or her views concerning the crime, the person responsible, and the need for restitution." *Id.*; see also Maureen McLeod, *An Examination of the Victim's Role At Sentencing: Results of a Survey of Probation Administrators*, 71 JUDICATURE 162, 168 (1987) (noting possible influence of victim impact statements on judicial process); *supra* note 58 and accompanying text (discussing state statutes allowing victim participation in sentencing phase of trial).

⁶² See, e.g., *Sandvik v. State*, 564 P.2d 20, 20 (Alaska 1977) (holding that impact of crime on victim is relevant circumstance surrounding crime); *Lodowski v. State*, 490 A.2d 1228, 1254 (Md. 1982), *vacated on other grounds*, 475 U.S. 1078 (1986). "We believe that there is a reasonable nexus between the impact of the offense on the victim or the victim's family and the facts and circumstances surrounding the crime especially as to the gravity or aggravating quality of the offense." *Id.*

⁶³ See Martha Middleton, *Victims of Crime Flexing Muscles; Bigger Role Wanted*, NAT'L L.J., Mar. 13, 1989, at 1. Judge William S. Posten noted that his decision was in response to victims telling him they felt that they were "just statistics." *Id.*

II. THE PROBLEMS WITH VICTIMS' RIGHTS LEGISLATION

Although the expanded legislation in this area may seem impressive, oftentimes these measures have little practical significance.⁶⁴ While statutory changes may be a prerequisite to substantive reform, the true test remains whether these reforms will provide victims of crime with greater rights.⁶⁵ This section will concentrate on the problems that victims face in trying to assert their new-found rights.⁶⁶

A. Problems With Restitution and Compensation

There are major weaknesses in the various restitution and compensation programs in the United States.⁶⁷ Many state's financial assistance programs contain a clause requiring a minimum monetary loss before a victim can receive the benefits of the program.⁶⁸ The purpose of minimum loss provisions is to reduce administrative costs by reducing the amount of small claims.⁶⁹ Furthermore, some programs require victims to demonstrate financial need before they can claim the benefit of a financial assistance program.⁷⁰ Moreover, many programs will deny a claim if the victim has contributed, in any way, to their own injuries.⁷¹

⁶⁴ See Kelly, *Victim Participation*, *supra* note 9, at 181. "While . . . developments may create the impression that victims' rights are omnipresent in most criminal courts, merely counting the number of statutes is misleading." *Id.*; see also Eikenberry, *supra* note 2, at 45. "The lack of an enforcement mechanism is the major shortcoming of the current and federal state statutes outlining victims' rights." *Id.*

⁶⁵ See, e.g., Calcutt, *supra* note 14, at 823 (commenting on whether Florida's Victims' Bill of Rights actually provides "rights" for crime victims).

⁶⁶ See *infra* notes 67-76 (discussing ineffectiveness of state legislation); see also *infra* notes 109-31 and accompanying text (discussing ineffectiveness of current federal legislation).

⁶⁷ See Calcutt, *supra* note 14, at 813-16 (outlining major shortcomings of financial assistance programs).

⁶⁸ See, e.g., CONN. GEN. STAT. ANN. § 54-211(c) (West Supp. 1993) (no compensation awarded for first \$100 of injury sustained); D.C. CODE ANN. § 3-402(a)(4) (Supp. 1992) (claimant must suffer economic loss in amount greater than \$100 in order to recover).

⁶⁹ See Calcutt, *supra* note 14, at 833-34 (describing economic problems associated with state funded victim compensation).

⁷⁰ See, e.g., D.C. CODE ANN. § 3-403(c)(1) (Supp. 1992) (claimant must show financial hardship to receive compensation); MICH. COMP. LAWS ANN. § 18.361(5) (West Supp. 1992) (victim must show financial hardship as a result of crime in order to receive compensation).

⁷¹ See, e.g., ALA. CODE § 15-23-12(a)(2) (Supp. 1992) (rationale behind statute is that a victim who is in any sense responsible for the crime should not benefit more than victims who are completely blameless); LA. REV. STAT. ANN. § 46:1809 B(4)(a) (West 1990) (same); Calcutt, *supra* note 14, at 825. For example, in Florida, when a husband abuses a wife for a period of years, and the wife kills the husband in desperation, neither the wife nor the husband's estate can receive compensation awards. *Id.*; see also FLA. STAT. ANN. § 960.04(2) (Supp. 1993) (denying eligibility to any person who aided in commission of crime upon

The most significant problems with these programs are due to the failures of society and not the failures of the programs themselves.⁷² For example, under many restitution programs the alleged law-breaker must be convicted in order for the victims to receive compensation.⁷³ However, statistics show that nationwide less than one-half of all violent crimes and only one-quarter of robberies result in an arrest.⁷⁴ In addition, even when convictions occur judges have a difficult time forcing criminals to pay restitution.⁷⁵ Finally, victims attempting to obtain compensation may find that their statutory rights are narrowed by the state's incapacity to disburse a sum which would make the victim whole.⁷⁶

B. *The Constitutional Problem—Rights Without Remedies*

Although the victims' bill of rights has provided the means by which victims can participate in the criminal justice system, states have not provided remedies for victims whose rights are violated.⁷⁷ For example, Michigan's Victims' Bill of Rights specifically states that "[n]othing in this article shall be construed as creating a cause of action for money damages against the state, a county, a

which claim is based).

⁷² See, e.g., *State v. Ivie*, 590 P.2d 740, 740-41 (Or. 1979) (in pronouncing sentence trial court concluded that unverified amount claimed by victim in restitution may have been somewhat inflated); see also Gilbert Geis, *Restitution By Criminal Offenders: A Summary and Overview*, in *RESTITUTION IN CRIMINAL JUSTICE* 147, 153 (Joe Hudson & Burt Galaway eds., 1977) ("[V]ictims may inflate their claims against offenders, just as they do against insurance companies . . ."); Lorraine Slavin & David J. Sorin, *Congress Opens a Pandora's Box—The Restitution Provision of the Victim and Witness Protection Act of 1982*, 52 *FORDHAM L. REV.* 507, 551 (1984) (suggesting that victims who are not required to verify losses may be tempted to inflate claim).

⁷³ See, e.g., ALASKA STAT. § 12.55.100(a)(2) (1990) (conviction-only limitation in state restitution statute); FLA. STAT. ANN. § 947.181 (West Supp. 1993) (same); see also Calcutt, *supra* note 14, at 824 (noting various restrictions). But see Slavin & Sorin, *supra* note 72, at 510 n.23. "An order of restitution based on the criminal transactions charged could extend beyond the conviction and encompass harm resulting from crimes which were charged but for which no conviction was obtained." *Id.*

⁷⁴ See FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, *UNIFORM CRIME REPORTS FOR THE U.S. 1985*, at 154-55 (1986).

⁷⁵ See Davis, *supra* note 19, at 245-46 (noting that statistics show only 42% of offenders pay in full); see also Calcutt, *supra* note 14, at 824. Although some restitution schemes provide a portion of the criminal's prison wages, these funds are rarely enough to provide for the offender's family, let alone restitution. *Id.*

⁷⁶ See David Abrahamson, *Redefining Roles: The Victims' Rights Movement*, 1985 *UTAH L. REV.* 517, 547 n.121 (commenting that now that victims have gained place in system, they must compete for system's extremely limited resources).

⁷⁷ See Kilpatrick & Otto, *supra* note 3, at 19. "[V]ictim perceptions of helplessness and lack of control are maximized by raising the expectation that a right to participate exists, the victim electing to exercise that right, and then being denied that right." *Id.*

municipality or any of their agencies, or instrumentalities, or employees."⁷⁸ Therefore, if a victim is denied any of the "rights" they have been granted under Michigan's Victims' Bill of Rights, he or she has absolutely no redress.⁷⁹ It is entirely permissible for judges, prosecutors, and district attorneys to ignore the statutory rights which victims have been granted.⁸⁰ Consequently, victims will continue to lack true legal rights until they are given a method of enforcement.⁸¹

Similarly, it has been held that a violation of California's Victims' Bill of Rights does not give rise to a federal cause of action.⁸² In *Dix v. County of Shasta*,⁸³ William Edward Dix, a victim of an attempted homicide, brought an action against the judge and the probation department for violating his rights as granted by Article I, Section 28 of the California Constitution, commonly referred to as California's Victims' Bill of Rights.⁸⁴ Dix had not been notified about the sentencing, plea bargaining, and release of the man who had shot him.⁸⁵ The court found that California's Victims' Bill of Rights required the probation department to notify Dix of all sentencing proceedings, including the offender's release.⁸⁶ Furthermore, the court determined that the Bill imposed an obligation on prosecutors not to plea bargain with the accused criminal.⁸⁷

Despite these obligations, the judge and the probation depart-

⁷⁸ See *id.* at 17 (noting that several states provide this type of disclaimer in their victims' bill of rights).

⁷⁹ See *id.* (noting that disclaimers render victims' bill of rights useless).

⁸⁰ See *supra* notes 71-74 and accompanying text (discussing disclaimers in victims' bill of rights and psychological effect this has on crime victims).

⁸¹ See Kilpatrick & Otto, *supra* note 3, at 27 (noting inability of victims to enforce rights); see also *infra* notes 91-101 and accompanying text (discussing problems with enforcing victims' rights).

⁸² See *Dix v. County of Shasta*, 963 F.2d 1296, 1301 (9th Cir. 1992) (holding that victims' bill of rights does not give crime victims a liberty or property interest enforceable under the Due Process Clause).

⁸³ *Id.* (arguing that violation of California's Victims' Bill of Rights would give rise to a cause of action).

⁸⁴ *Id.* at 1297; see also *Brosnahan v. Brown*, 651 P.2d. 274, 277 (Cal. 1982). California's Victims' Bill of Rights was enacted by referendum in 1982. *Id.* It was said to have "accomplished several changes in the criminal justice system in [California] for the purpose of protecting or promoting the rights of victims of crime." *Id.* Its constitutional validity was challenged shortly after its enactment. *Id.*

⁸⁵ See *Dix*, 963 F.2d at 1298.

⁸⁶ See *id.* (noting that California Penal Code obligated prosecutors to refrain from plea bargaining, notify victim of sentencing proceedings, and take victim's statement into account when sentencing).

⁸⁷ *Id.* (discussing violations of Victims' Bill of Rights).

ment completely ignored Dix's statutory rights.⁸⁸ When Dix tried to bring an action against the county for this violation the Ninth Circuit held that Dix did not have a federal cause of action.⁸⁹

The court held that the language of California's Victims' Bill of Rights did not provide victims of crime with a constitutionally cognizable liberty or property interest.⁹⁰ The court explained that a state does not create a liberty interest unless the law has "substantive predicates" and uses "explicitly mandatory language."⁹¹ The court found that California's Victims' Bill of Rights did not contain "substantive predicates," but rather focused on the procedural aspects of victims' involvement in the criminal justice system.⁹² Additionally, the bill did not contain the requisite mandatory language as it only provided what judges "may" do and not what they "must" do.⁹³ For example, section 1191.1 of the Bill provides victims with the right to "receive notice and appear at all sentencing proceedings of the person who committed the crime."⁹⁴ This does not create a liberty interest for victims because it is only a procedural right and not a substantive right.⁹⁵

⁸⁸ See *id.* "Despite these crystal-clear commands, prosecutors persuaded Judge Brown to diminish Bradley's [the offender's] sentence in exchange for his cooperation. . . ." *Id.*

⁸⁹ See *id.* at 1300 (no cause of action lies under protections of due process for violation of victims' bill of rights); see also *supra* note 64 and accompanying text (discussing victim's inability to enforce rights).

⁹⁰ See *Dix*, 963 F.2d at 1299 (although state may choose certain procedures, that alone does not create substantive rights).

⁹¹ *Id.* (citing *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 463 (1989)); see, e.g., *Smallwood-El v. Coughlin*, 589 F. Supp. 692, 697 (S.D.N.Y. 1984). "[T]he repeated use of explicitly mandatory language in connection with requiring specific substantive predicates . . . demands a conclusion that the state has created a protected liberty interest." *Id.*; *Hewitt v. Helms*, 459 U.S. 460, 471-72 (1983) (noting that a liberty interest is only created where "the Commonwealth has . . . used language of unmistakably mandatory character requiring that certain procedures, 'shall,' 'will,' or 'must' be employed").

⁹² See *Dix*, 963 F.2d at 1299. "[T]he state law must contain 'explicit mandatory language' specifying the outcome that must be reached upon a finding that the substantive predicates have been met." *Id.* (quoting *Thompson*, 490 U.S. at 463). The court further concluded that California's Victims' Bill of Rights did not contain the requisite substantive predicates. *Id.* Thus, the procedure dictated by the bill of rights did not create substantive rights. *Id.*

⁹³ See *id.* at 1299 (describing why words of statute are directory and not mandatory).

⁹⁴ See CAL. PENAL CODE § 1191.1 (Deering 1993). The statute provides:

The victim of any crime, or his or her parent or guardian if the victim is a minor, or next of kin if the victim has died, has the right to attend all sentencing proceedings under this chapter and shall be given adequate notice by the probation officer of all sentencing proceedings concerning the person who committed the crime.

Id.

⁹⁵ See *Dix*, 963 F.2d at 1300 (provision of bill which requires notification of victim is not mandatory).

Furthermore, "the state law provides only that victims have a right to be present, it does not specify how that presence must effect the sentencing proceedings."⁹⁶ Therefore, the deprivation of a victim's rights under Article I, Section 28 of the California Constitution was not a deprivation of life, liberty, or property and thus there was no federal cause of action for the denial of such a right.⁹⁷ The California's Victim's Bill of Rights is an example of poor drafting. Had the legislators simply added words which amounted to "substantive predicates" victims would have a federal cause of action if their rights were violated. An amendment to California's Victim's Bill of Rights is necessary to give victims of crime the rights that the statute was intended to convey.

While California's Victims' Bill of Rights is considered one of the most comprehensive of its kind, even this far-reaching bill is meaningless without some method of enforcement.⁹⁸ A victim whose rights are violated has no redress against those who deny or ignore these rights.⁹⁹ Although sweeping reforms have been provided for victims on paper, it is worthwhile to question whether they have actually been given any "rights" at all.¹⁰⁰ This has led one commentator to note that "victims were politically, all dressed up, but had no place to go."¹⁰¹

C. *The Impact on the Victim*

While victims have clearly gained many legislative reforms, varying from financial assistance programs to increased participation in the criminal process, many within the victims' rights movement

⁹⁶ *Id.*

⁹⁷ *See id.* at 1301. "Although Dix may have a legitimate grievance against the state officials involved in Bradley's sentencing and release, he has no federal cause of action." *Id.*

⁹⁸ *See* Calcutt, *supra* note 14, at 823. "Obviously the right to be informed, to be present, and to be heard, is meaningless without concrete guidelines for its enforcement." *Id.*

⁹⁹ *See* Richard Aynes, *Constitutional Considerations: Government Responsibility and The Right Not To Be A Victim*, 11 PEPP. L. REV. 63, 116 (1984) (suggesting that state "should be held responsible to victims, both in the form of damage for injury and through equitable relief in requiring investigation and prosecution"). *But see id.* at 103 ("[I]ndividuals are also in the best position to bring pressure upon the prosecutors office if they are dissatisfied . . . [through] publicity, political lobbying, or litigation").

¹⁰⁰ *See* Paul S. Hudson, *The Crime Victim and the Criminal Justice System: Time For A Change*, 11 PEPP. L. REV. 23, 41 (1984). The biggest barrier to victims' vindication of their rights is that most reforms do not receive constitutional protection. *Id.* When victims' rights conflict with the criminals' rights, the rights of the latter, which are guaranteed by the Constitution, will control. *Id.* at 42.

¹⁰¹ *See* Elias, *supra* note 1, at 226 (suggesting that victims who have unenforceable rights actually have no rights at all).

fear that current state law merely amounts to paper promises.¹⁰² Many fear that a victim's feeling of helplessness will be exacerbated by the impotency of state law.¹⁰³ Numerous victims report feeling victimized a second time by a system that is supposedly designed to protect them.¹⁰⁴ The inadequate state law creates the false expectation that a victim is entitled to participate in the legal process.¹⁰⁵ Victims feel angry and powerless when the exercise of their rights are denied.¹⁰⁶ State law continues to treat victims' "rights" as victims' privileges which may be granted or denied at the state's whim.¹⁰⁷ It has been noted that "[p]roviding rights without remedies would result in the worst of consequences, such as feelings of helplessness, lack of control and further victimization Ultimately, with the crime victims' best interests in mind, it is better to confer no rights at all than 'rights without remedies.'" ¹⁰⁸ If the legislature and the judiciary continue to fail in their efforts to provide for the needs of victims of crime, anger and cynicism towards the criminal justice system will continue to increase.

¹⁰² See Middleton, *supra* note 63, at 1. "[T]he victims' rights lobby . . . has become concerned that victims have now won hundreds of rights, but lack remedies to back up those rights" *Id.*

¹⁰³ See Kilpatrick & Otto, *supra* note 3, at 19 (noting psychological effect that feelings of helplessness have on person who has been victimized).

¹⁰⁴ See Wertheimer, *supra* note 8, at 412. "[T]he victim seems to be immediately forgotten and left to nurse his or her wounds while the state fixates on the pursuit, prosecution, and punishment of the criminal." *Id.*

¹⁰⁵ See Kilpatrick & Otto, *supra* note 3, at 20 (noting victims' inability to participate in criminal process).

¹⁰⁶ See Davis, *supra* note 19, at 247. A survey was conducted of 198 crime victims who had been awarded restitution. *Id.* When asked to comment on the experience, "[f]orty-eight percent said that no one had asked them about the extent of their losses before the amount of restitution was awarded." *Id.* "Less than one in three had any idea when to expect payment." *Id.* "[Only] nineteen percent felt that they had been kept well informed by officials." *Id.*

¹⁰⁷ See Marlene A. Young, *A Constitutional Amendment For Victims of Crime: The Victim's Perspective*, 34 WAYNE L. REV. 51, 64 (1987) [hereinafter Young, *Victim's Perspective*]. "[V]ictim's rights are really privileges that operate at the mercy of the police, prosecution or judge." *Id.*; see also *supra* notes 73-76 (discussing lack of enforcement of victims' rights).

¹⁰⁸ See Kilpatrick & Otto, *supra* note 3, at 27. "Society as a whole must decide whether crime victims' rights are important enough that their abrogation must be remedied." *Id.*

III. FEDERAL LEGISLATION AND THE POSSIBILITY OF A FEDERAL VICTIMS' BILL OF RIGHTS

A. *Current Federal Legislation*

Understanding the necessity to treat victims with respect and compassion, former President Reagan formed a Task Force on Victims of Crime ("Task Force") in 1982, which proposed legislation to meet the needs of victims.¹⁰⁹ Many of these proposals have either been enacted or are currently being pursued.¹¹⁰ Under the guidance of the Task Force, the federal government has moved forward in preserving the rights of victims by passing several acts¹¹¹ such as the Federal Victim and Witness Protection Act of 1982¹¹² and the Victims of Crime Act of 1984.¹¹³

The Federal Victim and Witness Protection Act was enacted to provide model legislation for the states to improve and safeguard the victims' role in the criminal justice system without encroaching upon the constitutional rights of the defendant.¹¹⁴ The Act criminalized threats or retaliation against victims, thereby emancipating victims from harassment and intimidation.¹¹⁵ However, the victim's rights remain subordinate to the defendant's rights,¹¹⁶ and, therefore, the Act merely provides guidelines, not enforceable rights.¹¹⁷ Nevertheless, the enforcement of victims' rights is crucial to the operation of the criminal justice system, as it prevents victims from either being ignored or used only to identify the offender.¹¹⁸

The purpose of the Victims of Crime Act of 1984 was to induce the states to create victim compensation programs and to aid in

¹⁰⁹ 1982 TASK FORCE, *supra* note 3 (describing proposed legislation); *see also* Garboursy, *supra* note 3, at 224-25 (discussing 1982 Task Force provisions).

¹¹⁰ *See* 1986 TASK FORCE, *supra* note 3, at iii. As of 1986, almost 75% of the recommendations from the Task Force had been enacted. *Id.*

¹¹¹ *Id.* at 13-18 (discussing various types of victims' rights legislation).

¹¹² Pub. L. No. 97-291, 96 Stat. 1248 (codified as amended in scattered sections of 18 U.S.C. § 3663 (Supp. IV 1986)).

¹¹³ Pub. L. No. 98-473, 98 Stat. 2170, 2171 (codified at 42 U.S.C. § 10602(a)(1) (Supp. IV 1986)).

¹¹⁴ *See* Garboursy, *supra* note 3, at 225 (explaining Victim and Witness Protection Act).

¹¹⁵ *See* Kennard, *supra* note 5, at 424 (stating need to protect victims).

¹¹⁶ *See* Eikenberry, *supra* note 2, at 48. Existing legislation is a mere guideline to courts and, as such, is inadequate. *Id.*

¹¹⁷ *See* Elias, *supra* note 1, at 232. The recommendations of the Task Force are not enforceable as law, but rather are simply recommendations for state legislation. *Id.*

¹¹⁸ *See* Eikenberry, *supra* note 2, at 31 (supporting victims' bill of rights).

the maintenance of local programs assisting victims.¹¹⁹ The Victims of Crime Act established the Crime Victims' Fund which achieves the purpose of the Act by matching thirty-five percent of the money paid by the states for victim compensation awards.¹²⁰ The Fund compensates victims and supports victim service programs.¹²¹ The revenue of the Fund consists of monies from bond forfeitures.¹²² Grants are distributed directly to victims or to service programs which results in a sense of justice for the victim and society.¹²³ Even though many programs were implemented under the Task Force,¹²⁴ some were enacted by state or local governments solely to ease the burden of the criminal justice officials, and not to benefit the victims.¹²⁵

The Task Force initiated steps toward greater rights and protections for victims, but has failed in many respects.¹²⁶ First, the federal legislation allows each state to create its own standard regarding the victims' programs.¹²⁷ Second, the impact of the legislation is occurring too slowly for victims and society to realize any results.¹²⁸ Third, policy determinations will be decided by the courts since no laws were actually implemented.¹²⁹ Finally, off-

¹¹⁹ See Young, *Victim's Perspective*, *supra* note 107, at 60 (discussing Victims of Crime Act).

¹²⁰ See Kennard, *supra* note 5, at 424 (depicting victim compensation). The states must meet certain criteria in order to be eligible for V.O.C.A. funds for compensating victims. See Garboursy, *supra* note 3, at 229. Some of the criteria include the following: the money must be used for medical expenses; the state program must compensate victims who are not residents and residents who are injured outside the state; and the program must compensate all victims and not have any categorical exclusions, such as drunk driving victims. *Id.*

¹²¹ See Garboursy, *supra* note 3, at 227-31. Examples of the various types of programs include rape crisis centers, domestic violence shelters, and child abuse treatment programs. *Id.* at 230. These programs and services are located in law enforcement agencies, prosecutors' offices, churches, community-based groups, hospitals, mental health associations, and social service agencies. *Id.* at 231. The following are some of the requirements that the state must meet: the programs aiding victims of sexual assault, spousal abuse, or child abuse will be given priority; the funds must not replace state or local funds; the programs must be managed by a public agency and/or a non-profit organization; volunteers must be used in the programs; and the programs must assist victims in obtaining compensation. *Id.*

¹²² *Id.* at 227.

¹²³ *Id.* (discussing compensation of victims).

¹²⁴ *Id.* A recent study revealed that in 17,019 criminal cases accepted for prosecution, 23,579 victims were granted protection and services in 94 districts. *Id.*

¹²⁵ See ROBERT ELIAS, *THE POLITICS OF VICTIMIZATION* 179 (1986) (discussing disadvantages of victim assistance programs).

¹²⁶ See Elias, *supra* note 1, at 235, 239 (discussing failure of federal legislation).

¹²⁷ *Id.* at 239.

¹²⁸ *Id.*

¹²⁹ *Id.*

cial's concern for victims is affected by politics and elections, thus causing an initiation and then an abandonment of many programs.¹³⁰

B. Proposed Federal Legislation

Eighty-three percent of the population will be a victim of a violent crime sometime during their lifetime.¹³¹ Every American is in some way affected by crime.¹³² Therefore, Congress proposed an amendment to the Comprehensive Crime Control Act of 1990¹³³ which would include a Victims' Bill of Rights.¹³⁴

The first provision of the proposed Victims' Bill of Rights is an enumeration of the victim's rights, including fairness and respect for the victim, protection from the accused, restitution, and information pertaining to the various stages of the criminal procedure.¹³⁵ However, it also expressly declines to create any cause of action or defense to any person who fails to receive any of these rights.¹³⁶

The second proposed provision contains certain specifications such as: defining who is a victim; indicating who is obligated to inform victims of available services; and mandating what services should be provided.¹³⁷ Again, neither a cause of action nor a de-

¹³⁰ *Id.*

¹³¹ See 136 CONG. REC. S6374-75 (daily ed. May 16, 1990) (stating crime statistics).

¹³² *Id.* at S6375 (proposing victims' bill of rights).

¹³³ Pub L. No. 103-05, 107 Stat. 31 (1993).

¹³⁴ See 136 CONG. REC. H9001-31 (daily ed. Oct. 5, 1990). The proposed Victims' Bill of Rights contains several provisions that enumerate rights, services, and restitution that victims are entitled to receive, and a recommendation that the provisions be adopted. *Id.* at H9029-30.

¹³⁵ *Id.* at H9029. The proposed rights include the following:

1. The right to be treated with fairness and with respect for the victim's dignity and privacy.
2. The right to be reasonably protected from the accused offender.
3. The right to be notified of court proceedings.
4. The right to be present at all public proceedings related to the offense, unless the court determines that the testimony by the victim would be materially affected if the victim heard other testimony at the trial.
5. The right to confer with an attorney for the Government in the case.
6. The right to restitution.
7. The right to information about the conviction, sentencing, imprisonment, and release of the offender.

Id.

¹³⁶ *Id.* at H9029. The "No Cause of Action or Defense" subsection "does not create a cause of action or defense in favor of any person arising out of the failure to accord to a victim the rights enumerated" in the proposed Victims' Bill of Rights. *Id.*

¹³⁷ *Id.* In the proposed statute, section 3 designates who is a responsible officer, indicates

fense is created for anyone denied these rights.¹³⁸

The third provision¹³⁹ in the proposal states that a restitution order is mandatory if the defendant is convicted of certain crimes and discretionary when the victim proves, by a preponderance of the evidence, that he or she was injured by the defendant's conduct during the criminal event.¹⁴⁰ Furthermore, if the defendant violates the payment schedule of the restitution order, then the defendant's federal benefits may be suspended after a hearing until the defendant illustrates a good faith effort to conform with the order.¹⁴¹ Additionally, the proposal states that the restitution order is enforceable by either the victim or the United States in a civil action.¹⁴²

The fourth provision, entitled "the Sense of Congress with Respect to Victims of Crime," encourages the states to adopt the objectives of the Victims' Bill of Rights which include: protecting the victim from the offender; granting the victim a role in the proceedings; providing information regarding the trial process; and preventing a second victimization.¹⁴³

The proposed amendment is widely supported and will most likely be passed with little or no opposition.¹⁴⁴ It is crucial to enact

how and when the responsible officer should identify the victim or victims, and describes the available services. *Id.*

¹³⁸ *Id.* This section disclaims all causes of action and defenses arising out of this section. *Id.*

¹³⁹ See S. 1335, 102d Cong., 1st Sess. § 5 (1991). Title V of the Victims' Bill of Rights would amend 18 U.S.C. § 3663 (1986). *Id.*

¹⁴⁰ *Id.* This provision further explains payment schedules and factors to determine the amount of restitution. *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* (addressing enforcement of the restitution order).

¹⁴³ See 136 CONG. REC. H9001-31 (daily ed. Oct. 5, 1990). The objectives of the Victims' Bill of Rights provide that:

Victims of crime should be treated with compassion, respect and dignity[;] . . . reasonably protected from the accused throughout the criminal justice process[;] . . . [given a] statutorily designated advisory role in decisions involving prosecutorial discretion, such as the decision to plea-bargain[;] . . . deserve comprehensive reform of the exclusionary rule, the application of which often results in the release of criminals on technicalities, rather than for substantive reasons[;] . . . have the right to be present at all proceedings related to the offense against him, unless the victim is to testify and the court determines that the victim's testimony would be materially prejudiced by hearing other testimony at the trial[;] . . . [and] should have the right to information about the conviction, sentencing, and imprisonment of the person who committed the crime against them.

Id.

¹⁴⁴ *Id.* Supporters include organizations such as the Department of Justice, the National Victim Center, the National Coalition Against Sexual Assault, the Justice Fellowship, and the National Organization for Victim Assistance. *Id.* As of October, 1992, this legislation is

a federal Victims' Bill of Rights to ease the victim's access to the criminal justice system and increase its reliability, while attempting to protect and ensure the victim's rights.¹⁴⁵ Even though the states have fostered the victims' rights movement, it is urged that the lack of unity among the states does not consistently prevent victimization in the criminal process. By enacting federal statutory rights, victims would be provided with some measure of fairness and protection in the criminal process.¹⁴⁶

C. *The Need for a Constitutional Amendment*

Recognizing the need to preserve and protect victims' rights, and the inadequacy of current federal legislation, there have been proposals for the incorporation of a Victims' Bill of Rights by either modifying the Sixth Amendment¹⁴⁷ or adopting a Twenty-Seventh Amendment.¹⁴⁸ However, there are many arguments against federal constitutional protection for victims.¹⁴⁹ First, opponents to such an amendment argue that victims' rights should not be increased because it would cause a negative psychological and economical effect on the victim.¹⁵⁰ Second, they argue that state

still pending. S. 1335, 102d Cong., 1st Sess. § 5 (1991).

¹⁴⁵ 136 CONG. REC. S6374-75 (daily ed. May 16, 1990). It was estimated that twenty-three million crimes went unreported in 1989. *Id.* If the Victims' Bill of Rights were in effect, more crimes would be reported because the victims would be more apt to turn to the criminal justice system for protection. *Id.*

¹⁴⁶ 136 CONG. REC. H9001, 9030-31 (daily ed. Oct. 5, 1990). Victims should not have to suffer more pain by being involved in the criminal justice system. *Id.*

¹⁴⁷ See 1986 TASK FORCE, *supra* note 3, at 114. The proposal would amend the Sixth Amendment by adding: "Likewise, the victim, in every criminal prosecution shall have the right to be present and to be heard at all critical stages of the judicial proceedings." *Id.*; Eikenberry, *supra* note 2, at 34 (discussing modification of Sixth Amendment); Spencer, *supra* note 6, at 3 (same).

¹⁴⁸ See Dolliver, *supra* note 6, at 88. In 1986, the National Organization for Victims' Assistance adopted a proposed Twenty-Seventh Amendment instead of honoring the Task Force's recommendation to revise the Sixth Amendment. *Id.* The proposed amendment stated: Victims of crime are entitled to certain basic rights, including the right to be informed, to be present and to be heard at all criminal stages of the federal and state criminal justice process to the extent that these rights do not interfere with existing constitutional rights." *Id.*

¹⁴⁹ See *id.* (discouraging constitutional protection for victims); Spencer, *supra* note 6, at 5-6 (supporting state provision instead); Young, *Victim's Perspective*, *supra* note 107, at 66 (same).

¹⁵⁰ Dolliver, *supra* note 6, at 90. If the victim participates substantially in the trial, then the victim will be reliving the crime, thus having a negative psychological effect. *Id.* If a victim's rights are violated, he may be able to obtain some relief from prosecuting attorneys and judges. *Id.*

legislation would be less confusing¹⁵¹ and easier to amend than a federal constitutional provision.¹⁵² Third, since the victim is not the one faced with the possibility of imprisonment or fine, the victims' personal liberty is not infringed upon in the criminal proceeding.¹⁵³ Fourth, a lack of uniformity among the states does not automatically justify a constitutional amendment.¹⁵⁴ Fifth, the enactment of a constitutional amendment would increase litigation.¹⁵⁵ Finally, it is argued that it would be extremely difficult to develop an amendment to the Constitution that would be accepted and ratified by the entire country.¹⁵⁶

Nevertheless, a constitutional amendment appears to be desirable.¹⁵⁷ It would be a more forceful way of ensuring that victims, in fact, do have rights, since it would be part of our Constitution.¹⁵⁸ It would present a minimum standard to the states, and would guarantee victims at least that degree of protection.¹⁵⁹ Victims

¹⁵¹ Young, *Victim's Perspective*, *supra* note 107, at 67. The National Organization for Victims' Assistance sponsored a forum which suggested that state constitutional provisions would be more effective than a modification of the Sixth Amendment. *Id.* at 66.

¹⁵² See Dolliver, *supra* note 6, at 90. Amending the Constitution would be more difficult than amending a state constitution because a consensus of the entire country is needed to amend the United States Constitution, whereas only a consensus within the state is required to amend a state constitution. *Id.*

¹⁵³ *Id.* Since the accused is faced with severe penalties such as imprisonment, fines, and the stigma of being a convict, the accused must be afforded protection and fairness. *Id.*

¹⁵⁴ *Id.* (opposing constitutional provision).

¹⁵⁵ *Id.* (arguing that a constitutional amendment will provide yet another basis for lawsuits).

¹⁵⁶ See Young, *Victim's Perspective*, *supra* note 107, at 67 (favoring state legislation affording victims' rights).

¹⁵⁷ See Eikenberry, *supra* note 2, at 31-32. Constitutional protection of victims is necessary to facilitate the functioning of the criminal system and the administration of justice. *Id.* Victims are reluctant to cooperate with a system which does not consider the impact of the crime on their lives. *Id.* Surviving family members of a victim are generally not asked to testify if they did not witness the crime and are not notified of the stages of the criminal process. *Id.*; Spencer, *supra* note 6, at 2. Conversely, the defendant's family members may be present at every stage of the trial. *Id.* at 3. Further, victims' rights provisions do not provide adequate remedial measures, and therefore, the objectives of the legislation are not accomplished. *Id.*; see also Kilpatrick & Otto, *supra* note 3, at 8 (supporting constitutional protections); Young, *Victim's Perspective*, *supra* note 107, at 64 (discussing constitutional provisions).

¹⁵⁸ See Kennard, *supra* note 5, at 437. Even though victims receive rights, that does not necessarily mean that victims are empowered. *Id.* For example, many states have implemented legislation that allows victims to be included in pre-trial negotiations. *Id.* at 431. However, these victims did not acquire enforceable rights. *Id.* Further, many victims are not aware of their rights, hence, creating meaningless rights. *Id.* at 431-32.

¹⁵⁹ See LeRoy L. Lamborn, *Victim Participation in the Criminal Justice Process: The Proposals for a Constitutional Amendment*, 34 WAYNE L. REV. 125, 173 (1987). A constitutional provision would ensure the victim an unrestricted right throughout the criminal process. *Id.* Further, state courts are free to recognize greater rights than the Constitution grants; for

would be shielded from the negative effects of legislative whim, and could benefit if a state legislature set out to provide victims with greater rights than the Constitution would require.¹⁶⁰

A victims' rights amendment, if drafted properly, would also create a liberty interest in victims' rights.¹⁶¹ As a result, victims would be able to enforce these rights against, and obtain relief from, state prosecutors and judges pursuant to Section 1983 of the Civil Rights Act.¹⁶² Victims might also be able to similarly redress these wrongs against federal officials.¹⁶³ By providing such a remedy to aggrieved victims, a victims' rights amendment would

example, Florida does not mandate that minors obtain parental consent in order to get an abortion. See *In re T.W.*, 551 So. 2d 1186, 1187 (Fla. 1989). But see *Planned Parenthood v. Ashcroft*, 462 U.S. 476, 493-94 (1983) (requiring parental consent for minors to get abortion is constitutional); see also *State v. Kam*, 748 P.2d 372, 380 (Haw. 1988) (affording broader protection to pornography than Constitution).

¹⁶⁰ See, e.g., *Michigan v. Mosley*, 423 U.S. 96, 100 (1975) (Brennan, J., dissenting) (citing practice of interpreting state procedural rights more expansively than does the United States Supreme Court); *Horne v. Warden, Maryland Penitentiary*, 526 F.2d 588, 590 (4th Cir. 1975). A state may provide greater protections within its own criminal law system than are provided by the Constitution, and federal due process will not be altered. *Id.*; see also *Grundler v. North Carolina*, 283 F.2d 798, 802 (4th Cir. 1960). Justice William Brennan has been a champion of expanding constitutional protections by utilizing independent state grounds. *Id.*; see William Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 *passim* (1977); Robert F. Utter, *State Constitutional Law, the United States Supreme Court, and Democratic Accountability*, 64 WASH. L. REV. 19, 27 (1989) ("at last count, more than 450 published state court opinions interpret state constitutions as going beyond federal constitutional guarantees"); Donald Wilkes, Jr., *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421, 424 (1974) (state courts continued expansion of constitutional rights after Burger Court retreated from it).

¹⁶¹ See Kilpatrick & Otto, *supra* note 3, at 8 (discussing ineffectiveness of victims' rights legislation since there is no available remedy in case of violation); Young, *Victim's Perspective*, *supra* note 107, at 64. Victims' rights legislation lacks enforceability which results in inadequate liberty interests. *Id.* However, a constitutional provision would provide a protected liberty interest with recourse. *Id.* at 65; see also *Dix v. County of Shasta*, 963 F.2d 1296, 1301 (9th Cir. 1992) (victims' bill of rights could give rise to a liberty interest if properly worded).

¹⁶² See Lamborn, *supra* note 160, at 183. Under the current system, the victim lacks the ability to enforce his or her own rights if they are violated. *Id.* Presently, prosecuting attorneys and judges are not liable for the deprivation of civil liberties under 42 U.S.C. § 1983. *Id.*; see also *Lynk v. La Porte Superior Court No. 2*, 789 F.2d 554, 556 (7th Cir. 1986) (judicial immunity does not include declaratory and injunctive relief, but judges are not liable for damages).

¹⁶³ See, e.g., *Bivens v. Six Unknown Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 390 (1971). Although there is no statutory provision equivalent to Section 1983 upon which to base liability of federal officers, the *Bivens* Court held that federal officers may be sued under the Constitution itself. *Id.* The basis for such suits is a federal court's "federal question jurisdiction" over all cases "arising under the Constitution or laws of the United States." See 28 U.S.C. § 1331 (1990); see also Lamborn, *supra* note 160, at 183-84. Any constitutional measure would be applicable to the federal government and its officials. *Id.* Federal and state officials would be responsible to ensure victims' rights if the Sixth Amendment were modified. *Id.*

serve to close a significant gap which currently plagues the area of victims' rights.

Most of the arguments against a constitutional amendment lack merit. Increasing victims' rights will not create a negative psychological effect on the victim because a victim is free to decline to exercise these new rights.¹⁶⁴ It also would not have a negative economic effect because victorious victims might be able to collect attorneys fees pursuant to Section 1988 of the Civil Rights Act.¹⁶⁵ The operation of Section 1988 would also serve to curtail the volume of litigation because it encourages only meritorious claims, and deters frivolous claims.¹⁶⁶ In addition, the formidable burden of proving intentional deprivation of rights, inherent in all Section 1983 claims, would also function to keep the volume of litigation at a manageable level.¹⁶⁷ Furthermore, lack of uniformity in the states is not the sole justification for a victims' rights amendment.¹⁶⁸ First, even if there were such an amendment, there might not be uniformity because some states would offer victims greater protection than that mandated by the amendment.¹⁶⁹ Second, it is not so much a lack of uniformity as a lack of effectiveness of current law which drives the need for the amendment.¹⁷⁰

¹⁶⁴ See Lamborn, *supra* note 160, at 183. Once victims are granted rights, then each victim has complete discretion whether to exercise these rights. *Id.*; see also Kennard, *supra* note 5, at 426. If victims are not protected, they will suffer a second victimization within the criminal justice system. *Id.*; Kilpatrick & Otto, *supra* note 3, at 10-12. Victims and their families may suffer long-term psychological problems resulting from the crime. *Id.* The psychological problems are intensified if victims are not protected in the criminal process. *Id.* at 18-20. However, if the victims are granted rights without an avenue of recourse, another victimization will occur. *Id.* at 27.

¹⁶⁵ See Spencer, *supra* note 6, at 2. The average cost of a crime to a victim and her family is \$22,000. *Id.* There are various economic costs that the victim incurs as a result of crime, including medical bills, lost wages, and psychological and social costs. *Id.*; cf. Kennard, *supra* note 5, at 426. A majority of victims are not notified of various sources of compensation available to ease the burden. *Id.*

¹⁶⁶ See *Givens v. Delta Elec. Power Ass'n*, 699 F. Supp. 91, 93 (N.D. Miss. 1988) (declaring that "a plaintiff may be assessed his opponents attorneys' fees, pursuant to 28 U.S.C. § 1927 and 42 U.S.C. § 1988 when he litigates a frivolous claim after it clearly became so"); see also FED. R. CIV. P. 11 (providing for attorney sanctions for bringing nonmeritorious claims).

¹⁶⁷ See *Trujillo v. Board of County Comm'rs*, 768 F.2d 1186, 1190 (10th Cir. 1985). Deprivation of certain rights requires a showing that the defendant intended to deprive the plaintiff of constitutional rights. *Id.* at 1189-90.

¹⁶⁸ Dolliver, *supra* note 6, at 90 (challenging victims' constitutional protection).

¹⁶⁹ See *supra* note 139 (discussing state legislation's lack of enforceability). A federal Victims' Bill of Rights would provide a minimum standard for states to enact, but they can always enlarge upon the rights granted in the Constitution. See *Michigan v. Mosely*, 425 U.S. 96, 120 (1975) (Brennan, J., dissenting).

¹⁷⁰ See Kilpatrick & Otto, *supra* note 3, at 8. Even when victims are granted rights, many

The ineffective present legislation, and not a lack of uniformity among the states, is what compels such reform.

Many propose that a state provision would be easier to enact and amend than a constitutional amendment.¹⁷¹ However, a state provision is also easier to repeal, which puts the victim in a state of uncertainty.¹⁷² Therefore, victims' rights would be more secure under the Constitution.¹⁷³ In addition, a constitutional amendment can be as flexible as a state statute due to the judicial tradition of construing constitutional provisions in light of the times.¹⁷⁴

Furthermore, opponents to a constitutional provision claim that there is no infringement on the victims' personal liberty,¹⁷⁵ and hence, no need for constitutional protection.¹⁷⁶ However, it is recognized that an infringement on personal liberty is not a prerequisite for constitutional protection.

The only substantive barrier to a constitutional amendment would be the difficulties encountered in the ratification process.¹⁷⁷

times the remedial provisions are not honored. *Id.*; Young, *Victim's Perspective*, *supra* note 107, at 64 (victim legislation lacks satisfactory remedial provisions).

¹⁷¹ See Spencer, *supra* note 6, at 5-6 (protecting victims' rights through state legislation); Young, *Victim's Perspective*, *supra* note 107, at 66 (same).

¹⁷² See *New Orleans v. New Orleans Water Works Co.*, 142 U.S. 79, 83 (1891) (demonstrating that state statute can be repealed as easily as it was amended); see also *County of Los Angeles v. Marshall*, 442 F. Supp. 1186, 1191 (D.C. Cir. 1977) (upholding validity of self-destruct clauses in state legislation).

¹⁷³ See *Wilson v. New Receivers of Missouri*, 243 U.S. 332, 386 (1917). Rights that are left to the states are "at the mercy of legislative caprice." *Id.* However, rights remain secure if they are constitutionally protected. *Id.*; see also *Great Northern Utils. Co. v. Public Serv. Comm'n*, 52 F.2d 802, 809 (D. Mont. 1931) (determining right to receive just compensation, though not secured by state legislation, is secured under United States Constitution).

¹⁷⁴ See *Fraternal Order of Police v. City of Philadelphia*, 812 F.2d 105, 111 (3d Cir. 1987) (subjecting both Pennsylvania Constitution and United States Constitution to flexible balancing test to determine whether a privacy interest existed); *ACACIA Mutual Life Ins. Co. v. Perimeter Park Assocs.*, 697 F.2d 945, 950 (holding that Constitution is flexible, not static), *reh'g denied*, 703 F.2d 582 (11th Cir. 1983); *Merchants Nat'l Bank of Mobile v. Dredge General*, 663 F.2d 1338, 1343, 1346 (5th Cir. 1981) ("[I]t is well established that the Constitution is sufficiently flexible to permit its requirements to be considered in relation to the legal and commercial context in which it is invoked" and "for this court to consider fundamental fairness in the situation in which it is invoked."); *Dow v. Carnegie Illinois Steel Corp.*, 224 F.2d 414, 423 (3d Cir. 1955) (flexible nature of Constitution permits federal courts to recognize "[b]asic concepts of the democratic society"). *But see Children's Hosp. of D.C. v. Adkins*, 284 F.2d 613, 621 (D.C. Cir. 1922) ("Any intimation that the Constitution is flexible, is unsound . . .").

¹⁷⁵ See *Riggs v. City of Albuquerque*, 916 F.2d 582, 585 (10th Cir. 1990) (asserting that plaintiff had standing to bring cause of action due to fact that he suffered "chilling effect" although no personal liberty had been infringed upon).

¹⁷⁶ See *infra* notes 143-49 and accompanying text (arguing against constitutional protection for victims).

¹⁷⁷ See Michael Arndt, *House Lines Up to Balance Budget Constitutionally*, CHI. TRIB., June

This is not a comment on the need for, or the effectiveness of, such an amendment. Notwithstanding this problem, an amendment could be ratified by positive publicity, widespread support, and universal commitment.¹⁷⁸

It is necessary to provide constitutional protection to the crime victim in order to correct the imbalance in the criminal justice system.¹⁷⁹ The Constitution was drafted to be a flexible document.¹⁸⁰ At first it did not include many of the liberties and rights that are present today, but over the years the American public has witnessed the abolishment of slavery, women's suffrage, and eligibility for voting requirements.¹⁸¹ Therefore, the way to redress victim injustice is to provide constitutional protection.¹⁸² The defendant is afforded many rights in the Constitution, but the victim is not.¹⁸³ For example, the defendant has a right to counsel, which is supported by taxpayers' money, but there is no equivalent representation for the victim.¹⁸⁴ The proposed federal legislation, while a step in the right direction, does not transcend state legislation and fails to adequately meet the need for enforceable victims rights. A constitutional victims' rights provision will equalize the grossly unbalanced treatment of the victims and the defendants in the criminal justice system.¹⁸⁵

11, 1992, at 1. "The last time Congress passed a constitutional amendment was in 1972, when it adopted the Equal Rights Amendment but this measure failed to be ratified by the states." *Id.*

¹⁷⁸ See Spencer, *supra* note 6, at 5-6. A group called the Victims' Constitutional Amendment Network (Victims CAN) promotes the support of constitutional protection of victims. *Id.* at 6. Members include the National Organization for Victims' Assistance, Mothers Against Drunk Driving, Childhelp U.S.A., and Parents of Murdered Children. *Id.* at 5.

¹⁷⁹ See Eikenberry, *supra* note 2, at 34. Since the defendant is afforded constitutional protection, the victim should receive the same. *Id.*

¹⁸⁰ See Spencer, *supra* note 6, at 3. The drafters of the Constitution desired a document that would withstand many problems and situations which the United States might encounter. *Id.*

¹⁸¹ *Id.* The Constitution has been amended several times to correct injustices. *Id.*

¹⁸² *Id.*; see also Eikenberry, *supra* note 2, at 48 (supporting constitutional provision).

¹⁸³ See Spencer, *supra* note 6, at 6 (supporting victims' bill of rights); Young, *Victim's Perspective*, *supra* note 107, at 66-67 (same).

¹⁸⁴ 136 CONG. REC. H9001-31 (daily ed. Oct. 5, 1990) (statement of Mr. Dewine). Victims should be provided with services equivalent to the defendant's. *Id.*

¹⁸⁵ See Eikenberry, *supra* note 2, at 47 (proposing victims' bill of rights). The defendant has government-funded services as a result of his constitutional rights and the victim should be treated in the same manner. See Young, *Victim's Perspective*, *supra* note 107, at 66.

CONCLUSION

After an analysis of the current law in the United States, it is clear that victims' rights are not adequately protected. The present state legislation does not provide any viable remedies for victims if their rights are violated. Similarly, federal legislation is inadequate to protect victims' rights. While a victim may enforce restitution orders and compensation awards, most other provisions lack enforceability. Accordingly, it is strongly advised that a constitutional amendment be enacted to correct the injustice in the criminal justice system. This will create uniformity throughout the nation by ensuring that all victims are protected and treated fairly. In other words, victims will be "dressed" with statutory rights and have a "place to go" if those rights are violated.

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