

Journal of Civil Rights and Economic Development

Volume 8
Issue 1 *Volume 8, Fall 1992, Issue 1*

Article 1

September 1992

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Recommended Citation

Cuomo, Mario M. (1992) "The Crime Victim in a System of Criminal Justice," *Journal of Civil Rights and Economic Development*. Vol. 8 : Iss. 1 , Article 1.

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VICTIMS' RIGHTS SYMPOSIUM

THE CRIME VICTIM IN A SYSTEM OF CRIMINAL JUSTICE

GOVERNOR MARIO M. CUOMO*

[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.¹

If we take the justice out of the criminal justice system we leave behind a system that serves only the criminal.²

In the last few decades, the role of the crime victim in the criminal justice system has evolved dramatically. By reinvesting crime victims with a significant role in the criminal justice system and affording them a greater prospect of being made whole through either civil damages or criminal restitution and reparation, a his-

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¹ *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934).

² PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT vi (1982) (statement of the Chairman, Lois Haight Herrington).

torical loop is closing. In New York State, events of the recently concluded legislative session have made a substantial contribution in this area.

Still however, the role and stature of the crime victim in our present criminal justice system is not what it should be. Indeed, as an enlightened society, we must press on to fully empower crime victims in a manner consistent with the constitutional rights of the accused. To understand what must be done prospectively, we must understand what has happened historically.

I. THE EVOLVING LEGAL STATURE OF THE VICTIM

The role and stature of the crime victim in what might be thought of, in the largest sense, as a system of "criminal justice" has changed dramatically throughout history.³ In primitive times, when the struggle for survival regularly pitted one individual against another, there was little to distinguish "crime" from the continuous struggle for existence. The law was the law of the strongest or the most clever; and the "crime victim" was not just an important player—if he survived, he was probably one of only two players, performing the role of victim, prosecutor, judge, and sometimes executioner. The concepts of punishment, deterrence, and compensation were probably inextricably intertwined and personal. Justice, if any, belonged to the strongest or the most clever.

As primitive family, clan, and tribal groups became established, social control became more than a matter of how individuals coexisted—it became a matter of how groups coexisted. A crime committed against one member of the group became, by extension, an offense against the group itself. One individual did not seek justice from another individual; rather, one clan would seek justice from another clan. This would often result in behavior characterized as the blood-feud. The role and stature of the individual crime victim thus became minimized.⁴

The blood-feud and related behaviors often led to protracted intergenerational conflict in the nature of a perpetual feud. This

³ For an excellent summary of the history of the crime victim, see STEPHEN SCHAFER, *VICTIMOLOGY: THE VICTIM AND HIS CRIMINAL* 5-32 (1977) (discussing history of criminal-victim relationship).

⁴ *Id.* at 6-8.

was increasingly at odds with the development of a material culture and its attendant commerce, especially in the developing communities. Recognizing the conflict, the generational response to crime was rejected in favor of a transactional approach, which viewed the commission of a crime and the appropriate response as one discrete transaction. This approach recognized the individual right and interest of the crime victim vis-a-vis the criminal offender. This transactional approach was evidenced by the Mosaic Dispensation among the Hebrews of biblical times, which provided for restitution and reparation. Among the ancient Greeks, a "death fine" was created which mandated the payment of a fine to the family of a crime victim.⁵

This system of transactional compensation continued to evolve in the Middle Ages and became known as the "composition," a mutual settlement or agreement between the victim and the offender. The community's system of "criminal justice" came to operate very much like our current tort law, complete with elements of punishment, damages, and the opportunity for private compromise. The composition eventually evolved into an elaborately detailed system of specific damages, sanctioned by the community for every kind or degree of injury which could be inflicted, and continued to represent and reinforce the unification of the concepts of punishment and compensation.⁶

With the development of centralized government in the latter half of the Middle Ages, the composition was subjected to increasing community "judicial" controls. The community gradually came to claim a share of the victim's compensation, and as the community's governmental authority increased, so did its share of the victim's compensation. It has been suggested that the community's share of the compensation may have represented one of three concepts: 1) a "commission" for brokering the reconciliation between the criminal offender and the victim; 2) the price offered by the community to the offender for the opportunity of redemption; or 3) the price of protection, given by the community, to the offender against possible retaliation on the part of the victim.⁷

⁵ *Id.* at 8-9.

⁶ *Id.* at 10-13.

⁷ *Id.* at 12-14.

The community's share gradually devolved into a fine paid to the king or the overlord, thereby representing a punishment rather than compensation. The victim's share continued to represent compensation, but it steadily decreased, until the king or overlord eventually claimed all of it as part of the state's monopolization of the institution of punishment. It was through this process that the rights of the victim became separated from the rights of the state in responding to the offense. Furthermore, there began to develop two very different sorts of jurisprudence: criminal law, in which the only parties were the state and the offender; and civil law, in which the only parties were the offender and the victim.⁸

This continuing divergence of criminal and civil jurisprudence suffered a set-back in the 1600s, as the European social and cultural system was transposed to the American colonies. Governmental authority was less imperial and centralized in the colonies than it was in the urban commercial centers of Europe. This resulted in the ascendance of the crime victim once again to the pivotal role in the process of identification, investigation, and prosecution of the offender. The exacting of restitution from the offender reflected the customs of Europe in the early Middle Ages.⁹

However, this pivotal role of the victim was short-lived. Commercial and property interests in the colonies increased, and urban commercial centers grew. Dissatisfaction with an increasingly inefficient and unworkable system of individual justice prompted calls for change. The writers of the eighteenth century Enlightenment articulated a theory of "social contract." One of the most influential works of the time, *Essay on Crimes and Punishment* by Cesare Beccaria,¹⁰ set the stage for a re-examination of the proper function of the criminal justice process in society.

Beccaria argued that a criminal justice system should respond to society's need to protect the law-abiding, contract-abiding citizen from the criminal, who breaches the social contract.¹¹ Society it-

⁸ *Id.* at 14-16.

⁹ For an explication of the role of the victim in colonial American criminal justice, see William F. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AM. CRIM. L. REV. 649, 651-54 (1976).

¹⁰ CESARE B. BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS (1764).

¹¹ *Id.* at 74.

self, Beccaria would argue, is the victim of crime, and society's response should serve only socially useful purposes. Its goal was to deter further criminal conduct, both as to that criminal and as to others, and to effect a reparation to society for the socially disruptive effect of the criminal's conduct. Punishment should not be inflicted to effect private retribution on behalf of the individual victim, nor to effect reparation for the damage caused to the individual victim.¹² Beccaria thus argued that the individual crime victim should be divorced from the purpose or effect of the criminal justice system; that the only proper role for the individual crime victim was as an informant and witness; and that the only redress available to the individual crime victim was the civil suit.

Beccaria's ideas took root and flourished in America in the late eighteenth and early nineteenth centuries. Americans evidenced a willingness to repudiate the English common law criminal justice traditions in favor of the principles of rationality and utilitarianism.¹³ Thus, the administration of American criminal justice became victim-blind.

II. THE RESURGENCE OF INVOLVEMENT OF THE CRIME VICTIM IN NEW YORK

Although the issues of victim compensation and reparation predominated at a number of international prison congresses in the latter part of the nineteenth century, the concept of advocacy on behalf of the individual crime victim, and the inequalities inherent in a victim-blind criminal justice system did not have a profound impact on public policy-making in the United States. Indeed, it wasn't until the 1960s, when the idea of government-funded crime victim compensation began to gain acceptance.

Government-funded compensation for crime victims was first instituted in Switzerland in 1937.¹⁴ The idea was raised and forcefully advocated within the British Commonwealth in 1957,¹⁵ and government-funded compensation programs were initiated in New Zealand in 1963, and the United Kingdom in 1964.¹⁶ In 1965, California became the first state in the United States to en-

¹² *Id.*

¹³ McDonald, *supra* note 9, at 654-55.

¹⁴ SCHAFER, *supra* note 3, at 132.

¹⁵ Margery Fry, *Justice for Victims*, THE OBSERVER (London), July 7, 1957, at 8.

¹⁶ SCHAFER, *supra* note 3, at 110.

act a law to compensate victims of violent crime, with a program to be operated by the California Department of Welfare.¹⁷ In 1966, New York enacted a law to create its own crime victim compensation program, but this program was, and still is, administered by an independent agency created for this singular purpose—the Crime Victims Compensation Board (now the Crime Victims Board).¹⁸ State after state as well as the federal government followed suit, and as a result there are crime victim compensation programs in all but a handful of states.

In its first fiscal year of operation (1967-68), the New York State Crime Victims Compensation Board (the "Board") received claims from 276 claimants, and made 43 awards of compensation averaging \$750.00.¹⁹ So few claims were decided that first year that the Board began the practice of publishing a synopsis of each of the claims decided in its annual report.²⁰

The number of claims received by the Board increased rapidly in subsequent years of operation; in fiscal year 1968-69, 519 claims were accepted and investigated, in addition to 1,307 inquiries, many of which were apparent claims that were rejected for further processing after a preliminary investigation.²¹ In fiscal year 1969-70, 929 claims were filed,²² and in fiscal year 1970-71, 1,594 claims were received and filed.²³ This rapid increase necessitated the elimination of publishing a synopsis of each of the claims decided. The number of awards of compensation also increased as the amount of claims increased: 220 awards in fiscal 1968-69, 336 awards in fiscal 1969-70, and 458 awards in fiscal 1970-71.²⁴ This trend has continued virtually uninterrupted to

¹⁷ 1965 Cal. Stat. ch. 1549. An act to add Section 1500.02 to the Welfare and Institutions Code and to add Section 11211 to Division 9 of the Welfare and Institutions Code as proposed by Assembly Bill No. 1682, relating to aid to families with dependent children. Passed by the Assembly June 17, 1965.

¹⁸ See ch. 894, § 1, [1966] N.Y. Laws 1889 (McKinney) (current version at N.Y. EXEC. LAW § 622 (McKinney 1982).

¹⁹ 1967 FIRST REPORT OF THE CRIME VICTIMS COMPENSATION BOARD 6-7, 9 (1968) [hereinafter FIRST REPORT].

²⁰ *Id.* at 11-40.

²¹ 1968 SECOND ANNUAL REPORT OF THE CRIME VICTIMS COMPENSATION BOARD 7 (1969) [hereinafter SECOND REPORT].

²² 1969 THIRD ANNUAL REPORT OF THE CRIME VICTIMS COMPENSATION BOARD 5 (1970) [hereinafter THIRD REPORT].

²³ 1970 FOURTH ANNUAL REPORT OF THE CRIME VICTIMS COMPENSATION BOARD 5 (1971) [hereinafter FOURTH REPORT].

²⁴ SECOND REPORT, *supra* note 21, at 7; THIRD REPORT, *supra* note 22, at 10; FOURTH REPORT, *supra* note 23, at 10.

this day.²⁵

The creation of New York's Crime Victims Compensation Board marked the beginning of a period of heightened consciousness regarding the needs, rights, and interests of crime victims. In the course of its first twenty-five years of operation the Board has provided operational, organizational, and legislative leadership for the recognition and enhancement of crime victims' rights in New York. With the steady increase in crime, and its impact, both real and perceived, upon the public, the concept of victims' rights in New York and elsewhere began to gain currency. The twenty-five year period from 1966 through 1991, witnessed the start of a modern era of crime victims' rights in New York.

III. THE ADVENT OF ORGANIZATIONAL CRIME VICTIM ADVOCACY

Following the creation of the Crime Victims Compensation Board, the elements of a rudimentary crime victim advocacy and support network began to develop.

Law enforcement and prosecution agencies were among the first to recognize the need to aid victims of crime. In 1974, the Kings County (Brooklyn) District Attorney's Office established one of the first victim/witness programs in New York State.²⁶ This was part of a nationwide effort initiated with Law Enforcement Assistance Administration (LEAA) grant funds to create model programs to aid victims of crime. The New York County (Manhattan) District Attorney's Witness Aid Program was established one year later. That same year the Rochester Police Department started one of the first law enforcement victim assistance programs in the nation as a pilot project with funding from an LEAA grant. Since 1974-75, many other law enforcement and prosecution agencies throughout the state have established victim/witness assistance programs.

However, the principal strength behind the crime victim advocacy movement came from victims, who formed grassroots self-help groups and coalitions. One of the first, the Albany County

²⁵ A summary of the historic trend in the numbers of compensation claims "accepted," and the number and total amounts of awards of compensation made, can be found in the most recent annual report available from the Crime Victims Board. 1990-91 TWENTY-FOURTH ANNUAL REPORT OF THE CRIME VICTIMS BOARD 11, 17-18 (1991).

²⁶ NATIONAL VICTIM CENTER, LOOKING BACK MOVING FORWARD—A HISTORY OF THE VICTIMS' RIGHTS MOVEMENT IN THE UNITED STATES 2 (Arlington, Va., 1992).

Rape Crisis Center, was formed in 1975 by rape and sexual assault victims. Many other groups followed, including RID (Remove Intoxicated Drivers) in 1978, the Gay and Lesbian Anti-violence Project in 1980, Parents of Murdered Children of New York State in 1981, the rape crisis centers at St. Lukes/Roosevelt Hospital and St. Vincents Hospital in Manhattan in 1982, and the New York Chapter of Victims for Victims in 1985.

The New York State Coalition Against Domestic Violence was formed in 1978, bringing together many groups in that field, and in 1981, a "hot line" was established with state and federal funding. In 1985, a victims' rights group known as the Western Coalition was the first of several state-wide coalitions created to bring together the constituencies of different victims' organizations. Since 1985, the Downstate, Central, Northeastern, and Southern Tier coalitions have been formed. The coalitions have worked together successfully to augment funding, to promote legislative initiatives, and to enhance the availability and diversity of new services.

Not-for-profit crime victims services and advocacy groups were formed at both the local and national levels. The Victim Services Agency was created in 1978 in New York City. The National Victim Center opened its New York offices in 1986. To facilitate and to partially fund the work of these and other victim advocacy groups, the Crime Victims Board was given the statutory authority and appropriation necessary to provide grants-in-aid funding to crime victim organizations and programs, beginning in fiscal year 1981-82.²⁷

The crime victims' advocacy organizations collaborated in a show of solidarity in 1986 when they held the first annual New York City Candlelight Vigil. Dedicated to victims of crime, the Candlelight Vigil has become a nationally recognized event sponsored not only by victims' rights advocates, but by the religious community, labor unions, and civic groups.

IV. LEGISLATIVE EVOLUTION OF CRIME VICTIMS' RIGHTS

A survey of the legislation which has been implemented in New York during the last 25 years is instructive since it reflects the

²⁷ See ch. 688, § 12 [1985] N.Y. Laws 1748 (McKinney) (current version at N.Y. EXEC. LAW § 631-a (McKinney Supp. 1993)).

experience of other states and can contribute significantly to understanding how crime victims' rights throughout the nation have evolved. Generally, New York's crime victim legislation can be compartmentalized into three categories: 1) enhancement of the victim's civil right of recovery; 2) fortification of the victims' right to restitution and reparation as an element of criminal sentencing; and 3) empowerment of the crime victim in an otherwise offender-oriented criminal justice system.

A. *Enhanced Civil Right of Recovery*

The sole purpose for which the Crime Victims Compensation Board was created was to establish an agency through which victims of crime could be compensated for their out-of-pocket economic losses. However, an additional and highly visible mission was added to the mandate of the Board in 1978 with the enactment of New York's original "Son of Sam law."²⁸

The Son of Sam law was enacted in response to media reports that the serial murderer David Berkowitz, (the "Son of Sam") was to be offered enormous sums of money for the exclusive rights to his crime story. This prompted an expression of outrage on the part of Governor Carey and the legislature, and they moved quickly to enact a law that would ensure that any such profits would be applied first to the benefit of the victim(s) of the crime. This law became a model for similar laws enacted by a majority of the states and the federal government.²⁹

Among other things, the Son of Sam law provided that any "entity" contracting with a person "accused or convicted of a crime,"³⁰ or any person "who has voluntarily and intelligently admitted the commission of a crime for which such person is not prosecuted,"³¹ for the production of a book or other work describing or depicting the crime, must pay over to the Crime Victims Board any moneys owing to that person under the contract.³² Once the

²⁸ Ch. 823, § 1, [1977] N.Y. Laws 1321 (McKinney) (current version at N.Y. EXEC. LAW § 632-a (McKinney Supp. 1993).

²⁹ For a list of states having similar statutes, see Karen M. Ecker & Margot J. O'Brien, Note, Simon & Schuster, Inc. v. Fischetti: *Can New York's Son of Sam Law Survive First Amendment Challenge?*, 66 NOTRE DAME L. REV. 1075, 1075, n.6 (1991).

³⁰ Ch. 417, § 1, [1978] N.Y. Laws 722 (McKinney) (repealed 1992).

³¹ Ch. 445, § 3, [1981] N.Y. Laws 909 (McKinney) (repealed 1992).

³² Ch. 417, § 1, [1978] N.Y. Laws 722 (McKinney) (repealed 1992).

Board received these funds, the Son of Sam law required them to be deposited into an escrow account to be available for a period of five years, to any victim of that person who had obtained a civil judgment.³³ Regardless of when the act occurred which was the source of the moneys, victims had up to five years from the date the funds were escrowed to institute an action for damages under a special statute of limitations provision. Any balance remaining in the escrow account after payments to victims and certain other creditors was to be returned to that person after five years.³⁴

The crime victim's right to civil recovery was further enhanced in 1983, when the Civil Practice Law and Rules were amended to provide, independent of the Son of Sam law, yet another statute of limitations within which a crime victim could bring a civil action against the offender: a period of one year from the termination of the corresponding criminal action.³⁵ This change gave crime victims a special opportunity to recover damages regardless of the absence of the criminal's storytelling for profit.

B. Fortification of the Right to Restitution and Reparation

Historically in New York, the victim's right to restitution and reparation was available only if the offender was sentenced to probation or conditional discharge, and only in an amount the offender could afford to pay.³⁶ In the modern era of victims' rights, this right to restitution and reparation has undergone considerable and almost yearly expansion.

In 1980, New York's Penal Law and Criminal Procedure Law were amended to provide statutory authority for a court to order restitution and reparation as a component of sentencing when the offender is sentenced to a period of incarceration.³⁷ However, the amount of restitution and reparation the court could require without the consent of the offender was limited to \$5,000.00 for a felony conviction, and \$1,000.00 for a misdemeanor conviction.

³³ *Id.*

³⁴ *Id.*

³⁵ Ch. 95, § 1, [1983] N.Y. Laws 278 (McKinney) (current version at N.Y. CIVIL PRAC. L. & R. § 215(8) (McKinney 1990).

³⁶ *See, e.g.*, ch. 1030, § 65.10(f) [1965] N.Y. Laws 1556 (McKinney) (current version at N.Y. PENAL LAW § 65.10(2)(g) (McKinney 1987).

³⁷ Ch. 290, §§ 2-5, [1980] N.Y. Laws 472 (McKinney) (current version at N.Y. CRIM. PROC. L. §§ 420.10-420.30 (McKinney 1983 & Supp. 1993)).

The right to restitution was made more meaningful with 1982 amendments, which required a pre-sentence investigation report to include, when relevant to the sentence recommendation or disposition, what has now come to be known as the "victim impact statement."³⁸ These amendments required the victim impact statement to include "an analysis of the victim's version of the offense, the extent of injury or economic loss or damage to the victim relating to disposition including the amount of restitution sought by the victim. . . ." The victim impact statement put the victim's interests in the record. One year later, a provision was added to ensure that the economic interests to the crime victim would be brought to the court's attention. The new provision required a district attorney to notify the sentencing court when the crime victim sought restitution, including the amount of restitution sought and the extent of the injury or loss to the victim, and required the sentencing court to consider ordering restitution to the victim as part of the sentence.³⁹

In addition to the change in sentencing procedures made in 1984, the Legislature expanded the crime victims substantive rights by authorizing the sentencing court to order restitution or reparation to a victim of crime in excess of the statutory limits, provided the excess represented either the return of the victim's property or reimbursement of medical expenses incurred by the victim prior to sentencing.⁴⁰ The removal of the \$5,000.00 ceiling for restitution of a felony eliminated one artificial barrier which could unfairly restrict a crime victim's ability to obtain full compensation for losses or injuries suffered. In addition, laws were enacted to increase the monetary amount of restitution a crime victim could recover. In 1986, New York's Penal Law was amended to increase the maximum statutory limits on orders of restitution for felonies from \$5,000.00 to \$10,000.00, and for misdemeanors and violations from \$1,000.00 to \$5,000.00.⁴¹

Beyond these legislative amendments imposing more stringent

³⁸ Ch. 612, § 1, [1982] N.Y. Laws 1569 (McKinney) (current version at N.Y. PENAL LAW, § 1.05 (McKinney 1987).

³⁹ Ch. 397, § 2, [1983] N.Y. Laws 644 (McKinney) (current version at N.Y. PENAL LAW § 60.27(1) (McKinney Supp. 1993).

⁴⁰ Ch. 468, § 1, [1983] N.Y. Laws 868 (McKinney) (current version at N.Y. PENAL LAW § 60.27(5) (McKinney 1987 & Supp. 1993).

⁴¹ Ch. 615, § 1, [1986] N.Y. Laws 1305 (McKinney) (current version at N.Y. PENAL LAW § 60.27(5) (McKinney 1987 & Supp. 1993).

requirements on prosecutors to seek restitution on behalf of victims, victims were ensured a greater opportunity to collect restitution by additional legislative enactments in 1985, which required a sentencing court to order the payment by the offender of any restitution or reparation to the victim prior to the payment of any fine. This legislation made crime victims' interests paramount by requiring courts to give priority to restitution orders over fines.⁴² To further facilitate the collection of restitution, the Executive Law was amended to provide that conditions of parole had to include a requirement that the parolee comply with any order of restitution previously imposed, and that a discharge from parole would be conditioned upon a good faith effort to comply with any such order of restitution.⁴³

C. Empowerment of the Crime Victim in the Criminal Justice Process

The enhancement of New York's restitution laws manifested the legislature's increasing recognition of the victim's entitlement to compensation from the offender. At the same time the legislature came to understand and to accept the victim's right to have a role in the processing and disposition of the criminal defendant's case. Consistent with this trend, New York has been developing and expanding the right of crime victims to meaningful involvement in, and protection and information from, the criminal justice process.

One of the first expressions of this understanding and acceptance was the enactment in 1978 of an amendment to New York's Criminal Procedure law, which required a district attorney to notify a crime victim of the final disposition of the criminal case against the offender, if the crime victim has so requested.⁴⁴ This enactment began the process of breaking down invisible barriers which often kept crime victims isolated from a process in which they had a deep personal interest. Recognizing the importance of the participation in the criminal justice process of victims and witnesses, the legislature amended New York's Penal Law in 1982 to

⁴² Ch. 506, § 2, [1985] N.Y. Laws 1275 (McKinney) (current version at N.Y. PENAL LAW § 120.03 (McKinney Supp. 1993).

⁴³ Ch. 466, § 1, [1986] N.Y. Laws 973 (McKinney) (current version at N.Y. EXEC. LAW § 259-i(2)(a) (McKinney 1982 & Supp. 1993).

⁴⁴ Ch. 496, § 1, [1978] N.Y. Laws 893 (McKinney) (current version at N.Y. CRIM. PROC. LAW § 440.50 (McKinney 1983 & Supp. 1993).

prohibit an employer from discharging or penalizing an employee who was subpoenaed to attend a criminal proceeding.⁴⁶

In 1983, Article 22 of the Executive Law was amended to require that police stations, precinct houses, and other appropriate locations prominently display posters giving notice of the existence and availability of crime victim compensation, of laws prohibiting the intimidation of crime victims, and of the local availability of crime victim services.⁴⁶ This constituted recognition by state government that victims' rights could be rendered virtually meaningless unless adequate notice was provided.

In 1984 I proposed as legislation, and was privileged to sign into law, the Fair Treatment Standards for Crime Victims Act⁴⁷—the first of its kind in the nation. This law required the Commissioner of the Division of Criminal Justice and the Chairman of the Crime Victims Board, in consultation with other officials, to promulgate standards for the appropriate treatment of victims in the criminal justice system.

The Fair Treatment Standards Act was sweeping in scope. Among its many objectives, it provided that victims be given information about the criminal justice system generally, and particularly about the criminal case in which he or she was involved, as well as information about available victim services and compensation. The act required special solicitude toward the victim on the part of the district attorney in considering release of the criminal defendant pending further proceedings, in the disposition of certain aggravated felonies, and in the sentencing of the convicted offender. As enacted this legislation provided secure areas for crime victims and other prosecution witnesses waiting to testify, for the prompt return of property held for evidentiary purposes, and for assistance with a victim's or witness's employer or creditors. The act required victim assistance education to be provided in law enforcement and district attorney training programs, and agencies which regularly provide services or otherwise interact with crime victims to review their policies and procedures with a

⁴⁶ Ch. 823, § 1, [1982] N.Y. Laws 1984 (McKinney) (current version at N.Y. PENAL LAW § 215.14 (McKinney 1988).

⁴⁶ Ch. 77, § 1, [1983] N.Y. Laws 252 (McKinney) (current version at N.Y. EXEC. LAW § 625-a (McKinney 1982 & Supp. 1993).

⁴⁷ Ch. 94, § 1, [1984] N.Y. Laws 165 (McKinney) (current version at N.Y. EXEC. LAW §§ 640-645 (McKinney Supp. 1993).

view to improving their services and their responsiveness to crime victims.⁴⁸

In 1985, the process of re-inclusion of the crime victim in the criminal justice process continued with a statutory change requiring the Board of Parole to consider any written statement submitted by a crime victim, or in certain cases the victim's family, in determining the suitability of a criminal offender for parole release. This legislation also required that the crime victim be notified of the right to submit such a written statement.⁴⁹ That same year the crime victim, and the family of a victim under certain circumstances, were granted the right to receive notification from the Department of Correctional Services of the release, escape, or absconding of an inmate, and of any subsequent capture, if the victim or the victim's family filed a request for such notification.⁵⁰ These changes constituted a substantial expansion of the victim's involvement beyond the adjudication of guilt and sentencing stages of the criminal justice system.

In 1987, New York's Executive Law was further amended to establish a Witness Protection Program within the Division of Criminal Justice Services, to be operated in consultation with the Crime Victims Board, to establish standards and to provide funds for witness protection and relocation program services to be provided by local provider agencies.⁵¹ Two years later New York's Penal Law was amended to provide for the imposition at sentencing of a "crime victim assistance fee" to be credited to the State's criminal justice improvement account, which provides funding for the witness protection program and the crime victim compensation program.⁵² This represented part of a legislative effort to shift the economic burden imposed upon the state by criminal activity to the party most appropriate to bear that burden—the criminal offender.

⁴⁸ Ch. 414, § 1, [1985] N.Y. Laws 1102 (McKinney) (current version at N.Y. EXEC. LAW § 640 (McKinney Supp. 1993).

⁴⁹ Ch. 78, § 2, [1985] N.Y. Laws 383 (McKinney) (current version at N.Y. CRIM. PROC. LAW § 440.50(1) (McKinney Supp. 1993).

⁵⁰ Ch. 504, § 1, [1985] N.Y. Laws 1265 (McKinney) (current version at N.Y. CORRECT. LAW § 149-a (McKinney 1987 & Supp. 1993).

⁵¹ Ch. 711, § 1, [1987] N.Y. Laws 1244 (McKinney) (current version at N.Y. EXEC. LAW § 835(11)-(13) (McKinney Supp. 1993).

⁵² Ch. 62, § 84 [1989] N.Y. Laws 273 (McKinney) (current version at N.Y. PENAL LAW § 60.35 (McKinney Supp. 1993).

In the latter part of the 1980s and the first two years of the 1990s the volume of crime victim-related legislation continued apace. However, there was a subtle change in the nature of the legislation. The bulk of the legislation during this five year period was victim specific, focusing on matters relating to victims of sexual violence, domestic violence, and child victims. This trend, and the legislation that was adopted during this period, merit separate review and discussion. To the extent that the legislation of that period is not particularly linked to the three focal points of this article, namely the re-inclusion of the crime victim in the offender based criminal justice system, enhanced rules of restitution and reparation, and a fortification of the civil right of recovery, I leave that analysis for another article.

V. SETBACK TO THE PROGRESSIVE ENHANCEMENT OF VICTIMS' RIGHTS

In 1986, the Crime Victims Board became aware of a contract between the publishing house of Simon & Schuster and convicted organized crime figure Henry Hill. Hill had earlier agreed with writer Nicholas Pileggi to collaborate on a book about his life of crime, and they subsequently arranged with Simon & Schuster to publish the book *Wiseguy: Life in a Mafia Family*. The Board reviewed the book and the contract, and in 1987 issued a "Proposed Determination and Order," declaring that the book *Wiseguy* was subject to the Son of Sam law.

Simon & Schuster responded by filing a civil rights action in federal court, claiming that the Board's action and the Son of Sam statute unduly burdened the First Amendment's guarantee of freedom of speech. Upon cross-motions for summary judgment, the United States District Court for the Southern District of New York found the statute and the Board's action to be consistent with the first amendment,⁵³ and a divided Second Circuit Court of Appeals affirmed.⁵⁴ Simon & Schuster appealed to the United States Supreme Court, and certiorari was granted.

On December 10, 1991, a unanimous Supreme Court reversed

⁵³ *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 724 F. Supp. 170, 180 (S.D.N.Y. 1989), *aff'd*, 916 F.2d 777 (2d Cir. 1990), *rev'd*, 112 S. Ct. 501 (1991).

⁵⁴ *Simon & Schuster*, 916 F.2d at 784 (Newman, J. dissenting).

the Court of Appeals and, in a decision authored by Justice Sandra Day O'Connor, held that New York's Son of Sam law violated the first amendment by targeting speech of a certain content for a financial burden placed on no other speech, without a properly narrow compelling state interest in doing so.⁵⁶

The Supreme Court's analysis began with the recognition that "[a] statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech."⁵⁶ The Court then found that the Son of Sam law was "such a content-based statute,"⁵⁷ and determined that New York must therefore demonstrate that the statute was "necessary to serve a compelling state interest and [was] narrowly drawn to achieve that end."⁵⁸

The Court acknowledged a number of potentially compelling state interests, including "ensuring that victims of crime are compensated by those who harm them," depriving criminals of the profits of their crimes, and . . . using these funds to compensate victims," and "compensating victims from the fruits of the crime."⁵⁹ The Court also acknowledged an interest, though not necessarily compelling, in "preventing wrongdoers from dissipating their assets before victims can recover."⁶⁰ However, the Court found no compelling interest on the part of the State in the narrow focus of the Son of Sam law on assets derived from "story-telling" as contrasted with "any of the criminal's other assets."⁶¹ The Court stated that this distinction among assets had "nothing to do with the State's interest in transferring the proceeds of crime from criminals to their victims."⁶²

In essence, the Court decided that "the State has a compelling interest in compensating victims from the fruits of the crime, but little if any interest in limiting such compensation to the proceeds of the wrongdoer's speech about the crime."⁶³ The Court then directed its inquiry to a determination of "whether the Son of

⁵⁶ *Simon & Schuster*, 112 S. Ct. at 512.

⁵⁶ *Id.* at 508.

⁵⁷ *Id.*

⁵⁸ *Id.* at 509.

⁵⁹ *Id.* at 509-11.

⁶⁰ *Simon & Schuster*, 112 S. Ct. at 509.

⁶¹ *Id.* at 510.

⁶² *Id.*

⁶³ *Id.* at 511.

Sam law [was] narrowly tailored to advance the former, not the latter, objective."⁶⁴

The Court concluded that, as "a means of ensuring that victims are compensated from the proceeds of the crime, the Son of Sam law is significantly overinclusive" because "the statute applies to works on any subject, provided that they express the author's thoughts or recollections about his crime, however tangentially or incidentally," and because "the statute's broad definition of 'person convicted of a crime' enables the [Crime Victims] Board to esrow the income of any author who admits in his work to having committed a crime, whether or not the author was ever actually accused or convicted."⁶⁵ Therefore, "the Son of Sam law clearly reaches a wide range of literature that does not enable a criminal to profit from his crime while a victim remains uncompensated."⁶⁶ Thus, the statute is not "narrowly tailored to achieve the State's objective of compensating crime victims from the profits of crime," and therefore, on its face, "the statute is inconsistent with the First Amendment."⁶⁷

While New York's Son of Sam law never had a considerable impact on the immediate lives or interests of the vast majority of crime victims in New York, it had nonetheless constituted an important statement of public policy: an agency of state government will ensure that a criminal will not profit from the sale of the story of his or her criminal misdeeds without first making those profits available to compensate the victim(s). The repudiation by the Supreme Court of this public policy statement demanded an immediate response.

A. *New York's Response to the Simon & Schuster Decision*

The Supreme Court's decision in *Simon & Schuster* gave New York an opportunity to reconsider how the state could best serve the interest in compensating the victim and ensuring that the criminal did not profit from the crime in a manner consistent with the Constitution. In March 1992, I was joined by Attorney General Robert Abrams in proposing a bill containing a number of

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ 112 S. Ct. at 512.

legislative initiatives designed to enlarge the opportunity for crime victims to be compensated by the criminals who have harmed them. This bill formed the basis for subsequent negotiation with the legislature resulting in the enactment of a "new" Son of Sam law, together with a package of other statutory amendments which significantly enlarged the availability of compensation to crime victims from offenders.⁶⁸

This new enactment established a seven-year period of limitations to bring a civil action in damages for all intentional torts arising from the commission of a crime. In recognition of the distinct and compelling state interest in preventing criminals from profiting from their crimes, this enactment created a second and discrete three-year period of limitations, measured from the time a crime victim discovered that the perpetrator has received or is receiving profits from the crime, to bring a civil action for damages.

It strengthened the opportunity for the crime victim to seek and receive restitution and reparation ordered by the sentencing court in the criminal proceeding, by helping to ensure that the victim is informed of the right to restitution and reparation, and by requiring sentencing judges to order restitution and reparation when it is requested by the victim, unless the interests of justice truly mandate otherwise.

No provision of this new enactment singled out speech for any particular burden, but rather it implemented broadly, wisely, and fairly a vision of essential justice between those who have been hurt and those who have hurt them. The underlying premise of the original Son of Sam law was affirmed: it is grossly unjust for a criminal to profit from criminality and leave the victim uncompensated.

Perhaps because of the widespread interest generated by the events surrounding the Son of Sam law, the 1992 legislative session significantly advanced the victims' rights agenda on other fronts. Of primary importance was an amendment to the Criminal Procedure Law to provide that the victim of a felony crime shall

⁶⁸ Ch. 618, § 2, [1992] N.Y. Laws 1669 (McKinney) (current version at N.Y. CIV. PROC. L. & R. § 6201 (McKinney 1980 & Supp. 1993); ch. 618, § 5, [1992] N.Y. Laws 1670 (McKinney) (current version at N.Y. CRIM. PROC. LAW § 410.90 (McKinney 1983 & Supp. 1993); ch. 618, § 14, [1992] N.Y. Laws 1674 (McKinney) (current version at N.Y. PENAL LAW § 65.05(3) (McKinney Supp. 1993).

have the right of "allocution"—the right to make an oral statement to the sentencing court with regard to any matter relevant to the question of sentence.⁶⁹ This constitutes a profound elevation of the victim's role in sentencing, which previously consisted of the comparatively dry recitation usually found in the written victim impact statements.

VI. AGENDA FOR THE FUTURE

We tend not to think about crime victims when we think about crime because of the way crime is treated in the news and in drama—we are encouraged to identify with the other actors: the criminals, the police, and the lawyers.

Americans have always been fascinated with good guys and bad guys Both criminals and police officers can go behind the scenes, into the secret places in the community—the darkened bars, the brothels, the courtrooms, the jails. They are the insiders, the ones who know what's really going on. Most of them are loners; they have no families to tie them down. Their nights are charged with excitement, filled with adventure. They don't have to keep their tempers or mind their manners. Nobody tells them what to do A crime victim is quite unexciting by comparison. The crime-story victim rarely holds the center of the stage because victims are neither glamorous nor powerful. The victim is a loser, an ineffective cipher in the power game. So crime victims are virtually ignored, clearly categorized as the least interesting people in the drama.⁷⁰

Increasingly, however, we as a society are coming to realize that these "least interesting people" are ourselves, our families, and our friends. We must continue to think about crime victims because they, we, are the mainstream of our society. To ignore the needs of crime victims in our society is to ignore the needs of most of our people—the good, moral, upright, hard-working, social contract-abiding majority.

Our agenda for the future must continue to focus on refining a criminal justice system that acknowledges and includes the crime

⁶⁹ Ch. 307, § 1, [1992] N.Y. Laws 1006 (McKinney) (current version at N.Y. CRIM. PROC. LAW § 380.50 (McKinney Supp. 1993).

⁷⁰ MORTON BARD & DAWN SANGREY, *THE CRIME VICTIM'S BOOK* 5 (1986).

victim in the process by which our society addresses the problem of what to do with the criminal offender. The criminal justice process should continue to be viewed not just as the means of bringing closure to the criminal transaction of the offender, but also as the means of bringing closure to the sense of violation the victim has been made to bear. Because a fundamental tenet of our free society is the social responsibility of the individual, our criminal justice system must ensure that criminal offenders bear to the extent possible the social and economic burden of their crime.

This agenda for the future must focus not only on the criminal justice issues *resulting* from crime, but also on the principal underlying causes of crime itself—among them the alienation experienced by too many of our fellow citizens who fail for whatever reason to share our values, our hopes, and our expectations. When we are able to address adequately these underlying *causes* of crime, and thereby to reduce the incidence of crime itself and the need for the intervention of a criminal justice system, then we shall have performed the greatest public service possible to alleviate the burden borne by the crime victim.