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The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences.[1]

INTRODUCTION

The victims'[2] rights movement has grown in force since the early 1970s.[3] The movement seeks to balance the criminal justice system's concern for the defendant with its concern for the victim[4] by affording victims a greater role in the criminal process.[5] This goal is

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1. Sheppard v. Maxwell, 384 U.S. 333, 363 (1966).

2. "Victims" as used throughout this Comment includes the immediate family and relatives of the victim. *See* Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 951-52 (1985) (discussing society's perception of who is a victim).

3. *See* THE NATIONAL ORGANIZATION FOR VICTIM ASSISTANCE, VICTIM RIGHTS AND SERVICES: A LEGISLATIVE DIRECTORY 1985 [hereinafter NOVA DIRECTORY]; Frank Carrington & George Nicholson, *The Victims' Movement: An Idea Whose Time Has Come*, 11 PEPP. L. REV. 1 (1984) (symposium issue); Robert C. Davis & Madeline Henley, *Victim Service Programs, in* VICTIMS OF CRIME: PROBLEMS, POLICIES, AND PROGRAMS 157 (Arthur J. Lurigio et al. eds., 1990) [hereinafter CRIME VICTIMS] ("[T]he growth of service programs [for victims] in the United States has been nothing short of phenomenal."). Some commentators have noted that the victims' rights movement has progressed faster than any other civil rights movement. *See, e.g.*, Curtis J. Sitomer, *New Civil Rights Thrust: Aid for Victims*, CHRISTIAN SCI. MONITOR, Apr. 5, 1983, at 1.

4. *See* PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT vii (1982) [hereinafter FINAL REPORT] ("The neglect of crime victims is a national disgrace. The President is committed to ending that neglect and to restoring balance to the administration of justice."). Professor Henderson has noted that:

> The success of these groups concerned with particular crimes and crime victims served to highlight the general importance of "victims" as an effective political symbol. Conservatives thus began rhetorically to paint "the victim" as a sympathetic figure whose rights and interests could be used to counterbalance the defendant's rights, and called for a new balance to be struck by courts and legislators.

Henderson, *supra* note 2, at 949.

5. Anderson and Woodard have noted that:

> Specific reforms include measures designed to protect victims and witnesses from intimidation, notify victims of designated occurrences in the proceedings, provide for victim participation in some proceedings, encourage employers not to discharge testifying employees, provide ombudsmen or support companions for victims, and guarantee victims the right to a speedy disposition of their cases.

grounded in the belief that victims have rights equivalent to those of the defendant.[6] Some advocates for victims' rights have even proposed the following addendum to the Sixth Amendment:

> Likewise, the victim, in every criminal prosecution shall have the right to be present and to be heard at all critical stages of judicial proceedings.[7]

This increased emphasis on victims' rights and involvement of the victim in the criminal process will cause a range of problems, including the potentially prejudicial role that victims, and victim advocates, may play in criminal trials.[8] Examples of this behavior in the courtroom include: the victim or victim's family sitting at the counsel table with the prosecutor during the trial,[9] victim/witness advocates accompanying witnesses to the witness stand,[10] and victim/witness advocates escorting prosecution witnesses in and out of the courtroom.[11]

The problems that arise from the victims' rights movement are rarely discussed, and any discussion that does occur is one-sided.[12] The reason for the one-sided discussion is that the two normally combative ideological foes—the liberal left (in the persona of the feminist movement in this instance) and the conservative right—share a common goal in this debate: protection of victims. Because both "sides" desire the same goal, the means to and consequences of achieving the goal are left unscrutinized, and honest evaluation of any new victims' rights programs or legislation does not occur.[13] This

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John R. Anderson & Paul L. Woodard, *Victim and Witness Assistance: New State Laws and the System's Response*, 68 JUDICATURE 221, 228 (1985).

6. *See, e.g.*, Richard L. Aynes, *Constitutional Considerations: Government Responsibility and the Right Not to be a Victim*, 11 PEPP. L. REV. 63 (1984) (symposium issue).

7. FINAL REPORT, *supra* note 4, at 114. But see James M. Dolliver, *Victims' Rights Constitutional Amendment: A Bad Idea Whose Time Should Not Come*, 34 WAYNE L. REV. 87 (1987), for an argument that an addendum to the Sixth Amendment is problematic and misconstrued. See generally Symposium, *Perspectives on Proposals for a Constitutional Amendment Providing Victim Participation in the Criminal Justice System*, 34 WAYNE L. REV. 1 (1987), for further discussion on the proposed addendum.

8. Throughout this Comment, any reference to "trial" refers to the guilt/innocence phase rather than the sentencing phase of a trial, which involves separate victims' rights considerations.

9. *See, e.g.*, ALA. CODE § 15-14-53 (1983) (granting the victim the right to be seated at the counsel table of the prosecutor); *see also infra* part III.B.1.

10. *See, e.g.*, State v. Suka, 777 P.2d 240 (Haw. 1989); *see also infra* part III.B.2.a.

11. *See infra* part III.B.2.b. (discussing this phenomena).

12. *See* Henderson, *supra* note 2; Dolliver, *supra* note 7. These are the only two major articles that criticize elements of the victims' rights movement.

13. *See* Henderson, *supra* note 2, at 951 (arguing that the ideological right asserts the same goal as the ideological left, granting victims' rights, in order to coopt the left); *cf.* Wendy Kaminev, *Feminists Against The First Amendment*, THE ATLANTIC MONTHLY, Nov. 1992, at 110 (arguing that both feminists and the religious right are pushing the view that pornography is not speech, thereby limiting the usual debate in which these two

lack of debate and discussion can lead to a trial environment where it is possible to subtly undermine a defendant's constitutional rights.

This Comment discusses the problems that the victims' rights movement creates at trial. While victims should be given special consideration outside the courtroom by virtue of their status as victims, they should not be afforded extra consideration or rights within the courtroom during a criminal trial. Although the phrase "victims' rights" may suggest that victims have special or additional rights, this Comment argues that victims have no greater rights during a trial than any other citizens. At trial, the rights under which all other rights must be subsumed—including victims' rights—are the defendants' constitutionally guaranteed rights to a fair trial and an impartial jury.

This Comment explores the victims' rights movement's effect, through legislation and the increasing courtroom presence of victims, on the rights of defendants. Defendants' rights are being overlooked and ignored in the emotionally charged rush to help victims, or, as some argue, in the rush to convict defendants.[14] During a criminal trial, defendants' Sixth Amendment rights to a fair trial and an impartial jury[15] should override the rights of victims if they conflict. Victim service programs[16] that do not involve the victim in the trial most appropriately meet victim needs. Excessive participation by victims or their advocates at trials unfairly denies defendants their Sixth Amendment rights by injecting emotion and prejudicial bias into the criminal process's search for the truth.

Part I of this Comment examines the origins of the victims' rights movement. Part II discusses defendants' Sixth Amendment rights to a fair trial and an impartial jury. This section illustrates how courts have found that defendants' Sixth Amendment rights may outweigh others' constitutional rights and interests in order to ensure a fair trial, focusing on the guidelines that courts use to balance defendants' Sixth Amendment rights with the public's First

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opposing views engage).

14. *See* Henderson, *supra* note 2, at 951.

15. In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

16. For a discussion of programs and services for victims, see PETER FINN & BEVERLY N.W. LEE, SERVING CRIME VICTIMS AND WITNESSES (1987). For a guide to victims' rights, see JAMES H. STARK & HOWARD W. GOLDSTEIN, THE RIGHTS OF CRIME VICTIMS (an ACLU Handbook) (1985).

Amendment rights of access to trials and expression. Part III argues that the guidelines used to balance defendants' Sixth Amendment rights with the public's First Amendment rights provide a model for balancing victims' and defendants' rights at trial. This section first provides examples of how victims' rights may violate defendants' constitutional rights to a fair trial and an impartial jury and then applies First Amendment guidelines to determine the extent of permissible victim participation in trials.

I. THE VICTIMS' RIGHTS MOVEMENT

A. *The Birth of Victims' Rights*

Prior to the victims' rights movement, the criminal justice system inadequately responded to the desire of victims to participate in the trial of their assailants, as well as to the victims' desire for retribution.[17] This led to a decreasing level of participation by victims and witnesses[18] and, consequently, fewer convictions.[19] The victims' rights movement responded to a widely held feeling that the victim had been forgotten by the criminal justice system.[20]

Citizens had "a growing feeling of impotence—a feeling that the authorities cannot relieve the problem and that there is little or nothing that the rest of us can do."[21] The women's movement articulated and publicized these feelings,[22] focusing on rape and how a

17. *See* Carrington & Nicholson, *supra* note 3, at 1-10; Josephine Gittler, *Expanding the Role of the Victim in a Criminal Action*, 11 PEPP. L. REV. 117, 121 (1984) (symposium issue); Paul S. Hudson, *The Crime Victim and the Criminal Justice System: Time For A Change*, 11 PEPP. L. REV. 23, 26-27 (1984) (symposium issue).

18. *See, e.g.*, U.S. DEPT. OF JUSTICE, MYTHS AND REALITIES ABOUT CRIME (1978); Davis & Henley, *supra* note 3.

19. ROBERT C. DAVIS, THE ROLE OF THE COMPLAINING WITNESS IN AN URBAN CRIMINAL COURT 2, 9 (1988).

20. *See, e.g.*, FINAL REPORT, *supra* note 4, at vi. ("Somewhere along the way, the system began to serve lawyers and judges and defendants, treating the victim with institutionalized disinterest."); Shirley S. Abrahamson, *Redefining Roles: The Victims' Rights Movement*, 1985 UTAH L. REV. 517, 523 (1985); William F. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AM. CRIM. L. REV. 649, 650 (1976); Robert Ward, *A Kinder, Gentler System: An Examination of How Crime Victims Have Benefitted From the Women's Movement*, 15 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 171, 172 (1989) ("Victims were treated as if they were invisible or irrelevant.").

21. Betty J. Spencer, *A Crime Victim's View on a Constitutional Amendment for Victims*, 34 WAYNE L. REV. 1, 2 (1987); *see also* Abraham S. Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L.J. 515 (1982).

22. *See, e.g.*, Davis & Henley, *supra* note 3, at 159 ("The first grass-roots programs were established between 1972 and 1976. Of the first three, all begun in 1972, two were rape crisis centers that grew out of the impetus of the women's movement."); Gittler, *supra* note 17, at 118 ("Much of the initial impetus for this movement stems from concern about rape victims generated by feminists and women's organizations . . . ."); Deborah P.

woman is "twice victimized" by the criminal justice system in a rape trial.[23] In response, many states enacted Rape Shield Laws,[24] which fulfilled the victim's desire and need to participate in the trial without being put on trial. Additionally, the movement sought to address victims' perceived need for retribution.[25]

Congress responded to the victims' rights movement by enacting the Victim/Witness Protection Act[26] in 1982 and the Victims of Crime Act (VOCA)[27] in 1984, providing protection for victims and funding for state compensation programs and victim/witness assistance agencies. Thus, on the federal level, victims and witnesses instantly achieved a newfound status in the criminal justice system.[28]

Kelly, *Victim Participation in the Criminal Justice System*, *in* CRIME VICTIMS, *supra* note 3, at 172 ("As recently as the early 1970s, attention to crime victims was virtually nonexistent. Efforts to change this were initiated by feminists . . . ."). *See generally* Gilbert Geis, *Crime Victims: Practices & Prospects in* CRIME VICTIMS, *supra* note 3, at 251, 255 ("National political developments were largely responsible for moving the subject of victims of crime onto the stage, center front, in the United States").

23. Robert Ward has noted:

> Today, in the Victims' Movement, we are concerned with the problem of secondary victimization. Unfortunately, this occurs when a victim seeks help from friends and/or from law enforcement, and is again victimized because he or she is treated badly. Who was it that taught us about the problem of secondary victimization? It was the Women's Movement and in particular, the victims of rape and sexual assault.

Ward, *supra* note 20, at 173-74. Shirley Abrahamson has commented:

> The early voices were frequently feminine and their tones were more those of anger than of fear. Their concern was for a particular victim, the victim of rape. The advocates sought to humanize treatment of the rape victim and to free the criminal justice system of sex role stereotypes which frequently resulted in blaming the rape victim for the crime.

Abrahamson, *supra* note 20, at 524. *See also* Gittler, *supra* note 17, at 118 n.4; SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE (1975).

24. By 1986, 48 states had enacted Rape Shield Laws. *See* Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts*, 70 MINN. L. REV. 763, 906-07 (1986).

25. For a discussion of society's call for retribution, see Henderson, *supra* note 2, at 990-99. "One meaning of retribution is associated with a theory of moral blameworthiness that justifies punishment. Although what constitutes appropriate punishment is both morally and culturally determined, the guiding notion is that defendants must pay a 'debt' to society to make amends for their wrongs." *Id.* at 990-91.

26. The Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (codified as amended at 18 U.S.C. §§ 1512-1515, 3579-3580 (1988)).

27. Federal Victims of Crime Act of 1984, Pub. L. No. 98-473, 98 Stat. 2170 (codified at 42 U.S.C. §§ 10601-10605 (1988)).

28. *See* Davis & Henley, *supra* note 3, at 157 ("Thanks, in part, to federal funding through the Victims of Crime Act (VOCA), victim service programs have developed a secure niche for themselves both within and outside the criminal justice system."). VOCA spent $100 million in 1986 and its funding limit was increased to $150 million in 1988. Robert Elias, *Which Victim Movement? The Politics of Victim Policy*, *in* CRIME VICTIMS,

States followed the lead of the Federal Government and soon initiated changes of their own. By 1984, thirty-nine states had enacted victim compensation legislation.[29] Additionally, numerous states had enacted victim/witness protection statutes,[30] which included provisions for "ombudsman or support companions for victims."[31] Some states went so far as to enact victims' "bills of rights."[32] Victims' rights had come of age but had not been fully and clearly defined.

B. *What are Victims' Rights?*

The victims' rights movement successfully identified important areas of concern for crime victims—compensation, assistance in

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supra note 3, at 226, 233.

29. *See* Anderson & Woodard, *supra* note 5, at 222. As of October, 1992, 47 states and the District of Columbia had compensation programs. *See* ALA. CODE § 15-23 (1992); ALASKA STAT. § 118.67.010 (1990); ARIZ. REV. STAT. ANN. § 41-2407 (1992); ARK. CODE ANN. § 16-90-701 (Michie 1990); CAL. GOV'T CODE § 13961.3 (West 1992); COLO. REV. STAT. § 24-4.1-100.1 (1992); CONN. GEN. STAT. § 54-201 (1992); DEL. CODE ANN. tit. 11, § 9002 (1992); D.C. CODE ANN. § 3-401 (1992); FLA. STAT. ch. 775.089 (1992); GA. CODE ANN. § 17-15-1 (Michie 1992); HAW. REV. STAT. § 351-2 (1991); IDAHO CODE § 19-5301 (1992); ILL. REV. STAT. ch. 70, para. 72 (1992); IND. CODE § 12-18-6-1 (1992); IOWA CODE § 912.1 (1992); KAN. STAT. ANN. §§ 74-7317, 74-7332 (1991); KY. REV. STAT. ANN. § 346.010 (Baldwin 1992); LA. REV. STAT. ANN. § 15:571.7 (West 1992); ME. REV. STAT. ANN. tit. 17-A, § 1321 (West 1991); MD. ANN. CODE art. 27, § 640 (1992): MASS. GEN. L. ch. 258A, § 1 (1991); MICH. COMP. LAWS § 18.351 (1992); MINN. STAT. § 611A.64 (1992); MISS. CODE ANN. § 99-41-1 (1991); MO. REV. STAT. § 595.045 (1992); MONT. CODE ANN. § 53-9-101 (1991); NEB. REV. STAT. § 29-2280 (1988); NEV. REV. STAT. § 217.001 (1991); N.J. STAT. ANN. § 52:4B-1 (West 1992); N.M. STAT. ANN. § 31-22-1 (Michie 1992); N.C. Gen. Stat. § 15B-1 (1991); OHIO REV. CODE ANN. § 2929.11 (Anderson 1992); OKLA. STAT. tit. 21, § 192.3 (1992); OR. REV. STAT. §§ 137.101, 147.005 (1991); 71 PA. CONS. STAT. § 180-7 (1992); R.I. GEN. LAWS § 12-25-1 (1986); S.C. CODE ANN. § 16-3-1180 (Law Co-op. 1991); S.D. CODIFIED LAWS ANN. § 23A-28B-1 (1992); TENN. CODE ANN. § 29-13-101 (1992); TEX. REV. CIV. STAT. ANN. art. 8309-1 (West 1992); TEX. CODE CRIM. PROC. ANN. art. 42.12 (West 1992); UTAH CODE ANN. § 63-63-1 (1991); VT. STAT. ANN. tit. 13, § 5353 (1992); VA. CODE ANN. § 19.2-368.1 (Michie 1992); WASH. REV. CODE § 7.68.120 (1991); W. VA. CODE § 14-2A-2 (1992); WIS. STAT. § 949.01 (1990); WYO. STAT. § 1-40-101 (1992).

30. *See* Anderson & Woodard, *supra* note 5, at 229. By 1985, twelve states had enacted legislation to deal with victim and witness protection: Alabama, Arizona, Colorado, California, Delaware, Louisiana, Pennsylvania, Wisconsin, Minnesota, Nevada, Illinois, and New York. For a more detailed analysis of these statutes, see *id.*

31. *Id.* at 228.

32. As of October, 1992, 17 states had victims' Bills of Rights. *See* ARIZ. CONST. art. 2, § 2.1 (1992); CAL. CONST. art. 1, § 28 (1992); DEL. CODE ANN. tit. 11, § 9401 (1992); ILL. REV. STAT. ch. 38, para. 1403 (1992); KAN. STAT. ANN. § 74-7333 (1992); MICH. CONST. art. 1, § 24 (1992); N.H. REV. STAT. ANN. 21-M: 8-K (1991); N.M. STAT. ANN. § 31-24-1 (Michie 1992); OR. REV. STAT. § 147.405 (1991); 71 PA. CONS. STAT. § 180-9 (1992); S.C. CODE ANN. § 16-3-1510 (Law. Co-op. 1991); TENN. CODE ANN. § 40-38-101 (1992); TEX. CONST. art. 1, § 30 (1992); UTAH CODE ANN. § 77-37-1 (1991); WASH. CONST. art. I, § 35 (1991); WIS. STAT. § 950.01 (1990); WYO. STAT. § 1-40-201 (1992).

participating in the system, restitution, and protection from intimidation.[33] The criminal justice system was compelled to respond to those needs because without victim cooperation the system would lose a key component in obtaining convictions and combatting crime—the victim's testimony. Consequently, state legislatures granted rights to victims, attempting to make victims feel needed by and important to the system.[34] These rights included, most prominently, the right to "participate in the criminal justice system."[35]

The right to "participate" seems general and broad. Victim participation means affording the victim protection, knowledge of the proceedings, and input into some prosecutorial decisions.[36] Participation, however, does not necessarily create trial rights for the victim,[37] and thus the extent of the victim's permissible participation is unclear.

States with victims' bills of rights[38] have established guidelines for victim participation in the criminal justice system. Normally the victim is granted the right:

1. To be informed of the final disposition of the case;
2. To be notified if any court proceeding for which they have received a subpoena will not occur as scheduled;
3. To receive protection from victim intimidation and to be provided with information as to the level of protection available;
4. To be informed of the procedure for receiving witness fees;
5. To be provided, whenever practical, with a secure waiting area not close to where the defendants wait;
6. To have personal property in the possession of law enforcement agencies returned as expeditiously as possible, where feasible, photographing the property and returning it to the owner within ten days of being taken;
7. To be provided with appropriate employer intercession so that loss of pay and other benefits resulting from court appearances will be minimized.[39]

While these guidelines provide a great deal of much needed attention to victims and their concerns, they do not mention permitting a victim to participate in or influence a defendant's trial. In other

33. *See* STARK & GOLDSTEIN, *supra* note 16, at 3-4.

34. *Id.* at 22.

35. *Id.* at 11.

36. Victims are sometimes allowed to participate in plea bargains, pretrial proceedings, and parole hearings. *Id.* at 58-82.

37. The proposed addendum to the Sixth Amendment would theoretically create trial rights for the victim. But, as Judge Dolliver points out, "[a]ny rights the victim seeks to secure are not of a constitutional character; thus, a victims' rights amendment is an inappropriate means of securing victims' rights." Dolliver, *supra* note 7, at 91.

38. *See supra* note 32.

39. STARK & GOLDSTEIN, *supra* note 16, at 23.

words, the very framers of victims' bills of rights assumed that victims could be made to feel safe and enfranchised in ways which did not involve their intrusion on defendants' trial rights. However, the victims' rights movement has demanded greater victim protection than found in the bills of rights, attempting to elevate the status of the victim to the level of the defendant.[40]

C. *The Jurisprudential Window of Opportunity for Victim's Rights: From Warren to Rehnquist*

The Warren Court[41] brought about drastic changes in the constitutional interpretation of criminal procedure and defendants' rights.[42] Many scholars view this period as the zenith of liberal judicial activism in criminal justice.[43] The Court broadened protections for defendants and enforced limits on state power more strictly.[44] Placing limits on police power provided a means for protecting individual freedom.[45]

Philosophically, the Warren Court perceived society and its deficiencies as the root cause of crime.[46] To punish individuals for crime partly caused by society seemed unjust to the liberal ideology. The liberal ideology thought that sanctions should focus on rehabilitation, not retribution.[47] Focusing the criminal justice system squarely on defendants and rehabilitation would force society to

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40. *See supra* notes 6-7 and accompanying text.

41. Earl Warren served as Chief Justice from September 1953 to May 1969.

42. *See generally* LIVA BAKER, MIRANDA: CRIME, LAW AND POLITICS (1983); ALEXANDER BICKEL, POLITICS AND THE WARREN COURT (1965); PHILIP B. KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT (1970); Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L. F. 518.

43. Justification for such a view rests on the two dozen or so "important" criminal law decisions rendered by the Warren Court. *See* Allen, *supra* note 42, at 520 n.8 (listing the important decisions); KURLAND, *supra* note 42 (analyzing the Warren Court's ideology).

44. By this time, our criminal justice system had firmly embraced the theory of public prosecution. For an analysis of the trend from private to public prosecution, see Henderson, *supra* note 2, at 938-42. With this dominant view came a need for greater review of state action, for abuse of freedom was seen as more likely in a state where the police were granted more power—or so the Warren Court believed. At least one scholar has argued that this belief arose from our lessons with European dictators. "One can safely assume that some public officials, including judges, were led to view the regulation of criminal justice functions not as a matter of local concern, but rather as part of the essential strategy of freedom." Allen, *supra* note 42, at 522; *see also* FRANCIS A. ALLEN, THE CRIMES OF POLITICS 4 (1974).

45. *See, e.g.*, BAKER, *supra* note 42; KURLAND, *supra* note 42; Allen, *supra* note 42.

46. *See, e.g.*, Ronald Bayer, *Crime, Punishment, and the Decline of Liberal Optimism*, 27 CRIME & DELINQ. 169, 172 (1981).

47. *See* FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE (1981).

confront the causes of crime.[48]

Society's concern with defendants' rights and belief in rehabilitation did not, however, lead to a decline in the crime rate.[49] As more Americans became victims of crime, a call for retribution, not rehabilitation, reverberated through the Supreme Court, Congress, and the country.[50] Following Warren Burger's replacement of Earl Warren as Chief Justice, Richard Nixon appointed William Rehnquist to the Supreme Court, and conservative ideology gained its foothold in the judiciary.[51] The Warren Court's era of defendant's rights had ended, and the pressures of politics, racism, and fear controlled.[52]

The conservative movement criticized the failure of liberal ideology to deal with crime. It responded to the nation's call for retribution and incarceration[53] with the "Crime Control Model."[54] This

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48. The causes of crime throughout this period were seen as alienation, poverty, discrimination, and lack of education. Henderson, *supra* note 2, at 943; *see also* Bayer, *supra* note 46, at 171-72. Society turned introspective and shouldered this liberal, ideological burden when it answered John Kennedy's call to "ask not what your country can do for you—ask what you can do for your country." Inaugural Address of John F. Kennedy, 1962 PUB. PAPERS 1, 3 (Jan. 20, 1961).

49. *See* FINAL REPORT, *supra* note 4, at vi; *see also* STARK & GOLDSTEIN, *supra* note 16, at 1; JAMES Q. WILSON, THINKING ABOUT CRIME 4-5 (1975); Goldstein, *supra* note 21, at 515.

50. *See* SUE DAVIS, JUSTICE REHNQUIST AND THE CONSTITUTION 3 (1989) ("Richard Nixon made the Supreme Court a major issue in his campaign for the presidency in 1968. In an attempt to appeal to voters by emphasizing law and order, he blamed decisions of the Warren Court for high rates of crime and little punishment."). The social upheaval in the late 1960s fed a growing fear of the breakdown of the public order. *See* Henderson, *supra* note 2, at 947-48; *see also* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (codified at 18 U.S.C. § 921 (1988)); FRED P. GRAHAM, THE SELF-INFLICTED WOUND (1970); RICHARD HARRIS, THE FEAR OF CRIME 22-29 (1969). Liva Baker asserted that:

> The man who had criticized Miranda [Warren Burger] had replaced the man who had written it [Earl Warren]. There was an empty seat at the extreme right, still another opportunity for the president who had campaigned against Miranda. Perhaps most important of all, for the first time all three branches of government, the Congress, the president, and finally the judiciary, were now lined up against Miranda.
>
> An era as well as a term had ended.

BAKER, *supra* note 42, at 287.

51. *See* DAVIS, *supra* note 50; *see also* DONALD E. BOLES, MR. JUSTICE REHNQUIST, JUDICIAL ACTIVIST (1987).

52. *See* Henderson, *supra* note 2, at 943-46.

53. Lois Forer explained:

> Reluctantly we must acknowledge that we simply do not know how to treat violent dangerous offenders so that they can be 'cured' of violence, unreason, and hostility. Until such time as there are developments in psychotherapy, chemistry, and medicine, the legal system will have to isolate these people who pose an unreasonable risk to society. For them, prison is the only appropriate penalty.

LOIS G. FORER, CRIMINALS AND VICTIMS 305 (1980). For a view that our nation is return-

conservative break from the Warren Court's liberal ideology manifested itself in a number of tough sentencing laws passed during the 1970s[55] and led to a growing number of victims groups established in the late 1970s and early 1980s.[56] While the Supreme Court was cutting back defendants' rights, these victims groups were publicizing victims' rights.[57] The efficacy of these groups stemmed from their political power at the national and state level.[58]

The goals of the victims' rights movement are subject to debate.[59] Although advocates of victims' rights agree on the importance of victim participation in the criminal justice system,[60] their justifica-

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ing to vigilantism to deal with the failures of the rehabilitation approach of the Warren Court, see RALPH A. FINE, ESCAPE OF THE GUILTY (1986).

54. The Crime Control Model "envisions a summary process, much like an assembly line, with reliance placed on administrative rather than judicial decisionmaking. Central to the ideology of the crime control model are the 'presumption of guilt' and the belief 'that the criminal process is a positive guarantor of social freedom.'" Henderson, *supra* note 2, at 946 (footnotes omitted). For a detailed analysis of the Crime Control Model, see HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 149-173 (1968).

55. *See* Henderson, *supra* note 2, at 947 n.62.

56. For example, Mothers Against Drunk Drivers (MADD) was founded in 1980 and Parents of Murdered Children was founded in 1978. Henderson, *supra* note 2, at 950 n.76. Additionally, Students Against Drunk Drivers (SADD) was founded in 1981. Barry Tempkin, *SADD Idea Has Happy Outcome*, CHI. TRIB., Sept. 30, 1990, at C24. *See also* Spencer, *supra* note 21, at 5 (describing a coalition formed in 1987 called Victims' Constitutional Amendment Network, including eleven victims' groups: NOVA, Sunny von Bulow National Victim Advocacy Center, MADD, Parents of Murdered Children, Childhelp USA, Protect the Innocent Victims Advocate Foundation, Justice for Crime Victims of America, Justice for Surviving Victims, Victims of Crime Advocacy League, Crime Victims Committee of the American Bar Association, and Campaign California).

57. *See, e.g.*, Ted Gest et al., *Victims of Crime*, U.S. NEWS & WORLD REP., July 31, 1989, at 16; Martha Middleton, *Victims of Crime Flexing Muscles: Bigger Role Wanted*, NAT'L. L.J., Mar. 13, 1989, at 1; Curtis J. Sitomer, *Judges Assemble From Across U.S. to Discuss the Rights of Crime Victims*, CHRISTIAN SCI. MONITOR, Nov. 28, 1983, at 1; Curtis J. Sitomer, *Shedding the Stigma of False Accusations*, CHRISTIAN SCI. MONITOR, July 25, 1985, at 23; Nick Thimmesch, *A Family's Fight for Justice*, SATURDAY EVENING POST, Dec. 1984, at 42.

58. This power was obtained through a political paradox. No politician in his right mind would vote against victims' rights legislation. To object to victims' rights would imply a lack of concern for his constituents, for anyone can be a victim of crime, and this impression could foster a belief among his constituents that he was "soft on crime." Most people do not see themselves as defendants, but rather as victims. Thus, no one could politically oppose victims' rights. The voices of victims rose, while defendants lost their voice to this new political wave. *See* Henderson, *supra* note 2, at 952-53.

59. Some participants in the debate argue that the movement pushes for a reconsideration of the "objectives of criminal justice." Goldstein, *supra* note 21, at 518. Others argue that the movement is a "cooptation of victim's concerns by crime control proponents." Henderson, *supra* note 2, at 1020.

60. *See* Carrington & Nicholson, *supra* note 3, at 9; Paul S. Hudson, *The Crime Victim and the Criminal Justice System: Time For a Change*, 11 PEPP. L. REV. 23, 35 (1984) (symposium issue); Deborah P. Kelly, *Delivering Legal Services to Victims: An Evaluation and Prescription*, 9 JUST. SYS. J. 62, 72 (1984).

tions for participation vary.[61] Regardless of these justifications, the success of the victims' rights movement in increasing community awareness of the criminal justice system has led to a participatory revival.

The remainder of this Comment argues that the numerous programs for victim/witness protection and participation have eroded defendants' Sixth Amendment rights to a fair trial and an impartial jury. Once victims are granted "participation" in certain areas of the criminal justice process (i.e., victim impact statements, parole hearings and plea bargains), they feel entitled to a role in the trial itself. Such participation is unnecessary because state and federal programs that do not directly affect the trial adequately protect victims.[62] Victim participation in the trial, however, is more than redundant; it violates a defendant's Sixth Amendment rights by injecting emotion and prejudice into the trial.[63]

II. SIXTH AMENDMENT RIGHT TO A FAIR TRIAL AND IMPARTIAL JURY

The Sixth and Fourteenth Amendments guarantee all criminal defendants, in both state and federal courts, the fundamental rights to a fair trial and an impartial jury.[64] The Supreme Court has determined that the basic components of a fair trial include a presumption of innocence[65] and the principle that "one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial."[66] It is important that the

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61. Many victims' rights advocates recognize victims' need for retribution, but they also note victims' need for closure, equality in the system, and recognition that they were not responsible for their victimization. *See, e.g.*, Deborah P. Kelly, *Victims' Perceptions of Criminal Justice*, 11 PEPP. L. REV. 15 (1984) (symposium issue); Dean G. Kilpatrick & Randy K. Otto, *Constitutionally Guaranteed Participation in Criminal Proceedings for Victims*, 34 WAYNE L. REV. 7 (1987). However, Professor Henderson argues that the movement's push for participation, and thus a voice, has been perverted into a tool to enhance conviction rates. Henderson, *supra* note 2, at 951.

62. *See supra* notes 30-32 and accompanying text.

63. *See infra* part III.B. for examples of such effects.

64. *See supra* note 15 and accompanying text; *see also* Duncan v. Louisiana, 391 U.S. 145 (1968) (holding that the Sixth Amendment right to a jury trial in all criminal cases is made applicable to the states through the due process clause of the Fourteenth Amendment).

65. *See In re* Winship, 397 U.S. 358, 363 (1970); Coffin v. United States, 156 U.S. 432, 453 (1895).

66. Taylor v. Kentucky, 436 U.S. 478, 485 (1978). *See also* Strickland v. Washington, 466 U.S. 668, 687 (1984) (holding that a fundamental component of fair trial due process requirements is that jurors reach a verdict based on the evidence presented in open

public tribunal demanded by the Sixth Amendment be "free of prejudice, passion, excitement, and tyrannical power."[67] Without these safeguards, the presumption of innocence so crucial to a criminal trial would be meaningless. Due process requires that any activity that may pose "a threat to the 'fairness of the factfinding process' . . . be subjected to 'close, judicial scrutiny.'"[68]

Courts should safeguard the trial process; they should prevent the jury from seeing or hearing anything that would prejudice a defendant's ability to receive a fair trial. For example, one potential threat to the fairness of a criminal trial is the presence of an object or activity that may create racial or emotional prejudice. Sometimes, jurors may not even be aware of the introduction of prejudice to the trial environment or the subtle impact that the prejudice may have. Awareness of the impact of the activity or object, however, is not the issue. Rather, the prejudice may merely be inherent:[69] "The question must not be whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether 'an unacceptable risk is presented of impermissible factors coming into play.'"[70]

A. *An Analysis of the Fair Trial Standard in Conjunction With First Amendment Fundamental Rights*

Courts use certain guidelines to balance fundamental rights. For example, guidelines have been applied by courts to balance defendants' Sixth Amendment rights and the First Amendment right of access to criminal trials. Courts have not, however, developed guidelines to balance defendants' Sixth Amendment rights and victims' rights. This section attempts to uncover guidelines for courts to use in balancing defendants' Sixth Amendment rights and victims' rights by examining the guidelines established in other areas. Part III then applies, by analogy, those guidelines to victims' rights.

1. *Access to the Courtroom.* The First Amendment guarantees the right to attend criminal trials[71] absent any "overriding inter-

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court).

67. Chambers v. Florida, 309 U.S. 227, 236-37 (1940).

68. Holbrook v. Flynn, 475 U.S. 564, 568 (1986) (quoting Estelle v. Williams, 425 U.S. 501, 503-04 (1976)); *see also* Estes v. Texas, 381 U.S. 532 (1965); *In re* Murchison, 349 U.S. 133 (1955).

69. *See* Woods v. Dugger, 923 F.2d 1454 (11th Cir. 1991) (holding that for the defendant "to prevail on his claim of being denied a fair trial, he must either show actual *or inherent* prejudice" (footnote omitted) (emphasis added)); Norris v. Risley, 918 F.2d 828 (9th Cir. 1990) (holding that proof of actual prejudice is not necessary to deny a defendant a fair trial; inherent prejudice is sufficient).

70. Holbrook v. Flynn, 475 U.S. at 511, (quoting Estelle v Williams, 425 U.S. at 505).

71. Victims, like all other citizens, have a First Amendment right to attend criminal

ests."[72] Overriding or balancing interests include, most importantly, a defendant's right to a fair trial.[73] This right to a fair trial often competes with other parties' First Amendment right of access. In these cases, the potentially prejudicial effect of the exercise of the right of access must be balanced against the defendant's Sixth Amendment right to a fair trial.[74]

One area where the right to access has been limited is in excluding the press from the courtroom. In order to bar the press from the courtroom, the defendant must show "that closure is required to protect the defendant's superior right to a fair trial."[75] While there must be "a showing of identifiable prejudice to the accused,"[76] a showing of actual prejudice is not needed.[77]

Supreme Court case law tips the balance of these two competing rights in the courtroom toward the defendant.[78] The Supreme

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trials. Victims, however, are usually called as witnesses and are thus excluded from the courtroom by rules of evidence. Thus, their right to access is essentially denied. This exclusion should undergo the proposed balancing test illuminated in Part III. Application of the test will most likely allow for victims to remain in the courtroom after they have testified if it can be shown that they will not be needed again.

72. Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510 (1984) (noting that "[t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values"); *see also* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606-07 (1982) (holding that the right to attend criminal trials is trumped only by a compelling state interest); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581 (1980) (stating that "absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public").

73. Estes v. Texas, 381 U.S. 532, 539 (1965) (holding that "[w]hile maximum freedom must be allowed the press in carrying on this important function [of covering trials] in a democratic society its exercise must necessarily be subject to the maintenance of absolute fairness in the judicial process").

74. *See, e.g.,* Press Enterprise Co. v. Superior Court, 464 U.S. 501; Richmond Newspapers, Inc. v. Virginia, 448 U.S. at 564 (noting that the conflicts between the First Amendment right of access and a defendant's Sixth Amendment right to a fair trial "are almost as old as the Republic" (quoting Nebraska Press Ass'n. v. Stuart, 427 U.S. 539, 547 (1975)); Sheppard v. Maxwell, 384 U.S. 333, 358 (1966) (noting that "the presence of the press at judicial proceedings must be limited when it is apparent that the accused might otherwise be prejudiced or disadvantaged"); Estes v. Texas, 381 U.S. 532 (holding that television cameras should have been excluded from the courtroom because the televising of the defendant's trial violated his right to a fair trial); Mares v. United States, 383 F.2d 805 (10th Cir. 1967), *cert. denied*, 394 U.S. 963 (1969) (discussing the need to accommodate both Sixth Amendment interests and First Amendment interests); *see also* Joseph F. Kobylka & David M. Dehnel, *Toward a Structuralist Understanding of First and Sixth Amendment Guarantees*, 21 WAKE FOREST L. REV. 363 (1986) (discussing these competing rights).

75. Richmond Newspapers, Inc. v. Virginia, 448 U.S. at 564.

76. Estes v. Texas, 381 U.S. at 542.

77. *See id.* at 542. Justice Clark notes that "[t]here is little wonder that the defendant cannot 'prove' the existence of such [prejudicial] factors. Yet we all know from experience that they exist." *Id.* at 547.

78. *See* Estes v. Texas, 381 U.S. at 539 (stating that the conduct and activities of the

Court has held that if an exercise of First Amendment rights is inherently prejudicial to the defendant, then that practice should be eliminated from the trial.[79] Any practice with a probability of unfairness is inherently prejudicial and should be prevented.[80]

By finding that a practice is inherently prejudicial, courts have in essence balanced First Amendment and Sixth Amendment rights. The defendant's right to a fair trial is weighed against First Amendment rights of speech and access. If the balance tips toward the defendant, the court has essentially reasoned that there is an unacceptable risk of unfairness and can then either exclude the media or take measures to eliminate the prejudicial conduct.

The Supreme Court has stated that prejudicial conduct can be limited, short of denying access, through the use of judicial orders that control the atmosphere of the courtroom.[81] In *Sheppard v. Maxwell*, the Court held that the defendant's Sixth Amendment rights were violated by the carnival-like atmosphere in the courtroom.[82] Reporters inside the bar, which the trial judge permitted, were particularly disruptive.[83] The Sixth and First Amendment interests involved in *Sheppard* could have been balanced easily. The judge, the Court concluded, could have easily controlled the situation by enacting strict rules governing courtroom decorum.[84] Access

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press in the courtroom are "subject to the maintenance of absolute fairness in the judicial process"). *But cf.* Globe Newspaper Co. v. Superior Court, 457 U.S. 596. In *Globe Newspaper Co.*, the Court struck down a Massachusetts statute that required judges to exclude the media and the general public from the courtroom during the testimony of a minor victim of a sex offense. The majority saw the state interest of protecting the victim as minor to the fundamental First Amendment right of access held by the media and the public. However, in dissent, Chief Justice Burger and Justice Rehnquist felt the statute had "relatively minor incidental impact on First Amendment rights and gives effect to the overriding state interest in protecting the child rape victims." *Id.* at 619-20.

79. *See, e.g.*, Turner v. State of Louisiana, 379 U.S. 466 (1965) (holding that the conduct of two deputy sheriffs who testified at trial, were present with the jury in and out of the jury room, and guarded the jury was prejudicial and necessitated reversal); Rideau v. State of Louisiana, 373 U.S. 723 (1963) (holding that the taping of a confession by the defendant and the televising of it prior to voir dire necessitated a new trial); *see also* Pennekamp v. Florida, 328 U.S. 331, 366 (1946) (Frankfurter, J., concurring) (stating that "[i]n securing freedom of speech, the Constitution hardly meant to create the right to influence judges or juries").

80. *See In re* Murchison, 349 U.S. 133, 136 (1954) ("Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness.").

81. Sheppard v. Maxwell, 384 U.S. at 358.

82. *Id.*

83. *Id.*

84. The *Sheppard* Court held that:

> The carnival atmosphere at trial could easily have been avoided since the courtroom and courthouse premises are subject to the control of the court. As we stressed in *Estes*, the presence of the press at judicial proceedings must be lim-

is a fundamental right; overrunning or disturbing the courtroom is not.[85]

When a court balances the First Amendment rights of the press with the defendant's Sixth Amendment rights, procedures that accommodate the rights of both parties are the most desirable. Consequently, courts rarely deny access to the courtroom during a trial. Instead, courts limit, or should have limited, prejudicial conduct through court orders that preserve both parties' constitutional interests.[86]

2. *Expression in the Courtroom: Buttons.* In addition to access to the courtroom, the First Amendment also protects freedom of expression. However, some courts have held that wearing buttons as a form of expression in a courtroom violates a defendant's right to a fair trial.[87] In *State v. Franklin*,[88] the West Virginia Supreme Court of Appeals held that the wearing of buttons in the courtroom by members of MADD and a uniformed sheriff "constituted a formidable, albeit passive, influence on the jury."[89] The *Franklin* court concluded that the presence of the MADD spectators and the uniformed police officer undermined the defendant's right to a fair trial.[90] The uniformed sheriff and spectators wearing buttons required a balancing test between the defendant's rights and the public's right of access.[91] In balancing the two interests, the *Franklin* court determined that this conduct could have irreparably under-

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ited when it is apparent that the accused might otherwise be prejudiced or disadvantaged.... The number of reporters in the courtroom itself could have been limited at the first sign that their presence would disrupt the trial. *They certainly should not have been placed inside the bar.* Furthermore, the judge should have more closely regulated the conduct of newsmen in the courtroom.

Id. at 358 (footnotes omitted) (emphasis added).

85. *See* Pennekamp v. Florida, 328 U.S. at 366.

86. *See* Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984) (stating that "expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions"); Sheppard v. Maxwell, 384 U.S. at 358 (evaluating the right of the press to be within the bar during trial); Estes v. Texas, 381 U.S. 532 (barring television cameras from courtroom for reason of prejudice); *see also* Chandler v. Florida, 449 U.S. 560 (1981) (holding that a judge has discretionary power to forbid media coverage whenever he is satisfied that such coverage will effect the defendant's right to a fair trial).

87. *See* Norris v. Risley, 918 F.2d 828 (9th Cir. 1990); State v. Franklin, 327 S.E.2d 449 (W. Va. 1985).

88. 327 S.E.2d 449 (prosecuting defendant for felony murder for driving under the influence of alcohol and causing the death of another driver).

89. *Id.* at 455. Of importance to the court was the fact that the MADD spectators were "clearly distinguishable from other visitors in the courtroom." *Id.*

90. *Id.*

91. "[W]e are concerned that the right of public access to a criminal trial be coordinated with the constitutional right of a defendant to a fair trial." *Id.* at 455.

mined the defendant's right to a fair trial.[92]

The *Franklin* Court couched its consideration of the case in terms of the right of access, while actually examining the right of expression.[93] Finding unacceptable the wearing of buttons in the courtroom by the sheriff and the MADD spectators,[94] the court suggested that remedial orders by the trial judge would have allowed both the right to a fair trial and the right of access to coexist harmoniously.[95] The court failed, however, to suggest any specific courtroom remedies.

Any form of expression that may implicate Sixth Amendment rights can be limited by a court.[96] Consequently, refusal to obey court orders (i.e., to remove buttons) could force a court to deny access to the proceedings in order to guarantee the defendant's Sixth Amendment right to a fair trial.[97]

In *Norris v. Risley*, the Ninth Circuit also found button wearing during a trial to be inherently prejudicial conduct.[98] Such First

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92. *Id.*

93. In contrast, the 9th Circuit found explicitly that buttons were intended to convey a message. Norris v. Risley, 918 F.2d 828. The same conclusion should have been explicitly articulated in *Franklin*, for it is apparent the buttons could have no other purpose then to convey a message of guilt. The *Franklin* court even implied this conclusion by stating that the MADD spectators were "tooth and nail opposed to any finding that the defendant was not guilty." State v. Franklin, 327 S.E.2d at 455.

94. "This court quite simply cannot state that the mere presence of the spectators wearing MADD buttons and the pressure and activities of the uniformed sheriff leading them did not do irreparable damage to the defendant's right to a fair trial by an impartial jury." State v. Franklin, 327 S.E.2d at 455.

95. "[T]he court's cardinal failure in this case was to take no action whatever . . . ." *Id.*

96. *See* Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984).

97. A court has similar authority to deny access when a defendant refuses to obey court orders. A defendant has a right to be present at every stage of his trial. Lewis v. United States, 146 U.S. 370 (1842). However, that right is not absolute. The Supreme Court has held that "there are at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant like Allen: (1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly." Illinois v. Allen, 397 U.S. 337, 343-44 (1970).

A court's decision to bind and gag a defendant in order to maintain the integrity of the trial and to make it possible for the defendant to remain present could be seen as actually undermining a fair trial and thereby denying a defendant his fundamental rights. *See id.* at 344. But it has been established that where the trial process is jeopardized, the rights to the party responsible for placing it in jeopardy may be abridged. *See id.* at 346-47. In the face of a court order, both a defendant and a holder of a First Amendment right have the *choice* of either desisting from the conduct which undermines the trial process or losing a right (i.e., the right to freedom from prejudicial conduct at trial, such as being bound, or the right to access to the trial).

98. 918 F.2d 828. Robert Lee Norris was tried for kidnapping and sexual intercourse without consent. *Id.* at 829. During his trial, some members of the Billings Rape Task Force and the National Organization for Women wore "Women Against Rape" buttons. It

Amendment expression compromised the presumption of the defendant's innocence.[99] The *Norris* court found that spectators, relying on their First Amendment rights, intended to convey a message by wearing buttons. However, this First Amendment right of expression, while important and fundamental, did not outweigh the defendant's right to a fair trial.[100] "[W]hen balancing these competing rights the issue is not whether the buttons posed a serious and imminent threat to life, but whether they posed such a threat to a fair trial. If so, the first amendment interests must bow to the constitutional right to a fair trial."[101] The court stated that the environment created by the button-wearing spectators may have impermissibly bolstered the credibility of prosecution witnesses.[102]

The most troubling aspect of the trial in the *Norris* case was the ease with which the trial court could have avoided the prejudicial conduct through a judicial order.[103] As the *Norris* court stated, "the burden of alleviating the risk [of an unfair trial] was minimal,"[104] implying that asking spectators to remove their buttons would have been a proper courtroom order.

Apparently, *Norris* establishes that trial spectators have a right to attend trials, but not to advocate views in a manner which potentially would compromise the fairness of trials. A right to advocate on behalf of the victim during the trial infringes upon the defendant's Sixth Amendment right to a fair trial and, as the *Norris* court held, "the importance of a fair trial outweighs spectators' first amendment rights."[105] Since the "actual impact of a particular practice on the judgment of jurors cannot always be fully determined,"[106] and the potentially prejudicial practice serves no compelling First Amendment interest (i.e., right of access or right to information), then the practice should be avoided when the burden of doing so is minimal.

The button cases, *Norris* and *Franklin*, differ from the First Amendment newspaper access cases.[107] Access to information, rather

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is this conduct the court found objectionable. *Id.* at 831.

99. "[T]he buttons' message, which implied that Norris raped the complaining witness, constituted a continuing reminder that various spectators believed Norris' guilt before it was proven, eroding the presumption of innocence." *Id.* (footnote omitted).

100. *Id.* at 832.

101. *Id.*

102. *Id.* at 833.

103. *See id.* at 834.

104. *Id.*

105. *Id.* at 832.

106. Estelle v. Williams, 425 U.S. 501, 504 (1976).

107. In the access cases,

> the individuals asserting first amendment rights claim the right to receive information. [In *Norris*,] some trial spectators sought a far broader and more ac-

than the right to advocate, was the key issue in the press cases.[108] Although the press, in the newspaper cases, did not seek to communicate facts or opinions directly to the jury, the jury *may* have been tainted by the media coverage. However, the *Norris* and *Franklin* courts were presented with an *intent* to convey a message of guilt—a much more direct form of prejudicial conduct. Thus, it was more likely that a prejudicial message would be conveyed to the jury in the button cases. These two ends of the spectrum, intent to convey a message of guilt and concern with dissemination of information, must both be balanced against a defendant's Sixth Amendment rights. An intent to convey guilt, however, is clearly more serious because that type of conduct will almost always create an unacceptable risk of compromising a defendant's ability to obtain a fair trial. Thus, conduct exhibiting an intent to convey a message of guilt should be regulated or banned.

B. *State Conduct That is Prejudicial to a Fair Trial*

"Information dissemination" and "intent to convey a message of guilt" occupy different ends of the "prejudicial conduct" spectrum. Often, state conduct is involved in the trial. State conduct which falls near the "intent to convey a message of guilt" end of the spectrum should always be found to be inherently prejudicial because of the irreparable harm it would cause to a defendant's ability to obtain a fair trial. State conduct which falls near the "information dissemination" end of the spectrum may also create an unacceptable risk because such activity is subjected to stricter scrutiny when the prejudicial activity is conducted by state officials. If conduct is ultimately found to be prejudicial, it should be permitted only upon, first, a showing of a compelling state interest,[109] and second, a balancing of the interests served by the conduct and the defendant's interests. Absent a compelling state interest, the possibility of the

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tive role, to make a statement about Norris's guilt. No case has been cited to us for the proposition that trial spectators have a constitutional right to advocate trial outcomes in the courthouse.

Norris v. Risley, 918 F.2d at 833 n.5.

108. *See, e.g.*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980); Nebraska Press Ass'n. v. Stuart, 427 U.S. 539 (1975); Sheppard v. Maxwell, 384 U.S. 333 (1966).

109. A compelling state interest includes an essential state policy, like protecting the courtroom from the defendant, guarding against the escape of the defendant, or, as this Comment discusses, increasing victim participation in the system. The use of a compelling state interest to allow inherently prejudicial conduct has, thus far, been applied only to state conduct. *See, e.g.*, Illinois v. Allen, 397 U.S. 337 (1970). Where non-state conduct has been inherently prejudicial, no compelling state interest could permit such behavior. *See, e.g.*, Norris v. Risley, 918 F.2d 828, 831 n.2 (9th Cir. 1990) (noting that the preservation of First Amendment protections by permitting the wearing of buttons by spectators was not a compelling state interest).

state's conduct tainting a defendant's fair trial should not be tolerated, regardless of the state benefits that might otherwise be derived from letting the conduct stand.

1. *The Presence of Uniformed Police Officers in the Courtroom is Justified When There is a Compelling State Interest.* The Supreme Court has said that any type of state behavior that threatens the "'fairness of the fact finding process' . . . must be subjected to 'close judicial scrutiny.'"[110] In *Holbrook v. Flynn*,[111] six co-defendants were tried and normal courtroom security procedures called for a twelve-man security force. Due to a shortage of regular courtroom security personnel, four uniformed state troopers sat in the front row of the spectators' section during the trial. Applying its standard of "close judicial scrutiny,"[112] the Court upheld the actions of the trial court in permitting the troopers' presence.[113] The Court first reasoned that the presence of a security force in the courtroom was not inherently prejudicial.[114] The Court then determined that the presence of the troopers did not constitute actual prejudice.[115] Because a determination was made that the state's conduct was not inherently or actually prejudicial, the Court did not reach the question of whether the conduct served a compelling state interest. However, the Court noted in dicta that even if the state conduct was impermissibly prejudicial, the state's legitimate interest in maintaining custody of the defendants would justify the troopers' courtroom presence.[116]

Two important points can be distilled from *Holbrook*. First, the Court held that the wide range of inferences that could be drawn from the officers' presence necessitated a case-by-case analysis of whether the presence of a security force is inherently prejudicial.[117] Second, "even were [the court] able to discern a *slight degree* of prejudice attributable to the troopers' presence at respondent's trial, sufficient cause for this level of security could be found in the State's need to maintain custody over defendants."[118]

Holbrook states that different inferences can be drawn from a particular courtroom procedure.[119] Some inferences would be preju-

110. Estelle v. Williams, 425 U.S. 501, 503-04 (1976).

111. 475 U.S. 560 (1986).

112. Estelle v. Williams, 425 U.S. at 504.

113. Holbrook v. Flynn, 475 U.S. at 572.

114. *Id.* at 569.

115. *Id.* at 571.

116. *Id.* at 571-72. *But see* Woods v. Dugger, 923 F.2d 1454 (11th Cir. 1991) (holding that the presence of up to twenty uniformed police was not a necessary policy in a trial for the murder of a prison guard in a town that was heavily tied to the prison industry).

117. Holbrook v. Flynn, 475 U.S. at 569.

118. *Id.* at 571 (emphasis added).

119. *Id.* at 569.

dicial to a fair trial, others would not. The *Holbrook* Court held that a case-by-case analysis must be utilized to decide the issue in question.[120] In order to find that a practice is inherently prejudicial, a court must find that "an unacceptable risk is presented of impermissible factors coming into play."[121]

When the court's first point—that prejudice in each case is decided on the facts of that case—is considered with the court's second point—that a slight degree of prejudice can be overcome by a substantial state interest—it becomes apparent that the case-by-case analysis established by *Holbrook* is actually a consideration of the probability of prejudice in light of the importance of the state interest. The greater the state interest, the greater the probability of prejudice must be to ban the state conduct. If, as Justice Marshall states, a slight degree of prejudice can be overcome by a sufficient state interest, then it follows that the same slight degree of prejudice cannot be overcome by an insufficient state interest.

A court's finding that a particular type of conduct is inherently prejudicial is followed by a further inquiry into the state interest. If there is an essential state interest, then the court must balance it against the inherent prejudice and the possibility of the prejudicial conduct or object tainting the trial.[122] Conversely, if the state has *no* compelling interest in the inherently prejudicial practice, then any probability of taint is too great and the state's practice should be prohibited.

III. A FAIR TRIAL AND "VICTIMS' RIGHTS"

The impact of the victims' movement on the criminal justice system has encouraged victim participation at trial. While the validity of this participation can be argued,[123] courts should ensure that participation, at the very least, does not infringe on defendants' Sixth Amendment rights. The pivotal determination is the standard to be used to determine victims' status at trial. A victim's interest in the trial should not be raised to the level of a new constitutional

120. *Id.*

121. *Id.* at 570 (quoting Estelle v. Williams, 425 U.S. at 505).

122. *Holbrook* implies that a compelling state interest (i.e. safety or maintaining the integrity of the trial) is more important, at the trial level, then First Amendment interests. A practice protected by the First Amendment that is at all prejudicial must be eliminated, while a practice justified by a state interest undergoes a balancing. The practice furthering the state interest may create a risk of prejudice, but the risk of prejudice can be outweighed by the strength of the state interest.

123. *See* Symposium, *Victims' Rights*, 11 PEPP. L. REV. 1 (1984); Symposium, *Perspectives on Proposals for a Constitutional Amendment Providing Victim Participation in the Criminal Justice System*, 34 WAYNE L. REV. 1 (1987). *But see* Henderson, *supra* note 2.

right.[124] Rather, the victim's right to participate in a criminal trial should be defined by victims' First Amendment rights to access.[125]

A. *Victims Do Not Have the "Right" to Prejudice or Taint the Trial*

There is no Constitutional basis for the concept of "victims' rights."[126] The Sixth Amendment guarantees a defendant many rights at trial, but it does not guarantee any rights to victims.[127] Any push for an addendum to the Sixth Amendment that would allow victims the same or similar trial rights as defendants is a misreading of the Bill of Rights and would be inconsistent with the goals of the Sixth Amendment.[128] By "emphasizing the conflict between the victim and the accused and placing the victim in the role of a quasi-prosecutor or co-counsel, the victims' rights amendment represents a dangerous return to the private blood feud mentality."[129]

As criminal justice evolved, state prosecutions replaced private actions.[130] The state, in order to fulfill its contract with its citizenry, undertook all prosecutions.[131] Criminal defendants were guaranteed rights under the Sixth Amendment in order to avoid state oppression.

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124. *See* Dolliver, *supra* note 7.

125. *See supra* notes 75-93 and accompanying text for a discussion of the right of access. For the sake of argument, the author allows the assumption that "victims' rights" are equivalent to First Amendment rights. The Supreme Court has actually held victims' rights to be less compelling than First Amendment rights. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (holding that a Massachusetts statute that required judges to exclude the media and the general public from the courtroom during the testimony of a minor victim of a sex offense violated the fundamental First Amendment right of access held by the media and the public).

126. Professor Dolliver has commented:

> The Bill of Rights was designed to protect personal liberties from governmental infringement, not to protect private individuals from each other. No personal liberty of a victim is infringed upon by the government at any time during the criminal prosecution. The victim has not been arrested, is not being tried, is not in danger of being fined or imprisoned—as is the defendant—and is not being deprived of any alternative legal remedies against a defendant. Any rights the victim seeks to secure are not of a constitutional character. (footnote omitted).

Dolliver, *supra* note 7, at 91.

127. *See generally* Dolliver, *supra* note 7.

128. *See supra* note 126.

129. Dolliver, *supra* note 7, at 90 (footnote omitted). The danger involved is the infusion of emotion into the criminal trial, which is clearly prejudicial and contradictory to fair trial standards. *See supra* notes 69-70 and accompanying text.

130. For an in depth discussion of private prosecution and the evolution to public prosecution, see Henderson, *supra* note 2, at 938-52. *See also* ENCYCLOPEDIA OF CRIME AND JUSTICE, vol. 4, at 1611-12 (S. H. Kadish ed., 1983); ROBERT ELIAS, THE POLITICS OF VICTIMIZATION: VICTIMS, VICTIMOLOGY, AND HUMAN RIGHTS (1986); STARK & GOLDSTEIN, *supra* note 16, at 20-21; Abrahamson, *supra* note 20, at 520-21; McDonald, *supra* note 20, at 649.

131. *See* CESARE BECCARIA, ESSAYS ON CRIMES AND PUNISHMENTS 1, 74 (1764).

All specifically guaranteed "rights" at the trial stage belong to defendants. The only rights held by victims during trials are those granted by the First Amendment or by state law.[132] This is proper, for the state has an interest in seeing that victims, as witnesses, help the state prosecute defendants, and if victims feel alienated or mistreated, they may not participate in the criminal justice system.[133] Any legitimate interest the state has in victim participation can be accomplished through means which do not compromise the fairness of trials. These means include transportation to and from the courthouse, reception at the courthouse, escort into and out of the courthouse, a safe waiting area, counseling, child care, witness fees, and compensation.[134] If the state interest in victim participation is met through procedures that do not violate defendants' Sixth Amendment trial rights, then any procedure beyond these non-violative procedures would be unlikely to further serve the state's interest, and would further fail the balancing test established in *Holbrook*.

B. *Have Victims Rights Gone Too Far?*

1. *Victims at the Counsel Table.* The Alabama Code allows victims to sit at the counsel table with the prosecutor.[135] The Court

132. For example, the Rhode Island constitution recognizes the victim, but does not grant the victim any trial rights. The Rhode Island Constitution states:

> A victim of crime shall, as a matter of right, be treated by agents of the state with dignity, respect and sensitivity during all phases of the criminal justice system. Such person shall be entitled to receive, from the perpetrator of the crime, financial compensation for any injury or loss caused by the perpetrator of the crime, and shall receive such other compensation as the state may provide. 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.

R.I. CONST. § 23.

133. *See* Kelly, *supra* note 61; Hudson, *supra* note 60, at 28-34.

134. *See* PETER FINN & BEVERLY N.W. LEE, SERVING CRIME VICTIMS AND WITNESSES, U.S. DEPT. OF JUSTICE, NATIONAL INSTITUTE OF JUSTICE 3 (June 1987). *See generally* NOVA DIRECTORY, *supra* note 3.

135. The code reads, in part:

> The victim of a criminal offense shall be entitled to be present in any court exercising any jurisdiction over such offense and therein to be seated at the counsel table of any prosecutor prosecuting such offense or other attorney representing the government or other persons in whose name such prosecution is brought.

ALA. CODE § 15-14-53 (Supp. 1992); additionally, the code reads:

> A victim of a criminal offense shall not be excluded from court or counsel table during the trial or hearing or any portion thereof conducted by any court which in any way pertains to such offense, provided, however, a judge may remove a victim from the trial or hearing or any portion thereof for the same causes and in the same manner as the rules of court or law provides for the exclusion or removal of the defendant.

ALA. CODE § 15-14-54 (Supp. 1992).

of Criminal Appeals of Alabama, in *Pierce v. State* and *Crowe v. State*, addressed the legality of the Code provisions providing such victim participation and found no violation of the defendant's constitutional rights.[136] However, neither decision analyzed these provisions in connection with the defendant's constitutional rights;[137] the courts failed to engage in the *Holbrook* balancing test, which is required when the First Amendment right of access conflicts with the Sixth Amendment right to a fair and impartial trial.

An application of this Comment's balancing test to the facts of *Pierce* and *Crowe* compels the conclusion that the victim's presence at the counsel table in each case was inherently prejudicial because the presence of the victims posed an unacceptable risk that the defendants' rights to a fair trial were compromised. Regardless of whether a victim's presence at the counsel table is considered State presence in the courtroom, courts have held that in-court intent to convey a message of guilt or the infusion of emotion into the trial is inherently prejudicial.[138] Counsel table presence is more akin to conveying a message of guilt than it is to information dissemination because the victim's presence can serve no purpose other than to inject emotion into the trial. Like buttons worn by State or non-State affiliated spectators,[139] the victims in *Pierce* and *Crowe* sent an unmistakable and prejudicial statement to the jury that the defendant was guilty.

Assuming that the victims' presence at the counsel table was more like information dissemination than conveyance of a message,

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136. *See* Pierce v. State, 576 So. 2d 236, (Ala. Crim. App. 1990); Crowe v. State, 485 So. 2d 351 (Ala Crim App. 1984). In *Pierce*, the defendant appealed from a conviction of intentional murder during the course of a robbery. During the trial, the victim's daughter was allowed to sit at the prosecutor's table. The court did not find this procedure violative of the defendant's Sixth Amendment right to a fair trial. Pierce v. State, 576 So. 2d at 251. In *Crowe*, the defendant appealed from a conviction of capital murder of an on-duty deputy sheriff. The victim's widow was allowed to sit at the prosecutor's table during the trial. The court found that this procedure did not violate the defendant's Sixth Amendment rights. Crowe v. State, 485 So. 2d at 363.

137. The court in *Pierce* said, "[c]learly, Miller had a right [because of the statute] to be present in the courtroom and to be seated at the prosecutor's table during the trial of the person accused of killing her mother." Pierce v. State, 576 So. 2d at 251. The court in *Crowe* observed:

> It is clear that Mrs. Taylor had a right to be seated at the prosecutor's table. In view of this right and the fact that the record indicates no prejudice from the trial court's allowing her to be present, we must agree with the trial court on this matter. No constitutional rights of the appellant were abridged because of this one instance.

Crowe v. State, 485 So. 2d at 363.

138. *See* Norris v. Risley, 918 F.2d 828 (9th Cir. 1990); State v. Franklin, 327 S.E.2d 449 (W. Va. 1985).

139. *See* State v. Franklin, 327 S.E.2d 449.

but constituted state presence, this presence would still be inherently prejudicial. However, courts have held that a prejudicial state practice at trial can be justified if a compelling state interest exists.[140] No such interest existed in *Pierce* or *Crowe*. While the state has an interest in increasing victim participation in the criminal justice process, that interest is not necessarily compelling. Absent evidence to the contrary, courts should assume that the trial process without additional victim participation represents the fairest balance of the state's interest in prosecuting criminals and the defendant's interest in receiving a fair trial.

Moreover, even if the state's interest in victim participation in *Pierce* and *Crowe* were compelling, that interest could have been adequately served via means that were less offensive to the Constitution. For example, the courts could have let the victim sit in the front row of the spectators' seats, rather than at the counsel table.

A similar outcome is reached if victim presence is not considered state presence and is deemed to fall on the information dissemination end of the prejudicial conduct spectrum. The Supreme Court has held that any trial injected with public emotion or passion is unfair.[141] Permitting the victim to sit at the counsel table crossed the bright line the Supreme Court has drawn separating a fair trial from one that has been wrongfully injected with emotion and passion. Further, whatever interests the victim has in courtroom access or expression, those interests could have been served without harming the defendant's rights to a fair trial and an impartial jury.

2. *Victim/Witness Advocates.* A product of the victims' rights movement is the victim/witness advocate.[142] An advocate is a person who supports and informs the victim.[143] They usually work under the umbrella of the prosecutor's office[144] and work closely with the actual prosecutor. These advocates often accompany the victim or victim's family into the courtroom. In certain circumstances, their conduct in the courtroom may be prejudicial to the defendant.

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140. *See* Holbrook v. Flynn, 475 U.S. 560 (1986).

141. *See* Chambers v. Florida, 309 U.S. 227, 236-37 (1940).

142. *See* Anderson & Woodard, *supra* note 5, at 228.

143. New Hampshire has defined the victim/witness advocate as follows:

> There is hereby established within the criminal justice bureau of the department of justice, the office of victim/witness assistance. The office shall provide information and services to victims and witnesses in criminal cases prosecuted by the attorney general and shall develop and coordinate a statewide victim/witness rights information program . . . .

N.H. REV. STAT. ANN. § 21-M:8-b (1991).

144. *See, e.g., id.*

a. **Victim/Witness Advocates in the Witness Box.** The Hawaii Supreme Court has held that a victim/witness advocate "sitting with the complainant and standing behind her with her hands on her shoulders during the complainant's testimony . . . bolstered [the] complainant's credibility."[145] This conduct had a prejudicial effect on the jury, thus compromising the defendant's rights to a fair trial and an impartial jury.[146]

The *Suka* court, unlike the *Pierce*[147] and *Crowe*[148] courts, considered several factors. First, the court examined whether there was a probability of prejudice in the victim/witness advocate's conduct. The court found that the conduct "could have had the effect of conveying to the jury . . . [the victim/witness advocate's] belief that complainant was telling the truth, thereby denying the defendant the right to a fair and impartial jury."[149] Second, the court considered whether the victim/witness advocate's presence was necessary to further the state's interest in the trial proceeding. The court concluded that "the record does not support the conclusion that the complainant could not testify without [the victim/witness advocate] being present next to her."[150] The presence of the victim/witness advocate could have been upheld if there were a finding of necessity to further the state's interest. The *Suka* court suggests, however, that alternatives to accompanying a witness to the witness box should first be explored.[151]

The *Suka* court followed an analysis similar to the First Amendment/Sixth Amendment balancing analysis. It found that the state's interest must be "necessary" before it would allow this conduct.[152] The court found a probability of prejudice and weighed it against the state's interest.[153] Thus, unless the state's interest outweighs the probability of prejudice, this practice, at least in Hawaii, will be disallowed and other conduct that is less prejudicial will be adopted.

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145. State v. Suka, 777 P.2d 240, 242 (Haw. 1989). In this case, the defendant was charged with rape. During the trial, the victim/witness advocate accompanied the complainant, a fifteen year old girl, to the witness box and sat with the complainant during her testimony. *Id.*

146. *Id.* at 243. The *Suka* court noted that the age of the victim, fifteen, was a consideration for the court—the older the victim, the less compelling the need for a victim/witness advocate. *Id.*

147. Pierce v. State, 576 So. 2d 236 (Ala. Crim. App. 1990).

148. Crowe v. State, 485 So. 2d 351 (Ala. Crim. App. 1984).

149. State v. Suka, 777 P.2d at 242 (footnote omitted).

150. *Id.* at 243.

151. *Id.* The court noted, however, that even if a finding that the victim/witness advocate was not needed at the witness box but such a need was established elsewhere in the courtroom, this new need would still have to undergo due process considerations. *Id.*

152. *Id.*

153. *Id.*

b. **Victim/witness Advocates Escorting Every Witness for the Prosecution Into and Out of the Courtroom.** The victim/witness advocate is responsible for providing services that fulfill victims' rights. However, there are no clear guidelines for these advocates to follow. This open-ended definition of an advocate's role provides advocates with a great deal of discretion and latitude.[154] If the advocate's mission is to ensure that victims and witnesses are free from intimidation and are reasonably protected from the accused, then it is possible for them to interpret their role as including actions that help victims and witnesses at the trial (i.e., escorting the victim into and out of the courtroom). The victim/witness advocate is concerned with protecting and comforting the victim; she is not concerned with the defendant. The judge, who controls the actions of lawyers in his courtroom, should similarly be responsible for controlling the conduct of others—the victim, the victim's family, and the victim/witness advocate.

In one case, every prosecution witness, from the victim to FBI agents, forensic experts, and police officers, was escorted into the courtroom, up to the bar, and then back out of the courtroom by a victim/witness advocate, who also sat with the victim's family throughout the trial.[155] This practice is not acceptable under a Sixth Amendment analysis because, as in *Suka*, the credibility of the witnesses may be bolstered by the presence of an employee of the state or of an outsider. The jury may believe that the victim/witness advocate knows something unknown to them that has caused the victim/witness advocate to side with the victim. Most jurors are probably not aware that the victim/witness advocate's role is to side with the victim. The probability of prejudice ensuing from this practice should be found to outweigh the state interest.

The state has an interest in making witnesses feel safe, comfortable, and free from intimidation during their participation in the trial. Once inside the courtroom, any fear of intimidation should

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154. *See, e.g.*, N.H. REV. STAT. ANN. § 21-M:8-b (1991). Victim/witness advocates could interpret their role as permitting them to protect the rights of crime victims, which include:

> (c) The right to be free from intimidation and to be reasonably protected from the accused throughout the criminal justice process.
>
> ....
>
> (e) The right to attend trial and all other court proceedings the accused has the right to attend.
>
> ....
>
> (g) The right to have inconveniences associated with participation in the criminal justice process minimized.

N.H. REV. STAT. ANN. § 21-M:8-k (1991).

155. The author observed these practices at the trial of State v. VandeBogart in June and July, 1991. No. 90S-655 (Rockingham County, N.H., Super. Ct. 1991).

disappear, because whatever intimidating presence exists in the courtroom can be adequately controlled by the judge through judicial order. Therefore, the state's interest in escorting witnesses into the courtroom—protection and freedom from intimidation—are met by means other than the use of victim/witness advocates as escorts.[156] The use of victim/witness advocates as courtroom escorts should not be allowed because it is inherently prejudicial.[157] The state interest has little weight in the balancing test because that interest can be met by other, less prejudicial practices that do not interfere with the trial.

CONCLUSION

At the trial, what participation should victims be permitted?

There is a First Amendment right to access to the courtroom. Victims, however, are often denied this access because they are subpoenaed as witnesses and excluded from the courtroom when they are not actually testifying.[158] The right of access for a victim should not be denied once the victim has testified and negated the basis for his exclusion.[159] However, other than this fundamental First Amendment right of access, the victim should have no greater role in the trial. The victims' rights movement has made tremendous progress in helping victims receive counseling and compensation and has increased public awareness of their plight.[160] These forms of assistance are accomplished through programs and services that function outside of the courtroom and apart from the trial. Thus, pushing for change inside the courtroom is inappropriate.

To avoid any chance of a miscarriage of justice, victim participation, at the trial level, should be limited to spectator access to the

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156. Courtroom orders that remove intimidating forces would not violate constitutional rights. The defendant is in no position to intimidate a witness or victim. If he attempts to, the judge can warn him that he may be removed for disrupting the trial. *See* Illinois v. Allen, 397 U.S. 337 (1970). The only other possible intimidating presence would be the defendant's family. The judge could order the family excluded from the courtroom if they were openly hostile to witnesses, or could allow a victim/witness advocate to sit with the witness to give the witness protection. If the judge decided to exclude the defendant's family from the courtroom, then that order would have to undergo the First Amendment/Sixth Amendment balancing test.

157. As in *Suka*, the court could find that some witnesses may need an escort. The state need would have to be great to overcome the inherent prejudice in the practice.

158. At least two states have amended their laws to provide that the exclusionary rule does not apply to victims. *See, e.g.*, OR. REV. STAT. § 40.385 (1987); N.H. R. EVID. 615 (1990).

159. *See* Karyn E. Polito, *The Rights of Crime Victims in the Criminal Justice System: Is Justice Blind to the Victims of Crime?*, 16 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 241, 251 (1990).

160. *See* Davis & Henley, *supra* note 3; Anderson & Woodard, *supra* note 5.

courtroom, and nothing more. The best means for curtailing abuse is for the judiciary to staunchly uphold defendants' trial rights by limiting any prejudicial conduct. Although judges should consider victims' interests, they must focus on the Constitution and remember that victims' interests do not override, or even equal, defendants' constitutional rights.

It is important to recognize and address the plight of victims. While defending victims' rights is easy because people see themselves as potential victims rather than defendants,[161] it is more difficult to recognize the movement's constitutional limitations. These limits are delineated by the Sixth Amendment and should not be quietly usurped by the power of a movement that few are willing to criticize because they would be perceived as embracing criminals, rather than as embracing the Constitution.

The victims' rights movement has validity. It should not, however, be allowed to define our Constitution through a single lens. The courts must recognize the role of victims in the criminal justice system, but in doing so, the courts must remember that they are responsible for upholding the rights of all—victims and defendants.

161. *See* Henderson, *supra* note 2, at 951-52.