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Victims' Rights: An Idea Whose Time Has Come—Five Years Later: The Maturing of an Idea

Frank Carrington* and George Nicholson**

I. INTRODUCTION

In 1984 the authors of this article wrote the lead article for a symposium on victims' rights published in the *Pepperdine Law Review*.¹ Entitled *The Victims' Movement: An Idea Whose Time Has Come*,² that article reviewed the advances in crime victims' rights during the past ten to fifteen years. The article highlighted the changes made in the private sector through such organizations as the National Organization for Victim Assistance (NOVA), Mothers Against Drunk Drivers (MADD), the Victims' Assistance Legal Organization (VALOR), Society's League Against Molesters (SLAM), and Parents of Murdered Children, to name only a few.³ The article also discussed legis-

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1. Carrington & Nicholson, *The Victims' Movement: An Idea Whose Time Has Come*, 11 PEPPERDINE L. REV. 1 (Symposium 1984).

2. *Id.*

3. None of the over 6,000 victims' assistance organizations currently operating in the United States should feel slighted if not mentioned by name in this article. Not only are there too many organizations to enumerate, but the individual stories, for example, of rape crisis centers, victim coordinator's projects in district attorney's offices, and support groups for those who have lost loved ones would be so interesting and instructive, they could comprise a separate law review article.

One of the most notable of these private crime victims advocacy programs, the Victims of Crime Resource Center, was initiated by the University of Pacific's McGeorge School of Law. One of the Center's major projects is a crime victims' telephone hotline, "1-800-VICTIMS," through which crime victims in California may learn of their rights and the diverse national, state, and local resources available to them. An aver-

lative efforts on behalf of victims at the federal, state, and local levels,⁴ the establishment and Final Report of President Reagan's Task Force on Victims of Crime,⁵ and the passage by California voters of the "Victims Bill of Rights."⁶ The article concluded on a somewhat self-congratulatory note on behalf of the entire victims' movement:

[T]oday, due to energetic leadership by policy makers at the federal, state, and local levels, and a great deal of hard work at the same levels by private parties devoted to victims' rights, an effective inexorable and cooperative national endeavor is underway to guarantee crime victims their rightful places everywhere in America's legal system.⁷

This article will track the major advances in the victims' movement since the publication of the 1984 *Pepperdine Law Review Symposium*. Notwithstanding a few major setbacks, primarily at the hands of the United States Supreme Court, the victims' movement has matured in the last five years, with a number of positive signs indicating that, indeed, victims' rights' have truly arrived.

age of 225 crime victims call the Center's hotline each day, amounting to over 80,000 calls annually. For more information about this program, write to Dean Fordon Schaber, McGeorge School of Law, 3200 Fifth Avenue, Sacramento, California 95817. Both authors are pleased to have been able to assist in the formation of this project.

For a programmatic review of victims' rights in California, see E. VILLAMOARE & J. BENVENUTI, CALIFORNIA VICTIMS OF CRIME HANDBOOK (1988) (available in McGeorge School of Law Library). See generally F. CARRINGTON & J. RAPP, VICTIMS' RIGHTS: LAW AND LITIGATION (1988); THE ATTORNEYS' VICTIM ASSISTANCE PROJECT OF THE A.B.A. CRIM. JUST. SEC., THE ATTORNEYS' VICTIM ASSISTANCE MANUAL (Dec. 1987); Herrington, *Victim of Crime*, 26 S. TEX. L.J. 153 (1985); Note, *Criminal Law-Victim Rights: Remembering the 'Forgotten Person' in the Criminal Justice System*, 70 MARQ. L. REV. 572 (1987); Presentation by Justice Anthony Kennedy, South Pacific Judicial Conference, in New Zealand (Mar. 3-5, 1987). For information on the origin of the victims' rights movement, see FORGOTTEN VICTIMS: AN ADVOCATE'S ANTHOLOGY (G. Nicholson, T. Condit & S. Greenbaum eds. 1977) (available from the California District Attorneys' Association in Sacramento, California). For a list of other sources of information on victims' rights, see Gann, *Justice for the Accuser: Proposition 8—The Victims' Bill Of Rights*, 4 BENCHMARK 69 (1988).

4. See, e.g., The Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (1982) (codified as amended at 18 U.S.C. §§ 1501, 1512-1515, 3579-3580 (1984 & Supp. 1989)). The executive branches of state governments have become interested and have acted as well. For example, the California Legislature and Governor George Deukmejian have been so impressed with Dean Schaber's innovative victims' telephone hotline that they now provide roughly \$200,000 annually through grant funds. Additionally, the Attorney General of British Columbia is pursuing a derivative program. Furthermore, the California Department of Justice, in a program begun during Governor Deukmejian's 1979-1983 tenure as Attorney General, notifies crime victims of the status of appeals involving the criminals who victimized them.

5. PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT (1982) [hereinafter FINAL REPORT].

6. Gann, *supra* note 3, at 69.

7. Carrington & Nicholson, *supra* note 1, at 12.

II. LEGISLATION

A. Federal Legislation

The Victims of Crime Act of 1984⁸ established a fund making grants available to states for victim compensation, victim assistance programs, and child abuse prevention and treatment. Funds for these grants arise from fines in federal criminal cases, penalty assessments, forfeitures of federal bail bonds, as well as a federal "Son of Sam" law, whereby funds from literary or other exploitation of the criminal's activities must be escrowed for the benefit of the victim. The federal "Son of Sam" law followed current state laws of the same nature, but was somewhat more narrowly drafted.

The Act also provides funding for federal crime victim assistance programs, including crisis intervention, forensic services, and salaries of victim service providers. Finally, the Act mandates that at least forty-five percent of the Crime Victims Fund shall be distributed to states for the purpose of aiding state crime victim programs.⁹

B. State Legislation

Any effort to catalog the various laws which have been enacted by state legislatures during the last five years would far exceed the scope of this introductory article. Suffice it to say that the legislatures of every state continued to respond enthusiastically to the victims' movement. Major initiatives were seen in areas such as victim impact statements, victims' rights to allocution at sentencing (and in some cases even at the plea bargaining stage), rape shield laws, extension of statutes of limitations in child sexual abuse cases, and other areas as well.

Compendia of this kind of legislative action, state by state, can be obtained from two principal sources: the National Victim Center (formerly the Sunny von Bulow National Victim Advocacy Center)¹⁰ and the National Organization for Victim Assistance (NOVA).¹¹ The

8. Pub. L. No. 98-473, § 1401, 98 Stat. 2170 (1984) (codified at 42 U.S.C. §§ 10601-10604 (Supp. V 1987)), amended by Children's Justice and Assistance Act of 1986, Pub. L. No. 99-401, § 102, 100 Stat. 903 (1986); and Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 9121, 102 Stat. 4419 (1988).

9. See generally Rodino, *New Help for Crime Victims*, 32 FED. B. NEWS & J. 88, 89 (Feb. 1985).

10. The National Victim Center is located at 307 West 7th Street, Suite 1001, Fort Worth, Texas 76102; (817) 877-3355; E. Gene Patterson, Executive Director.

11. NOVA is located at 717 D. Street, N.W., Suite 1989, Washington, D.C. 20004;

work of NOVA, described in the 1984 article,¹² will be updated below, and the work of the National Victim Center, new on the scene since the 1984 article, also will be discussed.

One example of how the state courts are taking the victims' rights issue and its related legislation seriously is provided by the Illinois case of *Myers v. Daley*.¹³ Mr. Myers, a Chicagoan, had been the victim of a violent crime, which he reported to the State's Attorney's office.¹⁴ Subsequently, he exercised his right under the Illinois Bill of Rights for Victims and Witnesses of Violent Crime Act¹⁵ and wrote to the State's Attorney's office requesting the status of his case, but he received no reply. He then sued the State's Attorney to obtain the information, which ultimately was forwarded to him. Upon an agreed dismissal of the case, the court awarded Mr. Myers \$92.32 in court costs. The State's Attorney appealed. The Illinois Court of Appeals affirmed the award, holding that the State's Attorney had a legal duty to furnish the information, and that it would frustrate the purposes of the Act if court costs were not allowed to one who was invoking his legal rights under the Act.¹⁶

III. EXECUTIVE BRANCH INITIATIVES

It would be difficult for anyone, regardless of political persuasion, to dispute the fact that Ronald Reagan was the first United States President to put the full weight and influence of that office behind the victims' movement. He had been in office only three months when he proclaimed the first National Crime Victims' Week,¹⁷ and he continued to do so during each year of his tenure as President. Such support on the national level gave enormous impetus to similar state proclamations by various governors. The presidential imprimatur embodied in this initiative elevated concern for victims to a level never before attained.

The Victims' Week proclamations came under the heading of "moral support," albeit from the highest national level. An initiative on a far more substantive level soon followed in the form of the President's Task Force on Victims of Crime, the first such presidential-level commission in the nation's history. As noted in the authors' 1984 article,¹⁸ the task force reported to President Reagan with sixty-

(202) 393-NOVA; Dr. Marlene A. Young, Executive Director; John Stein, Esq., Associate Executive Director.

12. See Carrington & Nicholson, *supra* note 1.

13. 166 Ill. App. 3d 249, 521 N.E.2d 98 (1987).

14. *Id.* at 250, 521 N.E.2d at 99.

15. ILL. ANN. STAT. ch. 38, para. 1401-1407 (Smith-Hurd Supp. 1989).

16. *Myers*, 166 Ill. App. 3d at 250, 521 N.E.2d at 100.

17. Proclamation No. 4831, 3 C.F.R. 18 (1982) (Crime Victims' Week, 1981).

18. Carrington & Nicholson, *supra* note 1, at 7.

eight specific recommendations geared to preventing victimization and to alleviating the plight of those unfortunate enough to become victims or survivors of crime.¹⁹ As of 1989, seventy-five percent of the recommendations had been acted upon, usually in a highly bipartisan spirit of cooperation between the Administration and Congress.

Pursuant to the 1984 Victims Act, the Administration established the Office on Victims, which administers funds appropriated for crime victims by Congress and assists victims' organizations through the expertise of the Office's staff.²⁰ The impact of the coordinated efforts of the executive and legislative branches has been felt on a nationwide basis.²¹

There is every indication that an interest in victims' rights will continue during the Bush Administration. Then Vice President Bush campaigned for the Presidency on an anti-crime, pro-victim platform.²² A victim-related issue that arose, almost at the outset of the campaign, was the subject of furloughs for convicted murderers. All too often, convicts escape from furlough programs and commit acts of violence on innocent victims. The Vice President's opponent,²³ an ardent advocate of such furlough programs, refused to back off on an issue that struck many as typical of an unrealistic, even intolerable, concern for the convenience of convicted murderers, to the complete detriment of the rights of the murderers' actual and potential victims. Commentators on the Bush/Dukakis campaign have posited the theory that the furlough issue, more than any other, ensured the

19. See FINAL REPORT, *supra* note 5.

20. The first Director of the Office on Victims was Assistant Attorney General Lois Haight Herrington, who had served as Chairperson of the President's Task Force on Victims of Crime. The current director is Dr. Jany Nady Burnley, Ph.D. in Psychology. The Office on Victims is located at 633 Indiana Avenue, N.W., Suite 1300, Washington, D.C. 20510; (202) 724-5983.

21. While not well known outside of Reagan Administration circles, it is a matter of record that the principal architect of the Administration's efforts in the victims' area was Edwin L. Meese, III, former Counselor to the President and Attorney General of the United States. Mr. Meese has had an abiding interest in and concern about the victims' plight since his days as a prosecutor in Oakland, California, long before the Reagan Administration. He used the power of the two high federal offices which he held to improve the lot of crime victims at every level of federal involvement.

22. On August 9, 1988, then Vice President Bush announced the formation of a Citizens Against Crime Coalition, chaired jointly by Governor James R. Thompson of Illinois and Senator Arlen Specter of Pennsylvania. The "National Leadership" of the Coalition consisted of members of the law enforcement and victims' rights communities, including two former members of President Reagan's Task Force on Victims of Crime.

23. Massachusetts Governor Michael Dukakis was the Democratic nominee for President in 1988.

defeat of the Democratic candidate.²⁴

For victims and their advocates, there is every reason to believe that President Bush will continue to encourage government initiatives on behalf of crime victims. For example, one of his first acts in office was the proclamation of National Victims' Rights Week, 1989.

IV. THE SUPREME COURT

A number of confusing split decisions among the Justices of the United States Supreme Court must be considered when analyzing the Court's holdings regarding the victims of crime. While it is difficult to neatly categorize the Justices into voting blocs, certainly a rough sketch of voting trends may be useful in ascertaining how the Court *generally* views crime victims' rights.

The current Justices may be fairly characterized as "conservatives," "swing votes," or "liberals" regarding criminal justice issues.

The "conservatives" are those Justices who will likely vote to affirm convictions or otherwise rule in favor of the prosecution, law enforcement, and the safety of society. They include Chief Justice Rehnquist and Justices White, O'Connor, Scalia, and Kennedy. The "swing votes," Justices Blackmun and Stevens, lean heavily toward the rights of accused or convicted criminals, while the "liberals," Justices Brennan and Marshall, vote almost invariably for the rights of accused or convicted criminals.

However, when a case involves crime victims and the issue concerns their rights or legal needs—such as the manner in which the system has treated them, or when victims are seeking civil redress from perpetrators or third parties whose negligence has facilitated the crimes against them—a shift in alignment often occurs. Those Justices who manifest a concern for the safety of society by their decisions in pure criminal cases often take an anti-victim posture in the class of crime victim cases described above. Conversely, those who regularly vote for criminals' rights *may* vote for victims' rights as well, but *only* when the rights of criminals are not affected.

The following is a brief examination of the Supreme Court's jurisprudence in cases in which victims' rights, as opposed to the rights of

24. Timing is often critical in campaigns for high office. By August of 1988, when the Presidential race was getting off the ground, an article entitled *Getting Away With Murder* appeared in *Reader's Digest*. See Bidinotto, *Getting Away With Murder*, *READER'S DIG.*, July 1988, at 1. The article focused on furloughed Massachusetts murderers and their victims, including the victims of Willie Horton, a convicted murderer who, while on furlough, raped a woman and tortured her husband. Horton became a household word in American politics, and writers about the 1988 Presidential campaign have given the furlough issue, and Mr. Bidinotto's article, a role of significant influence in the defeat of Governor Dukakis. See GETMOND & WHITCOVER, *WHOSE BROAD STRIPES AND BRIGHT STARS?* 164 (1989).

criminals, is the central question. For an issue as important and volatile as the rights of crime victims, there are surprisingly few Supreme Court cases. The lack of legal precedent primarily is due to the fact that, until recently, the American legal system, including the United States Supreme Court, did not really recognize that crime victims had any legal rights.²⁵

V. CASES IN WHICH CRIME VICTIMS DID NOT PREVAIL

The first major victims' rights case to reach the Supreme Court during the past decade was *Martinez v. California*,²⁶ in which the Court held that a California statute²⁷ provided blanket immunity to correctional officials for the murder of a fourteen-year-old girl by a prisoner who had been released under grossly negligent circumstances. The Court found that the statute violated neither the Federal Civil Rights Act,²⁸ nor the Due Process Clause of the United States Constitution. Justice Stevens, writing for a unanimous court, stated that the child's murder, six months after the release of her murderer, was too remote in time to sustain a cause of action, and that, in any event, the murder was the "action" of the murderer himself rather than "state action" for purposes of the Federal Civil Rights Act.²⁹

In *United States v. Shearer*,³⁰ an action was brought under the Federal Tort Claims Act³¹ by the parents of a soldier who had been murdered by another soldier. The latter had been convicted of murder, and then released under allegedly negligent circumstances. The Court held that the parents failed to state a cause of action because Section 2680(h) of the Federal Tort Claims Act retained the immunity of the United States for "any claim arising out of assault or battery."³² The Court also held that the action was barred by the *Feres* doctrine, named for the landmark case, *Feres v. United States*.³³ *Feres* is cited for the proposition that a soldier cannot recover under the Federal Tort Claims Act for injuries arising "out of or . . . in the

25. See F. CARRINGTON & J. RAPP, *supra* note 3, at 1.

26. 444 U.S. 277 (1980).

27. CAL. GOV'T CODE § 845.8(a) (West 1980 & Supp. 1979).

28. 42 U.S.C. § 1983 (1982).

29. *Martinez*, 444 U.S. at 285.

30. 473 U.S. 52 (1983).

31. 28 U.S.C. §§ 1346(b), 2671 (1982).

32. *Shearer*, 473 U.S. at 55 (emphasis omitted).

33. 340 U.S. 135 (1950).

course of activity incident to service.”³⁴

The *Shearer* opinion was written by then Chief Justice Burger, and joined in full by Justices White, Rehnquist, and O’Connor.³⁵ Justices Brennan, Marshall, Blackmun, and Stevens joined only in that part of the opinion which held that the *Feres* doctrine barred the action.³⁶ These Justices did not agree that the action should be barred by the “assault and battery” exception to the Federal Tort Claims Act.³⁷

By 1987, a number of states had passed legislation mandating that “victim impact statements” could be reviewed by the courts when considering the sentences to be imposed upon criminals. In *Booth v. Maryland*,³⁸ the Court, in a five-to-four decision, held that statutorily approved victim impact statements could not be used during the penalty phase of capital cases because they might “inflame” the jurors’ minds against the defendant.³⁹ Justice Powell wrote the opinion, in which Justices Brennan, Marshall, Blackmun, and Stevens concurred.

The Court faced an almost identical issue in 1989, in *South Carolina v. Gathers*,⁴⁰ wherein the Court reversed a capital conviction because the prosecutor, during the penalty phase, read from religious tracts that the victim had been carrying at the time of his murder, and also commented on the victim’s religious characteristics. Justice Brennan wrote the opinion, joined by Justices Marshall, Blackmun, and Stevens; Justice White concurred in order to form a majority because he felt bound by the holding in *Booth*.⁴¹

Also, in 1989, a majority of the Court took “Suffer, Little Children” as its text in *DeShaney v. Winnebago County Dep’t of Social Services*.⁴² Chief Justice Rehnquist, who wrote the majority opinion, in which Justices White, Stevens, O’Connor, Scalia, and Kennedy joined, framed the issue before the Court:

Petitioner is a boy who was beaten and permanently injured by his father, with whom he lived. The respondents are social workers and other local officials who received complaints that petitioner was being abused by his father and had reason to believe that this was the case, but nonetheless did not act to remove petitioner from his father’s custody. Petitioner sued respondents claiming that their failure to act deprived him of his liberty in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. We hold that it did not.⁴³

34. *Id.* at 146.

35. *Shearer*, 473 U.S. at 53.

36. *Id.* at 59 (Brennan, J., dissenting), 60 (Marshall, J., concurring).

37. Justice Powell took no part in the decision.

38. 482 U.S. 496 (1987).

39. *Id.* at 508.

40. 109 S. Ct. 2202 (1989).

41. *Id.* at 2211.

42. 109 S. Ct. 998 (1989).

43. *Id.*

In more detail, the facts show that the Winnebago County authorities were aware of the danger posed to the victim, Joshua DeShaney, by his father, who had custody of the child. Joshua was hospitalized twice with suspicious injuries which indicated child abuse, but each time he was returned to his father. Finally, Joshua's father beat him so severely that permanent brain damage ensued. The father was convicted of child abuse.⁴⁴

Joshua, through his mother, sued the Winnebago County Department of Social Services under the Federal Civil Rights Act,⁴⁵ alleging a violation of his civil rights and due process rights based on the Department's failure to intervene on Joshua's behalf. The U.S. District Court granted summary judgment and the U.S. Court of Appeals for the Seventh Circuit affirmed.⁴⁶ The appellate court held that the due process clause did not protect citizens from "private violence," and that the causal connection between Joshua's injuries and the Department's failure was too attenuated to state a civil rights cause of action.⁴⁷

The Supreme Court affirmed,⁴⁸ with the majority reiterating the principle that the due process clause does not protect citizens from private violence. It then considered the issue of whether a "special relationship" existed between Joshua and the Department which would create a duty in the Department to protect Joshua from his father.

Petitioners contend, however, that even if the Due Process Clause imposes no affirmative obligation on the State to provide the general public with adequate protective services, such a duty may arise out of certain "special relationships" created or assumed by the State with respect to particular individuals. . . . Petitioners argue that such a "special relationship" existed here because the State knew that Joshua faced a special danger of abuse at his father's hands, and specifically proclaimed, by word and by deed, its intention to protect him against that danger. . . . Having actually undertaken to protect Joshua from this danger—which petitioners concede the State played no part in creating—the State acquired an affirmative "duty," enforceable through the Due Process Clause, to do so in a reasonably competent fashion. Its failure to discharge that duty, so the argument goes, was an abuse of governmental power that so "shocks the conscience" . . . as to constitute a substantive due process violation.⁴⁹

The Court rejected this argument. It found no "special relation-

44. *Id.* at 1001.

45. 42 U.S.C. § 1983 (1982).

46. *DeShaney v. Winnebago County Dep't of Social Services*, 812 F.2d 298 (1987).

47. *Id.* at 301-02. In its decision, the court referred to *Martinez v. California*, 444 U.S. 277, 285 (1980), as support for its holding.

48. *DeShaney*, 109 S. Ct. at 998.

49. *Id.* at 1004 (citation omitted).

ship” because Joshua was not in the state’s custody.⁵⁰ The Court noted that *Estelle v. Gamble*⁵¹ and *Youngberg v. Romeo*⁵² stand for the principle that persons in actual custody, who are not able to care for themselves, are entitled to care from the state in an eighth amendment context. However, the Court held that since Joshua was not “in custody,” no “special relationship” existed, even though the Winnebago County authorities knew that Joshua was in danger.⁵³ In short, the Court utilized the narrowest possible construction of “custody” for Civil Rights Act purposes.

Justice Brennan dissented, joined by Justices Blackmun and Marshall.⁵⁴ The dissent accused the majority of taking far too narrow a view of *Estelle* and *Youngberg*, pointing out that once the state, through the county, had taken some action on Joshua’s part, it had effectively foreclosed him from acting on his own behalf. The dissent analyzed the situation as follows:

Even more telling than these examples is the Department’s control over the decision whether to take steps to protect a particular child from suspected abuse. While many different people contributed information and advice to this decision, it was up to the people at DSS to make the ultimate decision (subject to the approval of the local government’s Corporation Counsel) whether to disturb the family’s current arrangements When Joshua first appeared at a local hospital with injuries signaling physical abuse, for example, it was DSS that made the decision to take him into temporary custody for the purpose of studying his situation—and it was DSS, acting in conjunction with the Corporation Counsel, that returned him to his father. . . . Unfortunately for Joshua DeShaney, the buck effectively stopped with the Department.

In these circumstances, a private citizen, or even a person working in a government agency other than DSS, would doubtless feel that her job was done as soon as she had reported her suspicions of child abuse to DSS. Through its child-welfare program, in other words, the State of Wisconsin has relieved ordinary citizens and governmental bodies other than the Department of any sense of obligation to do anything more than report their suspicions of child abuse to DSS. If DSS ignores or dismisses these suspicions, no one will step in to fill the gap. Wisconsin’s child-protection program thus effectively confined Joshua DeShaney within the walls of Randy DeShaney’s violent home until such time as DSS took action to remove him. Conceivably, then, children like Joshua are made worse off by the existence of this program when the persons and entities charged with carrying it out fail to do their jobs.

It simply belies reality, therefore, to contend that the State “stood by and did nothing” with respect to Joshua. . . . Through its child-protection program, the State actively intervened in Joshua’s life and, by virtue of this intervention, acquired ever more certain knowledge that Joshua was in grave danger. These circumstances, in my view, plant this case solidly within the tradition of cases like *Youngberg* and *Estelle*.⁵⁵

Justice Blackmun, dissenting separately, pointed out the paradox

50. *Id.* at 1004-05.

51. 429 U.S. 97 (1976) (prisoner).

52. 457 U.S. 307 (1982) (involuntarily committed mental patient).

53. *DeShaney*, 109 S. Ct. at 998.

54. *Id.* at 1007.

55. *Id.* at 1010-11 (citations omitted).

that under the *DeShaney* ruling, 42 U.S.C. § 1983 fails to protect a class of people which have the greatest need of government protection—the class of abused children. He stated:

Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by respondents who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing except, as the Court revealingly observes, . . . "dutifully recorded these incidents in [their] files." It is a sad commentary upon American life, and constitutional principles—so full of late of patriotic fervor and proud proclamations about "liberty and justice for all," that this child, Joshua DeShaney, now is assigned to live out the remainder of his life profoundly retarded. Joshua and his mother, as petitioners here, deserve—but now are denied by this Court—the opportunity to have the facts of their case considered in the light of the constitutional protection that 42 U.S.C. section 1983 is meant to provide.⁵⁶

After *DeShaney* and *Martinez*, it is clear that while the conservative majority of the Court are willing to protect society from the criminals themselves, they are not willing to extend that protection to those endangered by the negligence of bureaucrats, thus leaving unprotected the likes of four-year-old Joshua DeShaney or fourteen-year-old Mary Ellen Martinez.

The cases described above are devastating to the burgeoning campaign of enhancing the legal rights of crime victims in the legislatures and the courts. The news, however, is not *all* bad as the Court also has rendered some decisions sympathetic to the victims' point of view.

In 1947, the Court handed down an opinion that is rarely cited despite its strong pro-victim holding. In *Lillie v. Thompson*,⁵⁷ the Court held that employers could be liable for failure to provide a safe place to work if employees are criminally victimized because of this failure. *Lillie* involved a female telegraphist who worked nights in a remote telegraph shack which her employer knew was frequented by hobos and other potentially dangerous individuals. When she was foreseeably assaulted by these persons, a cause of action for negligent failure to provide a safe place to work was found to exist.⁵⁸

The Court's October 1987 term furnished two cases reasonably

56. *Id.* at 4224 (Blackmun, J., dissenting) (citation omitted). See also Fain, *Why Does Joshua DeShaney Rate Lower Than Willie Horton?*, L.A. Daily J., Mar. 3, 1989, at 4, col. 1. For an analysis of pre-*DeShaney* child abuse negligence cases, see Carrington, *Responsibility for the Negligence of State-Employed Human Service Professionals*, 1987 PROF. NEGL. REP. 131.

57. 332 U.S. 459 (1947).

58. *Id.* at 461-62.

favorable to crime victims. In *Kelly v. Robinson*,⁵⁹ the Court held that court-ordered restitution to the state, imposed on a woman who had been convicted of welfare fraud, was not a debt that was dischargeable in bankruptcy. Justices Marshall and Stevens dissented. Justice Powell, the author of the opinion, intimated that a similar rationale would prevail in cases involving restitution to private parties from their assailants, under a theory that federal remission of judgments imposed by state criminal judges would be involved.⁶⁰

In *Pennsylvania v. Ritchie*,⁶¹ the Court reversed a decision of the Supreme Court of Pennsylvania holding that the defendant in a rape-sodomy-incest case had a discovery right to *all* of the records of the Pennsylvania Children and Youth Services (CYS) pertaining to the victim. Justice Powell, writing for a plurality, cited Pennsylvania's efforts to combat child abuse and provided that the defendant's right to review CYS records was limited to having the trial court, in camera, review such records to determine if they contained any information favorable to the defendant which probably would have changed the outcome of the trial. As a result, the defendant's attorney would not be permitted to rummage through the victim's statements on a generalized fishing expedition. Justices Brennan, Marshall, Stevens, and Scalia dissented.

Finally, the Court appeared to retreat somewhat from its holding in *United States v. Shearer*⁶² in another Federal Tort Claims Act case, *Sheridan v. United States*.⁶³ In *Sheridan*, a Navy enlisted man, Carr, was found lying on the floor of a naval hospital building in a drunken stupor. The naval personnel who found and revived him, attempted to take him to the emergency room, but Carr broke free, pointed a rifle at his would-be rescuers, and fled. The naval personnel who had discovered Carr did not attempt to stop him, and their failure to report the incident was in violation of Navy regulations. Carr later shot Mr. Sheridan, a civilian, on civilian property, in what was apparently a random shooting incident. The Supreme Court held in a five-to-three decision that the Sheridans had stated a cause of action against the United States under the Federal Tort Claims Act despite the "assault and battery" exception in the Act. Chief Justice Rehnquist and Justices O'Connor and Scalia dissented.

It is perhaps premature to predict what the Court's ultimate posture on victims' rights issues will be. Victims' attorneys have been winning major victories in state courts in the past ten to fifteen

59. 479 U.S. 36 (1986).

60. *Id.* at 48-49.

61. 480 U.S. 39 (1987) (Powell, J., plurality).

62. 473 U.S. 52 (1983); *see supra* notes 30-37 and accompanying text.

63. 487 U.S. 392 (1988).

years,⁶⁴ and it is possible that, as a sizeable body of victims' law is established in lower courts, even the Supreme Court will take a fairer and more realistic attitude towards victims' rights. Additionally, because the Court reviews so few cases, primarily concerned with cosmic constitutional issues, the above-mentioned body of victim-oriented civil cases will continue to develop despite some setbacks by the Court.

VI. PRIVATE VICTIMS' RIGHTS ACTIVITIES

Disclaimer and apology already have been made⁶⁵ for the fact that, in an introductory article such as this, it is impossible to list all of the worthy victims' rights activities in the private sector. Nonetheless, it is appropriate to give the reader at least *some* insight into what such programs can accomplish.⁶⁶ Certainly, it is not an understatement to

64. See generally F. CARRINGTON & J. RAPP, *supra* note 3.

65. See *supra* note 3.

66. A specialized victims' movement has developed to assist campus crime victims. It is tragic, but true, that far too many school, community college, college, and university officials have been inattentive to, and in some cases, indifferent to, the safety of their students and staffs. This simply must change, and there are many dedicated people working very hard toward that end. For example, this concern for campus crime victims has been incorporated into the California Constitution. See CAL. CONST. art. I, § 28(c) (noting that "[a]ll students and staff of public primary, elementary, junior high, and senior high schools have the inalienable right to attend campuses which are safe, secure and peaceful"). According to California Supreme Court Justice Stanley Mosk, "innocent, law-abiding students have a constitutional right to protection from crime and criminals, and are entitled to a safe school environment." *In re William G.*, 40 Cal. 3d 550, 574, 709 P.2d 1287, 1302, 221 Cal. Rptr. 118, 133 (1985) (Mosk, J., dissenting); see also J. RAPP, F. CARRINGTON & G. NICHOLSON, *SCHOOL CRIME AND VIOLENCE: VICTIMS' RIGHTS* (1986); Nicholson, Rapp & Carrington, *Campus Safety: A Legal Imperative*, 33 EDUC. L. REP. 979 (1986); Comment, *The Right to Safe Schools: A Newly Recognized Inalienable Right*, 14 PAC. L.J. 1309 (1983).

To assist elementary and secondary schools in dealing with campus safety, Pepperdine University operates the National School Safety Center, located at 16830 Ventura Boulevard, Suite 200, Encino, California 91436; (818) 377-6200. Dr. Ronald Stephens is the Director of the Center. Countless print and audio/visual resources are available through the center.

To assist community colleges, colleges, and universities in improving campus safety, Towson State University operates the Center for the Study and Prevention of Campus Violence, c/o Towson State University, Towson, Maryland 21204; (301) 830-2178. Dr. Jan Sherrill is the Director of the Center.

Howard and Constance Clery, whose daughter, Jeanne, was murdered in her dormitory room at Lehigh University in Pennsylvania in 1986, founded Security on Campus, Inc., 618 Schoemaker Road, Suite 105, Gulph Mills, Pennsylvania 19406; (215) 768-9330. This organization promotes and encourages safe community college, college, and university campuses. In fact, the Clerys are successfully spearheading a national effort to statutorily require community colleges, colleges, and universities to notify present and potential students of the nature and volume of campus-related crime. They have al-

assert that without the tireless and dedicated work of the hundreds of thousands of volunteers in service to crime victims, there would be no victims' movement as we know it today.

Given the above constraints, the authors will discuss briefly the activities of the two major victims' organizations that operate on a nationwide scale, with the hope that their activities will give some idea of what is being done at the state and local levels. The first such organization, founded in 1976 by a small group of victim advocates in Fresno, California, was the National Organization for Victim Assistance, Inc. (NOVA).⁶⁷ NOVA's literature highlights some of its major accomplishments: (1) assistance in formulating and passing the Victims of Crime Act, the Victim and Witness Protection Act, the Justice Assistance Act, and bills of rights for victims; (2) providing through its advocates, crisis counseling, information, referral, and assistance; and (3) providing local victim assistance programs with updated information on how to serve the victims with whom they have contact.⁶⁸ NOVA's annual National Forums on Victims Rights and various conferences provide vehicles for victims' advocates from all over the country to meet, to share ideas, and to be heard.

The second national victim organization, the National Victim Center (the Center), formerly the Sunny von Bulow National Victim Advocacy Center, was founded in 1985. Its broad-ranging programs include: (1) seminar training across the country of direct-line victim service personnel involved in such areas as rape crisis counselling, child protection activities, assistance with domestic violence cases, and counselling survivors of homicide victims; (2) work for constitutional amendments creating "Victims' Bills of Rights" in the several states;⁶⁹ (3) information referral to individual crime victim service

ready achieved their goal in Florida, Louisiana, Pennsylvania, and Tennessee. They believe they are close to achieving their goal in California, Massachusetts, New Jersey, and New York. Related bills will soon be reintroduced in Missouri and Texas. Additionally, federal bills to the same effect have been introduced in the Congress of the United States. Senator Arlen Specter (R-Pa.) introduced S. 1925, the Prime Awareness and Campus Security Act of 1989, and Representative William F. Goodling (R-Pa.) introduced H.R. 3344, bearing the same title.

For an overview of the Clerys' program, see Beyette, *Campus Crime Crusade*, L.A. Times, Aug. 10, 1989, § V, at 1. Another devoted and distinguished set of parents, Robert and Connie Hosemann, and their dedicated attorneys, John MacMeeken and Kevin Washburn, have been waging a protracted battle against the Oakland [California] Unified School District, which, after many early trial court victories, lost ground at the appellate level. Nevertheless, the Hosemanns' battle on behalf of their son, Steven, has borne important and enduring results for the campus safety movement. For more information, see Toby, *Crime in American Public Schools*, 58 PUB. INTEREST 18 (1980). Matters have become worse since Professor Toby authored this important work.

67. See *supra* note 11.

68. NATIONAL ORGANIZATION FOR VICTIM ASSISTANCE, FROM THE DARKNESS OF CRIME . . . TO THE LIGHT OF HOPE: THE CAMPAIGN FOR VICTIMS RIGHTS (1989). See *supra* note 10 for the address where NOVA's promotional literature can be found.

69. Such Bills of Rights have been passed as constitutional amendments in Califor-

agencies (since its establishment, the Center has made some 4000 such referrals); (4) maintaining a data base of some 13,000 pieces of legislation that concern victims' rights, directly or indirectly; and (5) maintaining another data base of the names and addresses of, and key individuals involved with, over 7000 victim assistance agencies nationwide. Current information about victims' issues is made available to these individuals and agencies upon request through the Center's quarterly newsletter, *Networks*.⁷⁰

Of principal interest to attorneys, paralegals, law students, and faculty, as well as to others who are concerned with the legal rights of crime victims, is the Center's Crime Victims Litigation Project (the Project). Initiated late in 1986, the Project has established the only data base in the country that is concerned specifically and exclusively with victims' legal rights.

The Project's concept developed from the realization that there was no central national resource of law and empirical data to which those involved in civil cases on behalf of victims could turn. In effect, the other aspects of the victims' movement had outstripped the more time-consuming effort of establishing victims' litigation as a "new tort," whereby the legal system might elevate the legal status of crime victims to that, for example, of victims of medical malpractice,

nia, Florida, and Michigan, and have been introduced in Washington and Texas. Victims' advocates, with whom the Center has worked closely, are in the process of putting Victims' Bill of Rights amendments on the ballots in Arizona, Colorado, Ohio, Maryland, Mississippi, New Jersey, New York, and South Carolina. For a comprehensive outline of the dramatic impact such efforts can have, see Gann, *supra* note 3, at 69; McAlister, Fairbanks, & Carrington, *Paul Gann, Citizen Politician—A Tribute*, 4 BENCHMARK 67 (1988). See also *People v. Markham*, 49 Cal. 3d 63, 775 P.2d 1042, 260 Cal. Rptr. 273 (1989) (quantum of proof); *People v. May*, 44 Cal. 3d 309, 748 P.2d 307, 243 Cal. Rptr. 369 (1988) (admissions and confessions); *In re Lance W.*, 37 Cal. 3d 873, 694 P.2d 744, 210 Cal. Rptr. 631 (1985) (search and seizure). Mr. Gann's article chronicles nothing short of a revolutionary upheaval in California criminal law. For two exceptional examples of the numerous journalistic observations on the significance of California's Proposition 8, the Victims' Bill of Rights, see Hagar, *Prosecutors Win Edict on Use of Confessions*, L.A. Times, Feb. 2, 1988, § 1, at 1; Carrizosa, *Prop. 8 Survives Essentially Intact After Three Years*, L.A. Daily J., Nov. 12, 1985, § 1, at 1.

Mr. Gann gave his view of the current situation in California when he wrote:

According to the Sacramento Union, in its lead editorial of November 19, 1985, 'On balance, Proposition 8 is working, once again validating the value of the direct democracy envisioned by [former California Governor] Hiram Johnson three-quarters of a century ago. For proof, listen to [San Francisco Public Defender] Jeff Brown, a critic of the measure: "The net sum is that a lot more people have been in prison and there's probably a lot tougher evidentiary rules in the courtroom."' What more need one say?

Gann, *supra* note 3, at 74.

70. See *supra* note 8.

defective products, and toxic torts. Although some movement had occurred on the front of victims' legal rights, a central resource had not yet been created.

The Project began with the establishment of its data base. Categories of victims' cases in which redress for injuries were to be sought in the civil courts were selected. Categorization was surprisingly easy because the majority of lawsuits fell into one of two major classifications: (1) suits by victims against the perpetrators of crime or (2) suits by victims against third parties whose simple or gross negligence caused or facilitated the criminal acts which had victimized them.

Victim v. Perpetrator cases were placed neatly into the following subcategories:

Direct Cases—suits filed directly against the perpetrators themselves with emphasis on substantive legal issues;

Insurance Related—cases in which insurance coverage—usually homeowner's—was at issue;

Collectability—avenues of redress when the actual perpetrator had no funds, for example: parental liability, "Son of Sam" laws, restitution, and compensation; and

Evidentiary and Procedural Issues—areas where procedural questions dominated the success (or failure) of a given case.

Third-party cases fell into the following subcategories and sub-subcategories:

Failure to Protect or Prevent Crime—suits filed usually against government entities, particularly law enforcement agencies;

Negligence in Handling Prisoners—issues here include Release, Escape, Failure to Supervise, and Failure to Warn;

Negligence in Handling Dangerous Mental Patients—same issues as for prisoners; and

Private or Semi-Private Parties: Landlords, Innkeepers, Schools Hospitals, Owners and Operators of Other Premises, Common Carriers, Employers, and Others—each of these categories was further divided into: Failure of Security; Failure to Supervise; Negligent Employment; Retention; and Other.

The data base is maintained through a weekly review of all of West's advance sheets.⁷¹ All cases involving crime victims are entered. Additionally, all victim cases decided during the past ten years which are cited in the advance sheets are collected and entered.

In 1988, the Project established the Coalition of Victims' Attorneys and Consultants (COVAC) as its membership, educational, research,

71. This weekly review covers all of West's federal and regional reporters: F.2d, F. Supp., A.2d, N.E.2d, N.W.2d, P.2d, So. 2d, S.E.2d, and S.W.2d.

and referral arm. COVAC Update, which presents the most important victim cases decided during a given quarter, refers members to victims who have not yet retained attorneys and to other attorneys, and provides direct counseling services by telephone or by letter to interested parties. The Project's services are available to all attorneys and others involved in victim cases. There is no charge for COVAC members or attorneys handling *pro bono* cases, and only a nominal charge in other instances.⁷²

VII. CONCLUSION

It is apparent from the foregoing that the above-characterized "maturing process" for the victims' movement is well under way. The ultimate goal, that of elevating the rights of crime victims and their survivors to their proper status in our system of justice, is being approached with a rapidity that few would have predicted with any great degree of confidence only two decades ago.⁷³

72. See Marcotte, *Project to Aid Crime Victims*, 73 A.B.A. J. 20 (Sept. 1987); *Database for Lawyers of Crime Victims*, 23 TRIAL 94 (July 1987); Middleton, *Victims of Crime Flexing Muscles: Bigger Role Wanted*, Nat'l L.J., Mar. 13, 1989, at 1.

73. Much may also be attributed, indirectly, to the crime victims' movement. For example, major attention has been directed at trial court delay reduction in the years since the advent of crime victims' sensitivity. This attention has been occurring in most states throughout the nation. Thus, in California, renewed attention and meaning has been given to the following victim assistance statute:

All proceedings in criminal cases shall be set . . . heard and determined at the earliest possible time . . . it shall be the duty of all courts and judicial officers and of all counsel, both the prosecution and the defense, to expedite such proceedings to the greatest degree that is consistent with the ends of justice.

CAL. PENAL CODE § 1050 (West 1985); see also CAL. CT. R. 227.8. Furthermore, plea bargaining, one of the most controversial aspects of the administration of criminal justice, has been significantly transformed, at least in California. This is directly attributable to Proposition 8, the Victims' Bill of Rights. Thus, "plea bargaining [in specified cases] . . . is prohibited . . . [in superior court]." CAL. PENAL CODE § 1192.7(a) (West 1982). This was a goal of the drafters of Proposition 8, not to totally abolish plea bargaining, but to move it to the earliest possible stages of the criminal adjudicatory process—after arraignment and before preliminary hearings in municipal court. It was anticipated this would require prosecutors and defenders to assign more experienced personnel, earlier, to handle appropriate cases. It was also anticipated this would reduce victim and witness uncertainty and dislocation. Now, coincidentally, this parallels contemporary, cost-cutting interest by court administrators. 4 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW §§ 2180-2187 (2d ed. 1989). In all respects, the plea bargain results sought by the drafters of Proposition 8 have been achieved and are spreading throughout the courts of California. See generally MACDONALD, ALTERNATIVE RESOLUTION OF CRIMINAL CASES IN CALIFORNIA COURTS (1989); MORRIS & NICHOLSON, COORDINATION BETWEEN SUPERIOR AND MUNICIPAL COURTS, INSTRUCTION MANUAL (1989) (Conference of Supervising Criminal Law Judges, Judicial Council, State of California, Sept. 15, 1989.) The crime victims' movement has had the derivative impact of requiring the judiciary to analyze many of its other activities. Thus, it is

now more clearly recognized that trial courts should plan and adopt independent delay reduction and sentencing policies and programs in criminal cases, uncoerced by the demands of any litigant. These policies and programs will then be reviewed by appellate courts only within the narrow constraints of whether judicial discretion by the trial courts has been abused. See *Bryce v. Superior Court*, 205 Cal. App. 3d 671, 676-77, 252 Cal. Rptr. 443, 446-47 (1988); CAL. PENAL CODE § 859a (West 1985); CAL. CT. RULES 205(1), 227.10, 532.5(a)(1), 701. Finally, consideration of public safety has been restored as a major consideration in setting bail and releasing defendants on their own recognizance. See CAL. CONST. art. I, § 28(e); CAL. PENAL CODE § 1275 (West 1982); Leetham, *And the Defendant Will be Admitted to Bail*, 18 BEVERLY HILLS B.A. J. 176 (1984). While much has been achieved, eternal vigilance by the public is needed to guarantee that never again can it be said that criminals have all the rights. See Mosk, *Mask of Reform*, 10 SW. U.L. REV. 885, 889-90 (1978). Similarly, care must always be exercised to ensure that the criminal justice system never ventures too far the other way. Indeed, United States Supreme Court Justice Benjamin N. Cardozo was correct when he declared, "[J]ustice, though due to the accused, is due 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." *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934).