Special Victims' Rights Issue

State–Federal Judicial Observer

NEWS AND COMMENTARY OF INTEREST TO THE STATE AND FEDERAL JUDICIARY

A Federal Judicial Center publication to further state–federal judicial relations • Number 14 • April 1997

A Proposed Victims' Rights Constitutional Amendment

For an Amendment

by Laurence H. Tribe
Ralph S. Tyler, Jr. Professor of
Constitutional Law, Harvard University

Beginning with the premise that the Constitution should not be amended lightly and should never be amended to achieve short-term, partisan, or purely policy objectives, I would argue that a constitutional amendment is appropriate only when the goal involves (1) a needed change in government structure, or (2) a needed recognition of a basic human right, where (a) the right is one that people widely agree deserves serious and permanent respect, (b) the right is one that is insufficiently protected under existing law, (c) the right is one that cannot be adequately protected through purely political action such as state and federal legislation and/or regulation, (d) the right is one whose inclusion in the U.S. Constitution would not distort or endanger basic principles of the separation of powers among the federal branches, or the division of powers between the national and state governments, and (e) the right would be judicially enforceable without creating open-ended or otherwise unacceptable funding obligations.

photo by Richard A. Chase

I believe that a properly drafted victims' rights amendment would meet these criteria. The rights in question—rights of crime victims not to be victimized yet again through the process by which government bodies and officials prosecute, punish, and release the accused or convicted offender—are indisputably basic human rights against government, rights that any civilized system of justice would aspire to protect and strive never to violate. To protect these rights of victims does not entail constitutionalizing the rights of private citizens against other private citizens; for it is not the private citizen accused of crime by state or federal authorities who is the source of the violations that victims' rights advocates hope to address with a constitutional amendment in this area. Rather, it is the government authorities themselves, those who pursue (or release) the accused or convicted criminal with insufficient attention to the concerns of the victim, who are sometimes guilty of the kinds of violations

See FOR, page 8

Against an Amendment

by Philip B. Heymann
James Barr Ames Professor of Law,
Harvard University

I write in opposition to the proposed constitutional amendment to protect the rights of crime victims. My reasons are very simple.

photo by Richard A. Chase

If it is not intended to free the states and federal government from restrictions found in the Bill of Rights—which would be a reckless tampering with provisions that have served us very well for more than 200 years—it is unclear what purpose the amendment serves. Indisputably, the rights it gives are now within the familiar powers of the federal and state governments, although the amendment establishes a new federal direction of state procedures—i.e., a new encroachment on healthy federalism. That the necessary powers to legislate all these protections already exist in federal and state governments would not be proof that a constitutional amendment was unnecessary if, as in the case of many of the rights now guaranteed by the Constitution, there was real reason to fear that the concerns of minorities would be ignored by majorities or by an overreaching government. But the concerns of victims are embraced by all but a tiny portion of the American public. Nor do we have any reason to fear that our elected officials will favor criminals over victims; the very idea is ludicrous. Thus, the rights established by the proposed amendment are totally unnecessary protections against majorities or an overreaching government.

Our criminal justice policy has become so politicized that there is ample reason to believe the real purpose of the amendment is to underline, by a symbolic step, the fact that our elected officials side with victims rather than with criminals. This is the type of use of a constitutional amendment that we should avoid. The constitutions of some of the most repressive regimes in the world are full of provisions that fail to give real remedies and fail to define real rights but solemnly pronounce universally approved ideals. Constitutional amendments, whose very terms are subject to the power of the majority "to enact appropriate exceptions when required for compelling reasons of public safety," as in the third section of the draft amendment, are unprecedented in the United States. We have taken our Constitution more seriously.

All of this would be ample reason for rejecting the amendment, even if it had no other cost, for it has no benefits that cannot and will not be obtained, with greater care, by legislation. But the amendment does threaten significant costs. The amendment will cause immense uncertainties and confusion in criminal law, beginning from the very question of "Who is a victim?" Judges will have to face the issues of ambiguity

See AGAINST, page 8

A Special Focus on the Victims' Rights Amendment

The proposed Victims' Rights Amendment, one version of which has been introduced into the current session of Congress as Senate Resolution 6 by Senators Feinstein and Kyl, reflects the intense interest in this issue in the United States and abroad. This interest already has resulted in constitutional amendments and statutes in many states, victims' rights policies and programs in other countries, and even an international declaration.

The supporters and proponents of the amendment in the United States cut across traditional political affiliations. Both "liberal" and "conservative" persons and organizations support the proposed amendment. Likewise, both "liberal" and "conservative" persons and organizations oppose the proposed amendment.

There are good arguments for and against the proposed amendment. Judges and court personnel, as well as members of Congress and their constituencies—the citizens of the United States—should be aware of the full range of arguments relating to Senate Resolution 6 and the circumstances surrounding its creation and introduction in Congress.

The Federal Judicial Center is pleased to publish this special issue of *The State–Federal Judicial Observer*, which focuses on the arguments and circumstances surrounding the proposed amendment, for the purpose of encouraging enlightened debate.

Rya W. Zobel
Director, Federal Judicial Center

The Proposed Constitutional Amendment: Senate Joint Resolution 6

Senate Resolution 6 was introduced in the 105th Congress, 1st Session, on January 21, 1997, by Senators Dianne Feinstein (D-Cal.) and Jon Kyl (R-Ariz.). The following is the full text of the proposed constitutional amendment.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid for all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

Article—

Section 1. Each victim of a crime of violence, and other crimes that Congress may define by law, shall have the rights to notice of, and not to be excluded from, all public proceedings relating to the crime;

To be heard, if present, and to submit a written statement at a public pretrial or trial proceeding to determine a release from custody, an acceptance of a negotiated plea, or a sentence;

To the rights described in the preceding portions of this section at a public parole proceeding, or at a nonpublic parole proceeding to the extent they are afforded to the convicted offender;

To notice of a release pursuant to a public or parole proceeding or an escape;

To a final disposition of the proceedings relating to the crime free from unreasonable delay;

To an order of restitution from the convicted offender;

To consideration for the safety of the victim in determining any release from custody; and

To notice of the rights established by this article; however, the rights to notice under this section are not violated if the proper authorities make a reasonable effort, but are unable to provide the notice, or if the failure of the victim to make a reasonable effort to make those authorities aware of the victim's whereabouts prevents that notice.

Section 2. The victim shall have standing to assert the rights established by this article. However, nothing in this article shall provide grounds for the victim to challenge a charging decision or a conviction; to obtain a stay of trial; or to compel a new trial. Nothing in this article shall give rise to a claim for damages against the United States, a State, a political subdivision, or a public official, nor provide grounds for the accused or convicted offender to obtain any form of relief.

Section 3. The Congress and the States shall have the power to enforce this article within their respective jurisdictions by appropriate legislation, including the power to enact exceptions when required for compelling reasons of public safety or for judicial efficiency in mass victim cases.

Section 4. The rights established by this article shall apply to all proceedings that begin on or after the 180th day after the ratification of this article.

Section 5. The rights established by this article shall apply in all Federal and State proceedings, including military proceedings to the extent that Congress may provide by law, juvenile justice proceedings, and collateral proceedings such as habeas corpus, and including proceedings in any district or territory of the United States not within a State. ❑

Inside . . .

The Justice Department and Victims' Rights Programs

by James G. Apple

A significant feature of the victims' rights statute passed by the Congress in 1984, in addition to the creation of a victims' "bill of rights," was the creation of the Office for Victims of Crimes (OVC) within the Department of Justice (42 U.S.C. § 10605). Since the creation of that office, it has developed a significant number of programs to assist victims of crimes—not only victims of federal crimes, but also, indirectly, victims of state crimes.

One feature of the bill was the creation in the U.S. Treasury of a Crime Victim's Fund, into which are deposited fines collected from persons convicted of offenses against the United States (with certain defined exceptions).

Two programs have grown out of the establishment of the Crime Victims Fund: "victims compensation" and "victims assistance."

The victims compensation program of the OVC provides funds for the operation of victims compensation programs in the several states. All 50 states now have victims compensation programs.

From 1986 through the end of the current fiscal year, the OVC will have made grants of over $637 million to individual states for their victims compensation programs. Each state administers its own victims compensation program, although most states have the same eligibility requirements. Typical awards to individuals range from $10,000 to $25,000.

Under the state programs, victims are reimbursed for such crime-related expenses as medical costs, mental health counseling, funeral and burial costs, and lost wages or loss of support.

The victims assistance program extends grants to approximately 10,000 organizations that provide services to crime victims. Typical of such organizations are domestic violence shelters, rape crisis and child abuse centers, and victims' service centers within law enforcement agencies, prosecutors' offices, hospitals, and social service agencies.

Services provided by these organizations include crisis intervention, counseling, and providing emergency shelters and emergency transportation.

During the 10-year period from 1986 to the end of the last fiscal year, more than $688 million in grants have been made under the victims assistance program. The OVC anticipates that during the current fiscal year $400 million will be distributed.

The Office for Victims of Crime, since its inception, has developed specific substantive programs of its own to assist victims of crime, particularly education programs, in addition to providing funds. Such programs include the following:

• Working with the American Bar Association to encourage law schools to "establish, develop, and expand" domestic violence assistance programs in law school clinics to assist victims of domestic violence.

• Creating a "blueprint" for encouraging employers and unions to provide support for victims of domestic violence.

• Developing a "child safe" project to coordinate federal, state, and local resources for prevention and intervention programs for child victims and their families.

• Conducting symposia, regional conferences, workshops, seminars, and a national teleconference on such issues as domestic and family violence and victims of hate and bias crimes.

• Assessing and developing uses of technologies to address the needs of crime victims.

• Developing protocols and training materials to encourage the integration of victim services as an essential component of community policing.

• Investigating promising strategies and practices in law enforcement, and correctional, probation, and parole systems that address the needs of victims of crimes.

• Developing guidelines for offender mediation and dialogue with victims of crimes.

• Providing training and technical assistance to victim assistance programs and other agencies that deal with crime victims.

Information about victims assistance and compensation programs in individual states can be obtained from the State Compensation and Assistance Division, Office for Victims of Crimes, 633 Indiana Ave., N.W., Washington, DC 20531, phone (202) 307-5983, fax (202) 514-6383.

The Office of Victims Assistance also maintains a home page at <http://www.ncjrs.org/ovchome.html>. ❑

State–Federal Judicial Observer

a publication of the Federal Judicial Center

Rya W. Zobel, Director, Federal Judicial Center
Russell R. Wheeler, Deputy Director, Federal Judicial Center

EDITOR:
James G. Apple, Chief, Interjudicial Affairs Office, Federal Judicial Center

Published in the Interjudicial Affairs Office, Federal Judicial Center, One Columbus Circle, N.E., Washington, DC 20002-8003; phone: (202) 273-4161, fax: (202) 273-4019

A note to our readers

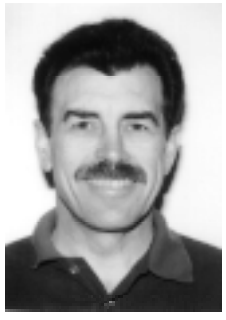
The *State–Federal Judicial Observer* welcomes comments on articles appearing in it and ideas for topics for future issues. The *Observer* will consider for publication short articles and manuscripts on subjects of interest to state and federal judges. Letters, comments, and articles should be submitted to Interjudicial Affairs Office, Federal Judicial Center, Thurgood Marshall Federal Judiciary Building, One Columbus Circle, N.E., Washington, DC 20002-8003.

OBITER DICTUM

An Alternative Approach in the Victims' Rights Debate: Restorative Justice

by Thomas J. Quinn
Visiting Fellow,
National Institute of Justice

The concept of "balance" is key to our system of justice. Judges daily are faced with the challenge of weighing protection of society versus due process for individuals; the rights of offenders versus the interests of victims; and the reality of more cases than can humanly be decided under the full color of law. The degree of difficulty is increasing as higher expectations from the victims' rights movement and escalating demands from a fearful public confront a fiscally strapped justice system.



Dissatisfaction with justice is not new, although the alienation from the justice system felt by many citizens is growing as a result of recent high-profile cases. What is different is the growing influence of victims in setting justice policy. Victims are demanding to be present, to be informed, to be heard. Further, they seem to hold the moral high ground over rigid bureaucracies arguing procedural nuances that seem disconnected from disorder in the streets or pain felt by victims of crime. Victims are organized, and legislators are listening. Twenty-nine states have adopted constitutional amendments for victims, and the President has endorsed a federal amendment.

The tendency of some officials—especially lawyers knowledgeable about case law and valuing precedence—is to go on the defensive, arguing against change. The judiciary, by design, helps to insure structure, order, and stability over time—a bulwark against whim and transient shifts of public opinion. Against that necessary feature must be balanced the recognition of one of our founding fathers, Thomas Jefferson, that our institutions must change as society matures. He thought it as unlikely that an adult don the clothing worn as a child as our institutions rely on practices of former generations. The judiciary as an institution, and the individuals who comprise it, can play a deliberate part designing the changes that are certain to arrive. Judges are more than arbiters of fact of individual cases; they are respected professionals who share the responsibility to help mature the process of justice. The consumers of justice have legitimate concerns, and the judiciary can play a leadership role in transforming those concerns into positive systemic change. Short of a constitutional amendment, or perhaps in addition to one, programs and policy adjustments can address much of the dissatisfaction. Restorative justice principles offer a common sense framework for this to occur.

Victim Plays Central Role

Restorative justice addresses both the process and the goal of justice. Under these principles, the victim plays a central role and the sanction process is more personal. Crime is considered first an offense against the individual and the community, rather than the state. The offender is held accountable to right the wrong, to repay the damage, with more direct involvement of the principals and greater emphasis on consensus processes rather than adversarial ones. Choices are given to victims.

This is actually a return to the justice of old, before the Norman conquest at the Battle of Hastings in 1066. For centuries in England the local villages delivered justice by making the offender repay the victim, based on the Laws of Ethelbert, which continued traditions established by earlier cultures back to the Code of Hammurabi 4,000 years ago.

Furthermore, the Bible, expressing early Jewish law, supports a restorative justice philosophy. While "an eye for an eye" is often thought of as justification for revenge, some scholars cite its limiting and restorative aspects. A reading of Leviticus 24 supports this interpretation: ". . . he that killeth a beast, shall provide a beast . . . eye for an eye, tooth for tooth, shall be restored . . . ."

William the Conqueror and his son, Henry, changed the emphasis from individual victims to crimes against the state; the fines and centralization gave them money and power. Supporters of restorative justice would return some of the control and power to the victim and the community.

Approach Being Recognized

Importantly, the victim-advocacy community is cautiously opening its arms to this approach. They are acknowledging that since most offenders are returning to the community, the community should ensure that the intervention is a positive one. One note of caution: Many victims are suspicious that restorative justice is a veiled attempt at rehabilitation with no serious attempt to evolve or address the victim's concerns. Any agent of change should honestly attempt to involve victim interests if their support is to be expected.

Restorative justice would not replace the adversarial process for all cases, but many issues are forced into the adversarial system because of an absence of options, not unlike the situation on the civil side where ADR has been accepted as a necessary partner in delivering justice. Even in the most contested and serious cases, however, there are steps that can be taken to help victims along the adversarial path. Examples of restorative justice approaches include the following:

• *Victim–Offender Mediation:* The victim is offered the opportunity to confront the offender with a trained mediator—either directly or through video. Screening and preparation help diffuse extreme actions and set an atmosphere where anger can be expressed, questions answered, and restitution agreements reached, before or after incarceration. Victims should never be coerced. Research demonstrates that such processes reduce fear, increase satisfaction, and improve payment of restitution. In the relatively few very serious cases where such dialogue takes place in prisons with prisoners serving life sentences, victims still report a sense of healing otherwise absent.

• *Family Group Conferences and Sentencing Circles:* Victims and their families meet in a mediated setting with the offenders and their families (sometimes with community representatives) to discuss the case, how to repay the damage, and what penalty should apply. This more personal approach is credited as part of the reason juvenile crime went down 27% in one Australian jurisdiction; it also reduced prosecutions, court cases, and incarcerations in New Zealand. Several U.S. jurisdictions, including the Mille Lacs tribe in Minnesota, are adapting this model to their locale.

• *Community Service:* This well-known

See OBITER, page 8

Victims' Rights Amendment's Ambiguity Would Encourage Litigation

by Elisabeth Semel
National Association of Criminal Defense Lawyers

The proposed victims' rights amendment is a personal injury lawyer's dream come true. It is rife with litigation-spawning ambiguity. And the ambiguity is unfixable.

Start with the title, for example. Consider those whom the amendment is intended to benefit: crime victims. Proponents of the amendment would have everyone believe that the use of the word "victim" is self-defining. But even in providing for mandatory restitution to victims of offenses under the recently enacted Anti-Terrorism and Effective Death Penalty Act of 1996, Congress had to craft a highly specific statutory description of the term. The proposed amendment contains no such qualifying language. Moreover, even if it were appropriate to engraft such highly specific terminology onto a constitutional amendment, the definition would still be inadequate for purposes of achieving the wholesale victim empowerment envisioned by the proposals.

Indeed, because the term "victim" would be the key to a litany of victim entitlements, there would be endless legal contests over claims of such status and for such entitlements. Thus, the first judicial issue in every case, standing (that is, who may legitimately stand before the court with a claim), will itself be a highly litigious battleground.

Who is a victim? Which victims count? While the amendment's supporters might take issue, many Americans would agree that persons wrongfully convicted and imprisoned and then released are indeed "victims." What about the wife who finally attacks her husband after years of being brutalized? The woman who pulls a gun on the man after he stalked and terrorized her relentlessly for months? The neighbor who torches the crack house to protect his children? Given the levels of domestic violence, child sexual abuse, and drug addiction that plague our nation, it is not at all uncommon to be a victim one day and a defendant the next. Likewise, given the numbers of wrong accusations and convictions, many crime victims of today may well be tomorrow's wrongly accused and/or incarcerated.

When is someone a victim? Under the traditional American system of justice, there really is no victim until it is determined that: (1) a crime was committed; and (2) the defendant is guilty of the crime. By its sweeping language, the proposed amendment immediately "rushes" to give complaining witnesses the "victim" label, so that the accused becomes "the perpetrator" at the inception of the criminal justice proceedings. For instance, in effect seating the complaining witness at counsel table, he or she has a co-equal position from which to oppose release of the defendant on bail. Thus, the government's burden of proof has been lightened. Indeed, it has been removed.

The identification of the defendant is nowhere as tricky. At least after the government's formal charge, it is obvious who the defendant is. As a matter of fact, rightly or wrongly, he or she is often instantly notorious as a result of the mere accusation of crime. Was it not in part for this very reason that the Founders drafted a Bill of Rights to correct for the abuse of power when the government targets the individual? By reallocating power to ambiguous private interests, safeguards of the Fifth, Sixth, Eighth, and Fourteenth Amendments are effectively eliminated by this proposal.

What will our courts make of this amendment, which contains a litany of entitlements (e.g., notice; presence and comment at most stages of the process; resolution of the proceedings "free from unreasonable delay"; "safety of the victim"; and "restitution")? For instance, does the constitutional promise of final disposition "free from unreasonable delay" empower the victim to effectively run the court's docket and determine which case must go to trial, to the detriment of the prosecution's readiness to present its evidence and the ability of the accused to defend against the charges?

Certainly this whole new range of entitlements is contrary to the preservation of judicial independence, the efficient tradition of justice, and a Tenth Amendment concern about excessive federal causes of action. The amendment takes traditional and historic state power over criminal justice matters and federalizes it, both as a matter of procedures and substantive criminal law. As already discussed, a victims' rights amendment would surely produce an increasingly litigious society—carrying with it economic costs, and on this scale of "private prosecution" by victims, very significant ones at that.

Consider, for example, that the amendment would subject both state and federal governments to its broad set of victims' rights and entitlements. Conflicts in the interpretation of the amendments provisions—between state and federal courts and among the many state jurisdictions—would abound, and a chaotic body of law invites litigation, and more chaos. Courts are public resources, and irrational litigation is a great drain on tax dollars and the economy.

The costs of the federally mandated notice requirements alone—without regard to

See AMBIGUITY, page 4

Summary of Arguments For and Against a Victims' Rights Constitutional Amendment

Proponents of a Victims' Rights Amendment say that such an amendment would:

- Balance the rights of victims and defendants, giving victims "the same rights as criminals"
- Ensure that victims are treated with fairness, dignity, and respect in the court system
- Provide uniform protection nationwide
- Provide the opportunity for psychological healing
- Allow victims to regain control of their lives rather than be victimized again by "the system"
- Increase the police protection available to victims
- Affect the obligations of both the federal and state governments
- Not require extensive enforcement mechanisms, based on state experiences
- Not impose burdensome costs for implementation and might even save money
- Help democratize the criminal justice system by allowing victims the chance to "meaningfully" participate in judicial proceedings

Opponents of a Victims' Rights Amendment say that such an amendment would:

- Conflict with defendants' due process rights
- Challenge the presumption of innocence by establishing a "victim" before a "criminal" is established
- Create a tremendous amount of litigation because there is no enforcement mechanism in place
- Be very costly to local governments in terms of money, time, and energy for police, prosecutors, and corrections officials
- Be defectively vague because it does not define "victim"
- Duplicate protections available through state and federal legislation, with some of the same enforcement problems
- Drastically change the criminal justice system by adding a third party (victims) to all aspects of the process
- Infringe on states' rights to prosecute criminal cases
- Compromise judicial independence
- Introduce unnecessary and irrelevant emotionalism into the courtroom
- Give priority to one of the purposes of punishment (retribution) over other purposes

Source (in part): National Organization of Women (NOW) Legal Defense and Education Fund, Washington, D.C.

Victims' Rights Amendment Not a Threat to Defendant's Rights

by Professor Paul G. Cassell
University of Utah, College of Law

Some opponents of victims' rights have argued that a federal victims' rights amendment would infringe on the constitutional rights of the accused. Often such claims are made in the most general terms without any explanation as to what rights would be infringed. Nor is there much explanation as to why the courts cannot protect both victims' and defendants' rights.

A good illustration of the illusory nature of the conflict between victims' and defendants' rights is provided by the victims' right to attend a trial. Frequently it is claimed that such a right would infringe on the defendant's rights. While compelling policy reasons support the victim's right to attend trials, defendants and defense attorneys sometimes make generalized allusions to a superseding federal "constitutional right" to have the victim excluded. They rarely define with any precision from whence this constitutional right derives, nor do they explain how it invalidates a constitutional provision giving victims a right to attend trials. Instead, one finds that defendants simply argue that they have a right to exclude victims under the Fifth and Sixth Amendments.

I have scoured those provisions carefully in search of language that would support the far-reaching argument that it is positively unconstitutional for a state to allow a victim to remain in the courtroom during a criminal trial. I have discovered no specific language, or even a penumbra of a specific language, that appears to support that claim. Instead, there are three provisions that support, if anything, the opposite view that a victim of a crime should remain in the courtroom: the Sixth Amendment's guarantee of a "public" trial, not a private one; the Sixth Amendment's guarantee of a right to "confront" witnesses, not to exclude them; and the Fifth and Fourteenth Amendments' guarantee of "due process of law," which construed in light of historical and contemporary standards suggests victims can attend trials.

The Sixth Amendment guarantees a defendant the right to a "public trial." These words suggest that the admission of persons to a trial—not their exclusion—is the constitutionally protected value. The application of the public trial right has obvious implications for victims of crime. As the Supreme Court held in *Press-Enterprise Co. v. Superior Court of Cal.*, 464 U.S. 501 (1984), "[p]ublic proceedings vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct. . . ." In another decision (*Gannett Co. v. DePasquale*, 443 U.S. 368 (1979)), the Supreme Court held that "public judicial proceedings have an important educative role. . . . The victim of the crime, the family of the victim, [and] others who have suffered similarly . . . have an interest in observing the course of a prosecution."

The only other language in the Constitution that appears to have direct application to the claim that defendants can exclude crime victims suggests—once again—the opposite conclusion. The Sixth Amendment guarantees that in all criminal prosecutions that "the accused shall enjoy the right . . . to be confronted with the witnesses against him." In interpreting the right to confront, the Court recited a passage from Shakespeare concerning a face-to-face meeting between the defendant and victim: "Shakespeare was thus describing the root meaning of confrontation when he had Richard the Second say: 'Then call them to our presence—face to face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak . . .'" (*Coy v. Iowa*, 487 U.S. 1012 (1988)). The suggestion that the victim should have been excluded from the courtroom, at least while not testifying, hardly finds support in this vision of confrontation.

The original meaning of the Bill of Rights does not embrace excluding a victim from the courtroom under a "due process of law" argument. While a limited right to sequester witnesses has historical roots, courts have long recognized that a motion for sequestration is a request addressed to the trial court's discretion, not a demand to invoke a right. As explained in what appears to be the first Utah case to address the exclusion of witnesses, "The modification of the order excluding witnesses was a matter of discretion, as was also the making of it at first." This is consistent with the early English doctrine.

Even more devastating to the notion that due process creates a constitutional right to exclude a crime victim is the concession that the trial court may authorize individual omissions to a sequestration order. Historically, a number of cases upheld exclusions from sequestration orders for a crime victim or a family member of a crime victim. A related argument stems from the principle that a party to a lawsuit generally may not be excluded under a sequestration order. This principle has venerable roots. The rationale supporting such an approach is apparent. A Utah court held in *State v. Utah Merit Sys. Council*, 614 P.2d 1259 (1980), that "[A] party's presence at the proceeding may be essential in assisting in the presentation of its case and otherwise protecting its interests by observing the conduct of the trial." Accordingly, as the Advisory Committee to the Federal Rules of Evidence has explained, "Exclusion of persons who are parties would raise serious problems of confrontation and due process." Criminal defendants are, of course, excepted from the operation of the rule because "[a] sequestration order affects a defendant in quite a different way from the way it affects a nonparty witness who presumably has no stake in the outcome of the trial."

Given that a party—a witness with a stake in the outcome of the trial—has historically not been subject to exclusion, the fallacy of the argument for excluding victims becomes clear. If the victim in a criminal case brought a civil suit against the defendant for the same conduct, she would be a party with a stake in the trial and the defendant could not exclude her from the trial. Yet if she could remain in the court-

See RIGHTS, page 4

Victim Impact Statements: Do They Help or Hinder?

by Melissa Deckman Fallon
Intern, Interjudicial Affairs Office
Federal Judicial Center

A major goal of the victims' rights movement has been to integrate victims into the criminal justice process. One significant achievement of the movement has been the successful promotion of victim impact statements, first used in a California courtroom in 1976. These statements, which can take either a written or oral form, are generally introduced at the sentencing phase of a trial. They may include an objective assessment of the effects of the crime on the victim or the victim's family and/or a subjective commentary about their feelings regarding the crime and sentence. Currently, all fifty states have granted admissibility of these statements in some form at the time of sentencing or allow them to be contained in the presentence investigation reports. Although popular with the general public, legal scholars and judges are mixed on the appropriateness and effectiveness of victim impact statements.

Supporters Cite Closure, Recovery

Supporters of victim impact statements argue that allowing victims the opportunity to share their experiences resulting from crime affords victims closure and helps promote psychological recovery. The feelings of helplessness and loss of control experienced by the crime victim could be alleviated if victims are allowed to actively participate in the trial. Such participation, proponents maintain, renders the sentencing process more democratic and better reflects the community's response to crime. Further, victim participation helps to "balance" the rights and concerns of victims with the rights of defendants, which are already protected constitutionally.

Some judges claim that victim impact statements often "personalize" the crime. New York Superior Court Justice Frank Weissberg once said, "Occasionally as we process cases we forget they are about victims." Other judges claim that such statements add valuable information to the case and that without such information, an informed consensus about the proper sentence a defendant should receive cannot be reached. "I feel the more a judge knows, the better the judge is able to make an intelligent sentence," said Judge Barnett E. Hoffman, who presided over a case in the New Jersey Superior Court in which a victim's family gave emotional oral testimony at the sentencing of a defendant convicted of carjacking, rape, and murder.

One study of state trial judges conducted by Susan Hillenbrand of the American Bar Association found that 90% of the judges found the information contained in the victim impact statements to be either "useful" or "very useful" in determining an appropriate sentence.

Critics argue, however, that the relevant information needed to determine sentences has already been introduced in the trial as evidence. The "information" contained in victim impact statements about the suffering of victims or their families instead brings unnecessary emotionalism into the courtroom without serving any legal purpose.

Critics See Blurring of Civil and Criminal Trials

Further, critics argue that the courtroom should not be the place where victims of crime find catharsis for their pain. "[P]ersonal therapy is not a defensible purpose of criminal trials, which are conducted in the name of the people at large," wrote Jeffrey Rosen in a *Los Angeles Times* article (April 10, 1995). Other critics argue that the use of victim impact statements blurs the line between civil and criminal trials. While the pain suffered by victims is highly relevant in determining proper compensation in a personal injury case, for example, these critics maintain that the use of such information in a criminal trial serves only to exact retribution and vengeful punishment.

Worse yet, some critics fear that the emphasis on victim impact statements could change the focus away from the crime and defendant to the victim, turning the sentencing hearing into a "mini-trial" on the victim's character or status. Ultimately, if some victims appear more sympathetic than others to the jury or judge, the sentences could be handed down unevenly, resulting in a discriminatory application of the law. The worst abuses could be in capital sentencing cases, where many argue that the application of the death penalty already discriminates against blacks. In 1991, however, the Supreme Court's *Payne* decision gave individual states the right to permit such testimony in capital cases. (See article on page 5 of this edition for further information on the Court's decisions regarding impact statements.)

Use of Victim Impact Statements Rare

While supporters and opponents continue to debate the merits of using such statements, the reality is that the use of victim impact statements is neither widespread nor effective in achieving its goals. Valerie Finn-Deluca reports in the *Criminal Law Bulletin* (Sept./Oct. 1994) that only 15 percent of victims submit written impact statements; even less present oral statements in states that allow it. Most empirical studies indicate that victim impact statements do little to affect sentencing. Further, there is little evidence that victims who submit such statements are more satisfied with the criminal justice system than those victims who do not. One study by researchers Robert Davis and Barbara Smith of the Victims Service Agency in New York found not only that the use of impact statements by victims did not affect their satisfaction with the justice system, but also found no indication that impact statements led to greater feelings of involvement on the part of victims. ❑

AMBIGUITY, from page 3

the expenses that will flow from other victims' entitlements—are staggering. By its language, these proposals appear to mandate (without funding) the expenditure of state tax dollars to enforce federal constitutional benefits. This creation of affirmative duties on the part of the states is surely the "big government" and "welfare state" conservatives have decried.

In short, the distortion of the courts undermines impartiality, judicial administration, and the rule of law to the risk of us all. This open-ended list of promised protections, well being, and empowerment to those claiming victim status raises scores of interpretation questions, and no certain answers. And no amount of technical tinkering with amendment language will stave off the litigation debacle to be spawned by the attempt to offer such rights and entitlements by way of constitutional amendment.

An Objective Study Needed

Congress would better serve the people, including all types of victims, current and potential, were it to order a thorough and objective study of the costs and impacts of victims' rights reforms currently being tested at the state level. Such a careful study should certainly be undertaken before legislators move forward in considering a federal magnification of the victims' rights phenomenon through an amendment to the U.S. Constitution.

The proposed amendment threatens not only the rights of the accused and the system of public prosecution, it also deprives the judiciary of its independence and impartiality, by aiming to convert judges into victims' rights advocate-adjuncts, and courts into victims' rights forums.

The Fifth, 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. The basic components of a fair trial include a presumption of innocence, and the requirement 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. The Sixth Amendment requires that our tribunals remain "free of prejudice, passion, excitement and tyrannical power." Without these safeguards, the presumption of innocence so crucial to a fair trial would be abrogated. And judicial independence ensures these safeguards.

Contrary to disclaimers by victim's rights advocates, their participation during a trial is not a neutral or benign force vis-à-vis the constitutional protections for the citizen accused. Already, the appearance of large groups visibly identified with the alleged victim inside courtrooms has become commonplace throughout the country. And often these contingents do not merely observe the proceedings in a respectful manner, but make themselves known to the judge and jury in a way that threatens undue influence over the decision makers. Courts have long held that conduct by victims' supporters may indeed subvert the presumption of innocence.

Legislation, Not Amendment, Required

Sensitivity to the legitimate concerns of victims of crime does not require a constitutional amendment. To the extent these issues require a federal government, it could be (and largely has been) accomplished through straightforward legislation. And reforms in this area should be focused on the states, not the federal government. The overwhelming number of crimes, especially violent ones, are rightly handled in state court systems.

Criminal defense lawyers are fully supportive of legal reforms that would require law enforcement and prosecutorial agencies to treat crime victims with sensitivity and respect, as well as those that include restitution as a sentencing option, especially when it is used intelligently in lieu of a lengthy sentence for a nonviolent offender. However, the greatest good we all can do for victims is to decrease their numbers. We certainly should not be increasing their numbers, as these amendment proposals seem sure to do. Rather than wasting our limited tax dollars on a costly and probably dangerous constitutional amendment process, all Americans would be better served by careful study. Such a study should include thorough and objective assessment of the costs and consequences on our justice system of the current plethora of so-called victims' rights reforms. And it should focus on the inevitable costs and consequences of federalizing such measures through our precious Constitution. ❑

RIGHTS, from page 3

room in a civil suit, then the due process clause cannot require a different result in a criminal trial over the same facts. The due process clause applies to civil and criminal cases alike. It would be strange reading of this clause to say that while due process probably requires the victim's presence in a civil action for a crime, it positively prohibits her presence in a criminal case for the same conduct.

In sum, there is no constitutional footing for concluding that, under contemporary constitutional principles, a criminal defendant has a federal constitutional right to exclude crime victims from trials.

Nowhere does the U.S. Constitution confer on defendants a monopoly on such rights as the right to notice of court hearings or the right to speak at such proceedings as sentencing hearings, bail hearings, plea hearings, or parole hearings. Nor does the Constitution envision that the defendant will always remain the only person with a constitutional right to a speedy trial. Victims can be given this right as well. Indeed, it appears that all too often victims are the only ones with an interest in a speedy trial. Those who argue that victims' rights amendments will diminish the rights of criminal defendants have not made—and cannot make—their case.

Too Much Judicial Activism?

A further objection is sometimes raised that the amendment will require too much judicial interpretation and thus lead to judicial activism—displacing the will of the people and their elected representatives. The activism objection overlooks the role that Congress and the states will have in implementing the federal amendment "by appropriate legislation." The experience in the states reveals that implementing legislation will be the critical part of the amendment's interpretation, suggesting that legislative power may be augmented, not reduced, by a federal victims' amendment.

When considering a judicial activism objection, it must be remembered that this objection is often made by those who are opposed to expansive interpretations of the rights of criminal defendants in areas such as the exclusionary rule or the procedures for taking confessions. To those holding the view that the courts have gone too far in protecting criminal defendants, extending protections for the victims of those defendants should hardly be regarded as undesirable.

Minimal Costs, If Any, Incurred

A last objection that is occasionally raised is that victims' rights are too costly, either in terms of direct costs (such as mailing of court notices) or indirect costs (consuming courtroom time). However, the only noticeable cost from victims' rights is in the area of providing notice. Real world experience in the states has disproved speculative claims about undue costs. In Utah, for example, prosecutors now regularly provide notice to crime victims at nominal cost. Notice is provided by means of a computer-generated postcard or form letter. Computer programs that produced subpoenas for crime victims have been modified to produce notices as well. In a few large jurisdictions, some modest additional clerical support was required to accomplish this task, but there was no substantial fiscal burden imposed on the system. Indeed, in Utah, it appears that the net fiscal impact of the Utah Victims' Rights Amendment may have been to save government funds by reducing the need for protracted preliminary hearings.

The U.S. Supreme Court has recognized that "in the administration of criminal justice, courts may not ignore the concerns of victims." Yet to crime victims, it has appeared in recent years that courts and others in the criminal justice system have been doing just that. Some level of victim frustration with the system is inevitable. But examples of victims' problems suggest substantial justification for that frustration. Commonsense suggests that victims should not be kept in the dark about court proceedings, should not be summarily excluded from courtrooms during trial, should not be denied the right to speak at sentencing and other proceedings. Yet without the passage of the federal Victims' Bill of Rights Constitutional Amendment, victims around the country will continue to be subjected to all of these indignities. ❑

The Victims' Rights Movement: A Brief History

by Melissa Deckman Fallon
Intern, Interjudicial Affairs Office
Federal Judicial Center

The bombing of the Alfred P. Murrah Federal Building in Oklahoma City in 1995 and the O.J. Simpson trials have brought increased attention to the victims' rights movement, whose advocates claim that victims are often mistreated and ignored by the criminal justice system. Supported by both liberal and conservative political forces, the victims' rights movement encompasses a wide range of goals and activities.

Some victims' advocates want increased government funding for victim-assistance programs that cover counseling, medical and funeral expenses of victims and their families; others want tougher sentencing of criminals. Still other proponents advocate various legal changes, such as measures that would allow victims greater opportunities to participate in the judicial process by attending trials, making victim impact statements, and submitting their opinions during plea bargaining, sentencing, and parole hearings.

The victims' rights movement has created an opposition movement. There are groups that express concern about some of the ideas, programs, and proposals that the victims' rights movement supports. These concerns relate to the purposes of a criminal trial and protections accorded the accused, and reflect a fear that consideration of the rights of victims of crime may overshadow or dominate criminal proceedings that are designed primarily to determine the guilt or innocence of the accused and thereby interfere with the constitutional rights of the accused, as well as make it more difficult to convict the guilty (e.g., challenges to tainted testimony if victims are present and then testify).

Origins of the Movement

The victims' rights movement has its origins in the early English legal system. As justice researchers Fred Gay and Thomas J. Quinn pointed out in an article in *The Prosecutor* (Sept./Oct. 1996), "for centuries in England the local villages delivered justice by making the offender repay the victim. This was based on the Law of Ethelbert (circa 600 AD) and continued traditions based on earlier cultures." They also noted in the article that "Muslim, American Indian, and many Pacific rim societies include restoration to the victim and the community as core elements of justice."

Ideas about victims' rights were transported to Colonial America and early colonial practice followed the English system of allowing victims of crime to prosecute their own cases. By the late 18th century, however, the evolution of salaried police and prosecutors in effect removed the victim from the process of the criminal justice system. Victims' rights advocates argue that this movement in the late 18th century toward public prosecution did not reflect a desire to eliminate any role for the victim.

The current push for victims' rights has its origins in the early 1960s. The idea that the state should provide financial compensation to victims of crimes for their losses originated in New Zealand and England. California became the first state to implement such a program in 1965, followed by New York.

In the next decade, the feminist movement also spurred victim-oriented initiatives, emphasizing their view of the importance of providing special care to victims of rape or spousal abuse and focused on crisis intervention and counseling for victims. The social science discipline of victimology, which explores the relationship between criminals and victims and the larger impact that crime has on society, expanded in the 1970s. Victimologists and researchers in other disciplines produced studies that documented alarmingly high levels of crime. Further research showed that crime was greatly feared by most Americans, and that victims often received little attention or assistance in the aftermath of crimes.

Crime victims, who grew increasingly dissatisfied with the way government handled their cases, became advocates themselves, forming in the last two decades what have become powerful public interest groups, such as Mothers Against Drunk Driving, Parents of Murdered Children, Handgun Control, Inc., and the National Organization for Victim Assistance (NOVA). According to NOVA, the number of local victims' rights organizations has risen dramatically, from 200 in 1980 to more than 8,000 by 1994.

Federal Response to Crime Victims

The demands of these groups have not gone unheeded. Although the federal government became more concerned with crime during the Kennedy and Johnson administrations, no legislation concentrating on crime victims was passed until 1976 and 1978. These initiatives for crime victims were small-scale. In 1976, Congress authorized funding to provide federal death benefits to the families of public safety officers killed in the line of duty. Two years later, Congress passed a bill protecting the privacy of rape victims in federal trials, by placing limits on the ability to use a rape victim's past sexual conduct in a rape trial. Legislators hoped these two laws would serve as "model" legislation for the states to follow.

The Reagan administration took the lead in bringing widespread crime victim efforts to reform at the federal level. In 1982, President Reagan commissioned a presidential task force for victims of crime. The publication of the commissioners' final report later that year was a milestone for the victims' rights movement. The report, which generally criticized the criminal justice system's neglectful treatment of victims, recommended 68 specific proposals, including amending the Sixth Amendment to the U.S. Constitution by adding the phrase: "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."

That same year, Congress passed the *Victim and Witness Protection Act of 1982*, a bill aimed at helping crime victims and witnesses who were expected to testify at trials by allowing the attorney general to relocate or protect any witness from intimidation. Additionally, it greatly expanded the rights of victims. Among other things, the act called for notification of and consultation with the victim at various stages in the disposition of the case, and allowed a judge to order restitution to the victims to cover various expenses. In 1984, Congress passed the *Victims of Crime Act*, which established the Office for Victims of Crime (OVC). OVC was given responsibility for administering the Crime Victims Fund, the primary financial resource for all federally supported victim programs. This program does not rely on tax dollars, but distributes fines collected from federal offenders deposited in a special account of the U.S. Treasury.

In 1990, the federal government further sought to safeguard victims' rights by enacting the Victim Rights and Restitution Act, which gives victims the following rights:

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

(42 U.S.C. § 10606)

Controversy Over Victim Impact Statements

These federal initiatives, and similar state initiatives, are not without critics. One particularly controversial topic concerns victim impact testimony, which refers to written or oral testimony about the impact of the crime on the victim and the victim's family. These statements are generally read to the jury at sentencing. Supporters of such initiatives claim these statements are an additional way that the victim can participate in the criminal justice system. Critics maintain, however, that such statements can jeopardize defendants' rights to a fair trial and fear that their use in capital cases increases the risk of racially biased applications of the death penalty. The Supreme Court has heard three cases regarding the constitutionality of victim impact statements in cases involving the death penalty. The Court ruled in *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 501 U.S. 808 (1989), that victim impact testimony could not be used in capital sentencing as it was both irrelevant and inflammatory. The majority claimed that such statements lead to arbitrary imposition of capital punishment.

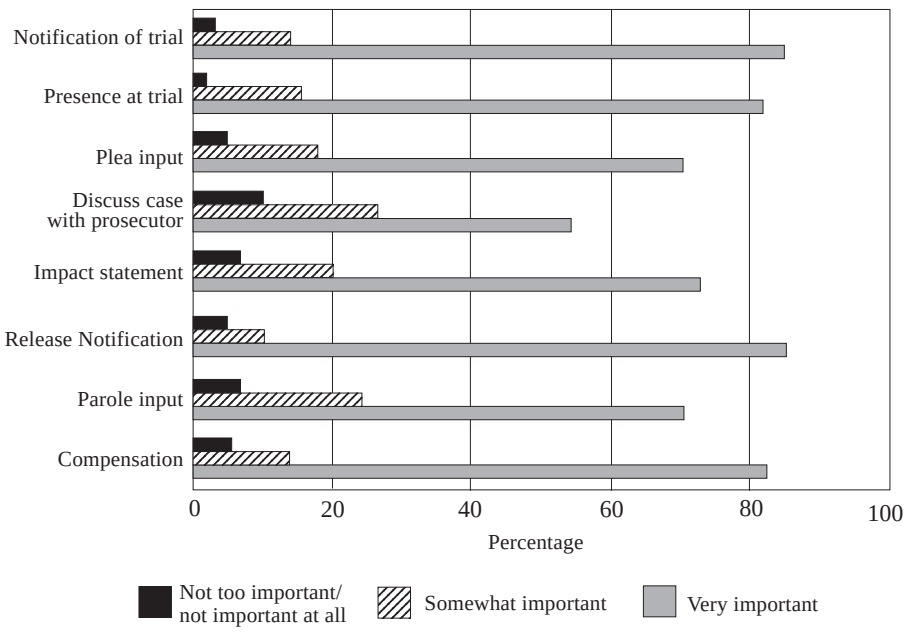
These decisions were, however, reversed by the Court in 1991 in *Payne v. Tennessee*, in which a 6-3 majority ruled that the Eighth Amendment does not bar such testimony per se if legislation permits it. According to Chief Justice Rehnquist, such testimony is relevant because "it educates the jurors on the victim's uniqueness, and assessment of the harm caused by the defendant has long been an important factor in determining the appropriate punishment."

The current focus of the victims' rights movement is to create better awareness of the programs currently offered to victims, improving such programs, or seeking new laws which bring further rights to crime victims. Most visibly, at the state level, rights advocates are working to add amendments that guarantee victims' rights to the 21 state constitutions that do not have such an amendment. These rights may include, in addition to the ones provided for in the federal Victim Rights and Restitution Act, the following:

- the right to protection from intimidation and harassment;
- the right to confidentiality of records;
- the right to speedy trial provisions;
- the right to prompt return of the victim's personal property seized as evidence from the offender; and
- the right to receive the offenders' profits from the sales of stories about their crimes.

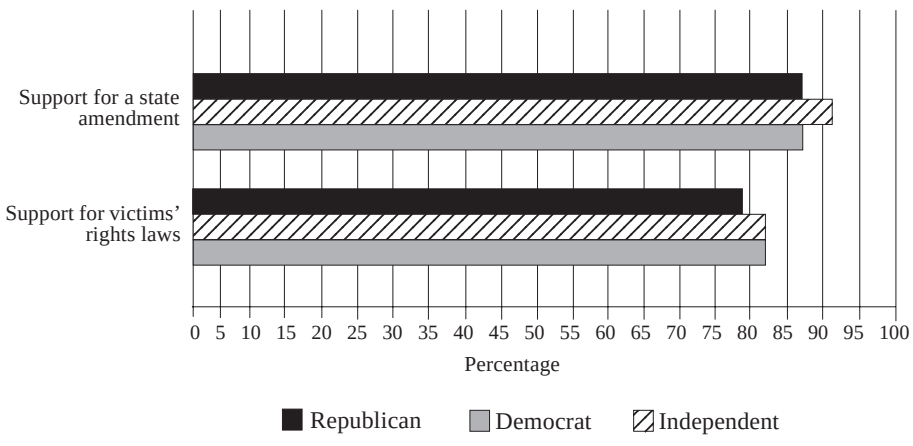
At the federal level, organizations such as the National Victims' Constitutional Amendment Network are urging passage of a federal constitutional amendment that places victims' rights on the same level as the rights guaranteed persons accused of crimes. ❑

Public Support for Victims' Rights*



**Note:* This graph uses information from 1991 from the National Victim Center. Although somewhat dated, the information in this graph gives an idea of how the public sees the debate over crime victims' rights. However, the graph does *not* consider public opinion about the wisdom of passing a federal constitutional amendment to guarantee such rights.

Public Support for State Victims' Rights Amendments and Victims' Rights Laws (by Political Affiliation)*



**Note:* This graph uses information from 1991 from the National Victim Center. Although somewhat dated, the information in this graph gives an idea of how the public sees the debate over crime victims' rights. However, the graph does *not* consider public opinion about the wisdom of passing a federal constitutional amendment to guarantee such rights.

Twenty-Nine States Amend Constitutions to Benefit Victims

Important to the commencement of the debate on whether to amend the U.S. Constitution to include victims' rights is the fact that 29 states already have such amendments to their constitutions. Moreover, efforts are currently being made to pass constitutional amendments in Georgia, Maine, Massachusetts, and New York.

While 21 states do not have constitutional amendments guaranteeing victims' rights, almost all of them have statutes that in effect accomplish the same end. Further, according to the Office for Victims of Crime (OVC) of the U.S. Department of Justice, every state has some type of victim compensation program to assist crime victims (see related story, page 2).

The constitutional amendments in the 29 states vary in their provisions; some amendments are more comprehensive than others.

Below is a summary of the various constitutional amendments adopted in the various states. The summary for each state cites when the amendment was adopted, the level of electoral support provided in favor of it, and the major provisions each addresses. For more information regarding the specific language of the amendments, contact the National Victim's Center on the World Wide Web at <http://www.nvc.org/nvcan>.

Alabama
Year: 1994; Electoral Support: 70%
Provisions:
- Right to be informed, to be present, and to be heard at all crucial stages of criminal proceedings
- No cause of action can be taken against the state or its employees

Alaska
Year: 1994; Electoral Support: 87%
Provisions:
- Right to be "reasonably protected" from the accused through imposition of proper bail
- Right to confer with prosecution
- Right to obtain information about and be present at all criminal/juvenile proceedings where accused has right to be present
- Right to restitution from accused
- Right to be informed (upon request) of defendant's escape or release from custody

Arizona
Year: 1988; Electoral Support: 58%
Provisions:
- Right to be informed (upon request) of accused's escape or release from custody
- Right "to be present at, and upon request, to be informed of all criminal proceedings where the defendant has right to be present"
- Right to be heard at post-arrest release decisions, plea sessions, and sentencing
- Right to confer with prosecution
- Right to read presentence reports
- Right to restitution from defendants
- Right to be heard at parole hearings
- Right to be informed of victims' constitutional rights

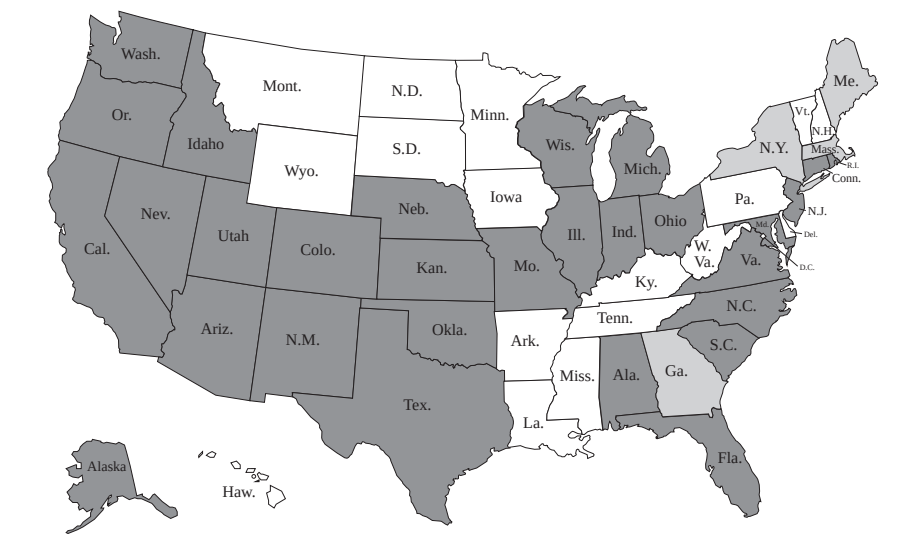
California
Year: 1982; Electoral Support: 56%
Provisions:
- Right to restitution from defendants
- Right or "expectation that persons who commit felonious acts causing injury to innocent victims will be appropriately obtained in custody or trial"
- Right to "safe schools"

Colorado
Year: 1992 Electoral Support: 86%
Provisions:
- Right to "be heard when relevant, informed, and present at all critical stages of the criminal justice process"

Connecticut
Year: 1996; Electoral Support: 78%
Provisions:
- Right to be "reasonably protected" from the accused throughout the criminal justice process
- Right to notification of court proceedings
- Right to attend the trial and other court proceedings that the accused has the right to attend (unless victim is to testify and the court decides that victim's testimony would be materially affected by hearing other testimony)
- Right to consult with prosecution
- Right to comment on plea agreements
- Right to make statements at sentencing
- Right to restitution from defendants
- Right to information about the arrest, conviction, sentence, imprisonment, and release of the accused

Florida
Year: 1988; Electoral Support: 90%
Provisions:
- Right to "be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused"

Idaho
Year: 1994; Electoral Support: 79%
Provisions:
- Right to "prior notification of trial court, appellate, and parole proceedings and, upon request, to information about the sentence, incarceration, and release of the defendant"
- Right to be present at "all criminal proceedings"
- Right to consult with prosecution
- Right to be heard at plea hearings, sentencing, incarceration, or parole hearings
- Right to restitution from defendants
- Right to read presentence reports relating to the crime
- No cause of action can be taken against the state or its employees



States with a victims' rights amendment

States without a victims' rights amendment

States with pending legislation to create a victims' rights amendment

Illinois
Year: 1992; Electoral Support: 77%
Provisions:
- Right to notification of court proceedings
- Right to confer with prosecution
- Right to be heard at sentencing
- Right to information about the conviction, sentence, imprisonment, and release of the accused
- Right to attend the trial and other court proceedings that the accused has the right to attend (unless victim is to testify and the court finds that the victim's testimony would be materially affected by hearing other testimony)
- Right to have present at all court proceedings, subject to rules of evidence, an advocate or other support person of victim's choice
- Right to restitution from defendants

Indiana
Year: 1996; Electoral Support: 89%
Provisions:
- Right to "be informed of and present during public hearings and to confer with the prosecution, to the extent that exercising these rights does not infringe upon the constitutional rights of the defendants"

Kansas
Year: 1992; Electoral Support: 84%
Provisions:
- Right to be informed of, and present at, public hearings
- Right to be heard at sentencing
- No cause of action can be taken against the state or its employees

Maryland
Year: 1994; Electoral Support: 92%
Provisions:
- Right to "be informed of the rights established in this article, and, upon request and if practicable, to be notified of, to attend, and to be heard at criminal justice proceedings, as these rights are implemented"
- No cause of action can be taken against the state or its employees

Michigan
Year: 1988; Electoral Support: 80%
Provisions:
- Right to be reasonably protected from accused throughout criminal justice process
- Right to notification of court proceedings
- Right to attend trial and other court proceedings
- Right to confer with prosecution
- Right to make statement at sentencing
- Right to restitution from defendants
- Right to information about the conviction, sentence, imprisonment, and release of accused

Missouri
Year: 1992; Electoral Support: 84%
Provisions:
- Right to be present at all criminal justice proceedings
- Right to be informed of and heard at guilty pleas, bail hearings, sentencings, probation revocation hearings, and parole hearings (unless court determines otherwise)
- Right to reasonable protection from accused during criminal justice process
- Right to information concerning escape or release of defendant
- No cause of action can be taken against the state or its employees

Nebraska
Year: 1996; Electoral Support: 78%
Provisions:
- Right to be informed of all criminal court proceedings
- Right to be present at trial (unless court determines otherwise)
- Right to be present at all criminal court proceedings
- Right to make oral or written statement at sentencing, parole, pardon, commutation, and conditional release proceedings

Nevada
Year: 1996; Electoral Support: 74%
Provisions:
- Right to be informed and present at all public hearings involving critical stages of criminal proceedings
- Right to be heard at sentencing or parole hearings
- No cause of action can be taken against the state or its employees

New Jersey
Year: 1991; Electoral Support: 85%
Provisions:
- Right to be present at public judicial proceedings, unless "properly sequestered in accordance with law or court rule prior to completing his or her testimony as a witness"

New Mexico
Year: 1992; Electoral Support: 68%
Provisions:
- Right to reasonable protection from accused during criminal justice process
- Right to notification of and to attend all court proceedings
- Right to confer with prosecution
- Right to make statements at sentencing and post-sentencing hearings
- Right to restitution from defendants
- Right to information about the conviction, sentence, imprisonment, and release of accused
- Right to "have prosecuting attorney notify the victim's employer, if requested by the victim, of the necessity of the victim's cooperation and testimony in court proceedings that may necessitate the absence of the victim from work for good cause"

North Carolina
Year: 1996; Electoral Support: 78%
Provisions:
- Right to be informed of and present at court proceedings
- Right to be heard at sentencing
- Right to restitution from defendants
- Right to information about conviction or final disposition and sentence of accused
- Right to be notified of escape, release, proposed parole or pardon of accused, or notice of commutation of accused's sentence
- Right to present views and concerns of the Governor or agency considering any action that could result in release of accused
- Right to consult prosecution
- No cause of action can be taken against the state or its employees

Ohio
Year: 1994; Electoral Support: 77%
Provisions:
- Rights to notice, information, access, and protection
- Right to "a meaningful role in the criminal justice process"
- No cause of action can be taken against the state or its employees

Oklahoma
Year: 1996; Electoral Support: 91%
Provisions:
- Right to know status of investigation and prosecution of the criminal case, including where disposition and plea negotiations will occur
- Right to know location of defendant following arrest, during prosecution of criminal case, during a sentence to probation or confinement, and upon release or escape
- Right to be present at any criminal proceeding
- Right to be heard at sentencing or parole hearings
- Right to restitution from defendants

Oregon
Year: 1996; Electoral Support: 56%
Provisions:
- Right to "meaningful role" in criminal justice system
- Right to reasonable protection from accused throughout criminal justice process
- Right, upon request, to information about conviction, sentence, imprisonment, criminal history and release of defendant
- Right to refuse an interview, deposition, or other discovery request by the defendant or his attorney
- Right to restitution from defendant
- Right that "no law shall limit the court's authority to sentence a criminal defendant consecutively for crimes against different victims"
- Right to have "all charges against a criminal defendant tried in a single trial; subject to rules regarding venue"
- Right, upon request, to be consulted about plea negotiations

Rhode Island
Year: 1986; Electoral Support: Passed by Constitutional Convention
Provisions:
- Right to restitution from defendant
- Right to address court regarding impact of crime

South Carolina
Year: 1996; Electoral Support: 89%
Provisions:
- Right to information about arrest, release, or escape of accused
- Right to be informed of and present at any criminal proceedings where defendant has right to be present
- Right to submit either written or oral statements at bond and bail hearings
- Right to be heard at hearings involving post-arrest release decisions, a plea, or sentencing
- Right to be reasonably protected from accused throughout criminal justice process
- Right to confer with prosecution
- Right to reasonable access to all documents

See STATES, page 7

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power

(Adopted by the United Nations, Resolution 40/34, on November 29, 1985)

A. Victims of Crime

1. "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within member states, including those laws proscribing criminal abuse of power.

2. A person may be considered a victim, under this declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

3. The provisions contained herein shall be applicable to all, without distinction of any kind, such as race, colour, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability.

Access to justice and fair treatment

4. Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.

5. Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive, and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.

6. The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:

(a) Informing victims of their role and the scope, timing, and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information;

(b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;

(c) Providing proper assistance to victims throughout the legal process;

(d) Taking measures to minimize inconvenience to victims, protect their privacy when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation; and

(e) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.

7. Informal mechanisms for the resolution of disputes, including mediation, arbitration, and customary justice or indigenous practices, should be utilized where appropriate to facilitate conciliation and redress for victims.

Restitution

8. Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependents. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights.

9. Governments should review their practices, regulations and laws to consider restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions.

10. In cases of substantial harm to the environment, restitution, if ordered, should include, as far as possible, restoration of the environment, reconstruction of the infrastructure, replacement of community facilities and reimbursement of the expenses of relocation, whenever such harm results in the dislocation of a community.

11. Where public officials or other agents acting in an official or quasi-official capacity have violated national criminal laws, the victims should receive restitution from the State whose officials or agents were responsible for the harm inflicted. In cases where the government under whose authority the victimizing act or omission occurred is no longer in existence, the state or government successor in title should provide restitution to the victims.

Compensation

12. When compensation is not fully available from the offender or other sources, states should endeavour to provide financial compensation to:

(a) Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes; and

(b) The family, in particular dependents of persons who have died or become physically or mentally incapacitated as a result of such victimization.

13. The establishment, strengthening, and expansion of national funds for compensation to victims should be encouraged. Where appropriate, other funds may also be established for this purpose, including those cases where the State of which the victim is a national is not in a position to compensate the victim for the harm.

Assistance

14. Victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based, and indigenous means.

15. Victims should be informed of the availability of health and social services and other relevant assistance and be readily afforded access to them.

16. Police, justice, health, social service, and other personnel concerned should receive training to sensitize them to the needs of victims and guidelines to ensure proper and prompt aid.

17. In providing services and assistance to victims, attention should be given to those who have special needs because of the nature of the harm inflicted or because of factors such as those mentioned in paragraph 3 above.

B. Victims of abuse of power

18. "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss, or substantial impairment of their fundamental rights, through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights.

19. States should consider incorporating into the national law norms proscribing abuses of power and providing remedies to victims of such abuses. In particular, such remedies should include restitution and/or compensation, and necessary material, medical, psychological and social assistance and support.

20. States should consider negotiating multilateral international treaties relating to victims, as defined in paragraph 18.

21. States should periodically review existing legislation and practices to ensure their responsiveness to changing circumstances, should enact and enforce, if necessary, legislation proscribing acts that constitute serious abuses of political or economic power, as well as promoting policies and mechanisms for the prevention of such acts, and should develop and make readily available appropriate rights and remedies for victims of such acts. ❑

Concern for Crime Victims Becomes International Issue

Concerns about "victims' rights" are not confined to the United States. The United Nations, in Resolution 40/34, approved on November 29, 1985, adopted a Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. The Declaration includes in the first paragraph a definition of "victim" (see full text of declaration, this page). Many other countries have established crime victim compensation programs.

The U.N. resolution, which grew out of the deliberations at Milan, Italy, in August and September 1985 of the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders, affirmed "the necessity of adopting national and international measures in order to secure the universal and effective recognition of, and respect for, the rights of victims of crime and of abuse of power." In adopting the declaration, the resolution stated that its purpose was "to assist Governments and the international community in their efforts to secure justice and assistance for victims of crime and victims of abuse of power."

Fifteen countries, including the United States, have programs that provide varying types of payments for crime victims. (For details of the U.S. compensation program, see story on page 2.) Of the 14 other countries, all of them provide compensation not only to their own citizens who are victims of crimes, but also to foreign citizens who are victimized while visiting the country. In addition, four countries compensate their citizens who are victims of crimes committed in other countries.

The fourteen countries that provide such compensation are listed below. Asterisks indicate those countries that provide compensation for their own citizens who are victimized in other countries:

Austria, Belgium, Canada*, Denmark, Finland*, France, Germany, Great Britain (including Northern Ireland), Republic of Ireland, Japan, The Netherlands, Norway*, Sweden*, United Arab Emirates

Benefits provided in other countries include compensation for medical expenses, funeral and burial expenses, lost wages, family assistance, serious disability, mental health consultation and counseling, loss of support of minors and dependents, travel, damaged clothing, services to replace work in the home, litigation expenses, vocational and personal rehabilitation, pensions, pain and suffering, bereavement, loss of parental services, "violation of personal integrity," and inconvenience resulting from injury.

Further information about the United Nations policy relating to victims of crimes can be obtained from the Department of Public Information, United Nations Headquarters, New York, NY 10017, phone (212) 963-1234.

Information about crime victim programs in other countries is available from Office of Victims of Crimes, 633 Indiana Ave., N.W., Washington, DC 20531, phone (202) 307-5983, fax (202) 514-6383. ❑

STATES, from page 6

relating to the crime against the victim before trial
- Right to restitution from defendant
- Right to be informed of and present at proceedings where post-conviction action is being considered
- No cause of action can be taken against the state or its employees

Texas
Year: 1989; Electoral Support: 73%
Provisions:
- Right to be reasonably protected from accused throughout criminal justice process
- Right, upon request, to notification of court proceedings
- Right to be present at all public court proceedings (unless victim is to testify and court determines victim's testimony would be materially affected if victim hears other testimony)
- Right to confer with prosecution
- Right to restitution from defendant
- Right to information about conviction, sentence, imprisonment, and release of accused
- No cause of action can be taken against the state or its employees

Utah
Year: 1994; Electoral Support: 68%
Provisions:
- Right, upon request, to be informed of, be present at, and to be heard at criminal justice hearings related to the victim, either in person or through a lawful representative
- Right to have a sentencing judge receive and consider, without evidentiary limitation, reliable information concerning the background, character, and conduct of a person convicted of an offense (except in capital cases or situations involving privileges)
- No cause of action can be taken against the state or its employees

Virginia
Year: 1996; Electoral Support: 84%
Provisions:
- Right to reasonable protection from accused through criminal justice process
- Right to address court at sentencing
- Right to receive notice of judicial proceedings
- Right to restitution from defendant
- Right to information about release or escape of offender
- Right to confer with prosecution
- No cause of action can be taken against the state or its employees

Washington
Year: 1989; Electoral Support: 78%
Provisions:
- Right to meaningful role in criminal justice system
- Right to be informed of and right to attend trial and all other court proceedings the defendant has a right to attend (subject to discretion of individual presiding over trial or court proceeding)
- Right to make statement at sentencing and parole hearings

Wisconsin
Year: 1993; Electoral Support: 84%
Provisions:
- Right to reasonable protection from accused throughout justice process
- Right to notification of court proceedings
- Right to attend court proceedings (unless trial court finds sequestration is necessary to fair trial)
- Right to confer with prosecution
- Right to make statement to court at disposition
- Right to restitution from defendant
- Right to information about outcome of case and release of accused ❑

AGAINST, from page 1

and uncertainty that the draft amendment poses, ambiguity and uncertainty that will cloud our already too complicated criminal processes, to the extent that the amendment has any bite.

Another Cost of the Amendment

The other cost of the amendment is less obvious. We have, for many years, entrusted the management of the inherent competition among retribution and other goals of punishment to our prosecutors, the great majority of whom are subject to periodic election by the people of the United States. The proposed amendment promises a constitutionalized priority to one of the purposes of punishment—retribution—over others that can be of greater concern in particular cases. A prosecutor may have to ignore the concerns of the victim to obtain the testimony of a defendant who can bring down an entire organized crime ring. A prosecutor may have to speed the processes of adjudication by plea bargains that cause resentment on the part of one set of victims in order to do rough justice or provide immediate security to another set of victims whose rights have been violated by another set of criminals. A prosecutor may need secrecy in various stages of a proceeding in order to assure the safety of a witness.

Each of these situations—and many others—requires trade-offs in the interest of a broader public. The prosecutor is electorally responsible to the public. He should not be placed in the position of violating the spirit or even the letter of the Constitution on the infrequent, but by no means rare, occasions when giving a full hearing to the victim, who retains his or her civil remedies in any event, would impose unreasonable costs on other victims, past or future. If this delicate balance is to be tampered with, it should be by legislation, which can be easily amended—not by a constitutional provision written in ignorance of the prosecutorial concerns involved.

The proposed amendment may or may not be good politics for either party. It is bad law enforcement, and it is bad Constitution writing. ❑

(This article was adapted from a letter written to Sen. Edward Kennedy in September 1996.)

FOR, from page 1

that a properly drawn amendment would prohibit.

Pursuing and punishing criminals makes little sense unless society does so in a manner that fully respects the rights of their victims to be accorded dignity and respect, to be treated fairly in all relevant proceedings, and to be assured a meaningful opportunity to observe, and take part in, all such proceedings. These are the very kinds of rights with which our Constitution is typically and properly concerned. Specifically, our Constitution's central concerns involve protecting the rights of individuals to participate in all those government processes that directly and immediately involve those individuals and affect their lives in some focused and particular way. Such rights include the right to vote on an equal basis whenever a matter is put to the electorate for resolution by voting; the right to be heard, as a matter of procedural due process, when government deprives one of life, liberty, or property; and various rights of the criminally accused to a speedy and public trial, with the assistance of counsel, and with various other participatory safeguards including the right to compulsory process and to confrontation of adverse witnesses. The parallel rights of victims to participate in these proceedings are not less basic, even though they find no parallel recognition in the explicit text of the Constitution.

Rights May Be Breached

There appears to be a substantial body of evidence showing that, even where statutory or regulatory or judge-made rules exist to protect the participatory rights of victims, such rights often tend to be honored in the breach, not on the entirely understandable basis of a particularized determination that affording the victim the specific right claimed would demonstrably violate some constitutional right of the accused or convicted offender, but on the very different basis of a barely considered reflex that protecting victims' rights represents either a luxury we cannot afford or a compromise with an ignoble desire for vengeance.

As long as we do so in a manner that respects the separation and division of powers and does not invite judges to interfere with law enforcement resource allocation decisions properly belonging to the political branches, we should not hesitate to make explicit in our Constitution the premise that I believe is implicit in that document but that is unlikely to receive full and effective recognition unless it is brought to the fore and chiseled in constitutional stone: The premise that the processes for enforcing state and federal criminal law must, to the extent possible, be conducted in a manner that respects not only the rights of those accused of having committed a crime but also the rights of those they are accused of having victimized.

The fact that the states and Congress, within their respective jurisdictions, already have ample affirmative authority to enact rules protecting these rights is a reason for not including new enabling or empowering language in a constitutional amendment on this subject, but is not a reason for opposing an amendment altogether. The problem with rules enacted in the absence of such a constitutional amendment is not that such rules, assuming they are enacted with care, would be struck down as falling outside the affirmative authority of the relevant jurisdiction. The problem, rather, is that such rules are likely, as experience to date sadly shows, to provide too little real protection whenever they come into conflict with bureaucratic habit, traditional indifference, sheer inertia, or any mention of an accused's rights regardless of whether those rights are genuinely threatened.

Rights of Accused Need Protection

Of course any new constitutional language in this area must be drafted so that the rights of victims will not become an excuse for running roughshod over the rights of the accused. Any constitutional amendment in this field must be written so that courts will retain ultimate responsibility for harmonizing, or balancing, the potentially conflicting rights of all participants in any given case. But assuring that this fine-tuning of conflicting rights remains a task for the judiciary should not be too difficult. What is difficult, and perhaps impossible, is assuring that, under the existing system of rights and rules, the constitutional rights of victims—rights that the framers of the Constitution undoubtedly assumed would receive fuller protection than has proven to be the case—will not instead receive short shrift.

To redress this imbalance, and to do so without distorting the Constitution's essential design, it may well be necessary to add a corrective amendment on this subject. If the provision were properly drafted it would help close a distinct and significant gap in our existing legal system's arrangements for the protection of basic human rights against an important category of governmental abuse. ❑

(This article was adapted from a letter written to Senators Orrin Hatch and Joseph Biden and Representatives Henry Hyde and John Conyers, Jr. in September 1996.)

OBITER, from page 2

sanction is particularly appropriate for crimes with no specific victim, as a substitute to repay society for the disruption caused. The specific service should in some way be related to the harm. The Midtown Community Court in Manhattan requires prostitutes to work in the immediate area cleaning up trash and graffiti and contributing to a sense of order. Like other examples cited here, community service should be rooted in restorative principles in its actual application, not just a punitive sanction.

• *Restitution:* This most basic of sanctions usually suffers from a lack of professional process for assessing, ordering, collecting, and disbursing the funds. It is a low priority in most systems, with few having state of the art operations or involving the victim in the discussions with the offender.

• *Sentencing:* The private program "Restorative Resolutions" in Winnipeg, Canada, prepares client-specific plans tied to restorative justice principles. The community is involved in designing the sanction. In Arizona, the U.S. district court probation and presentence staff collaborate with the U.S. attorney's office and other agencies to focus on victim needs throughout the sanction process.

• *Balanced and Restorative Justice (BARJ):* BARJ is supported by the federal Office of Juvenile Justice and Delinquency Prevention in several sites. BARJ principles call for every sanction to include consideration of public safety, accountability to victim and community, and competency of the offender.

• *Victim Impact Panels:* Victims are given the opportunity to speak to classes or groups of offenders, whether or not the perpetrator in their case was apprehended. The limited research available indicates it helps victims heal and lowers recidivism.

• *Citizen Reparation Boards:* Vermont's judiciary will refer some probation cases to volunteer citizen boards to contact the victim and meet with offenders to design an appropriate sanction.

Process Adds Complaints

There is no question that adding the victim and the community to the evaluation will complicate the mechanics of the process, but it should advance the search for justice. The police community has come to recognize that police work is more than enforcing the law. As part of the community, the responsibilities of police officers include helping to solve problems and create an environment that encourages public safety. Other components of the justice process, including the judiciary, are beginning to acknowledge their own roles as part of the broader justice mechanism charged with insuring domestic tranquility.

Though interpretation of case law and administration of court rules are important, more is required to achieve justice. How the court can best interact in new ways with the other segments of the justice process and the citizenry to better serve victims is best left to local consensus, but a judiciary that is open to new methods and partnerships would be a step in the right direction. Judges should be informed about victim issues, be present during efforts at system improvement, and be heard in the community. The process and the percept of justice will be better for it. ❑

(Thomas J. Quinn is Visiting Fellow at the National Institute of Justice, supported by grant 95-CX-IJ-0016. His views do not necessarily reflect the views of the Department of Justice.)

State–Federal Judicial Observer (#14)
a publication of the Federal Judicial Center

Interjudicial Affairs Office
Federal Judicial Center
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, DC 20002-8003