

1985

## Colonial Lawyer, Vol. 14, No. 2 (Spring 1985)

Editors of Colonial Lawyer

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### Repository Citation

Editors of Colonial Lawyer, "Colonial Lawyer, Vol. 14, No. 2 (Spring 1985)" (1985). *Colonial Lawyer*. 23.  
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# THE COLONIAL LAWYER

*A Semi-Annual Journal on American Legal Issues*

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VOLUME 14

SPRING 1985

NUMBER 2

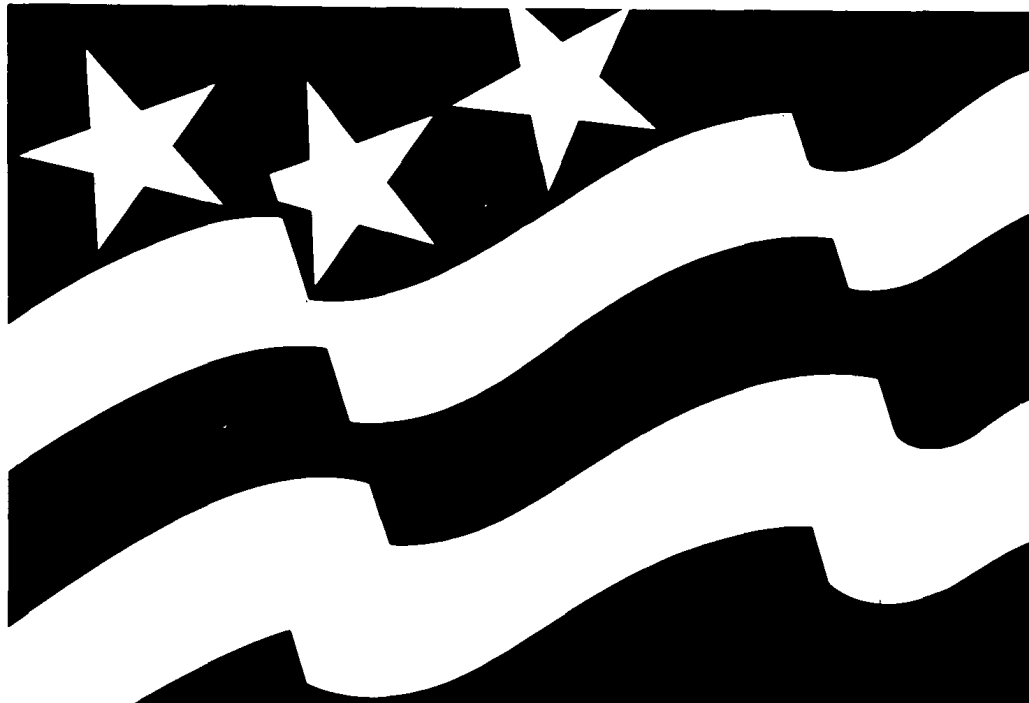
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## EDITOR'S BRIEF

A criminal justice system has two moral obligations to the rest of society when a dangerous criminal is apprehended. It should take measures to prevent the dangerous criminal from causing further harm and it should take action to compensate those who have been injured by the criminal. For too long, our criminal justice system has shrugged both of these obligations.

Different people will disagree over what is the best method to prevent a dangerous criminal from inflicting further harm. Some might argue that social reform on a broad scale is needed. Others will claim that individual rehabilitation will suffice. Finally, others will maintain that dangerous individuals are incapable of being rehabilitated. Although no one knows for sure just what is the best method, one thing is certain: Our criminal justice system does not prevent violent criminals from causing further harm. We operate a revolving door system where, all too often, the only difference between the criminal walking in and the individual walking out is that the individual walking out is equipped with much more knowledge on how to victimize the law-abiding citizenry.

A solution often disregarded, but indisputably effective, does exist: long term incarceration. A murderer locked up in the penitentiary is much less likely to kill a law-abiding citizen than a murderer roaming the streets. While it is unquestioned that incarceration effectively prevents criminals from inflicting further harm on society, many people, nevertheless, believe that dangerous criminals should be given a second chance. Unfortunately, the second chance is all too often a second crime. Regardless, we have a system where people sentenced to life find themselves released on parole after serving only a few years. It is this practice that causes our system to fail its first moral obligation. Rather than preventing further harms, our system, by releasing dangerous criminals out into the general public, is causing a harm.

Having failed its first moral obligation, our system can only be justified if it meets its second obligation; compensating those injured by violent criminals. To acknowledge this obligation is to acknowledge that victims, too, have rights. This issue of *The Colonial Lawyer* is devoted to recognizing the rights of victims. Although ignored until recently, these rights are as basic to a free society as any others. It is fundamental that if we are willing to allow dangerous criminals freedom, we must also be willing to compensate those who suffer because of our tolerance.

James S. Long

## A MESSAGE FROM THE NEW DEAN

It is a great honor having been chosen to succeed Dean William B. Spong. It is also a great responsibility. Under Dean Spong's leadership, our law school has made remarkable progress. We have moved from the brink of disaccreditation to a point where national distinction is in view. I am confident that the next few years will bring us closer to achieving excellence in all parts of our educational program.

Our law school has special strengths. We have a highly committed faculty, an able student body and exceedingly loyal alumni. We also have a uniquely distinguished history. Together these things make the hope of future progress quite realistic.

No dean can accomplish anything of significance by himself. Success will be measured not by any personal achievements of mine, but rather by my ability to unite all parts of the law school community in a common effort to achieve important goals. This spirit of affirmation and collaboration has characterized our law school for the 12 years I have known it. It is critical that we preserve it. Only through a sustained spirit of shared enterprise will the law school become all that we hope.

In our eagerness to improve we should not forget to preserve the good things we already have. I include among these an atmosphere here which is founded on a sympathetic interest in each other as human beings. Lawyers are more than technicians. Great lawyers have an interest in the human spirit and in the hopes and dreams of individual men and women. We must continue to cultivate that spirit in our students, our faculty and our graduates. The best way I know to do that is to guard and nurture the present environment in which mutual concern is a common virtue.

In some areas, improvements are needed. We must find more money to support student scholarships. We also need additional funding for faculty development. A number of important student activities such as the law review and moot court have achieved remarkable levels of excellence with inadequate financial resources. We need a new law school dormitory and additional space for smaller classes, student organizations and placement activities.

Our faculty is devoted to the welfare of this law school and to its own improvement. Our faculty is still relatively young. Many of my colleagues are at the beginning of very promising careers. To the degree that their work brings them to the favorable attention of the national legal educational and professional community, our law school will benefit. To help each faculty member achieve his or her full professional potential requires more than the faculty member's personal commitment. It requires an institution able and willing to provide the financial and intellectual resources adequate to fulfill high aspirations.

Our alumni are a special point of pride. We have an unusually loyal body of graduates. Their loyalty and willingness to devote time and resources to the law school have made the difference in nearly every important part of our educational program. I believe this commitment is a reflection of the special educational experience our law school provides. I will be looking for new ways to involve more of our graduates in the ongoing educational program of the school.

All law schools share a fundamental obligation to educate their students to be good lawyers and to encourage their faculties to advance society's understanding of the law. The unique and distinguished history of the Marshall-Wythe School of Law imposes upon us an additional responsibility. That responsibility was best expressed by George Wythe who wrote not only for his time but for our own: "Here we must form such characters as may be fit to succeed those who have been useful in the national counsels of America." I hope that my service as dean will be remembered as a time in which the Marshall-Wythe School of Law strove with determination and some success to be worthy of George Wythe's great ambition.

Timothy J. Sullivan

# MR. JEFFERSON, THE STATE OF WEST VIRGINIA, AND THE RIGHTS OF VICTIMS OF CRIME

Frank Carrington\*

The movement on behalf of crime victims in the United States has been premised on a fundamental, albeit often unstated, belief that government—federal, state and local—has a moral obligation towards those who have been murdered, raped, robbed or otherwise violated by the criminal elements in our society.

Actually, there is nothing new about this “moral obligation” theory. Thomas Jefferson summed it up in his Preamble to a “Bill for Proportioning Crimes and Punishments in Cases heretofore Capital” for the Virginia Legislature:

Whereas, it frequently happens that wicked and dissolute men, resigning themselves to the domination of inordinate passions, commit violations on the lives, liberty and property of others, and, the secure enjoyment of these having induced men to enter into society, *government would be defective in its purpose*, were it not to restrain such criminal acts by inflicting due punishments on those who perpetrate them . . .<sup>1</sup>

What Mr. Jefferson was referring to, in so many words, was that, because under The Social Contract, we, as citizens, have laid down our arms and entrusted the protection of our safety to the government, (*i.e.* police, prosecutive and correctional functions). Government has a moral obligation to protect its citizens from the depredations of the lawless and violent.

One would suppose that the law courts in this country, the self-appointed bastions of our liberties, would have long ago resoundingly endorsed and enforced this moral obligation. As a matter of fact they have not. The liberal trend in American jurisprudence, simmered on the stone of the pronouncements of the “Warren” Supreme Court (c. 1956-1978), was ever vigilant to enunciate, and even create out of whole cloth, “rights” protecting citizens from government, but little of a useful nature was put forward regarding the government’s duty to protect.<sup>2</sup> The moral obligation espoused by Thomas Jefferson was consigned to obscurity.

The State of West Virginia has, generally, an undeserved reputation of being a rather backward state. Aside from a recent, momentary flurry of publicity over the purchase of a seat in The United States Senate by West Virginia’s Governor Rockefeller in 1984, one usually thinks of hillbillies, moonshiners and people of that ilk, if one thinks at all of the Mountaineer State.

Consequently, it is somewhat ironic that the only court decision holding foursquare that government has a moral obligation to victims of crime arose in West Virginia. The “liberal and enlightened” states, for example New York,<sup>3</sup> Pennsylvania<sup>4</sup> and California,<sup>5</sup> have taken a stony attitude towards victims’ rights when

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<sup>1</sup> *The Writings of Thomas Jefferson*, Washington, D.C. (1905) Vol.I, p. 218 (Emphasis added).

<sup>2</sup> See, e.g. *Mapp v. Ohio*, 367 U.S. 643 (1961), *Miranda v. Arizona*, 384 U.S. 436 (1936).

<sup>3</sup> *St. George v. State*, 308 N.Y. 681, 124 N.E.2d 320 (1954).

<sup>4</sup> *Freach v. Commonwealth*, 23 Pa. Comm. 546, 354 A. 2d 908 (1976).

<sup>5</sup> *Thompson v. County of Alameda*, 614 P.2d 728 (1980).

it comes to litigation.<sup>6</sup> Apparently alone, West Virginia has heeded truly to the dictum of Thomas Jefferson.

The case is *State ex. rel. Davis Trust Co. v. Sims*.<sup>7</sup> It is worth digesting at some length, as follows:

On January 20, 1945, Lucy Ward, a lady “. . . past seventy-three years of age . . . and a respected citizen of Randolph [West Virginia],”<sup>8</sup> was raped and murdered by James Chambers, who walked away from the West Virginia Medium Security Prison at Huttonsville, where he was serving a life term for murder. The court characterized Chambers’ record in prison, after his first murder commitment in 1935, as follows:

In 1941, during his confinement in the maximum security penitentiary at Moundsville, Chambers attacked [another] female inmate of that institution [he had previously attacked a female inmate during his prison confinement] and stabbed her in the hip with a knife because she refused to have sexual relations with him. On another occasion he accosted her in the bathroom of the prison. For his misconduct he was punished by being confined to his cell and restricted to two meals a day for a period of sixty days. Some time later, while working as a member of a prison road crew, he attacked a fellow prisoner with a knife. He was afterwards transferred to the [medium security] prison at Huttonsville.<sup>9</sup>

On the day of the murder of Miss Ward, Chambers left the prison unaccompanied and unobserved, went to the nearby Ward farm, raped and murdered Miss Ward, and then returned to the prison. His absence from the prison was not known by the authorities until after the commission of the crime. (Chambers was later hanged for this crime.)

Regarding conditions at the Huttonsville prison, the court found

that prisoners were allowed to leave the prison at will, unaccompanied by any guard; that they had attempted to rape women in the neighborhood, for which they had not been punished; that they had been arrested for other offenses while absent from the prison late at night; that they possessed keys to gasoline tanks and outside buildings of the prison; and that the knife with which Chambers killed his victim was obtained by him from articles of prison equipment. There was neither proper discipline nor adequate supervision of the prisoners.<sup>10</sup>

The court considered Chambers’ record and the conditions at Huttonsville in combination, and found as follows:

The recital of the foregoing undisputed facts indicates beyond question that the authorities in charge of the Huttonsville prison and their agents completely disregarded the duty imposed upon them to keep Chambers securely confined to the prison at

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<sup>6</sup> See generally, Carrington, *Victims Rights Litigation: A Wave of the Future*, 11 U. Rich. L. Rev. 447 (1977).

<sup>7</sup> 46 S.E. 2d 90 (W.Va. 1945).

<sup>8</sup> *Id.* at 92.

<sup>9</sup> *Id.* at 92.

<sup>10</sup> *Id.* at 92.

all times. Instead they afforded him the opportunity to leave the prison at will, without their knowledge of his absence, and without any surveillance whatsoever of his whereabouts or his behavior. Those responsible for his confinement were fully aware of his vicious character and his dangerous propensity to engage in dangerous and murderous conduct. He was prone to commit revolting sexual offenses. His criminal record from April 1, 1935, when he murdered his first victim, and while he was serving his sentence of life imprisonment as punishment for that crime, gave warning of his dangerous and vicious disposition and marked him as a killer and a sexual degenerate of a violent type. Those whose duty it was to guard him, and who disregarding that duty, failed to watch and confine him, should have known and indeed expected that he would commit rape or murder, or both, whenever the opportunity occurred for him to perpetrate either of those crimes. Instead of being kept in close confinement in the penitentiary at Moundsville during the full term of his imprisonment he was, without any excuse or discernable justification, transferred to the West Virginia Medium Security Prison, which by statute was then deemed to be a part of the penitentiary, Section 1, Chapter 23, acts of the Legislature of West Virginia, 1939, Regular Session, where he remained under relaxed and indifferent supervision and where he was free from any effective surveillance. In these wholly unwarranted circumstances that which should reasonably be expected to happen did occur. In reality a man known to be a killer was allowed to roam at will, unguarded and unobserved. It would have been surprising if, under those conditions, an event of that nature had not come to pass.<sup>11</sup>

The estate of Miss Ward filed a claim for damages resulting from her death. The State Court of Claims awarded the estate \$2,500 and recommended to the legislature that it authorize payment. By a special act the West Virginia legislature found that Chambers' escape and subsequent murder of Miss Ward was due to "the gross and inexcusable negligence" of the prison authorities, and authorized a \$5,000 payment from state funds to her heirs for mental anguish and loss of her services. The state auditor refused to pay the amount on the grounds that: 1) the allegations did not establish a "moral obligation" on the part of the state; 2) the payment would be void as a "gift"; 3) the appropriation was not constitutionally authorized; 4) the operation of the prison was a governmental function and the state was not liable for the acts or omissions of its employees; and 5) the state was immune from liability and had received no benefit for the payment.

The representative of Miss Ward's estate brought an action in the West Virginia Supreme Court for a writ of mandamus to compel the auditor to make payment. The court ruled in favor of the estate and granted the writ.

The court defined the issue as whether or not the facts, as alleged, created a "moral obligation" upon which the legislature could validly base an award of compensation. It held first that a legislative declaration of a "moral obligation," while entitled to serious consideration, was not binding on the courts; rather, it was up to the courts to determine whether the declaration comported with the law. It continued:

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<sup>11</sup> *Id.* at 92 (Emphasis supplied).



In the Cashman case, this Court stated a general rule by which, subject to certain exceptions, the existence of a moral obligation of the State in favor of a private person may be recognized and for the payment of which a valid appropriation of public funds in the public interest may be made by the legislature in any particular instance. An obligation or a duty, legal or equitable, not imposed by statute but created by contract or *resulting from wrongful conduct*, which would be judicially recognized as legal or equitable in cases between private persons, is within the scope of the rule.<sup>12</sup>

The court held there was a duty on the part of the West Virginia correctional authorities to “exercise due care to keep the convict Chambers in continuous and secure confinement and to prevent his escape while his sentence of life imprisonment remained in force and effect.”<sup>13</sup> It held that private persons or institutions charged with such a duty could clearly be held liable if that duty were breached, and so could the state.

The court noted that, as a general rule, release or escape of a convict will not give rise to liability if the keepers were unaware of his or her vicious or dangerous propensity to kill or injure others.<sup>14</sup> The reason for the general rule was that the actions of the wrongdoer were not foreseeable, that is, the state’s actions were not the proximate cause of the injury. It held, however, that in the facts of the instant case, given Chambers’ record and previous conduct, the murder of Miss Ward was foreseeable:

Before Chambers killed Miss Ward his vicious disposition and his propensity to attack and injure persons when in possession of a knife had been demonstrated upon at least two occasions while he was serving his sentence for the murder of his first victim, whom he destroyed by cutting her throat with a razor in 1935. His previous criminal record and his dangerous character were known to the prison authorities to whose custody and control he had been committed by the sentence of life imprisonment in the penitentiary. The natural and probable consequences of his freedom from secure and continuous confinement or restraint, which should have been anticipated and foreseen by his keepers, especially a female, whom he might encounter in circumstances which would afford him an opportunity for an attack of that nature. Yet with this knowledge, and by it warned that, if permitted to be at large, unwatched and unguarded, he would likely injure or kill a human being, they afforded him the opportunity to leave the prison alone while unaware of his absence and of his possession of a knife which he obtained at the very institution in which he should have been kept in strict confinement and denied access to any weapons at any time. That which, in the circumstances, could reasonably be foreseen or anticipated by an ordinarily prudent person did occur. It should have been expected. The negligence of the officers and the agents of the state responsible for his secure confinement,

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<sup>12</sup> *Id.* at 94 (Emphasis supplied), citing *State ex. re. Cashman v. Sims*, W. Va., 43 S.E. 2d 805 (1947).

<sup>13</sup> *Id.* at 94.

<sup>14</sup> *Id.* at 94 citing: 38 Am. Jur., Negligence, Section 71, *Henderson v. Dade Coal Co.*, 100 Ga. 568, 28 S.E. 251, 40 L.R.A. 95; *Hullinger v. Worrell*, 83 Ill. 220; *Thomas v. Sloss-Sheffield Steel & Iron Co.*, 144 Ala. 188, 39 So. 715.

arising from these acts and omissions, was the proximate cause of the death of Miss Ward. Otherwise stated, her death was the natural and probable consequence of their negligent acts and omissions.

A person is liable for damages occasioned by his negligence where they could reasonably have been anticipated by an ordinarily prudent person.<sup>15</sup>

The court discussed the difference between a *moral obligation* (which was required to be declared by the legislature) and a *legal obligation*. The state contended that it was legally immune from liability for actions taken in running the prison system. The court conceded this; however it continued:

The doctrine which gives rise to a moral obligation of the state, in any particular instance, is not rendered inoperative by, and it is not incompatible with, the principle which recognizes the immunity of the state from suit, or the principle which denies the existence of a cause of action against it for the negligence of its officers, agents and employees. It rests upon considerations of an entirely different and independent character. If the state were subject to suit or action, or a cause of action existed against it for the negligence of its officers, agents or employees, while engaged in the discharge of a governmental function or in other activity or conduct; or if there were legal liability upon the state, or any legally recognized remedy for such against it, there would be no occasion for one aggrieved or injured to seek from the state, upon the basis of a moral obligation, the relief which he is denied by positive law but to which he would be entitled if, in the identical situation, an obligation or a duty would be judicially recognized in cases between private persons. Only when the conduct of the officers or the agents of the state, for which it is not legally liable, is such that, if engaged in by private persons, it would constitute the breach of an obligation, legal or equitable, which would be judicially recognized in cases between private persons, does the nature or the effect of such conduct require consideration in determining whether a moral obligation of this exists. And to give rise to an obligation of that character the factual situation must be such as to justify legislative action declaratory of its existence, and the obligation must be imposed upon or voluntarily assumed by the state by the enactment of constitutional legislation.<sup>16</sup>

The writ of mandamus ordering the state auditor to pay \$5,000 to Miss Ward's estate was issued by the court. Other courts might well take the humanistic approach taken by the Supreme Court of West Virginia.

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<sup>15</sup> *Colonna v. Rosedale Dairy Co.*, 166 Va. 314, 186 S.E. 94 (1936).

<sup>16</sup> 46 S.E. 2d. at 98.

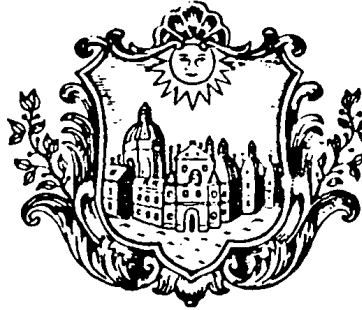
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# INITIATIVES IN VICTIMS ASSISTANCE

Mandie M. Patterson\*

## I. THE VICTIMS' MOVEMENT

The criminal justice system has traditionally emphasized the rights of criminal defendants and, according to many, forgotten or ignored the legitimate rights of crime victims and witnesses. In the past few years, however, a trend has developed at the state and national levels in which the rights of victims and witnesses have been recognized and given attention. The growing responsiveness to the needs of crime victims and witnesses has burgeoned in the past decade.

Although California enacted legislation creating the first state program to compensate innocent victims of violent crime as early as 1965, the victims' movement did not really gain momentum until the 1970's and 1980's. Among the developments in the 1970's were the establishment of victim and witness assistance programs, an increase in the number of state victims' compensation programs, victims' legislation enacted by several states, and the formation of the National Organization of Victims Assistance (NOVA) in 1976. NOVA is an "umbrella" membership organization which coordinates victims' rights efforts nationally.

### A. Federal Initiatives

#### 1. *The President's Task Force on Victims of Crime.*

During the 1980's, victims' rights developments continued on both state and national levels. President Reagan appointed the President's Task Force on Victims of Crime on April 23, 1982. The Task Force, chaired by Lois Haight Herrington, reviewed literature on victimization, interviewed professionals working with victims and heard testimony from crime victims—their friends and relatives. Hearings were conducted in Washington D.C., Boston, Denver, San Francisco, St. Louis and Houston.

The Task Force completed its report in December 1982 and formally presented it to President Reagan in January 1983. This report contained sixty-eight recommendations for action by, among others, criminal justice agencies, hospitals, Bar Associations and the private sector. One of the recommendations was to provide federal funding for victims' compensation and for services provided to victims.

#### 2. *The Victims of Crime Act of 1984.*

This assistance was made possible when Congress enacted the Comprehensive Crime Control Act of 1984. President Reagan signed this Act on October 12, 1984. One of the components of this Act is the Victims of Crime Act of 1984 which will provide federal financial assistance to qualified state compensation programs and financial assistance to states for support of programs which provide services to crime victims.

Virginia will participate in both aspects of the Act. Governor Robb has designated the state Department of Criminal Justice Services to administer the victim services program. The compensation program will be administered by the State Industrial Commission and its Division of Crime Victims' Compensation.

Federal guidelines for the implementation of these two programs are at the time of this writing published in the *Federal Register* for draft review prior to being finally adopted. It is anticipated that funds for these programs will be made available to states during the latter part of calendar year 1985.

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\* Mandie M. Patterson is associated with the Virginia Department of Criminal Justice Services.

### 3. *The Justice Assistance Act of 1984.*

Another aspect of the Comprehensive Crime Control Act is the Justice Assistance Act of 1984. This Act provides federal financial assistance to eighteen designated target areas or proven effective programs. Of particular interest to those wishing to provide or improve services to crime victims and witnesses is the program area which consists of assistance to jurors and witnesses, and assistance (other than compensation) to victims. Virginia will be participating in this Act. Funds for this program also will be administered by the state Department of Criminal Justice Services.

### 4. *Omnibus Victim and Witness Protection Act of 1982.*

Congress earlier enacted the Omnibus Victim and Witness Protection Act of 1982 which provides as follows:

- a. a requirement for a victim impact statement containing all financial, social, psychological and medical effects of the crime on the victim, as part of federal pre-sentence reports;
- b. protection of federal victims and witnesses from intimidation;
- c. payment of restitution by offenders to victims of federal crimes;
- d. guidelines for fair treatment of victims and witnesses in federal crimes;
- e. a provision prohibiting a felon from profiting from the sale of the story of his crime (sometimes referred to as the Son of Sam provision).

### 5. *Office of Justice Programs.*

In March 1983, President Reagan appointed the Chairman of the Task Force on Victims of Crime, Lois Haight Herrington, Assistant Attorney General for Justice Assistance, to implement the Task Force recommendations. The Justice Assistance Act of 1984 established the Office of Justice Programs headed by Assistant Attorney General Herrington. The Office for Victims of Crime, created in July 1983, is part of the Office of Justice Programs and is the agency which is charged with implementing the task force recommendations. This is being done, in part, by the establishment of a national resource center and development of model legislation. Model legislation is being prepared by, among others, the National Association of Attorneys General. Training programs for professionals are being developed in conjunction with organizations, including the National Sheriff's Association, the National Organization of Black Law Enforcement Executives, the National Judicial College, the National Organization for Victim Assistance, and the National Association of State Directors of Law Enforcement Training.

### 6. *Attorney General's Task Force on Family Violence.*

In September 1983, the Attorney General's Task Force on Family Violence was created. This task force, like the earlier Task Force on Victims of Crime, conducted hearings throughout the nation. The Task Force presented its report, including sixty-three recommendations for action, to the Attorney General in September 1984.

### 7. *National Victims Rights Week.*

In April 1981, President Reagan proclaimed the first National Crime Victims Week. Since that time, the designation has been repeated in 1982, 1983 and 1984. National Crime Victims Week in 1985 is scheduled for April 14 through 20. Ceremonies marking this week will be held in localities throughout Virginia. Governor Robb will sign a proclamation on April 17 designating that period as Crime Victims Week in Virginia. This ceremony is being planned by the Virginia Network for Victims and Witnesses and will be attended by members and other interested individuals.

## B. State Initiatives

The Virginia General Assembly has enacted a variety of victim related legislation in recent years. Among them are the following measures:

### 1. *Criminal Injuries Compensation Fund.*

The Virginia Victims of Crime Act, establishing the compensation fund, was enacted by the 1976 session of the General Assembly and became effective on July 1, 1977 (see *Code of Virginia* § 19.2 - 368.1 through 368.18). It provides for the reimbursement of out-of-pocket expenses for personal injuries suffered by victims who are not otherwise covered by insurance or public welfare. The Division of Crime Victims' Compensation is located at 1000 DMV Drive in Richmond and is administered by the State Industrial Commission.

Revenue for the Crime Victims' Compensation Fund is generated by the imposition of an additional court fee against all criminal defendants convicted of a felony or a Class I or Class II misdemeanor (other than drunkenness or disorderly conduct).

Amendments in 1983 included raising the limit on victims' compensation awards from \$10,000 to \$12,500 and the establishment of the toll free numbers for the Division of Crime Victims' Compensation. The General Assembly in 1984 amended the eligibility criteria for awards and repealed the requirement that victims must have suffered financial hardship in order to be compensated for their expenses. Left intact was the \$100 deduction for expenses. In 1985 changes included raising the limit on emergency awards to \$2000 and increasing the limit on compensation awards to \$15,000. Additional information about the victims' compensation fund may be obtained by contacting Mr. Robert Armstrong at the above address; telephone number (804) 257-8686. [Toll Free Number is (800) 552-4007].

### 2. *Victim Impact Statements.*

The 1983 General Assembly also allowed for the inclusion of a victim impact statement in pre-sentence reports. This gives the crime victim the opportunity to relate the physical, financial and emotional effects of the crime on him/her. During the sentencing phase of the trial, the judge may review the victim impact statement to consider the effects of the crime on the victim(s).

### 3. *Fair Treatment of Victims and Witnesses.*

House Joint Resolution 105, enacted by the 1984 General Assembly, urges police, prosecutors and other persons in the criminal justice system to assure that crime victims and witnesses receive ". . . dignified, respectful, courteous and sensitive treatment . . ." The resolution goes on to enumerate eight specific services to be provided to victims and witnesses. Among them are protection from threats and intimidation, referral to available social and financial services, separate waiting areas and employer intercession services.

### 4. *State Funding of Victim-Witness Programs.*

The General Assembly in 1984 authorized the state Department of Criminal Justice Services to make grants, totaling \$75,000, to localities for the purpose of funding programs to serve crime victims and witnesses. This year the appropriation was more than doubled, so that \$200,000 will be available for grants during the next state fiscal year.

### 5. *Other legislation.*

Other victim related legislation includes provisions for victim restitution by offenders, funding of rape crisis centers and domestic violence shelters. Additional legislation provides for the appointment of interpreters for deaf and/or non-English speaking victims. Considered also in 1985 was legislation relating to child victims. Legislation creating the Missing Children Information Clearinghouse was adopted.

## **II. VICTIM ASSISTANCE IN VIRGINIA**

Several localities in Virginia have initiated, as a result of legislation passed by the General Assembly or prior to General Assembly action, programs to serve crime victims and witnesses.

### **A. Objectives of Victim-Witness Programs**

Victim-Witness programs are designed to reduce the trauma of victimization and to increase witness cooperation in prosecuting cases. The major objectives of victim-witness programs are:

1. Increasing the victim's access to counseling and other financial and service resources.
2. Facilitating the victim's understanding of the law enforcement and criminal justice process.
3. Producing greater law enforcement and criminal justice responsiveness to the victim's needs.
4. Educating the victim about future crime prevention activities.
5. Reducing the time and money lost by witnesses in a criminal case.
6. Improving the amount of information received by victims and witnesses about the processing and outcome of their cases.

### **B. Crime Commission Report**

In 1983, the Virginia State Crime Commission conducted an evaluation of these programs. At that time, there were fourteen victim and/or witness assistance programs in Virginia. Based on figures provided by eight of the programs, the Crime Commission estimated that these programs have "initial contact with a total of 40,000 victims and witnesses across the Commonwealth each year. If the other programs maintained these records, it could probably be demonstrated that the total number of contacts for all programs would be well over 60,000 persons on a yearly basis."

### **C. Victim-Witness Programs in Virginia**

Since the publication of the Crime Commission's report, the number of victim-witness programs in Virginia has increased to seventeen. After the establishment of the first program in Portsmouth in 1976 with Law Enforcement Assistance Administration (LEAA) funds, five other localities - Virginia Beach, Lexington/Rockbridge, Arlington, Leesburg/Loudoun and Richmond - also initiated programs. When LEAA funding was discontinued, several of the localities assumed the costs of the programs themselves. In addition to these programs, there are eleven other programs in Virginia. Six of the eleven are state grant programs and five are partial programs. Partial programs do not have full-time program coordinators and provide fewer services than the full-time programs. Of the seventeen programs in Virginia, twelve are full time and five are partial programs. (See chart for specifics.)

## D. Programs in Other States

On the national scene there are over 500 victim-witness assistance programs in the country, with programs in virtually every state. Beginning in Florida in 1974, these programs have burgeoned all over the country, primarily with the initial support of LEAA funds. The first ones were set up as exemplary projects in Alameda County, California, in 1974; Milwaukee, Wisconsin in 1974; Brooklyn, New York in 1974; and Pima County, Arizona in 1974. Today at least nineteen states provide state revenue funding for the establishment and maintenance of these programs. With the passage of the federal legislation outlined earlier and the increase in state funding, it is expected that the number of programs providing services to crime victims will increase.

## E. Program Models

There are three major program models—the victim model, the witness model and the victim-witness model. In recent years, especially with the initiation of state funding of programs, most of the programs in Virginia are based on the victim-witness model.

Highlights of the types of programs are as follows:

### 1. *Victim Model*

- a. Sponsor - generally hosted by law enforcement agencies, community based organizations, and local sponsors, such as city managers, mental health centers and human resource departments.
- b. Major objective - reducing the trauma of victimization and restoring the victim to his/her former state.
- c. Specific objectives -
  - (1) increasing the victim's access to counseling and other financial and service resources;
  - (2) facilitating the victim's understanding of the law enforcement and criminal justice process;
  - (3) producing greater law enforcement and criminal justice responsiveness to the victim's needs;
  - (4) educating the victim about future crime prevention activities.
- d. Clients are usually located -
  - (1) through telephone calls at the crime scene;
  - (2) through routine screening of police reports;
  - (3) through referrals from other agencies.

### 2. *Witness Assistance Model*

- a. Sponsor - generally sponsored by Commonwealth's Attorneys.
- b. Major objectives - increasing witness cooperation and saving time for system personnel.
- c. Specific objectives -
  - (1) reducing the time and money lost by witnesses in a criminal case;
  - (2) improving the amount of information received by witnesses about the processing and outcome of their cases;
  - (3) getting the witness to court.
- d. Clients are usually located by -
  - (1) a routine review of witness or subpoena lists;
  - (2) referral from prosecutors;
  - (3) referral from other agencies.



### 3. *Victim-Witness Model*

Combines aspects of the victim model and witness model.

## F. State Grant Programs

The Department of Criminal Justice Services (DCJS) administers the \$75,000 state grant program. Because of the limited funds during its first year of operation, DCJS limited the number of localities eligible to apply. Twenty-six eligible localities were selected based on proven experience in administering victim-witness programs, crime rate, violent crime rate, and number of cases initiated in circuit court. All these measurements were based on relative population.

Six localities were awarded funds to help them establish new programs to crime victims and witnesses, or to expand existing services. The six—the cities of Alexandria, Roanoke, Chesapeake, Hampton, and Norfolk and Albemarle County—were among eleven jurisdictions which applied for funding. Guidelines for the second year of the program will be promulgated in the near future. Hampton and Norfolk did not have formal victim-witness assistance programs at the inception of the state program on July 1, 1984 and have used the grant funds to initiate programs. The others have used funding to assist in expanding their existing services. Hampton's and Norfolk's programs operate through the offices of the Commonwealth's Attorneys, as do those in Roanoke and Alexandria. In Chesapeake, the Sheriff's Department provides victim-witness services; the Police Department has operated Albemarle County's program since July 1, 1984.

State grant programs are required to perform three broad functions. These are:

1. Assistance to victims and witnesses in dealing with the complexities of the criminal justice system.
2. Provision of information and direction in applying for victims' compensation.
3. Provision of or referral to specialized counseling or social services for victims.

In addition, programs must coordinate with community and social service agencies as well as agencies of the local criminal justice system. The use of volunteers is encouraged, as is providing public education and crime prevention information.

## III. BENEFITS OF VICTIM-WITNESS PROGRAMS

Statistical analysis of program effectiveness on both the state and national levels is limited. DCJS will be conducting an evaluation of state grant programs later this year. Despite the limited research efforts, there are indications that these programs are beneficial. In localities where programs exist, law enforcement, court service personnel, and prosecutors report measurable benefits. Commonwealth's Attorneys, for example, report more victim cooperation and more successful prosecution because victims and witnesses are more educated about courtroom procedure and less intimidated by their experiences in the criminal justice system.

Several successful programs in Virginia have independently compiled data which demonstrates their cost-effectiveness. For example, in Virginia it has been shown that the annual savings incurred by the coordination of the trial docket and police officers' schedules is the equivalent of the annual salary for a full-time victim-witness coordinator. Similarly, it has been shown that the simple system of putting police witnesses "on call" has saved the annual starting salary of one full-time police officer. The heavy reliance of these programs on volunteers has significantly reduced operating expenses for the localities involved. For example,

Loudoun County's victim-witness assistance program estimates that in 1982 it saved the locality approximately \$7,000 in staff time by its use of community and student volunteers. Likewise, Virginia Beach's program estimates a savings of \$2,574.66 over a six month period.

Reports also suggest that localities with victim-witness programs are more likely to utilize restitution and community services as alternatives to incarceration. In Loudoun County alone, \$345,200.79 was collected in restitution for the year 1982. Furthermore, improved notification services by the victim-witness programs have eliminated a tremendous volume of court time which might otherwise have been wasted as a result of delays and continuances. The best example can be seen in the 80% reduction of "no shows" reported by Alexandria's Commonwealth's Attorney's Office with initiation of a notification letter sent to all witnesses prior to their receipt of a subpoena.

On the national scene, findings are similar to the results we have observed in programs in Virginia. In 1981 an evaluation of selected victim-witness assistance programs across the country by the National Institute of Justice revealed several significant benefits including the following:

- A. System costs are reduced and system efficiency is increased. This is accomplished in 3 primary ways:
  1. Unnecessary waiting time for police is eliminated.
  2. The need for the prosecution to make initial contact with the witness is eliminated.
  3. Staff effort notifying and contacting the witness is substituted for efforts by the police and prosecution.
- B. Less police, lay, and expert witness time is spent waiting.
- C. Police time delivering subpoenas is reduced. Time and dollar savings are reported in several jurisdictions as a result of:
  1. Substitution of mail service for personal service.
  2. Substitution of phone alert for personal service.
  3. Substitution of project (civilian) personnel for police.
- D. Prosecutors are freed from notification and other witness management duties.
- E. Prosecutors receive improved witness information, and witnesses give better testimony.
- F. Police sensitivity to victims and witnesses is increased significantly.
- G. Surveys of victims and witnesses indicate a far greater level of satisfaction with law enforcement and the criminal justice system in jurisdictions with victim-witness assistance programs than in those without them.

#### **IV. THE FUTURE**

With the passage of the Victims of Crime Act of 1984, a potential \$100 million will be available nationwide for funding programs which provide compensation and/or services to crime victims. In addition to this and other federal funding, more and more states are providing funding for programs. Coupled with the increased awareness of the need for better treatment of crime victims, it would seem that there will be an increase in programs in Virginia and nationally. There also will be more emphasis placed on providing services to "special" victims such as children, and victims of sexual assault and domestic violence. Those programs should increase the criminal justice system's responsiveness to victims and witnesses. Victims will be better educated about the criminal justice system and will demand more participation in the system. For example, victims will be interested in obtaining information about parole hearings and release dates of their assailants. There also may be an increase in the use of victim impact statements. The

increased emphasis on victims' rights may lead to an increase in so-called victims' legislation. For example, compensation programs may become more "generous" and legislation may mandate that victims have certain basic rights. In the future, the victims' rights movement will likely force changes in the criminal justice system. It is a movement which has been gaining momentum and seeks to provide better treatment for crime victims and witnesses not at the expense of defendants, but rather to balance the scales of justice.

## VICTIM-WITNESS PROGRAMS IN VIRGINIA

LOCALITY	PROGRAM LOCATION
<b>Full-Time Programs:</b>	
** Albemarle County ** Alexandria Arlington County ** Chesapeake ** Hampton Leesburg/Loudoun County ** Norfolk Portsmouth Richmond ** Roanoke City Rockbridge/Lexington County Virginia Beach	Police Department Commonwealth's Attorney's Office Commonwealth's Attorney's Office Sheriff's Department Commonwealth's Attorney's Office Local Government Commonwealth's Attorney's Office Commonwealth's Attorney's Office Commonwealth's Attorney's Office Commonwealth's Attorney's Office Commonwealth's Attorney's Office Commonwealth's Attorney's Office Commonwealth's Attorney's Office
Number of Programs: 12	
<b>Partial Programs:</b>	
Henrico County Lynchburg Montgomery County Suffolk Williamsburg	Sheriff's Department Commonwealth's Attorney's Office Private non-profit agency Commonwealth's Attorney's Office Commonwealth's Attorney's Office
Number of Programs: 5	

**TOTAL NUMBER OF PROGRAMS IN VIRGINIA: 17**

\*\* Full or partial funding through DCJS Grants

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# VICTIM COMPENSATION THROUGH SENTENCING

Frances L. Pierson\*

A crime victim in America is victimized twice: first, by an attacker and second, by a system which ignores crime victims and their needs. The criminal justice system designed to prevent crime and punish violations ignores the very citizens the system is designed to protect. This shortcoming has not escaped notice or criticism by legislators or the public.<sup>1</sup> A vocal force of crime victims has emerged, marshalling public opinion and political support to establish an active role for victims in criminal prosecutions.<sup>2</sup>

Many factors combined to spark the crime victims' lobby. Citizens became outraged when they compared the careful treatment of accused felons given court-appointed attorneys and the indifference afforded the felons' victims.<sup>3</sup> Victims felt dehumanized in criminal proceedings that treated their injuries as mere evidence.<sup>4</sup> Many victims resented that their personal injury became a societal injury punished through the criminal justice system, leaving them to seek civil redress.<sup>5</sup>

Those factors combined to create a general dissatisfaction with the justice system's treatment of crime victims. Given this dissatisfaction, the law followed the path predicted by Holmes, changing to correspond with the actual feelings and demands of the community.<sup>6</sup> Thus, legislators responded with state victim compensation funds,<sup>7</sup> crime victim restitution in sentencing,<sup>8</sup> probation<sup>9</sup> and parole<sup>10</sup>

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<sup>1</sup> 128 *Cong. Rec.* §3853-61 (daily ed. April 22, 1982) (statements of Senators Heinz, Laxalt, Jackson, Mitchell, Moynihan, Metzenbaum and Chiles); *S. Rep. No. 532*, 97th Cong., 2d Sess. 10, reprinted in 1982 *U.S. Code & Ad. News* 2515, 2516; *Older Americans Fighting the Fear of Crime: Hearing before the Senate Special Comm. on Aging*, 97th Cong., 1st Sess. 158 (1981) (statement of Frank Carrington, Crime Victims Legal Advocacy Institute).

<sup>2</sup> Crime victim organizations vary from specific nationally oriented groups like the Victims' Assistance Legal Organization, Inc. (VALOR) and the National Organization for Victim Assistance (NOVA) to local grassroots efforts like Project CARE (Community Advocacy Resource for the Elderly) in Yonkers, New York. Each organization provides information, guidance and publicity to help crime victims.

<sup>3</sup> *Omnibus Victims Protection Act: Hearing Before the Subcomm. on Criminal Law of the Comm. on the Judiciary on S.2420*, 97th Cong., 2d Sess. 69 (statement of Virginia Montgomery), "There is no one to represent me, the victim. Everyone in the system seems to only care about the assailant. I have felt like I am down in a hole with no way of getting out." *Id.* at 66 (statement of Senator Heinz).

<sup>4</sup> *Id.* at 187.

<sup>5</sup> *Id.* at 189, "It killed me when I got a subpoena saying, the State v. \_\_\_\_\_. He didn't do shit to the state, he did it to me and what he did to me was swept under the rug!"

<sup>6</sup> *O. Holmes, THE COMMON LAW* 41 (1881).

<sup>7</sup> Ramker and Meagher, *Crime Victim Compensation: A Survey of State Programs, Fed. Probation*, Mar. 1982 at 68. See also Lamborn, *The Methods of Governmental Compensation of Victims of Crime*, 1971 *U. Ill. L.F.* 655 (comparing different methods of administering a compensation program), Note, *State Legislation in Aid of Victims and Witness of Crime*, 10 *J. Legis.* 394 (1983) (highlights victims' problems with procedure and suggests basic improvements), Annot., 20 *A.L.R.* 4th 63 (1983).

<sup>8</sup> *Colo. Rev. Stat.* § 17-28-101 (1973); *Iowa Code Ann.* § 907.12(2)(WEST 1979); *Me. Rev. Stat. Ann.* tit. 17-A, § 1151(2)(Pamphlet 1982); *Mo. Ann. Stat.* § 559.021 (Vernon Supp. 1982); *N.M. Stat. Ann.* § 31-17-1A (Pamphlet 1981); *S.D. Codified Laws Ann.* § 23A-28-1 (1979). *But cf. Me. Rev. Stat. Ann.* tit. 17-A, § 1321 (Pamphlet 1982).

<sup>9</sup> *Va. Code* § 19.2-305(Supp. 1982). For an exhaustive listing of state probation statutes suggesting or mandating victim restitution, see Harland, *Monetary Remedies for the Victims of Crime: Assessing the Role of the Criminal Courts*, 30 *UCLA L. Rev.* 52, 69 nn. 109-11 (1982).

<sup>10</sup> *Ga. Code Ann.* § 17-14-4 (1983). See generally Read, *How Restitution Works in Georgia*, 60 *Judicature* 323 (1977).

programs aiding victim restitution and, on the federal level, the Probation Act<sup>11</sup> and the Victim and Witness Protection Act of 1982.<sup>12</sup>

Underlying these actions rests the belief that the justice system should recognize the rights of victims in the criminal law process. The degree of victim involvement may vary from active participation in the trial preparation<sup>13</sup> and the pre-sentencing investigation to passive acceptance of procedural information and social services aid.<sup>14</sup> In a justice system designed to protect and vindicate society, each party should be present: the offender, the society as prosecutor, and the society as victim.

The injured citizen, the convicted felon and the justice system benefit from the involvement of the victim in the judicial process. Bringing the victim into the criminal process removes some of the crime's emotional impact as the citizen sees his injury vindicated through the legal process.<sup>15</sup> Including the victim also removes his fear of the unknown, the courtroom and the trial process, as a doctor quiets a patient's fears about pending surgery. A victim who is involved in the prosecution from the first complaint to sentencing is more likely to feel justice has been served and is more likely to have a favorable impression of the justice system.<sup>16</sup>

The convicted felon benefits when the victim has an active role. Many felons undoubtedly view their victims as nameless "pigeons." Bringing the victim into the process personalizes the crime and forces the offender to see the human cost of his action.<sup>17</sup> Restitution as part of the criminal sentence goes further to quantify the extent of the injury.<sup>18</sup> Some social psychologists support restitution as a means of eliminating the criminal's distress at committing an unjust act.<sup>19</sup> Given the option of justifying his criminal behavior or compensating his victim, a felon is more likely to become rehabilitated through victim restitution.<sup>20</sup> The felon

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<sup>11</sup> 18 U.S.C. S 3651 (1982). The restitution provision dates from the Federal Probation Act's revision June 25, 1948, ch.645, 62 Stat. 842. See generally *Roberts v. United States*, 320 U.S. 264 (1943)(reviews origins of the Federal Probation Act).

<sup>12</sup> Pub. L. No. 97-291, 96 Stat. 1248 (codified as amended at 18 U.S.C. §§ 1501, 1512-15, 3579, 3580 (1982)).

<sup>13</sup> Active participation could include the victim as a witness and a willing information source during the investigation rather than a perfunctory appearance at trial. Victims may actively participate in the presentence report through the Victim and Witness Protection Act's addition to the *Fed. R. Crim. P.* 32(c)(2), see *supra* note 12.

<sup>14</sup> State compensation funds typically act like an insurance recovery with a fixed deductible and ceiling. The victim reports the crime, submits a detailed voucher to the compensation fund authority and waits for the check, see *supra* note 7.

<sup>15</sup> *Victims Protection Act* hearing, *supra* note 3 at 190-91, see also *infra* note 17.

<sup>16</sup> *Id.*, *Older Americans Fighting the Fear of Crime* hearing, *supra* note 1 at 67.

<sup>17</sup> Zehr and Umbreit, *Victim Offender Reconciliation: An Incarceration Substitute?*, *Fed. Probation* Dec. 1982 at 65-6.

<sup>18</sup> Offenders tend to underestimate the extent of their victims' loss, either out of ignorance or self-justification. See Hudson, Galaway and Chesney, *When Criminals Repay Their Victims: A Survey of Restitution Programs*, 60 *Judicature* 313,316 (1977).

<sup>19</sup> *Id.* at 317. "Restitution can aid an offender's rehabilitation by strengthening the individual's sense of responsibility. The probationer may learn to consider more carefully the consequences of his or her actions. One who successfully makes restitution should have a positive sense of having earned a fresh start and will have tangible evidence of his or her capacity to alter old behavior patterns and lead a law-abiding life." *Huggett v. State*, 83 Wis.2d 790,794, 266 N.W.2d 403,407 (1978). The criminal should understand the extent to which he has harmed the victim as a human being. *People v. Richards*, 17 Cal.3d 614, 620, 552 P.2d 97, 100-101, 131 Cal. Repr. 537, 540-41 (1976).

<sup>20</sup> Hudson, Galaway and Chesney, *When Criminals Repay Their Victims: A Survey of Restitution Programs*, *Fed. Probation* Feb. 1977 at 317.

should participate in the restitution evaluation for the payment to aid rehabilitation.<sup>21</sup> If the felon does not equate the payment with the costs of his actions, restitution becomes another criminal fine.<sup>22</sup>

The benefit to the justice system from active victim involvement can be measured in the number of crimes reported. Alienated victims do not report crimes; they seek to limit their losses by ignoring the offense.<sup>23</sup> If victims believe they will be treated fairly, they will be more apt to report crimes and cooperate with the police investigation and the ensuing prosecution.<sup>24</sup> Because eighty-seven percent of all crimes come to police attention through victim reports, public opinion about victim treatment is crucial.<sup>25</sup>

Thus, victim involvement may take many forms: knowledge of the proceeding, assistance by state compensation funds, contributions to the presentence investigation, appearance at the sentencing hearing and the receipt of restitution as a condition of sentencing, probation or parole. This article will analyze victim compensation as one element of victim involvement, the policies underlying its payment and its method of administration. Each method of compensation has its shortcomings and must address problems such as offender's inability to pay, constitutionally challenged restitution statutes and fiscal shortfalls of compensation funds. By focusing on the goal of helping the victim, this article will suggest solutions to finance and constitutionally administer restitution to improve victim compensation.

## I. RESTITUTION—A TRADITIONAL SANCTION REVISED

### *Restitution's Historical Foundations*

Restitution is not a new remedy for criminal injury but an ancient sanction that fell into disuse after the division of criminal and tort causes of action. Victim compensation through offender restitution can trace its origins to the Code of Hammurabi,<sup>26</sup> the Bible<sup>27</sup> and Anglo-Saxon law.<sup>28</sup> Early cultures recognized a single injury when an individual harmed another, requiring a single payment of restitution by the offender to the injured party.<sup>29</sup> This monetary payment compensated the victim, or the victim's family, for personal injury or property damage, averting vendettas through rough justice.<sup>30</sup>

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<sup>21</sup> *Supra* note 17 at 65.

<sup>22</sup> *Id.*

<sup>23</sup> More than 70% of personal larcenies occurred without contact between criminal and victim and more than 60% of personal larcenies with victim-criminal contact are *not* reported to the police. *Sourcebook of Criminal Justice Statistics* 1982 at 294. This reticence to report larcenies illustrates not only the public's lack of faith in police effectiveness, but also a reluctance to become a confused victim in the criminal proceedings. Applying the public's sense of cost-benefit analysis, reporting a crime is not worth the trouble.

<sup>24</sup> *Victims Protection Act* hearing, *supra* note 3 at 153 (citing the Final Report, Attorney General's Task Force on Violent Crime, Recommendation 62).

<sup>25</sup> *Id.* at 191.

<sup>26</sup> Wolfgang, *Victim Compensation in Crimes of Personal Violence*, 50 *Minn. L. Rev.* 223, 224 (1965)(Code of Hammurabi c. 2380 B.C.), Hobhouse, *Law and Justice*, in *Considering the Victim* 9 (1975).

<sup>27</sup> *Exodus* 21:18, 19 (restitution for personal injury), *Exodus* 22:1, 5-6 (restitution for property damage).

<sup>28</sup> 2 *F. Pollock and F. Maitland, History of English Law* 449-62 (2d ed. Washington, D.C. 1959)(1st ed. London 1895), *F. Maitland and F. Montague, A Sketch of English Legal History* 6, 19-21, 193-99 (1915).

<sup>29</sup> Colson and Benson, *Restitution as an Alternative to Punishment*, II *Det. C.L. Rev.* 523 *passim* (1980), Wolfgang, *supra* note 20 at 223. For a succinct overview of early culture's application of restitution see Hobhouse, *supra* note 20.

<sup>30</sup> Wolfgang, *supra* note 26 at 223-26.

Early societies followed the simple logical precept: repair the injury and return the status quo. If this is not possible, harm the offender to the extent the victim was harmed:--retribution to achieve justice. Society's preference, victim restitution, more efficiently restored the status quo by redistributing gain rather than an additional loss through retribution.

Victim restitution fell into disuse during the twelfth and thirteenth centuries in England due in part to the sovereign's greed as well as the increasingly complex legal bureaucracy.<sup>31</sup> Under Anglo-Saxon law, a statutory schedule of payments described the value of various injuries.<sup>32</sup> This schedule ensured consistent restitution. A killer would pay the *wergild*, or statutory sum, to the slain man's family.

Gradually the system of payment became more sophisticated, requiring the offender to redress the injury twice: *bot*, or betterment, to the injured party, and a second payment, a *wite*, to the King for breaking the King's peace.<sup>33</sup> Recovery became bifurcated because the King wanted to enrich the royal treasury. The combination of two payments, one to the victim and the other to the King, perished due to over-elaboration; devising a fixed payment for each diverse injury became too difficult.<sup>34</sup> As the use of the victim's *bot* declined, the King's share increased until the entire compensation became a fine payable to the Crown.<sup>35</sup> Injury compensation provided a principal source of state revenue but failed to recompense the victim or the victim's family.<sup>36</sup>

#### *Restitution's Modern Application*

The division between victim restitution and criminal sanctions continued unchallenged for hundreds of years. The introduction of probation in the late nineteenth century broke this precedent, providing the opportunity to require victim restitution as a probation condition.<sup>37</sup> Victim compensation, however, remained as only a minor concern until 1951 when Margery Fry, a British magistrate, advocated a national crime victim compensation plan.<sup>38</sup> Fry recommended a

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<sup>31</sup> Wolfgang, *supra* note 20 at 228, B. Galaway and J. Hudson, *Offender Restitution in Theory and Action* 16-17 (1977), Harland, *supra* note 9 at 52 and n.1. A complementary explanation for the criminal and tort division may be found in the twelfth century bureaucratization of the legal system. See S. Milson, *Historical Foundations of the Common Law* 404-28 (1981) for an overview of early criminal procedure, and generally, for legal history theory that bureaucratic changes met unforeseen, far-reaching results.

<sup>32</sup> F. Maitland and F. Montague, *supra* note 28 at 193-99. For example, under the laws of King Aethelbert, A.D. 600, "if a man be slain, let him make 'bot' with XX shillings". *Id.* at 194. F. Pollock and F. Maitland, *supra* note 28 at 460-61.

<sup>33</sup> F. Pollock and F. Maitland, *supra* note 28 at 451, Wolfgang, *supra* note 26 at 225-26.

<sup>34</sup> *Id.*, *supra* note 28 at 458-62, F. Maitland and F. Montague, *supra* note 28 at 20-21.

<sup>35</sup> F. Pollock and F. Maitland, *supra* note 28 at 459. The family of a slain man lost their right to receive the *wergild*. Parliament enacted a statute to give the family a right to claim civil damages, Lord Campbell's Act, Stat. 9-10 Vict. C.93. *Id.* at 459 & n.5.

<sup>36</sup> Wolfgang, *supra* note 26 at 228. Critics point to this same shortcoming in the United States criminal justice system, "Even where fines are imposed today, the state retains the proceeds, and the victim gets no compensation." *Id.* at 227 quoting Barnes & Teeters, *New Horizons in Criminology* 401 (1943). As states enact victim compensation statutes, this criticism becomes less valid.

At restitution's nadir the Parliament had to pass a statute, 21 Hen.VIII c.11, allowing a larceny victim to sue for restitution of his stolen goods because at common law the criminal indictment was at the King's discretion and did not include the victim. 4 W. Blackstone, *Commentaries on the Laws of England* 355-56 (1769).

<sup>37</sup> Harland, *supra* note 9 at 57. New York enacted an early victim restitution provision, *N.Y. Code Crim. Proc.* SS 483(2), 932 (McKinney 1910). *Id.* at 57 & n.33.

<sup>38</sup> L. Forer, *Criminals and Victims* 289-90 (1980), R. Meiners, *Victim Compensation* 9 (1978). For a brief insight into Fry's philosophy, See Fry, *Justice for Victims in Considering the Victim* 54 (1975).

national fund to insure citizens against losses due to crime in the same manner that workmen's compensation protects employees against work-related injuries.<sup>39</sup>

Using these two new approaches to victim compensation, probation conditioned sentencing and a national compensation fund, victims could receive restitution directly from the offender through probation, sentencing or parole conditions, or receive restitution from a state compensation fund.<sup>40</sup> State legislatures have adopted both methods. Some states limit restitution to offender payments; others supplement payments with state victim compensation funds.<sup>41</sup> None of these methods is problem-free.

On the federal level, Congress limits victim restitution to offender repayment. The Federal Probation Act allows judges the discretion to include victim restitution as a condition of probation.<sup>42</sup> Congress augmented this infrequently used provision with the Victim and Witness Protection Act of 1982 (VWPA) which allows victim restitution as part of the criminal sentence.<sup>43</sup> Restitution awards pursuant to this Act become a condition of parole.<sup>44</sup> The VWPA's restitution provisions faced a constitutional challenge in *United States v. Welden*<sup>45</sup> on equal protection, due process and seventh amendment grounds.<sup>46</sup>

Congress' concern for budget deficits has thwarted the creation of a national victim compensation program.<sup>47</sup> The budgetary obstacle has not only continued, but also worsened as the United States now faces a trillion dollar national debt. With fiscal concerns removed, Congress probably would support some form of national victim compensation as evidenced by Congress' wide support for the VWPA,<sup>48</sup> Congressmen's statements exhorting governmental responsibility for victims<sup>49</sup>

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<sup>39</sup> Fry, *supra* note 38 at 55-6.

<sup>40</sup> See *supra* notes 7-9 and accompanying text.

<sup>41</sup> See *R. Meiners, supra* note 33 at 25-39. See generally Lamborn, *supra* note 7. [insert example statutes].

<sup>42</sup> 18 U.S.C. § 3651.

<sup>43</sup> *Pub. L. No. 97-291, 96 Stat. 1248* (codified as amended at 18 U.S.C. §§ 1512-15, 3579, 3580 (1982)).

<sup>44</sup> 18 U.S.C. § 3579(g).

<sup>45</sup> 568 F. Supp. 516 (1983).

<sup>46</sup> In *Welden*, the United States District Court for the Northern District of Alabama ruled the VWPA's restitution provisions, 18 U.S.C. §§ 3579, 3580 violated the defendant's equal protection and due process rights due to the poor statutory drafting and the potential haphazard application. Equating the restitution award at the sentencing hearing with a civil trial for damages, the court also held this restitution award violated the seventh amendment right to a jury trial in a controversy with a value exceeding twenty dollars. 568 F. Supp. at 534-35. The government has appealed the decision in *Welden* to the United States Court of Appeals for the Eleventh Circuit.

<sup>47</sup> Introducing the VWPA's predecessor legislation, S. 2420, the *Omnibus Victims Protection Act of 1982*, Senator John Heinz laid out two parameters to victim assistance: no additional federal expenditures and no infringement on the constitutional rights of defendants. 128 *Cong. Rec.* S3853 (daily ed. April 22, 1982)(statement of Sen. Heinz). Sen. Lawton Chiles also supported S.2420 and reiterated that the legislation did not entail additional federal funding. *Id.* at S3861. Given President Reagan's dramatic budget cutbacks, any new budget outlays faced almost certain disapproval. Thus, passage of the victim assistance legislation depended on a zero budget impact.

<sup>48</sup> The VWPA passed the United States House of Representatives by unanimous consent on October 1, 1982. 128 *Cong. Rec.* H8464-70 (daily ed. October 1, 1982 Part III).

<sup>49</sup> "Clearly, there is an appropriate and necessary role for the Federal Government in addressing the problems encountered by crime victims." 128 *Cong. Rec.* H8207 (daily ed. September 30, 1982)(statement by Rep. McCollum). "Enactment of Federal legislation in this area [victim assistance] must be one of the highest priorities of the 97th Congress." 128 *Cong. Rec.* H8470 (daily ed. October 1, 1982)(statement by Rep. Fish).



and the political appeal of the victim assistance issue.<sup>50</sup> Legislation introduced in the House of Representatives and the Senate seeks to overcome Congress' fiscal wariness by creating a crime victim assistance fund supported by judicially imposed criminal fines and compensation fees.<sup>51</sup> The United States Department of Justice would channel this money to federal crime victims as well as state compensation programs.<sup>52</sup>

## II. VICTIM COMPENSATION'S WATERLOO: PROCEDURE AND FUNDING

Each of the avenues for victim compensation contains pitfalls. Requiring victim restitution through criminal sentencing has met constitutional resistance.<sup>53</sup> Thus, sentencing procedures incorporating restitution must be improved and clearly explained so they may be fairly and constitutionally applied. Money and justice rarely can be equated, but in victim compensation, the offender's or the state's lack of funds means a victim will be left without recovery. Sources of funds need not be mutually exclusive. No reason exists to choose between offender fines, state payment and federal compensation. Indeed, combining different funding approaches would improve the likelihood that all victims receive full compensation.

Surmounting the procedural problems, noted in *Welden*, and the offender's and government's financial problems is possible if legislators, judges and criminal justice administrators endorse the concept of victim compensation. Many state and federal legislators appear to support victim restitution by offenders and, when financially feasible, governmental compensation funds.<sup>54</sup> Whether these legislators are motivated by public opinion backing victims' interests, potential reelection votes for supporting victim assistance or their personal belief that victim compensation is just, the result remains the same—support for compensation. In contrast, the judiciary appears divided.<sup>55</sup> Some judges favor creative sentencing

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<sup>50</sup> Introduced in an election year, the VWPA's predecessor legislation, S.2420, had sponsors ranging from conservative Utah Senator Orrin Hatch to the paradigm liberal advocate, Senator Edward Kennedy. S.2420's introduction on April 22, 1982, coincided with National Crime Victims' Week (128 *Cong. Rec.* S3853 (daily ed. April 22, 1982)(statement by Senator Heinz)) and immediately preceded President Reagan's Executive Order 12360 establishing a task force on victims of crime (*Victims Protection Act* hearing, *supra* note 3 at 85).

<sup>51</sup> S.704, 98th Cong., 1st Sess. (1983), H.R. 5124, 98th Cong., 2d Sess. (1984).

<sup>52</sup> Introduced by Senators Heinz and Grassley, S.704 provides a one time compensation fee for misdemeanors and felonies. The bill also authorizes up to a 100% surcharge on criminal fines, depending on the criminal's ability to pay, with the proceeds directed to the Crime Victim's Assistance Fund. In a letter to their colleagues, the Senators note that an estimated \$45 to \$125 million could be generated for the fund in 1983 (letter of March 9, 1983 on file at *William and Mary Law Review* office).

<sup>53</sup> *United States v. Welden*, 568 F. Supp. 516 (1983). See text, and accompanying notes.

<sup>54</sup> At least thirty states have statutes providing victim restitution as a probation condition. Harland, *supra* note 9 at 69 n.109. In a budget survey 1978-80, thirty states (some not included in the statutory compilation above) provided funding for crime victim compensation. Ramker and Meagher, *supra* note 7 at 69. Federal support for compensation can be measured by the VWPA's passage and the introduction of S.704 and H.R. 5124, see *supra* notes 48-52 and accompanying text.

<sup>55</sup> Some judges advocate the rehabilitative use of restitution and its accompanying benefit to the victim. Judge Lois Forer, Court of Common Pleas, Philadelphia, outlined the reasons for her support in her book, *Criminals and Victims* (1980). Using restitution as a parole condition, Judge Forer believed the victim receiving payment recognizes there is justice in the criminal justice system, the state saves incarceration costs and the offender, spared from prison, benefits by atoning for his or her crime. *Id.* at 296. Judge Forer added an economic purpose for restitution. Requiring restitution for crimes with monetary gain removed criminal profit and added a deterrent effect. *Id.*

Justice Albert Kramer, District Court in Quincy, Massachusetts, operates a program called *Earn-it* which combines financial restitution and community service work. The program includes victim-offender meetings at which restitution agreements are formed benefitting both parties. *National Law*

including victim restitution.<sup>56</sup> Others adamantly oppose incorporating a civil remedy into a criminal setting.<sup>57</sup> Like many legislators, criminal justice administrators, prosecutors and parole officials appear to appreciate the benefits of victim compensation in furthering criminal prosecutions and tailoring sentences to fit individual crimes.<sup>58</sup>

*Improving the Imposition of Victim Restitution:  
Meeting the Constitutional Challenge*

The federal statutory authority for victim restitution as a sentencing condition was declared unconstitutional in *United States v. Welden*.<sup>59</sup> The United States Court of Appeals for the Eleventh Circuit reversed the *Welden* decision, finding the VWPA did not violate the seventh amendment, the due process or equal protection clauses.<sup>60</sup> Though the statute can therefore be constitutionally construed, amendments could clarify the challenged sentencing guidelines. Clearer rules of application would increase the restitution provisions' usefulness and the frequency of judicially imposed restitution.

*United States v. Welden* marked one of the first times a federal judge attempted to apply the VWPA's restitution provisions.<sup>61</sup> The three *Welden* defendants kidnapped a woman, raped her and murdered her boyfriend.<sup>62</sup> Upon their conviction, the judge sought to apply the new statute, balancing the defendants' ability to pay with the victims' injuries.<sup>63</sup> The judge, noting a host of unanswered questions and criticizing Congress' poor draftmanship, found that sections 3579 and

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*Journal*, Aug. 23, 1982 at 1, col. 2.

Other judges feel restitution should not be allowed in criminal cases. "Disposing of civil liability cannot be a function of restitution in a criminal case." *People v. Richards*, 17 Cal.3d 614,620, 552 P.2d 97, 101, 131 Cal. Rptr. 537,541 (1976). "If one makes use of the criminal law for some collateral or private purpose, such as to compel the delivery of property or payment of a debt rather than to vindicate the law, he is guilty of a misuse of process, and a fraud upon the law." *People v. Moore*, 43 Mich. App. 693, 697, 204 N.W.2d 737,739 (1972)(quoting *Hall v. American Inv. Co.*, 241 Mich. 341, 353, 217 N.W. 18, 20 (1928). For these and further criticisms of restitution in criminal cases, see Harland, *supra* note 9 at 54 & n.13.

<sup>56</sup> L. Forer, *Criminals and Victims* 289 (1980).

<sup>57</sup> This Note will show that restitution through sentencing is *not* a civil remedy. See *infra* notes ----- and accompanying text. *But cf. People v. Richards*, 17 Cal. 3d 614, 552 P.2d 97, 131 Cal. Rptr. 537 (1976); *State v. Scherr*, 9 Wis.2d 418, 101 N.W.2d 77 (1960)(comparing restitution to a civil remedy).

<sup>58</sup> "We strongly agree that restitution should be a sentencing tool available in all criminal cases—not only where sentences are probated." *Omnibus Victims Protection Act* hearing, *supra* note 3 at 92 (statement of D. Lowell Jensen, Assistant Attorney General, Criminal Division, U.S. Dept. of Justice). "The victim impact statement enriches the presentence report by providing the judge information of a type and quality provided by no other means . . . By supplying correct and verified information concerning amounts of financial losses to the victim, it makes a more accurate restitution decision possible." *Id.* at 146 (statement of Paul R. Falconer, Chief U.S. Probation Officer, District of Maryland). "On the practical side, victims and witnesses plan [sic] an *indispensable* role in our criminal justice system. As practitioners, we need to encourage their cooperation to the maximum extent possible." *Id.* at 163 (statement of Michael McCann, District Attorney of Milwaukee County, Wisconsin).

<sup>59</sup> 568 F. Supp. 516 (1983).

<sup>60</sup> 743 F.2d 827 (1984).

<sup>61</sup> The judge, in orally announcing the decision, noted, "I don't expect to be the last court to speak on this question, but it looks like I'll be the first." 568 F.Supp. at 535-36.

<sup>62</sup> 568 F. Supp. at 517, 525. One of the victims, Miss Calloway, had been struck on the head with a shotgun, had seen her boyfriend dead on the floor of their home, had been stripped naked and threatened with death, and was twice made to engage in oral sex while bleeding profusely from her head wound. *Id.* at 525. The victim impact statement estimated her damages at \$599. *Id.*

<sup>63</sup> VWPA restitution provision, 18 U.S.C. § 3580(a).

3580 of the Act violated the fifth amendment's equal protection and due process provisions and the seventh amendment's right to a jury trial on the issue of damages.<sup>64</sup> Although the Eleventh Circuit found these sections constitutional, the district court judge's dilemma highlights problems in imposing victim restitution.

The court in *Welden* found the restitution provisions violated due process and equal protection because they lacked sufficient procedural safeguards to ensure consistent results.<sup>65</sup> Though the court acknowledged that the federal statute allowing probation with victim restitution was not unconstitutionally vague despite indefinite standards,<sup>66</sup> the court found "a crucial distinction" between probation and sentencing.<sup>67</sup> Citing the probability of disparate results, the court ruled the statute violative of equal protection.<sup>68</sup> Given the indefinite procedural guidelines for imposing victim restitution, the court ruled the statute also violated the Due Process Clause.<sup>69</sup>

The major error in the court's reasoning, and the flaw which still threatens the

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<sup>64</sup> 568 F. Supp. at 534-35.

<sup>65</sup> "This Court thinks that Congress granted too much discretion to the courts and to the Attorney General, and, by exceeding its powers of delegation, created a potential Frankenstein." *Id.* at 534.

<sup>66</sup> *Id.* at 534. In *United States v. Baker*, 429 F.2d 1344 (7th Cir. 1977), the court held the Probation Act was not unconstitutionally vague. Further, the court held that delegation of discretionary powers did not need precise standards supporting Congress' determination that effective sentencing required broad discretion. 429 F.2d at 1347. This decision undermines the court in *Welden's* requirement of *ascertainable standards* (emphasis added). 568 F. Supp. at 534.

<sup>67</sup> 568 F. Supp. at 535. The court failed to elaborate on the difference between restitution as a condition of probation and restitution as a sentencing condition. In probation and sentencing hearings, the defendant may be given an opportunity to review the probation service's presentence report. *Fed. R. Crim. P.* 32(c)(3). The offender also may address the court before sentencing to present any information in mitigation of punishment. *Fed. R. Crim. P.* 32(a)(1). *Accord, Hill v. United States*, 368 U.S. 424 (1962); *Green v. United States*, 365 U.S. 301 (1961).

In *Welden*, the court criticized restitution as a sentencing condition enforceable as a civil judgment. 568 F. Supp. at 535, 18 U.S.C. § 3579(h). Restitution as a probationary condition also may be enforced as a civil judgment. 18 U.S.C. § 3651. However, in *Bearden v. Georgia*, - U.S. -, 103 S.Ct. 2065 (1983), the Court held failure to pay probation-conditioned restitution, was not a ground for cancellation of probation because petitioner, an indigent, had made a bona fide effort to pay. This decision may militate against civil enforcement measures such as contempt to press restitution sentencing awards against indigents. The VWPA's mandate that judges consider the defendant's ability to pay lessens potential enforcement problems.

<sup>68</sup> 568 F. Supp. at 535. Justice Frankfurter addressed the problem of disparate results in *Winters v. New York*, 333 U.S. 524 (1947), ". . . diversity in result for similar conduct in different trials under the same statute is an unavoidable feature of criminal justice. So long as these diversities are not designed consequences but due merely to human fallibility, they do not deprive persons of due process of law." 333 U.S. at 535.

Disparity in result inevitably will occur when different judges seek to balance the VWPA's factors of victim's financial loss, defendant's financial resources, defendant's financial needs and earning ability and the financial needs and earning ability of defendant's dependents. 18 U.S.C. § 3580(a). Balancing these factors requires judgment, not application of a statutory grid to determine restitution. The goal in restitution is not as much equal sentences as fair sentences and the VWPA's provisions can achieve this goal.

For theories of judicial interpretation of broad statutory language, see Frankfurter, *Some Reflections on the Reading of Statutes*, 47 *Colum. L. Rev.* 527 (1947), Freund, *The Use of Indefinite Terms in Statutes*, 30 *Yale L.J.* 437 (1921).

<sup>69</sup> 568 F. Supp. at 535. The court criticized the lack of standards such as rules of evidence, rules of discovery, burdens of proof, requirements of notice and requirements of standing. *Id.* Because restitution comprises one part of the offender's sentence, the determination of restitution follows the same procedure as the general criminal sentence. *Fed. R. Crim. P.* 32. Thus, the judge reviews the presentence report, questions the defendant and hears any mitigating evidence the defendant may offer. *Id.* The Federal Rules of Evidence do not apply at a sentencing hearing. 568 F. Supp. at 534.

If restitution's award was a civil hearing, criticism regarding this procedural vagueness would be valid. However, restitution is not a civil award, but a component of the criminal sentence designed to further rehabilitation while aiding the crime victim.

concept of victim restitution, is that restitution through sentencing is the constitutional equivalent of a civil suit for tort damages.<sup>70</sup> The goals and purposes of these two recoveries are different and should not be confused. Restitution through sentencing is a form of criminal punishment like a fixed term of incarceration.<sup>71</sup> Within minimum and maximum terms of punishment, criminal sentences for the same offense can vary drastically. The sentence varies depending on the offender's past criminal record, the sentencing judge's attitude on incarceration, the offender's likelihood of rehabilitation and other mitigating and aggravating circumstances outlined in the presentencing report.<sup>72</sup> Variations in sentences are not aberrations. They are the desired result of a criminal sentencing process that seeks to tailor each sentence to each individual crime. Victim restitution, equally variable, upholds the same goal because it tailors the amount of restitution to each crime, considering the financial needs and ability of the offender and the victim's injuries.

Congress did not intend to substitute victim restitution through sentencing for a victim's civil suit for tort damages.<sup>73</sup> The civil suit remains as a remedy in which the victim's recovery is unhampered by considerations of defendant's ability to pay.<sup>74</sup> Restitution is a part of the criminal sentence, supported by penal and rehabilitation theories.<sup>75</sup> The sentencing judge retains the same discretion in awarding restitution as other sentencing sanctions.<sup>76</sup>

The court in *Welden* accurately noted the absence of standards for rules of evidence and discovery in assessing restitution, but this shortcoming does not render the application of restitution procedurally unconstitutional. The law

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<sup>70</sup> 568 F. Supp. at 534. "The value in controversy . . . exceeds twenty dollars, and § 3579(h) turns a restitution order into a civil judgment." *Id.* This VWPA section allows a restitution order to be enforced "in the same manner as a judgment in a civil action." 18 U.S.C. § 3579(h). If the court in *Welden's* analysis accurately characterizes restitution as a civil judgment, then all federal criminal fines and penalties are also civil judgments for under 18 U.S.C. § 3565 these fines and penalties are enforceable "in like manner as judgments in civil cases." 18 U.S.C. § 3565 (1982).

<sup>71</sup> VWPA's restitution provisions, SS 3579, 3580, joined the other sentencing provisions of Title 18, Chapter 227, Sentence, Judgment and Execution because restitution is a sentencing condition. A just sanction for the offender should ensure that the wrongdoer repair his or her victim's harm. *S.Rep. No. 532, 97th Cong., 2d Sess. 30* (1982).

<sup>72</sup> *Williams v. New York*, 337 U.S. 241, 244-52 (1948); *United States v. Barnes*, 604 F.2d 121 (2d Cir. 1979). "Would that a simple algebraic formula consisting of the crime, times the defendant's history, times extenuating circumstances, which would equal the proper sentence, be productive of universally fair sentences; were this the case, the courts should be the first to welcome its adoption. In actual practice the rationale of sentencing is not that simple—nor should it be." *Id.* at 153-54. *See also Fed. R. Crim. P. 32* (presentence report submission and availability to defendant).

In *United States v. Danilow Pastry Co., Inc.* 563 F. Supp. 1159 (S.D.N.Y. 1983), the court, using the Probation Act to impose creative sentencing, required six wholesale bakeries charged with Sherman Act violations to donate fresh baked goods to needy organizations.

<sup>73</sup> 128 *Cong. Rec.* H8205 (daily ed. Sept. 30, 1982)(section-by-section analysis of companion bill H.R. 7191)"Subsection (c) of new section 3579 precludes the court from ordering restitution if the procedures necessary to issue the order will unduly prolong or complicate the sentencing process. This is necessary to insure that the sentencing process does *not* become a sort of *mini-civil trial for damages.*"(emphasis added).

<sup>74</sup> A victim may recover damages for criminal actions in a civil suit if the victim can show the defendant's action proximately caused the injury and the amount of damage suffered with the reasonable certainty. *D. Dobbs, Handbook on the Law of Remedies* 148-49 (1973). VWPA provision 18 U.S.C. § 3579(e)(2) provides a set off against later civil awards for any restitution payments.

<sup>75</sup> Restitution's rehabilitative function makes the offender of his or her wrongdoing and gives an opportunity for atonement, *see supra* notes 17-19. Restitution also penalizes the offender similarly to a criminal fine but the proceeds go to the victim rather than the government. *See generally*, E. Pincoffs, *The Rationale of Legal Punishment* 69 (1966)(principles to consider in sentencing a criminal).

<sup>76</sup> *See supra* notes 62 and 71.

allowing probation with restitution<sup>77</sup> contains *no* guidelines, yet has been found constitutional.<sup>78</sup> Victim restitution through sentencing has *some* guidelines and follows the United States Supreme Court's requirement that procedural due process provide an opportunity to be heard "at a meaningful time and in a meaningful manner."<sup>79</sup> The convicted felon and his or her attorney has an opportunity to address the court before sentencing to present information in mitigation of punishment.<sup>80</sup> Government counsel has a similar opportunity to speak.<sup>81</sup> The court also receives information from the presentence report which details among other things the victim's needs.<sup>82</sup>

At this hearing, the court resolves any dispute as to the amount of restitution by a preponderance of the evidence.<sup>83</sup> The defendant bears the burden of proving his or her financial needs and resources.<sup>84</sup> Government counsel represents the victim's interest and bears the burden of providing losses.<sup>85</sup>

Admittedly, the VWPA's provisions offer a judge broad discretion in arriving at an award figure. In *Welden*, this latitude troubled the judge who was faced with an incomplete presentence report<sup>86</sup> and three defendants with limited assets.<sup>87</sup> But a poorly prepared report should not condemn a valid statutory provision. Rather courts should promote effective administration of court procedure by encouraging more complete investigations. That some information may be missed despite a probation officer's best efforts but glaring omissions, like Mr. Hill's death as a victim, should not be condoned.

The court presented a litany of unanswered questions to highlight the provision's latitude and, implicitly, to criticize the vagueness of the provision's deliberately flexible sanction.<sup>88</sup> Answering a few of these questions will show how the VWPA can be constitutionally construed and applied.

*Question. If the court is dealing with more than one defendant should it apportion the restitution amount between the defendants on the basis of their degrees of guilt, or on the basis of their ability to pay, or some other basis or bases?*<sup>89</sup>

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<sup>77</sup> The Federal Probation Act, 18 U.S.C. S 3651 (1982).

<sup>78</sup> *United States v. Baker*, 429 F.2d 1344 (7th Cir. 1977). See *supra* note 65 and accompanying text.

<sup>79</sup> *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)(quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). For a review of hearing procedure, see *Fuentes v. Shevin*, 407 U.S. 67 (1972), *Bell v. Burson*, 402 U.S. 535 (1971), *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

In addressing the Probation Act's broad guidelines, the United States Supreme Court noted, "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

<sup>80</sup> *Fed. R. Crim. P.* 32(a)(1).

<sup>81</sup> *Id.*

<sup>82</sup> *Fed. R. Crim. P.* 32(c)(2)(D).

<sup>83</sup> 18 U.S.C. S 3580(d).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> 568 F. Supp. at 525. The crime in *Welden* involved three victims: Miss Calloway, beaten, abducted and forced to engage in oral sex; Mr. Hill, killed during Miss Calloway's abduction; and Mr. Little, deprived of the car upholstery clipped as evidence of Miss Calloway's bloodstains. *Id.* The victim-impact statement failed to mention either Mr. Hill's or Mr. Little's damages though both were victims under VWPA definition. 18 U.S.C. § 3579.

<sup>87</sup> 568 F. Supp. 525-26. *Welden's* assets totaled \$40,200 with \$17,000 in liabilities. Allison's assets totalled \$13,000 with \$20,000 in debts. Satterfield claimed no assets though his lawyer stated Satterfield had a statutory right-to-redeem worth \$12,000. *Id.*

<sup>88</sup> 568 F. Supp. at 527.

<sup>89</sup> *Id.*

*Answer.* The court must balance the offender's culpability with the degree of victim's injuries and the offender's ability to pay. If the court looked primarily to the offender's ability to pay, then greater emphasis would be placed on the victim's complete financial recovery. Instead, the court should weigh an offender's culpability and ability to pay to arrive at a figure which represents a sacrifice to the offender similar to the victim's degree of injury. A small sum from an impoverished burglar may not repay the victim's total losses, but it will aid the criminal's rehabilitation by bringing the theft to his terms as well as recognizing the victim's loss.

*Question.* Do the Federal Rules of Evidence apply during a restitution hearing? For instance, is "hearsay" admissible?<sup>90</sup>

*Answer.* As the court in *Welden* accurately noted, the Federal Rules of Evidence do not apply at sentencing hearings.<sup>91</sup> Because restitution is a sentencing sanction, the restitution part of the hearing also does not follow the Federal Rules of Evidence. A jury already found the defendant guilty in a trial conducted according to the Federal Rules of Evidence to prevent juror prejudice, bias and misunderstanding. The sentencing judge, acting without evidentiary proscriptions, may weigh the value of all facts and testimony such as the offender's previous criminal record, family background and general character. These factors are irrelevant to determine guilt but they give the judge insight to tailor a sanction both penal and rehabilitative.

The starting point to answer the court's questions must be the constitutional protections for the accused. Sentencing hearing guidelines, albeit broad, provide due process. Instead of returning to a *wergild* statutory payment schedule,<sup>92</sup> judicial discretion promotes equal protection, shaping the restitution award to fit the crime so each offender receives a fair sentence tailored to his or her particular crime. In this respect, equal protection means equal fairness, not identical sentences.

With constitutional protections secured, the next analysis should incorporate the policies behind victim restitution.<sup>93</sup> The strong support for victim compensation emphasizes the policy supporting judicial acknowledgment of victim's needs.<sup>94</sup> This support for victims, however, should be tempered. Despite due process protections, the defendant faces a loss of property based on government counsel's statements and the presentence investigation of victim's losses. Because the award determination imprecisely measures defendant's needs and ability to pay against victim's injuries, and because the victim retains the right to sue for civil damages, the court should err on the side of the offender in awarding restitution.

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<sup>90</sup> *Id.* at 528.

<sup>91</sup> *Id.* at 534.

<sup>92</sup> See *supra* notes 32-36 and accompanying text.

<sup>93</sup> In his treatise, *The Rationale of Punishment*, Bentham observed that no punishment could be tailored more equally than criminal fines because the quantum of fine can be "proportioned to the means which the delinquent has of bearing it. *J. Bentham, The Rationale of Punishment* 254 (1830).

<sup>94</sup> Congress' main consideration appeared to be victim compensation. 128 *Cong. Rec.* S3853-3863 (daily ed. April 22, 1982) Restitution, however, joined other sentencing provisions with all the accompanying sentencing goals of vengeance, deterrence, restraint, compensation (*J. Bentham, supra* note 92 at 4) and rehabilitation. *L. Forer, Criminals and Victims* 298 (1980). Thus, both victim and offender considerations need to be balanced.

In *Welden*, the court found the VWPA's provisions unconstitutionally violated the defendants' fifth amendment rights to equal protection and due process and seventh amendment right to a jury trial for a controversy exceeding \$20 in value.<sup>95</sup> The Eleventh Circuit's decision in *Satterfield*, reversing *Welden*, rejected this view. In comparing restitution through sentencing with restitution through probation, both sanctions meet the Supreme Court's broad requirements for equal protection and due process.<sup>96</sup> Because restitution through sentencing is not a civil damages award, the seventh amendment jury requirement does not apply.<sup>97</sup> Therefore, the VWPA restitution provisions are not constitutionally invalid.

#### *Policies supporting victim restitution sentencing*

Though the VWPA's broad restitution provisions pass constitutional muster, they are nonetheless indefinite guidelines requiring thoughtful judicial application. The statute less clearly defines the manner of assessing the defendant's financial situation and gives the judiciary limited guidance to balance these two figures in arriving at a just award.<sup>98</sup> Reviewing the policies promoting victim restitution may offer insight to answer the questions left open by the broad statutory language.

The VWPA introduces concern for the victim into the sentencing process via restitution. The sanction remains a sentencing alternative, however, and so sentencing policies should receive primary emphasis.<sup>99</sup> The goals of sentencing are several, among them rehabilitation, retribution, deterrence and incapacitation.<sup>100</sup> Restitution through sentencing promotes each of the above goals, furthering society's interest in criminal sentencing while aiding the victim.

Restitution aids offender rehabilitation by giving the offender an opportunity to make amends for his or her crime.<sup>101</sup> To be effective, the assigned restitution should be clearly defined, measurable and achievable.<sup>102</sup> Achievability of restitution ensures the offender will succeed in fulfilling the set goal and enjoy a sense of accomplishment.<sup>103</sup> An achievable restitution figure can be set if the court considers the offender's ability to pay.<sup>104</sup>

Without returning to the vindictive justice of "an eye for an eye,"<sup>105</sup> restitution offers a more complete punitive sanction.<sup>106</sup> Restitution through sentencing redresses society's injury, a broken law, with incarceration, and redresses the victim's injury with financial compensation. Thus, restitution becomes an integrated

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<sup>95</sup> *Id.*

<sup>96</sup> 568 F. Supp. at

<sup>97</sup> See *supra* notes 77-79 and accompanying text.

<sup>98</sup> 18 U.S.C. § 3579.

<sup>99</sup> 18 U.S.C. § 3579(d), "The court shall impose an order of restitution to the extent that such order is as fair as possible to the victim and the imposition of such order will not unduly complicate or prolong the sentencing process." See also Harland, *supra* note 9 at 90 (balancing factors).

<sup>100</sup> *W. LaFare and A. Scott, Handbook on Criminal Law* 21 (1972).

<sup>101</sup> See *supra* notes 17-22 and accompanying text.

<sup>102</sup> Keve, *The Therapeutic Uses of Restitution*, in *Offender Restitution in Theory and Action* 61 (1977). See also Harland, *supra* note 9 at 122-26.

<sup>103</sup> In *Huggett v. State*, 83 Wis.2d 790, 266 N.W.2d 403 (1978), the court criticized a repayment condition which would have taken twenty-seven years to repay, "[C]onditioning probation on the satisfaction of requirements which are beyond probationer's control undermines the probationer's sense of responsibility." *Id.* at 798-99, 266 N.W.2d at 407.

<sup>104</sup> 18 U.S.C. § 3580(a). The VWPA includes defendant's current financial status and future earning ability as well as defendant's dependents' financial status.

<sup>105</sup> *Exodus* 21:24.

<sup>106</sup> See generally Schafer, *The Restitution Concept of Punishment*, in *Considering the Victim passim* (1975).

criminal sanction recognizing both society's and the victim's injuries.

Requiring the offender to reimburse his victim adds a deterrent element to restitution, the discouragement of criminal gain.<sup>107</sup> This deterrent effect would be strongest in property crimes like larceny or embezzlement.<sup>108</sup> In assessing punishment, Bentham noted the "pain of privation occasioned by the loss . . . of money."<sup>109</sup> Because man derives the main source of his pleasures from money,<sup>110</sup> the forfeiture of money through restitution is an additional punishment and a disincentive to commit offenses.

Restitution's deterrent effect increases as judges become more willing to impose this repayment as an additional sanction.<sup>111</sup> This increased likelihood presents another risk for the would-be offender to assess in computing both the odds of punishment and the severity of punishment. If offenders sense judges are more likely to impose hefty restitution awards instead of jail terms, then offenders may seek to mitigate victim injuries.<sup>112</sup> This change in behavior would follow if offenders placed greater value on personal finances than potential prison time.

Restitution does not further the goal of offender incapacitation. But, with the VWPA's adoption, restitution may accompany incapacitation because restitution can now be imposed *with* a prison sentence.<sup>113</sup> Before the VWPA, courts were limited to restitution as a probationary condition which required the offender's release.<sup>114</sup> Allowing restitution through sentencing removes the necessity for courts to choose between imprisonment or victim restitution with probation. After the offender has completed a partial sentence and parole is granted, the restitution award will attach as another parole condition.<sup>115</sup>

While furthering sentencing goals, restitution also benefits the victim, a newly recognized figure in criminal justice. Though the victim retains the option to sue civilly for damages, this remedy may be chimerical given the cost of prosecution and the mental anguish of reliving the crime for a second trial.<sup>116</sup> Thus, allowing restitution through sentencing saves the victim the financial and emotional cost of a civil damage suit. The victim need not hire private counsel for a civil action. Instead, the prosecution represents the victim's interests at the sentencing hearing without charge. Although restitution ordered at sentencing may be less than

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<sup>107</sup> *L. Forer, supra* note 38 at 296.

<sup>108</sup> *Id.*. See also Gandy, *Attitudes Toward the Use of Restitution*, in *Offender Restitution in Theory and Action* 127 (1977)(given restitution's deterrent element, retributionist organizations can favor creative restitution).

<sup>109</sup> *J. Bentham, supra* note 92 at 254.

<sup>110</sup> *Id.* at 255.

<sup>111</sup> Despite a victim's right to sue for civil damages, few victims pursue a civil remedy, though this hesitancy may be changing. *Older Americans Fighting the Fear of Crime* hearing, *supra* note 1 at 158-62. *But see In re Harrel Brooks v. State*, 393 So. 2d 486 (Ala. 1981)(defendant erroneously prohibited from cross-examining victim in criminal trial regarding pending civil suit for damages arising from the same act); *State v. Anonymous*, 36 Conn. Sup. 9 (1980-1)(two cases)(involves request for daily transcripts of criminal trial for use in civil suit).

<sup>112</sup> Assuming offenders at times proceed rationally, a necessary assumption for deterrence theory, then an offender aware of restitution may limit the amount of irreparable damage, i.e. choose theft over vandalism.

<sup>113</sup> 18 U.S.C. § 3579(a)(1), "[I]n addition to or in lieu of any other penalty authorized by law . . ."

<sup>114</sup> 18 U.S.C. § 3651.

<sup>115</sup> 18 U.S.C. § 3579(g).

<sup>116</sup> Some victims are willing to endure the criminal trial and a civil trial to achieve justice. Mrs. Mary Knight, a rape victim, recovered a \$365,000 judgment in 1976 against her two attackers. *Older Americans Fighting the Fear of Crime* hearing, *supra* note 1 at 161. "[T]he purpose of this trial wasn't to collect. The purpose of this trial was that it's high time somebody got off their tail and did something about 'rape' . . ." *Id.* quoting *Washington Post*, Feb. 1, 1976, Section B, at 1, col. 6.



a civil damage award, the victim still receives compensation. For lower income victims ineligible for legal aid, the prosecution's advocacy may be the best alternative.

By providing an alternative forum for reparation, restitution through sentencing can promote judicial efficiency. The VWPA minimizes the judicial cost of the subsequent civil trial, and these suits may be abandoned altogether if victims are satisfied with their restitution awards. In the first instance, the VWPA promotes judicial efficiency by minimizing issue relitigation; the criminal conviction "shall estop the defendant from denying the essential allegations of the offense."<sup>117</sup>

In the second, a crime victim may prefer not to pursue a civil action with a possibly generous judgment,<sup>118</sup> in favor of smaller restitution awards<sup>119</sup> with no additional time or emotional commitment.<sup>120</sup>

### *Financing Victim Compensation: A Treasure Hunt for Victim Compensation*

Even if restitution sentencing meets constitutional requirements and can be fairly administered, the victim may still be left holding the bag, an empty bag. Though the first goal of restitution sentencing should be to include the victim in the criminal process, the second must be to promote meaningful compensation. The first result, victim participation is good; the second, victim reparation, is better.

Financing victim compensation requires money from offenders, the state or federal governments or private insurance. Ideally, the offender should pay the entire cost of making his victim whole. When the offender lacks sufficient funds, private insurance or government compensation programs should be available to supplement the deficit.

### *Problem of the Indigent Offender*

In the ideal restitution sentence, the offender would fully compensate the victim for all injuries. Full repayment by the offender would promote the rehabilitative and penal goals of restitution and would ensure that the victim did not suffer a financial loss due to the crime. Unfortunately, most offenders do not have unlimited resources,<sup>121</sup> so courts must balance the offender's ability to pay against the victim's injuries.<sup>122</sup>

The problem of partial offender restitution arises if the offender has limited funds or if the victim suffered expensive losses. Though many offenders are poor,<sup>123</sup> some are financially able to pay the full restitution amount.<sup>124</sup> Even if the offender has modest resources, restitution remains possible for the majority of

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<sup>117</sup> 18 U.S.C. § 3580(e).

<sup>118</sup> See *supra* note 115.

<sup>119</sup> Restitution awards through sentencing are likely to be smaller given the absence of punitive damages and the balancing requirement of defendant's ability to pay. 18 U.S.C. § 3580(a).

<sup>120</sup> See Kellogg, *Making Criminals Pay*, *Fed. Probation*, Sept. 1982 at 15.

<sup>121</sup> See Lamborn, *Remedies for the Victims of Crime*, 43 *S. Cal. L. Rev.* 22, 37-39 (1970). Using court-appointed counsel as a measure of indigency, Lamborn noted 43% of all persons tried for felonies received court-appointed defense counsel. *Id.* citing L. Silverstein, *Defense of the Poor* 7-8 (1965).

<sup>122</sup> 18 U.S.C. § 3580(a)(VWPA balancing test); see *supra* notes 87-88 and accompanying text.

<sup>123</sup> See *supra* note 120.

<sup>124</sup> *United States v. McMichael*, 699 F.2d 193 (4th Cir. 1983)(defendant convicted of bank embezzlement ordered to pay \$14,119.06 in restitution). In a 1978 survey of the Victim Services Agency Brooklyn restitution program, 59% (360 defendants) completed restitution payments. Zalichin, Schraga and Chytlo, *Restitution in Brooklyn and Bronx Criminal Courts: A Victim-Oriented Approach*, in *Victims, Offenders and Alternative Sanctions* 125 (1980).

minor property crimes such as burglary and purse-snatching.<sup>125</sup> Thus, restitution only presents a problem when the victim's losses exceed the offender's financial resources.

An indigent offender may still pay victim restitution through participation in a prison or probationary work program. Few, if any, prisons administer a job program which could generate earnings for victim compensation.<sup>126</sup> Some restitution analysts have criticized this shortcoming in penal programs noting inmate employment could teach job skills, supplement the costs of incarceration and provide income from which to pay victim restitution.<sup>127</sup> Two states, Minnesota and Georgia, pioneered restitution probation programs enabling offenders to work and either repay their victims directly or indirectly through community service.<sup>128</sup> The preferred result from the victim's point of view would be direct payment, but even the VWPA provides that victims may nominate an alternative beneficiary to receive restitution through services in lieu of money.<sup>129</sup>

Though indigent at sentencing, an offender may receive funds after sentencing.<sup>130</sup> Victims of the "Son of Sam" killer, David Berkowitz, can have their civil damage judgments satisfied from a royalty escrow fund established by the New York legislature.<sup>131</sup> The VWPA also requires the Attorney General to report to Congress regarding laws to ensure a federal felon does not profit from the sale of the story of his crime.<sup>132</sup> Despite the rarity of criminal story royalties, this money should be made available for victim restitution on a regular sentencing basis.<sup>133</sup> In a macabre sense, the victim equally earned the royalty through his death or injuries. Allowing royalty capture gives courts an additional source of restitution funding without tapping private insurance or public governmental resources.

#### *Alternative Sources of Compensation Funding*

A victim faced with partial offender restitution must look to alternative sources of funds to pay his medical bills or replace stolen articles. Two options, private insurance and public victim compensation, provide reimbursement for loss. The debate continues, however, on which funding source should bear the greater burden.<sup>134</sup>

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<sup>125</sup> Thirty-nine percent of the larcenies committed in the United States in 1980 were for under \$50, 33% were for \$50-\$200. *Sourcebook of Criminal Justice Statistics, Dept. of Justice* 376 (1982).

<sup>126</sup> Chesney, Hudson and McLagen, *A New Look at Restitution: Recent Legislation, Programs and Research*, 61 *Judicature* 348, 354 (1978).

<sup>127</sup> *Id.*. Some states authorize restitution from regular prison-labor income. *Ariz. Rev. Stat. Ann.* § 31-254(D)(2)(Supp. 1982-1983); *Fla. Stat. Ann.* §§ 944.49(2)(b), 945.091(5)(a)(West Supp. 1982); *Md. Ann. Code art. 27*, § 645 M(a)(3)(1982).

<sup>128</sup> See Hudson, Galaway and Chesney, *supra* note 18 at 313-14; Read, *supra* note 10.

<sup>129</sup> 18 U.S.C. § 3579(b)(4).

<sup>130</sup> David Berkowitz, the "Son of Sam" killer, illustrates a convicted criminal who received royalty payments for the right to publicize his crime. The State of New York responded with a law, *N.Y. Exec. Law* § 632(a)(Consol. Supp. 1982), to establish a royalties' escrow fund from which his victims' civil damage judgments could be paid. *Older Americans Fighting the Fear of Crime* hearing, *supra* note 1 at 161-62.

<sup>131</sup> *Id.*

<sup>132</sup> VWPA, section 7, 96 Stat. 1257.

<sup>133</sup> In jurisdictions where legislatures have enacted "Son of Sam" royalty laws, judges should include a royalty escrow provision as a standard practice in sentencing. The criminal remains free to exercise his first amendment right to tell his story. He is limited, however, in the ability to enjoy the economic fruits of his crime.

<sup>134</sup> See Wolfgang, *supra* note 26 *passim*, asserting a government responsibility exists to redress crime victims based on the gravity of the harm, not degree of need, because of the government's failure to protect its citizens. *But see* W. Luksetich and M. White, *Crime and Public Policy* 167-76 (1982), noting the free rider problem in state compensation programs and supporting private insurance.

Insurance should be the first alternative to supplement offender's partial restitution because individuals should be encouraged to mitigate their damages before relying on public funds.<sup>135</sup> Also, many people already are insured against theft or physical injury making insurance a common source of victim compensation.<sup>136</sup> By looking to insurance as the first alternative after offender restitution, courts and legislatures could save taxpayer dollars, prevent unjust enrichment through double recoveries and equitably limit victim reimbursement with public funds to the victim's out-of-pocket losses.<sup>137</sup>

Not all victims carry insurance, however, so governments should establish a public victim compensation program to ensure crime victims do not suffer economic harm as a result of their injuries.<sup>138</sup> Theories supporting government accountability for victim restitution range from a failure-to-protect thesis<sup>139</sup> to the general notion of public welfare assistance.<sup>140</sup> Regardless of rationale, placing the state as the final alternative for victim indemnification, after the offender and private insurance, spreads the cost of complete restitution over a broad sector thereby minimizing the individual cost of compensation protection. Having a state compensation program also ensures complete victim restitution. The victim is not left to hope the rapist or thug has reachable assets. Nor is the victim forced to rely solely on his personal insurance.

Though strong philosophical arguments support victim restitution based on harm rather than need,<sup>141</sup> pragmatism requires a look at states' limited financial resources.<sup>142</sup> Given scarce state funding, more victims can be aided if state programs set a minimum level at which expenses will be reimbursed, for example \$100, and require a showing of financial need. The needs test necessarily requires some middle-income victims to absorb the cost of their injuries. But this requirement would free restitution funds for other victims who cannot bear the increased financial hardship of their victimization.<sup>143</sup>

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<sup>135</sup> This idea conflicts with Wolfgang's thesis, *supra* note 26, that government should be the primary reimbursor when offender restitution insufficiently compensates the victim.

<sup>136</sup> See Annot., 20 A.L.R. 4th 63 (1983)(deduction for insurance reimbursement); Lamborn, *supra* note 7 at 32-3.

<sup>137</sup> Annot., 20 A.L.R. 4th *passim* (1983).

<sup>138</sup> Thirty states administer public victim compensation programs funded through a combination of criminal fines, criminal fine surcharges and tax dollars. See Ramker and Meagher, *supra* note 7. See also Note, *State Legislation in Aid of Victims and Witnesses of Crime*, *supra* note 7.

<sup>139</sup> See Wolfgang, *supra* note 26 at 232-34.

<sup>140</sup> See generally W. Luksetich and M. White, *supra* note 133 at 175-76 (characterizing victim compensation as a "merit good").

<sup>141</sup> Wolfgang, *supra* note 26.

<sup>142</sup> For a list of state compensation budgets, see Ramker and Meagher, *supra* note 7 at 69.

<sup>143</sup> In 1980, 506,873 families with incomes less than \$3,000 suffered burglaries. Families with incomes from \$3,000 to \$7,499 suffered 632,224 burglaries. *Sourcebook of Criminal Justice Statistics*, Dept. of Justice 307 (1982).

## CONCLUSION

Victim compensation through sentencing benefits the offender, the victim and the criminal justice system. The offender experiences the rehabilitative effect of personally redressing his crime and recognizes the human costs of his crime. The victim receives recognition of his injury through the criminal process and receives a monetary award to compensate, at least as much as money will allow, for his injuries. In the process of victim compensation, the justice system benefits through more cooperative victim/witnesses and an improved citizens' attitude toward judicial fairness and effectiveness.

Because the offender's payment of victim restitution must be tailored to the individual crime for maximum rehabilitative effectiveness, difficulties arise in fairly administering a flexible restitution policy. Due process and equal protection considerations require a consistent approach to victim restitution as a condition of sentencing, but this approach should emphasize first, sentencing goals of rehabilitation, punishment and deterrence, and second, victim reparation. If the goal of victim restitution, benefitting both offender and victim, remains a guiding star, then variable sentences will be the desired result rather than a tragic miscarriage of justice.

Funding victim compensation becomes a problem when the victim's losses exceeds the offender's ability to pay. This problem can be mitigated through offender work programs in prisons and parole activities. "Son of Sam" royalty legislation also can ensure that future offender windfalls will be subject to capture to compensate victims.

When the offender falls short of full restitution, private insurance should augment victim compensation. As a final resort, public victim compensation funds, financed through criminal fines and tax dollars, should ensure that victims receive complete compensation. This latter alternative, government-sponsored restitution, may be limited to those victims who would experience a financial hardship without compensation.

Restitution remains a viable option for redressing wrongs and punishing the offender. In its modest context of victim compensation through sentencing, restitution goes further to include the victim in the criminal justice process and give aggrieved victims a greater sense of justice and vindication. The value of victim compensation can be measured in increased victim respect for the justice system, transfer payments from offender to victim redressing criminal injuries and the rehabilitative and penal sentencing goals furthered by victim restitution. This value merits the effort to develop fair administrative procedures for victim restitution and to fund victim compensation when the offender's finances fall short.

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