

## Who's Against Victims' Rights? The Nature of the Opposition to Pro-Victim Initiatives in Criminal Justice

Andrew J. Karmen

Follow this and additional works at: <https://scholarship.law.stjohns.edu/jcred>

---

This Symposium is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in Journal of Civil Rights and Economic Development by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact [selbyc@stjohns.edu](mailto:selbyc@stjohns.edu).

# WHO'S AGAINST VICTIMS' RIGHTS? THE NATURE OF THE OPPOSITION TO PRO-VICTIM INITIATIVES IN CRIMINAL JUSTICE

ANDREW J. KARMEN\*

“Victims’ rights!” is the battle-cry of the growing crime victims’ movement. The individuals thrust by a cruel twist of fate into leadership positions in this cause have undergone traumatic ordeals inflicted by offenders which were only worsened by the criminal justice system. The movement’s spokespersons and tireless activists are the distraught parents of missing children; the mothers of sons and daughters killed by drunk drivers; people struggling to come to terms with past physical and sexual abuse; widows of police officers slain in the line of duty; battered wives; women raped by strangers, bosses, or boyfriends; random targets of racially or religiously motivated acts of hate; relatives of bystanders caught in the cross-fire of shootouts; and other survivors of all kinds recovering from vicious attacks on their personhood.

Who could oppose the legitimate demands of people espousing such a just and noble cause as the “empowerment” of innocent victims who suffered physical injuries, psychological harm, or financial losses? Who or what could stand in the way of initiatives to alleviate the plight of crime victims?

The answer is that, in their quest to secure rights they believe they are entitled to, activists and advocacy organizations have encountered considerable opposition, and continue to meet resistance from many quarters. Not much opposition comes from criminals, who are their natural enemies in this conflict, chiefly because offenders are not organized into interest groups. But the victims’ movement’s pursuit of its goals has been thwarted, slowed down, coopted, and derailed by its ostensible partners and allies in government, and also by ideologically-oriented groups concerned

\* Associate Professor of Sociology, John Jay College of Criminal Justice, New York, New York.

with the larger issues of criminal justice policy.

## I. A CAPSULE HISTORY OF THE PROBLEM AND THE MOVEMENT TO SOLVE IT

For most of American history, the legal system did not grant crime victims any rights whatsoever. A victim was simply a complainant who activated the machinery of the criminal justice system by bringing evidence and information about illegal acts to the attention of the authorities. If the police solved the case and made an arrest, the victim then played an additional role as a witness for the prosecution—helping the government to secure a conviction. Since crime was conceptualized as an event that threatened and offended the entire community, and was prosecuted by the state on behalf of an abstraction, (i.e. “the People”), the real flesh-and-blood victim was treated like just another piece of evidence, a mere exhibit to be discarded after the trial.<sup>1</sup> The responsibilities of victims—to report incidents, cooperate fully with the investigation, and ultimately testify as part of the state’s case in court—were clearly spelled out. But the rights that the injured parties deserved within the criminal justice process, as it handled and resolved “their” cases, were not given much consideration at all.<sup>2</sup>

To address these injustices and imbalances, crime victims began to seek each other out. Individuals joined together to form “consciousness-raising” groups, self-help support groups, and organizations to engage in public education, outreach, research and lobbying. Working together in coalitions and meeting periodically in conferences, the activists and advocacy groups emerged as a loosely constituted, highly de-centralized social movement in the early 1970s.<sup>3</sup> Ideologically, socially, and politically, it was unusually diverse. The movement’s leading activists and core groups did not have a clear philosophy. They were not bound together by any unifying set of principles, or a shared vision of a better world. Rank and file supporters were attracted to the cause from all

<sup>1</sup> See THE PRESIDENT’S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT, 11-13 (1982) (describing insensitive treatment of rape victim).

<sup>2</sup> See ROBERT REIFF, THE INVISIBLE VICTIM 111 (1979) (criminal justice system is “offender-oriented” and produces “social injustice for the victim”).

<sup>3</sup> See Eileen McNamara, *Revenging Angels*, BOSTON GLOBE, Feb. 23, 1992, (Magazine), at 12 (describing origins of movement and what motivates individuals involved).

walks of life—from all ages, racial and ethnic groups, and political persuasions. They acknowledged that all they had in common, really, besides being former victims recovering from a criminal incident, was a burning desire to turn their misfortunes into something positive, so that others who found themselves in the same predicament would not have to suffer as much as they had.<sup>4</sup>

Despite their differing priorities and world views, victim activists and advocates were able to work together under the umbrella slogan "victims' rights." Judging from the movement's leaflets, pamphlets, newsletters, position papers, conference proceedings, and published articles, it appears that most participants would agree upon this basic critique:

1) That criminal justice personnel—the police, prosecutors, defense attorneys, judges, probation officers, parole boards, corrections administrators—were systematically overlooking or neglecting the legitimate needs of crime victims until they began their campaign; 2) that there was a prevailing tendency on the part of the public as well as agency officials to unfairly blame victims for facilitating or even provoking crimes; 3) that explicit standards of fair treatment were required to protect the interests of complainants and prosecution witnesses, as well as injured parties whose cases were not solved; 4) that people who suffered injuries and losses inflicted by criminals ought to receive reimbursement from one source or another; and 5) that the best way to make sure that victims could pursue their personal goals and protect their own best interests was by granting them formal rights within the criminal justice system. (This pursuit of "rights" fit in well with the legacy of the late 1960s, with its spirited movements for civil rights, women's rights, soldiers' rights, students' rights, gay rights, prisoners' rights and patients' rights).

Three contemporaneous social movements—two from the political Left and one from the Right—influenced the initial directions and thinking of the fledgling victims' movement. The women's liberation movement challenged the way the male-dominated criminal justice system handled violence against girls and women.

<sup>4</sup> See Brent Smith, *Trends in the Victims' Rights Movement and Implications For Future Research*, 10 VICTIMOLOGY 34, 35-37 (1985) (movement sought to restore "perceived imbalance" in system and reduce trauma to victims); see also Lucy N. Friedman, *The Crime Victim Movement at its First Decade*, PUB. ADMIN. REV., Nov. 1985, at 790, 790-94 (outlining obstacles to victims' rights).

They responded by setting up rape crisis centers and then by establishing shelters for battered women. The civil rights movement questioned the way that white authorities treated minority victims of Klan terrorism, segregationist mobs, and brutal police officers. And the conservative law and order movement attacked the landmark decisions of the Warren Court that extended new rights to "criminals"—suspects, defendants, and prisoners—which put victims at an even greater disadvantage in the adversarial process.<sup>5</sup> These three distinct political movements have been competing, over the past few decades, for support within the ranks of the victims' movement.

## II. THE CRUX OF THE PROBLEM: THE VICTIM'S CONTRADICTIONARY ROLE

The drive for victims' rights has encountered opposition from two distinct sources. Resistance to progress in the field of victims' rights arises out of the inherently contradictory role of victims within the criminal justice system. The contradiction is as follows:

1) On the one hand, victims are allies of the government in the state's effort to suppress lawbreaking through punishment or compulsory treatment.

To the degree that victims are junior partners "on the same side" as the police and the prosecution, reforms intended to empower victims might end up facilitating the government's ability to convict and punish those persons that officials choose to pursue selectively. If it turns out that changes designed to strengthen the position of victims in the criminal justice process actually strengthen the position of law enforcement agencies and the prosecution in the adversarial system, then these proposals will be resisted by civil libertarians. Such enhancements of potentially repressive state power provoke distrust, alarm, and opposition from individuals and groups concerned with constitutional rights, procedural safeguards, and due process guarantees.

2) On the other hand, victims are independent actors in the criminal justice process. In defense of their own best interests, they may advocate courses of action that are rejected by a police officer, the assistant district attorney, the judge, the warden, or

<sup>5</sup> See FRANK CARRINGTON, *THE VICTIMS 187-88* (1975) (discussing the expansion of rights afforded to accused criminals).

the parole board. What victims define as their own best interests in "their cases" often diverges from or directly clashes with the goals of the state.

To the degree that they are "clients" or "consumers" of the criminal justice system's effort to dispense justice, the demands of victims for empowerment might bring them into conflict with their ostensible "allies" in the system. This may include the police (who are supposed to serve and protect them), the prosecutor's office (allegedly *their* law firm, that automatically furnishes an attorney for free), the judiciary (which in theory is neutral but fair, weighing the requests of competing interests), and corrections officials (who see to the punishment of the offenders). Nevertheless, these actors within the justice system must balance the victims' interests against other interests—their own personal advantages, their constitutional obligations, their agency's standing, and their determination of "what's good for society as a whole."

Granting new rights to crime victims necessitates a shake-up in the balance of power within the adversarial system.<sup>6</sup> Since all the political territory has already been staked out, the situation becomes a zero-sum game. A gain by the victims' movement can only be at another's expense. Some demands for a greater role in the criminal justice process pit victims against their natural adversaries, namely the suspects accused of harming them or criminals already convicted. Other demands for input into the process, however, are secured at the expense of those agencies, officials, and professionals who are responsible for law enforcement, prosecution, adjudication, and corrections.<sup>7</sup>

### III. POWER TO DO WHAT?—WHAT VICTIMS MIGHT WANT FROM THE SYSTEM

What do victims want from the criminal justice system—retribution, rehabilitation of the offender, or restitution? Some victims certainly want the system to help them "get even" with those offenders who made them suffer. But retaliation or revenge is only one possible goal.

<sup>6</sup> *But see* Richard Pliskin, *Where Are All the Victims?*, N.J.L.J., Nov. 30, 1992, at 1 (victims' rights amendment did not "unleash the jurisprudential nightmare" predicted).

<sup>7</sup> *See* ANDREW KARMEN, *CRIME VICTIMS: AN INTRODUCTION TO VICTIMOLOGY* 329-40 (2d ed. 1990) (full discussion of how victims are treated within criminal justice system and movement for victims' rights).

Some victims have come to the realization that they do not get much satisfaction—and certainly no material benefits—from the knowledge that a convict has been punished on their behalf. The deprivations endured by an inmate behind bars in no way eliminates the emotional, physical, or financial harm endured by the victim. Victims who reach this conclusion seek to be restored to the condition they were in before the crime occurred. Restitution by the offender becomes essential for their recovery. In this view, only through hard work and sacrifice, perhaps as a condition of probation or parole, can the offender make amends.

In addition, aside from retribution and/or restitution, some victims may press for rehabilitation of the offender. This course of action is especially likely if the victim and the offender had a positive *prior* relationship—as lovers, friends, neighbors, co-workers, or classmates. If the victim and the offender are going to continue to be in contact with each other in the future, it is in the best interest of the victim that the offender be rehabilitated. Victims who are of a less vindictive mind may believe that an offender with a psychological problem, violent temper, drug habit, or a lack of marketable skills, needs help, treatment, and support, rather than punishment.

#### IV. OPPOSITION WHEN VICTIMS CHALLENGE THE PREROGATIVES OF THE CRIME CONTROL ESTABLISHMENT

There are a number of scenarios where victims can have a falling-out with their “allies” in the criminal justice system. One frequent problem arises when the victim wants his case to be pursued but the police or prosecutors seek to drop the charges. Conversely, some victims may want charges to be dropped but the authorities want to press on. In some cases, the victim seeks restitution while the government is more concerned with incarceration. Occasionally the victim seeks the rehabilitation of the offender while the state seeks punishment, but more often the converse is sought.<sup>8</sup>

These potentially divergent goals sow the seeds of conflict between victims and officials. As victims are granted influence within

<sup>8</sup> See N. GARY HOLTEN & LAWSON L. LAMAR, *THE CRIMINAL COURTS: STRUCTURES, PERSONNEL, AND PROCESSES* 219 (1991) (“[s]pouse abuse cases are notorious for being dropped when the victim, usually the wife, declines to testify”).

the criminal justice process they will begin to behave as independent actors. The result is that victim advocacy organizations may find themselves at odds with important figures within the criminal justice establishment when they insist that such "insiders" relinquish control over the outcome of each stage in the proceedings.<sup>9</sup>

#### A. *Area of Conflict: The Victim's Right To Be Informed*

Carved in stone over the entrance to many college libraries is the inspiring message "Knowledge Is Power." The slogan overstates the relationship between information and influence. "In order to wield power, a person must be well informed" is a less catchy but more accurate message. Knowledge is a prerequisite for effective action. If victims are going to be meaningfully empowered within the criminal justice process, officials must undertake the additional effort to tell them all that they need to know.

Until recently, officials never perceived an obligation to inform victims about important developments in "their" cases. Now this is supposed to change, as more and more states and localities enact statutes designed to keep victims informed of the progress of "their" cases as they wind their way through the criminal justice process.<sup>10</sup>

Police departments have been pressured to "read victims their rights," perhaps not in the immediate aftermath of the crime, when they are dazed and bleeding, but shortly thereafter, when they have regained their composure. Victims need to know what they are getting into when they ask that the machinery of criminal justice be set in motion. Victims need to be advised about their potential responsibilities and duties, for example, to attend a line-

<sup>9</sup> See ROBERT ELIAS, *THE POLITICS OF VICTIMIZATION: VICTIMS, VICTIMOLOGY AND HUMAN RIGHTS* 173-80 (1986) (full discussion of conflicting goals and politics of victimology); see also Robert Elias, *Which Victim Movement? The Politics of Victim Policy*, in *VICTIMS OF CRIME: PROBLEMS, POLICIES AND PROGRAMS* 226, 238-46 (Arthur Lurigio et al. eds., 1990) [hereinafter *VICTIMS OF CRIME*] (full evaluation of victim policy, involvement in criminal process and politics of movement); Susan Hillebrand, *Restitution and Victim Rights in the 1980s*, in *VICTIMS OF CRIME*, *supra*, at 188, 190-92 (full discussion of victim restitution); Deborah Kelly, *Victim Participation in the Criminal Justice System*, in *VICTIMS OF CRIME*, *supra*, at 172, 172-84 (describing victims' goals at different levels in justice system).

<sup>10</sup> See COLO. REV. STAT. § 24-4.1-303 (1992) (guidelines for informing victims and witnesses of crimes of their rights); N.J. STAT. § 52:4B-44 (1992) (services available to victims on request); N.D. CENT. CODE § 12.1-34-02 (1991) (details information that state *must* provide victims and witnesses); WYO. STAT. § 1-40-203 (1992) (provides notification and information regarding status of case).



up and identify a suspect; to testify at pre-trial hearings; to take the stand at trial, perhaps one that may be televised; and to be subjected to cross-examination by the defense. Victims need to be made aware of the prospects for government protection from harassment, retaliation, and other forms of intimidation by offenders and their cohorts. They have to be made aware of methods of pursuing recovery of their financial losses through court-ordered restitution by the offender, from claims filed with state compensation programs, from private insurance coverage, and through lawsuits in civil court. Victims also need to be advised of the ways they can influence the outcome of the case, from bail decisions to sentencing and parole decisions.

If cases are solved by arrests (statistically speaking, most are not),<sup>11</sup> victims need to be informed by prosecutors about the legal constraints which restrict *defense* attorneys' investigations into their own (the victim's) backgrounds. Victims need to be instructed by the prosecution regarding the tactics that might be used against them during cross-examination. They have to become familiarized with the services, if any, available through the overworked and underfunded victim-witness assistance units at the D.A.'s office. This assistance may include help with parking and babysitting; intercession with employers and creditors; advance notification of the exact days and hours when they must be present in court; aid in collecting the low witness fees for missed work; referrals to self-help groups; and the speedy return of recovered stolen property held as evidence. Most of all, victims want access to a steady flow of progress reports from the prosecution to keep them posted about major developments in their cases. This could include information regarding the arrest of a suspect; the granting of bail and pre-trial release; the acceptance of a negotiated plea or the scheduling of a trial date; the jury's verdict and the judge's sentence; the conditions of a suspended sentence and the terms of probation; where the convict is to be incarcerated; and timely notification of release, whether due to furlough, parole, or the expiration of the sentence.

<sup>11</sup> See FEDERAL BUREAU OF INVESTIGATION, CRIME IN AMERICA: UNIFORM CRIME REPORT 161 (1990). The FBI compiles annual overall "clearance rates" which are the percentages of crimes resolved by arrest. The nationwide clearance rate for violent crime in 1989 was 46%. *Id.* Specifically, the rate for murder was 68%, for aggravated assault 57%, for forcible rape 52%, and for robbery the rate was 26%. *Id.*

### *B. Area of Conflict: Victim's Right To Influence Key Decisions*

Viewed from a distance, the officials and organizations of the criminal justice system function as a formidable interest group or lobby, a virtual "crime control establishment." On the surface it would appear, at first glance at least, that crime victims and criminal justice officials are "natural allies." Since victims turn to officials for help, serve as complainants, and contribute to the government's case by testifying, one would presume that there exists significant commonality of purpose. A closer examination, however, reveals that each of the component agencies has its own vested interests, and each group of officials and professionals have their own privileges to protect. When victims call for improvements in the way in which they are treated, they question the existing way of doing business—which might be more accurately described as "disposing of cases" rather than as "genuinely dispensing justice." Enacting reforms means directly confronting the practices of police officers and law enforcement agencies; assistant district attorneys and prosecutor's offices; probation officers and departments; judges; corrections officials; and members of parole boards. What victims are really asking for when they demand pledges of fair treatment and explicit guarantees of participatory input are intrusions upon the latitude and discretion (i.e. "the turf") of these criminal justice decisionmakers. It is therefore not surprising that these authorities would resist demands to share power when it comes to agency priorities, budgetary allotments, standards of evaluation for departmental and individual performance, and sheer personal inconvenience. The contested terrain includes such decisions as whether or not to investigate a complaint, to press or drop charges, and to grant or deny bail. Victims want the right to play an active role in negotiating the terms of a guilty plea, in deciding upon an appropriate sentence after a successful trial, and in determining the conditions of release for a prisoner on parole.<sup>12</sup>

<sup>12</sup> See JAMES STARK & HOWARD GOLDSTEIN, *THE RIGHTS OF CRIME VICTIMS* 210-14 (1985) (reviewing rights gained by victims within criminal justice system); see also DAVID AUSTERN, *THE CRIME VICTIM'S HANDBOOK* 17-23 (1987) (outlining and discussing full range of victim problems and limited solutions available).

*C. Area of Conflict: The Victims' Movement v. The Police*

Various constituencies in the victims' movement have demanded better treatment from the first representatives of the criminal justice system they encounter, namely the police.

Parents of missing children, for example, have challenged the professional judgment of department policymakers over the issue of how much time must elapse before an investigation and a full-scale search is begun. Police policy generally allows for hours or even days to pass before action is taken, while distraught parents want immediate action. Advocates for battered women have demanded that the police immediately arrest wife-beaters rather than tell the offender to "take a walk and cool off," or to attend marriage counseling. Battered women have requested the police to diligently enforce orders of protection issued on their behalf by judges. Supporters of victims of racial, religious, or homophobic bigotry have requested local police departments to set up special anti-bias squads to more effectively investigate hate-motivated crimes of vandalism and violence. Advocates for rape victims have demanded that departments establish sex crime investigation units staffed by specially-trained detectives and policewomen. This is demanded to assure victims that they will be questioned with sensitivity and that their complaints will be taken seriously.

By demanding improved service, victimized members of the general public are pressuring police administrators to reorder institutional priorities, reallocate resources, and redeploy officers. Law enforcement decisionmakers find it difficult to openly oppose these calls for greater responsiveness by the people they are sworn to protect and serve. When these decisionmakers resist pro-victim initiatives, they argue that their department doesn't have the manpower or money; or that not enough cases arise to justify such redeployments; or that the demands are impractical or unreasonable in terms of additional workloads.

*D. Area of Conflict: The Victims' Movement v. Prosecutors*

The victims' movement has challenged prosecutors to fulfill their claim that they run "public law firms" that provide free and automatic representation to innocent people harmed by the enemies of society.

Victimized "clients" provoke intense resistance from "their"

lawyers when they insist upon a say in the plea negotiation process. In some jurisdictions, victims are granted the right to be notified about the terms of the deal,<sup>13</sup> and some assistant district attorneys might seek approval of the terms before any formal settlement is announced, especially in highly publicized cases. However, prosecutors have balked at real power-sharing by denying victims the right to be present at the negotiations or to play a direct and active part in the bargaining process.

The reasons for prosecutorial reluctance are obvious. Victims (like offenders) are outsiders, and the courtroom work-group, composed of the prosecutor, defense attorney, and judge, are insiders, who have arrived at certain understandings about what the "going rate" should be in their jurisdiction for a particular type of charge. If the victim insisted on harsher terms or mandatory restitution—or compulsory treatment for the offender—these options would be considered disruptive since they would undermine the work-group's standardization of the disposal of cases. The root of the problem is that the victims' movement takes at face value the description of adjudication as an "adversarial process," whereas in reality, out-of-court settlements are meant to be an administrative routine carried out with assembly-line precision.<sup>14</sup>

#### *E. Area of Conflict: The Victims v. Other Criminal Justice Professionals*

Although judges are supposed to be impartial, they are not immune from the demands of victims. When it comes to setting bail, victims want judges to keep their safety in mind. Victims would like judges to warn defendants on pre-trial release to have no contact with complainants, and that acts of intimidation or threats of retaliation will be grounds for revoking bail.

On the rare occasion where plea negotiations break down and a formal trial before a jury must be staged, victims want a chance to shape the sentence should a conviction result. They do not want to have to rely on the prosecutor to represent their views when the prosecution makes its sentence recommendation. In many

<sup>13</sup> See 1992 La. Acts 383D (2)(a) (victims or family have right to notification of plea bargain and may express their views).

<sup>14</sup> See PAUL E. DOW, *DISCRETIONARY JUSTICE* 195 (1981) (court may pressure prosecution or defense to accept plea offer judge deems reasonable); SAMUEL WALKER, *SENSE AND NON-SENSE ABOUT CRIME* 31 (2d ed. 1989) (focus on courtroom work-group's operations).

states, victims of serious felonies now have a right to allocution, that is, to appear before the judge and recommend an appropriate sentence. If they are not allowed to address the court in person, they are sometimes granted the opportunity to put their opinions in writing, as part of a victim impact statement in the probation department's pre-sentence investigation report.<sup>16</sup> Hard feelings towards unresponsive judges can result if victims perceive, rightly or wrongly, that they are exercising an empty right "to let off steam" that has no discernible impact on the sentence that is handed down.<sup>16</sup> Of course, many other sources of input, besides the victim's notion of justice coupled with the judge's own predilections may influence the sentencing process. Among these influencing factors are: the prosecutor's recommendation; the defense attorney's request; the defendant's prior record; the state legislature's statutory limits; sentencing guidelines; media coverage; the weight of public opinion; and the availability of jail and prison space.<sup>17</sup>

Similarly, when parole boards meet to decide whether to release a convict ahead of schedule, victims want the right to attend the hearing and address members of the board.<sup>18</sup> A victim might argue that parole should not be granted because the inmate has not suffered sufficiently; or that the terms of conditional liberty should include mandatory participation in a treatment program; or that there be some form of restitution. But again, the board may decide on the basis of other priorities rather than what is best for the victim.

The demands of the victims' movement for input—into the way the police investigate, district attorneys prosecute, probation officers make sentence recommendations, judges hand down sentences, and parole boards set conditions for release—are intended to transform the privileges that are sometimes extended to

<sup>16</sup> For articles reviewing legislative changes, see, e.g., Mothers Against Drunk Driving (MADD), *Victims' Rights: How Far Have We Come?*, MADDVOCATE, Spring 1988, at 13; NATIONAL ORGANIZATION FOR VICTIM ASSISTANCE (NOVA), *VICTIMS' RIGHTS AND SERVICES: A LEGISLATIVE DIRECTORY* (1987).

<sup>16</sup> See PETER W. LEWIS & KENNETH D. PEOPLES, *THE SUPREME COURT AND THE CRIMINAL PROCESS* 90 (1978) ("The sentence imposed usually reflects the judge's own commitment to a particular sentencing philosophy; retribution, isolation or deterrence.").

<sup>17</sup> See KARMEN, *supra* note 7, at 198-99 (detailing complexity of pre-sentence litigation).

<sup>18</sup> See, e.g., 1992 Conn. Pub. Acts 92-153(4) (Reg. Sess.) (qualified right to appear before parole board and make statement regarding parole and conditions attached thereto).

a select group of "first class" victims<sup>19</sup> into formal rights that can be routinely exercised by all victims. But these demands for institutionalized participation meet resistance for another reason, less often acknowledged but statistically unavoidable. In "street crime" cases like aggravated assault, robbery, and burglary, many of the victims are drawn from the ranks of the underprivileged—the poor, the young, and oppressed racial minorities. Some victims might even be from *marginalized* groups, such as homeless persons, drug abusers, street gang members, or prostitutes. It seems unlikely that criminal justice personnel will honor commitments to victims' rights and willingly share decisionmaking with members of these groups. It is even more likely that officials will resist attempts by these "street crime" victims to exercise any rights, and they will receive instead second class treatment.<sup>20</sup>

In summary, the demand for empowerment—the ability to influence the course of events within the criminal justice process—inevitably brings the victims' movement into confrontation with existing power bases, hegemonic ideologies, key decisionmakers, and privileged professionals. This quest for fair treatment, respect, legal standing and influence invariably pits victims against existing institutional arrangements, understandings about organizational "turf," and the prerogatives of individual power-brokers.

## V. OPPOSITION TO VICTIMS' RIGHTS BECAUSE EMPOWERMENT MEANS ENHANCING THE REPRESSIVE POTENTIAL OF THE STATE

### A. *The Victims' Movement v. Civil Libertarians*

Civil libertarians believe that the criminal justice system in every society contains within it dangerous authoritarian tendencies. They fear that "it could happen here too!"—that a police state could emerge in the United States as it has in so many other societies. These civil libertarians seek to ensure that the laws of criminal procedure, embodying the separation of powers, checks and balances, and due process guarantees, are scrupulously fol-

<sup>19</sup> See Dow, *supra* note 14, at 97. Authors discussed a survey of the Los Angeles D.A.'s office which found that the "likelihood of prosecution increases 'if the victim has community status or prestige' or if there is public outcry." *Id.*

<sup>20</sup> See KARMEN, *supra* note 7 at 208-10 (noting problems encountered by underprivileged segments of society).

lowed. The struggle to contain the repressive tendencies of government often takes the form of safeguarding the rights of suspects, defendants, and even prisoners. Thus civil libertarians find themselves on the opposite side of the "zero sum" fence whenever victims try to secure additional rights for themselves by whittling down the rights of criminals.<sup>21</sup>

When the victims' movement launched a campaign in the 1980s to reform the Sixth Amendment to the Constitution, some were alarmed that basic civil liberties enshrined in the Bill of Rights could come under attack. Part of the movement sought to add language to the Sixth Amendment to the effect that victims were entitled to certain basic rights. Among these rights were the right to be informed, and the right to be present and heard at all critical stages of the criminal justice process. These rights were to be tailored so as to not conflict with existing constitutional guarantees extended to accused persons. However, others in the movement formulated the proposed constitutional amendment in a more contentious way. They sought to match defendants' rights with victims' rights. Currently, the drive for an amendment to the United States Constitution is being redirected in favor of efforts to codify victims' rights into state constitutions.<sup>22</sup>

Some of the sharpest battles have broken out over proposals to strengthen the hand of the state in the name of the victim. Some proposals include legislation to make it easier for the police to effect an arrest, for a defendant to be kept in jail rather than released on bail, to change the rules of evidence or limit the cross-examination of complainants, or lastly, for the government to keep convicts behind bars by shutting off avenues for appeal and review.

### *B. Supreme Court Decisions Clarifying Victims' Rights*

Some issues that divide the victims' movement from civil libertarians have been addressed by the Supreme Court in recent

<sup>21</sup> See Lynne N. Henderson, *The Wrongs of Victims' Rights*, 37 STAN. L. REV. 937, 937-1021 (1985) (discussing efforts to redress imbalance between crime victims and criminal defendants); see also Emilio Viano, *Victims' Rights and the Constitution: Reflections on a Bicentennial*, 33 CRIME & DELINQ. 438, 443 (1987) (stating that conservative approaches to victims' rights balance rights of accused with safety of community).

<sup>22</sup> See, e.g., Gail D. Cox, *California Passes Justice Reform Act*, NAT'L L.J., June 18, 1990, at 3 (discussing voters' adoption of "get tough" policy to codify victims' rights).

years. The Court's landmark rulings shaping victims' rights are presented here in chronological order.

The first controversy centered on whether the constitutional rights of an accused would be undermined by special procedures accorded to abused children.<sup>23</sup> In most states, youngsters who have suffered sexual assault may be protected from the ordeal of a public cross-examination by the defense attorney.<sup>24</sup> In a five to four decision, the Court held that a law which shields a child during a trial from a face-to-face confrontation with the defendant was constitutional. The child's testimony and the defense attorney's cross-examination in another room could be shown to the jury over closed circuit television if the prosecutor could convince the judge that the witness would be traumatized by having to testify in the defendant's presence.<sup>25</sup> Five of the nine Justices concluded that a face-to-face meeting was an important, but not indispensable, element of the Sixth Amendment's provision that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."<sup>26</sup> The majority believed that the state's interest in the physical and psychological well-being of abused children outweighed the defendant's right to face his accuser.<sup>27</sup> Moreover, the Sixth Amendment was not violated when the defense cross-examined the witness in private, and the judge, jury, and defendant viewed that confrontation on a television screen in the courtroom.<sup>28</sup> The minority declared that the Court was swept up in a pro-victim tide of public opinion which undermined an explicit constitutional guarantee.<sup>29</sup> At the time of the decision, thirty-two states had authorized the use of closed circuit television at the judge's discretion.<sup>30</sup>

<sup>23</sup> See *Maryland v. Craig*, 497 U.S. 836, 850-51 (1990) (Confrontation Clause of Sixth Amendment does not prohibit use of closed circuit television to avoid face-to-face encounter between abused child and defendant).

<sup>24</sup> See generally Linda Greenhouse, *Child Abuse Trials Can Use Television*, N.Y. TIMES, June 28, 1990, at A1 (discussing impact of *Craig*).

<sup>25</sup> See *Craig*, 497 U.S. at 843-44 (trial court must determine if evidence shows child will suffer trauma).

<sup>26</sup> *Id.* at 844-45 (citing U.S. CONST. amend. VI).

<sup>27</sup> *Id.* at 845-46 (discussing Maryland's interest in shielding children from further trauma).

<sup>28</sup> *Id.* at 849.

<sup>29</sup> *Id.* at 857-58 (Scalia, J., dissenting) (stating that majority applied "interest-balancing" analysis when Constitution forbade it).

<sup>30</sup> *Craig*, 497 U.S. at 847-48 (twenty-four states allow use of one-way closed circuit television and eight states allow two-way television).



The victims' movement has also sought to give victims a voice in the sentencing process through the use of "impact statements." These written or oral statements vividly convey to the judge the crime's toll on the victim (or the victim's family), emotionally, physically, and financially. In capital cases, civil libertarians have challenged the introduction of Victim Impact Statements (VIS) because of their potentially prejudicial nature. Minority offenders who kill members of the white majority might be singled out for execution, while those who kill minority victims are likely to receive lesser penalties. In 1987, the Supreme Court ruled that the emotional trauma inflicted on the survivors of a murder victim, and by extension, the victim's "worth," was not an appropriate factor for a jury to consider when weighing the killer's fate—whether imprisonment or execution.<sup>31</sup> The majority reasoned that the introduction of statements concerning the victim's social status during the penalty phase of the trial would undermine the Constitution's guarantee of equal protection.<sup>32</sup> But in 1991, the Court reversed itself and ruled that a victim impact statement could be taken into account when jurors decide the issue of life or death.<sup>33</sup>

Advocacy groups seeking to improve the victim's chance to be reimbursed have sought the passage of so-called "Son of Sam" statutes. These laws ensure that criminals can not "cash in" on their notoriety by selling inside accounts of their crimes to publishers and movie producers. Any money that accused or convicted offenders earned from selling their stories would be seized and placed in a government-run escrow account. The profits would then be available for victims to claim through civil lawsuits. However, a ruling by the Supreme Court in 1991 declared New York's 1977 law, which served as a model in 41 other states, unconstitutional.<sup>34</sup> The Court held that it violated the First Amend-

<sup>31</sup> *Booth v. Maryland*, 482 U.S. 496, 498-99 (1987) (victim impact statement harmful to accused), *overruled by* *Payne v. Tennessee*, 111 S. Ct. 2597 (1991); see Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 81 (1991) (discussing impact statement's violation of Eighth Amendment in *Booth*). See generally Craig E. Gilmore, Note, *Payne v. Tennessee: Rejection of Precedent, Recognition of Victim Impact Worth*, 41 CATH. U. L. REV. 469, 469-73 (1992) (discussing *Booth* and *Payne*).

<sup>32</sup> *Booth*, 482 U.S. at 498-99.

<sup>33</sup> *Payne*, 111 S. Ct. at 2606-07 (jury should possess as much information as possible); see Gilmore, *supra* note 31, at 470-73 (detailed analysis of *Booth* and *Payne* decisions); Michael Kroll, *How Much is a Victim Worth?*, N.Y. TIMES, Apr. 24, 1991, at A25, A26 (same).

<sup>34</sup> *Simon & Schuster, Inc. v. New York State Crime Victims Bd.*, 112 S. Ct. 501, 508-09

ment by unfairly singling out for confiscation earnings from interviews, speeches, and writings. The unanimous decision argued that the state's worthwhile goal of ensuring that criminals could not profit from their crimes, and its compelling interest in transferring the proceeds of crime from criminals to their victims, did not justify placing special burdens on a criminal's speech.<sup>36</sup> The Court indicated, however, that a law which exposed a criminal's assets from any and all sources to lawsuits by victims would not suffer from such a constitutional defect.<sup>36</sup>

Victim advocacy groups have also maintained that acts of racial, religious, or homophobic violence tear at the fabric of our multi-racial/multi-cultural society. They argue, therefore, that perpetrators of hate crimes should be punished more severely than those who commit similar acts of violence or vandalism without such bias. But free speech advocates question whether the offender's hatred of the victim's racial, ethnic, or sexual preference group can be convincingly established in court on the basis of slurs uttered during the heat of the attack. They also question whether hatred is a motive that should be punished more harshly than, say, greed or desperation. A 1992 Supreme Court ruling which overturned a conviction in a cross-burning case cast doubt upon the constitutionality of bias-crime laws across the nation.<sup>37</sup>

In sum, the Supreme Court has ruled in favor of victims' rights in two landmark decisions, permitting the introduction of victim impact statements during the penalty phase of capital cases, and allowing abused children to be shielded from cross-examination in open court. Nevertheless, the Court has ruled against victims' rights in two other instances. By striking down the extra penalties in laws punishing the perpetrators of hate crimes, and by finding

(1991) (law singling out profits derived from criminal's story violative of First Amendment).

<sup>36</sup> *Id.* at 510-11 (emphasizing lack of fairness in placing increased burden on criminals' freedom of speech).

<sup>36</sup> *Id.* at 512-13 (discussing constitutional problem of criminal profits and liabilities); see also Linda Greenhouse, *High Court Upsets Seizing of Profits on Convicts' Books*, N.Y. TIMES, Dec. 11, 1991, at A1, B8 (discussion of *Simon & Schuster*). New York later amended its law to comport with the Court's ruling. See Gary Spencer, *Revised 'Son-of-Sam Law Signed by Governor Cuomo*, N.Y.L.J. Aug. 14, 1992.

<sup>37</sup> See *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2541 (1992) (hate speech aimed at some groups cannot be punished differently than hate speech directed at others); see also Linda Greenhouse, *High Court Voids Law Singling Out Crimes of Hatred*, N.Y. TIMES, June 23, 1992, at A1 (analysis of *R.A.V.*).

defects in laws which facilitated the seizure of an offender's "artistic" profits, the Court limited some important options that had been available to victims.

The constitutional debate will continue as the Supreme Court scrutinizes attempts to expand victims' rights. There are even more controversies raging today around proposals for expanding victims' rights in ways that could infringe further on the rights of suspects, defendants, and convicts. Considering the Court's record in this field, it is futile to predict the outcome of future cases.

#### CONCLUSION: THE FUTURE OF VICTIMS' RIGHTS

The struggle by victims to gain formal rights within the criminal justice system continues on many fronts. And, as the analysis presented above demonstrates, the obstacles that the victims' movement encounters come from many quarters. Resistance from the victims' ostensible allies within the criminal justice system tends to be low profile, and takes the form of foot-dragging, cooptation, and objections on pragmatic grounds. The opposition from those concerned about civil liberties is indirect, since the real concern is not that victims will be empowered but that the government will grow more powerful. These confrontations are waged on the national stage and are likely to be resolved by decisions handed down by the Supreme Court over time.

What if, in the long run, the struggle for formal rights within the system leads to a frustrating stalemate? Suppose that criminologists and victimologists discover through their research and evaluations that the newly-gained rights have little impact, and that business goes on as usual. Two reactions by activists in the victims' movement are possible. The first reaction, both threatening and highly undesirable, could be the abandonment of the campaign for formal rights within the system and a turn towards a subtle endorsement of illegal, vigilante "street justice." The second option, much more promising, could be that a growing number of victims will redirect their attention and energies into exploring the potential of the emerging field of informal justice. Practiced at the neighborhood level, this alternative to formal adjudication relies upon the principles of conflict resolution, using the techniques of mediation to achieve the goals of victim restitution, offender rehabilitation, mutual reconciliation, and community har-

mony.<sup>38</sup> It may well be that, in an era of shrinking resources and continued constitutional limitations, this will be the most productive avenue for the victims' movement to travel down.

<sup>38</sup> See BURT GALAWAY & JOE HUDSON, *CRIMINAL JUSTICE, RESTITUTION AND RECONCILIATION* 45-49 (1990) (exploring alternative dispute resolution in detail); *see also* MARTIN WRIGHT, *JUSTICE FOR VICTIMS AND OFFENDERS* 122-30 (1991) (discussion of mutual benefits from alternative system).

