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FIRST WORLD CONGRESS OF VICTIMOLOGY: VICTIM-WITNESS INTIMIDATION

WILLIAM C. TOOMEY*

In early history the victim of crime was the focal point of criminal assessment and disposition.¹ Indeed, the concept of composition, the payment of a valued commodity to the victim and his kin from the perpetrator and his kin, was widespread in the settlement of criminal disputes.² The Law of Moses, for example, required the criminal to compensate the victim fourfold for stolen sheep and fivefold for the strongest oxen.³ Similarly, a murderer in ancient Greece could atone for his crime by paying a pecuniary "death fine."⁴ With the development of feudal powers in the latter part of the Middle Ages, however, the system of dispute resolution

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¹ See R. MEINERS, VICTIM COMPENSATION 7 (1978); S. SCHAFER, COMPENSATION AND RESTITUTION TO VICTIMS OF CRIME 3-4 (1970); E. ZIEGENHAGEN, VICTIMS, CRIME AND SOCIAL CONTROL 44-52 (1977); Laster, *Criminal Restitution: A Survey of its Past History* in CONSIDERING THE VICTIM: READINGS IN RESTITUTION AND VICTIM COMPENSATION 23-28 (1975).

² E. ZIEGENHAGEN, *supra* note 1, at 44-52 (1977). The blood-feud or blood revenge was a precursor to composition. S. SCHAFER, VICTIMOLOGY: THE VICTIM AND HIS CRIMINAL 7-8 (1977). Like composition, the blood-feud often involved a transfer of goods to the victim and his family from the assailant and his family. *Id.* at 7. Unlike composition, however, the purpose of the blood-feud was not to compensate the victim for his loss, but to restore the "balance of power in the world of primitive societies." *Id.* at 8.

³ S. SCHAFER, *supra* note 1, at 3-4. In ancient Rome, a thief was required to pay double the value of the stolen merchandise to the victim if the thief had not been caught in the act; triple, if the object was found in the course of a house-search, and quadruple, if the thief resisted the house-search or if he had taken the item by robbery. *Id.* at 4; see R. MEINERS, *supra* note 1, at 7.

⁴ S. SCHAFER, *supra* note 1, at 3.

began to ignore the individual victim; compensating the king for the breach of his peace became the dominant concern.⁵ This led to an emphasis on punishing the criminal⁶ and discouraging future criminal behavior.⁷ Crime was now viewed from a societal perspective: compensation for the victim was replaced by a collective desire to seek retribution against the assailant through the machinery of the state.⁸ Although the victim retained a civil action for damages against the perpetrator, he was obligated to bring suit at his own expense.⁹ The result of this historical development is that our criminal justice system has become so inundated with the societal aspects of crime that the victim has become the "forgotten man" in the disposition of criminal justice.¹⁰

When examining the victim and his role in the criminal justice system, it is essential to bear in mind that the victim himself functions within the interactional process of the crime. This concept has received recognition by a number of commentators.¹¹ Clearly, there is an important sociological relationship that operates to precipitate the criminal act.¹² For example, in a study of 588 killings occurring in Philadelphia over a 5-year period, Marvin Wolfgang discovered that approximately twenty-six percent of the homicides were caused by contributing actions of the victim.¹³ While this hardly diminishes the culpability of the actual

⁵ Concern for the victim waned because of greed by the governing authorities. W. TALLACK, REPARATION TO THE INJURED, AND THE RIGHTS OF THE VICTIM OF CRIME TO COMPENSATION 11-12 (1900), quoted in S. SCHAFER, *supra* note 1, at 8; see R. REIFF, THE INVISIBLE VICTIM: THE CRIMINAL JUSTICE SYSTEM'S FORGOTTEN RESPONSIBILITY 134-35 (1979).

⁶ Laster, *supra* note 1, at 23-28.

⁷ *Id.* at 28. St. Thomas More, who was beheaded for his opposition to King Henry VIII in the 16th century, suggested that the wrongdoer be required to work on public works projects and be forced to compensate the victim rather than the king. CONSIDERING THE VICTIM: READINGS IN RESTITUTION AND VICTIM COMPENSATION xx (J. Hudson & B. Gallaway eds. 1975). For an historical background of compensation to the king, see 2 F. POLLACK & F. MATTLAND, THE HISTORY OF ENGLISH LAW 460-62 (2d ed. 1899).

⁸ Wolfgang, *Victim Compensation in Crimes of Personal Violence*, 50 MINN. L. REV. 223, 228-29 (1965).

⁹ R. REIFF, *supra* note 5, at 134.

¹⁰ McDonald, *Criminal Justice and the Victim: An Introduction*, in CRIMINAL JUSTICE AND THE VICTIM 19-20 (W. McDonald ed. 1976).

¹¹ See, e.g., H. VON HENTIG, THE CRIMINAL AND HIS VICTIM 383-89 (1979).

¹² Von Hentig posits that the depressed, the acquisitive, the wanton, the lonesome and the heartbroken make "excellent" victims since they exude attitudes such as apathy, submissiveness, cooperation, and provocation, which operate to precipitate the criminal act. H. VON HENTIG, *supra* note 11, at 419-38. For an analysis of the consequences of victim precipitation, see Gobert, *Victim Precipitation*, 77 COLUM. L. REV. 511, 517-40 (1977).

¹³ See M. WOLFGANG, PATTERNS IN CRIMINAL HOMICIDE 254 (1975). Wolfgang's study involved the years 1948 to 1952. *Id.* at 256. In a similar study conducted in Chicago in 1965, 118 of the 318 homicides (37.9%) were victim-precipitated. Voss & Hepburn, *Patterns in Criminal Homicide in Chicago*, 59 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 499, 506 (1968); see Gobert, *supra* note 12, at 516-17.

criminal, the interaction between the perpetrator and the victim, various elements of opportunity, and the special qualities or particular actions of the victim often provide the blurred perceptions that can lead to tragedy.¹⁴

After recognizing that the victim plays some role in the process of crime, it is necessary to examine why a change in victim treatment is in order. At the root of the present state of victim affairs is the problem of victim-witness intimidation. A 1979 Department of Justice report indicated that only one-half of all rapes are reported.¹⁵ Additionally, large percentages of other crimes, such as robbery and assault, also are unreported.¹⁶ The reasons for this include a belief that nothing can be done, a feeling that the victimization was not sufficiently important, a conception that the police would not want to be bothered, a feeling that the victimization was a private matter, and a fear of reprisal by the criminal defendant.¹⁷

The problem of intimidation is typified in the case of the victim of domestic violence, especially the victims of child abuse. A child almost invariably will be afraid to disclose the abuse.¹⁸ Moreover, in most cases, the non-abusing parent also remains silent.¹⁹ Although all 50 states have enacted statutes that require the reporting of child abuse,²⁰ medical pro-

¹⁴ See H. VON HENTIG, *supra* note 11, at 383-450.

¹⁵ U.S. DEP'T OF JUSTICE, 1979 SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 328 (1980) [hereinafter cited as SOURCEBOOK]. In 1977, 154,237 rapes and attempted rapes were committed with 64,102 (42%) not being reported to the police. *Id.* Embarrassment, shame, fear of newspaper publicity and courtroom procedures, inconvenience, and fear of retaliation by the rapist are but a few of the many reasons for not reporting a rape. See S. KATZ & M. MAZUR, UNDERSTANDING THE RAPE VICTIM: A SYNTHESIS OF RESEARCH FINDINGS 185-86 (1979); *Preface to RAPE VICTIMOLOGY* vii-viii (L. Schultz ed. 1975).

¹⁶ See SOURCEBOOK, *supra* note 15, at 328 (personal robbery—44%; assault—55%; personal larceny without contact—74%; burglary—50%; household larceny—74%; vehicle theft—31%).

¹⁷ *Id.* at 340-41. In a 1968 survey conducted in Seattle, merely 45% of the most serious incidents of victimization were made known to the police. Hawkins, *Who Called the Cops?: Decisions to Report Criminal Victimization*, 7 LAW & SOC'Y REV. 427, 432 (1973). The majority of the victims who did not inform the police of the victimization believed that there was little or no benefit in reporting the offense. *Id.* at 441-42; see Hall, *The Role of the Victim in the Prosecution and Disposition of a Criminal Case*, 28 VAND. L. REV. 931, 934-37 (1975).

¹⁸ See Redeker, *The Right of an Abused Child to Independent Counsel and the Role of the Child Advocate in Child Abuse Cases*, 23 VILL. L. REV. 521, 534-39 (1977-1978).

¹⁹ Note, *Child Maltreatment: An Overview of Current Approaches*, 18 J. FAM. L. 115, 118 (1979-1980); see Besharov, *Behind Closed Doors*, FAM. ADVOC. 3, 3 (Fall 1980). Not surprisingly, studies have shown that most instances of child neglect and child abuse are reported by friends, neighbors, and relatives. *Id.*

²⁰ See Note, *Unequal and Inadequate Protection Under the Law: State Child Abuse Statutes*, 50 GEO. WASH. L. REV. 243, 250 (1982).

professionals are reluctant to report abuse cases because they believe that client or patient trust will deteriorate and that police intervention may ultimately harm the family.²¹ Additionally, while legislation in many states authorizes police to make arrests in domestic-abuses cases,²² the typical response is not to do so.²³

The means to remedy the modern inequity with victim treatment quite readily can be found in the concept of constitutional protectionism. This principle or theory is directed mainly toward those without resources to properly safeguard their own interests.²⁴ The last two decades have witnessed great strides in the enhancement and protection of the constitutional rights of criminal defendants. For example, the fourth amendment right to freedom from unreasonable search and seizure has been interpreted to render inadmissible any illegally seized evidence.²⁵ In *Miranda v. Arizona*,²⁶ the Supreme Court expanded the defendant's right against self incrimination to include a requirement that police fully in-

²¹ *Id.* at 268. In affluent families, child abuse remains largely unreported because the parents acquire anonymity by selecting physicians who protect their privacy. *Id.*; see Comment, *Civil Liability for Failing to Report Child Abuse*, 1977 DET. C.L. REV. 135, 145-66.

²² Lerman, *Protection of Battered Women: A Survey of State Legislation*, 6 WOMEN'S RTS. L. REP. 271, 274 (1980). In 26 states, law enforcement officers have been given the authority to make arrests in domestic abuse cases. *Id.* Nineteen states permit arrest without a warrant where a police officer has probable cause to believe that the abuser has committed a misdemeanor, 13 states allow an officer to arrest without a warrant if there is probable cause to believe that an abuser has violated a protection order, and six states sanction probable cause arrest in both of the aforementioned cases. *Id.*; see *Treat Wife Beating as Crime, Says Study*, N.J.L.J., Dec. 25, 1980, at 15, col. 1.

²³ Customary police responses to calls of conjugal violence include: not responding to the call; siding with the batterer; directing the offender to "take a walk around the block, cool down, get a grip on yourself"; and, in situations where the batterer has left before the police have arrived, refusing to apprehend the persecutor because of lack of time. Paterson, *How the Legal System Responds to Battered Women*, in BATTERED WOMEN 87-88 (D. Moore ed. 1979); see Berk & Loseke, "Handling" Family Violence: Situational Determinants of Police Arrest on Domestic Disturbances, 15 LAW & SOC'Y REV. 317, 318-20 (1980-1981).

²⁴ REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 9 (1963). See generally Birzon, Kasanof & Forma, *The Right to Counsel and the Indigent Accused in Courts of Criminal Jurisdiction in New York State*, 14 BUFFALO L. REV. 428, 431-32 (1965); Pollock, *Equal Justice in Practice*, 45 MINN. L. REV. 737, 739-41 (1961). The Supreme Court itself has observed "[w]hile authorities are not required to relieve the accused of his poverty, they have the obligation not to take advantage of indigence in the administration of justice." *Miranda v. Arizona*, 384 U.S. 436, 472 (1966).

²⁵ *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). In *Mapp*, a group of police officers forcibly entered a woman's home without presenting a search warrant. *Id.* at 644-45. The officers failed to locate the person or the contraband that they were seeking, although they did discover other illegal materials. *Id.* at 645. Nevertheless, the Supreme Court held that the evidence obtained was inadmissible at the trial for the police officers had violated the defendant's fourth amendment right against unreasonable search and seizure. *Id.* at 655.

²⁶ 384 U.S. 436 (1966).

form a suspect of his constitutional rights before interrogation.²⁷ In the same vein, the sixth amendment right to counsel, made applicable to the states,²⁸ has been deemed to attach upon police custody of the criminal defendant,²⁹ and has been extended to all indigent misdemeanor defendants faced with a potential jail sentence for more than 6 months.³⁰ Moreover, the right to counsel has been extended to protect the defendant in a juvenile delinquency proceeding.³¹ Constitutional guarantees also have extended to the parole³² and probation settings.³³ For example, state criminal hearings must afford the criminal defendant an opportunity to confront accusers, provide the defendant with a written record of the proceedings, and enable the appointment of an attorney if the state authority feels that the case warrants it.³⁴ It appears, therefore, that with

²⁷ *Id.* at 444. In *Miranda*, the Supreme Court reviewed four cases in which defendants were interrogated by police. *Id.* at 445. In each case, the interrogation was conducted without the defendant having received "full and effective warning of his [constitutional] rights . . ." *Id.* Observing that such warnings are a constitutional requisite, the Court concluded that the following procedures are required to assure the enjoyment of this protective privilege: the police must inform the defendant of the right to remain silent, of the right to counsel and, in the case of an indigent defendant, of the right to have a lawyer appointed to represent him. *Id.* at 479. The Court emphasized that police interrogation must cease once the accused has indicated a desire not to be interrogated or a wish to consult an attorney. *Id.* at 473-74. Further, the Court stated that the defendant may waive the right to counsel only if the waiver is made voluntarily, "knowingly and intelligently." *Id.* at 479. Thus, in *Miranda*, the defendant's written and signed confession, obtained during custodial interrogation, was held inadmissible because he was not made aware of his constitutional rights. *Id.* at 492.

²⁸ *Gideon v. Wainwright*, 372 U.S. 335, 342-45 (1963). The Supreme Court in *Gideon* held that the sixth amendment right to counsel is obligatory on the states through the fourteenth amendment and requires that an indigent defendant in a criminal prosecution have the right to appointed counsel. *Id.*

²⁹ *See Escobedo v. Illinois*, 378 U.S. 478, 491 (1964). In *Escobedo*, the Court held that refusal to honor the defendant's request to consult with his attorney during a pre-indictment custodial interrogation violated the defendant's sixth amendment right to counsel. *Id.* at 492. The defendant's incriminating statements were thus rendered inadmissible. *Id.*

³⁰ *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972).

³¹ *In re Gault*, 387 U.S. 1, 41 (1967). Delinquency proceedings that may result in committing the defendant to a state institution must meet certain essentials of fairness, including giving the defendant the right to notification of the charges, the right to a written record, the right to counsel, and the right to the constitutional privilege against self-incrimination. *Id.* at 31-58.

³² *Morrissey v. Brewer*, 408 U.S. 471, 472, 488-89 (1972) ("the Due Process Clause of the Fourteenth Amendment requires that a State afford an individual some opportunity to be heard prior to revoking his parole").

³³ *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973). In *Gagnon*, the Supreme Court held that due process requires preliminary and final hearings prior to revocation of probation. *Id.*

³⁴ *See id.* at 790. *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972). In *Wolf v. McDonnell*, 418 U.S. 539 (1974) the Court concluded that although the extension of the "full panoply" of rights due a criminal defendant is not mandated in prison disciplinary proceedings, a prisoner involved in such a proceeding is not "wholly stripped of constitutional protections." *Id.*

respect to the criminal defendant, modern society is quite willing to afford constitutional protection.³⁵

Having proceeded on a constitutional course of extending benefits to the criminally accused, it seems that society can now direct its attention to the victim of crime. While in recent years a number of programs intended to aid victims of crime have been instituted,³⁶ the notion of aid to

at 555-56. Indeed, the Court emphasized that there must be a hearing, an opportunity to defend and review charges, and a written record of the disciplinary action. *Id.* at 563-69.

³⁵ See M. SHAPIRO & R. TRESOLINI, *AMERICAN CONSTITUTIONAL LAW* 616-18 (5th ed. 1979); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 16-38 (1978). For a philosophical discussion of why the continued concern for our constitutional freedoms demands a shift in emphasis from protecting the rights of the accused to protecting those of the victim, see Hook, *The Emerging Rights of the Victims of the Crime*, 46 FLA. B.J. 192 (1972).

³⁶ President Reagan recently expressed his concern for crime victims by establishing the Presidential Task Force on Victims of Crimes. See Proclamation No. 4929, 47 Fed. Reg. 16,313 (1982). Similar concern also has been espoused by a number of commentators. See, e.g., Goldberg, *Preface to Government Compensation for Victims of Violence*, 43 S. CAL. L. REV. 1, 2-3 (1970); Hook, *supra* note 35, at 193-94; Inbau, *Foreword to Carrington, Victims' Rights Litigation: A Wave of the Future?*, 11 U. RICH. L. REV. 447, 448 (1977); Comment, *Rehabilitation of the Victims of Crime: An Overview*, 21 U.C.L.A. L. REV. 317, 317 (1973). This vocalization ostensibly has prompted numerous proposals that are intended to aid crime victims, including state-run victim compensation programs, restitution programs, victim-witness assistance services, and the implementation of a "Bill of Rights" for crime victims. Carrington, *Victims' Rights Litigation: Wave of the Future?*, 11 U. RICH. L. REV. 447, 451 & n.6 (1977); see S. SCHAFER, *supra* note 2, at 107-48; Hoelzel, *A Survey of 27 Victim Compensation Programs*, 63 JUDICATURE 485, 485-503 (1980).

Among the most comprehensive of these proposals is the victim compensation program. This program tends to focus upon the state's compensation of the victim, rather than on the compelling need to have the criminal vindicate the loss. S. SCHAFER, *supra* note 2, at 110. This state-oriented approach seems justified on the ground that such compensation is a state responsibility, akin to public welfare programs. See Hoelzel, *supra*, at 487; Miers, *Victim Compensation as a Labelling Process*, 5 VICTIMOLOGY 3, 3-5 (1980). Nevertheless, due in part to the public's unawareness of the availability of the programs, relatively few compensation claims have been filed. See, e.g., F. CARRINGTON, *THE VICTIMS* 248 (1975); R. REIFF, *supra* note 5, at 153-55; Vaughn & Hofrichter, *Program Visibility in State Victim Compensation Programs*, 5 VICTIMOLOGY 30 (1980). Furthermore, statutory restrictions on eligibility, such as, excluding compensation to victims who merely could prove property damages, refusing compensation to victims who are members of the offender's immediate family, and denying compensation to victims who cannot show financial hardship, also reduce the number of possible claimants. E.g., FLA. STAT. ANN. § 960.13(1)(a), (2) (West Supp. 1982) (property damage exclusion and "actual need" requirement); N.Y. EXEC. LAW § 624(2) (McKinney 1982) (family member exclusion).

In addition, it must be noted that numerous methods for improving the victim's position in the criminal justice system have not been advanced. See, e.g., Covey, *Alternatives to a Compensation Plan for Victims of Physical Violence*, 69 DICK. L. REV. 391, 402-05 (1965) (proposing that American courts should permit joinder of civil and criminal claims arising from the same act); Comment, *supra*, at 348-49 (advocating that benefits provided to criminals and disabled veterans, such as job training and placement, be made available to victims). It is suggested, therefore, that while a trend toward emphasizing the plight of the

these victims has not yet received universal recognition. It is suggested, however, that programs designed to provide assistance to the victim only touch the surface, for maximum vindication of victim needs can occur only after recognition by the criminal justice system.³⁷

The argument that the victim's rights, like those of the criminal defendant, must be accorded constitutional protection is more persuasive when it is realized that the victim has much in common with the criminal defendant. For instance, victims generally confront the same unfamiliar workings of the criminal justice system and related bureaucracies as did criminal defendants before their right to counsel was expanded.³⁸ Furthermore, victims generally come from the same sub-stratum of society as the criminals who prey on them.³⁹ Perhaps most importantly, victims

victim seems to be forming, a comprehensive basis for victim aid still needs to be fashioned. The federal government, which has consistently refused to grant funding toward state compensation programs, see Hoelzel, *supra*, at 493, should take a more active position in promoting victims' rights. Hopefully, President Reagan's proclamation is indicative of a willingness to augment the federal government's role in this critical area.

³⁷ See McDonald, *supra* note 10, at 19. It is submitted that victimologists should take a forceful role in assessing the plight of victims for they gauge the nature and extent of victim dissatisfaction with the criminal justice system more effectively than the legal community. For examples of such victimological studies, see Hindelang & Gottfredson, *The Victims' Decision Not to Invoke the Criminal Justice Process*, in CRIMINAL JUSTICE AND THE VICTIM 57-78 (W. McDonald ed. 1976) (statistical survey determining why victims fail to report crimes); Knudten, Meade, Knudten & Doerner, *The Victim in the Administration of Criminal Justice: Problems and Perceptions*, in CRIMINAL JUSTICE AND THE VICTIM 115-45 (W. McDonald ed. 1976) (statistical survey of victims discerning how victims perceive the criminal justice system); Hagan, *Victims Before the Law: A Study of Victim Involvement in the Criminal Justice System*, 73 J. CRIM. L. & CRIMINOLOGY 317 (1982) (study exploring whether the degree of victim involvement with the criminal justice system influences victim attitudes toward the system); Hall, *supra* note 17, at 931-78 (survey of judges and prosecutors determining the effectiveness of victim attempts to influence criminal proceedings).

³⁸ See M. BARD & D. SANGREY, *THE CRIME VICTIM'S BOOK* 147-51 (1979) (description of how the criminal justice system affects victims and why it treats them in the manner that it does); Lynch, *Improving the Treatment of Victims: Some Guides for Action*, in CRIMINAL JUSTICE AND THE VICTIM 166-67, 172 (W. McDonald ed. 1976) (noting how bureaucracy of the criminal justice system frustrates attempts to satisfy victims' needs). A number of programs have been implemented to provide assistance to the victim in coping with the bureaucratic snarls of the criminal justice system. See R. ROSENBLUM & C. BLEW, *VICTIM/WITNESS ASSISTANCE* 3-5 (1979). Services provided by such programs include: informing the victim of the progress of the case, facilitating the presentation of the victim's opinion on sentencing, providing better parking facilities, and providing child care services to render testifying less inconvenient. See SECTION OF CRIMINAL JUSTICE, AMERICAN BAR ASS'N, *VICTIMS OF CRIME OR VICTIMS OF JUSTICE?* 12-15 (1977).

³⁹ Lamborn, *Toward a Victim Orientation in Criminal Theory*, 22 RUTGERS L. REV. 733, 758 (1968) (factors conducive to crime are also conducive to victimization); Singer, *Homogeneous Victim-Offender Populations: A Review and Some Research Implications*, 72 J. CRIM. L. & CRIMINOLOGY 779, 786 (1981) (violent assault offenders and their victims tend to come from the same segment of society).

tend to be ostracized by members of the criminal justice system⁴⁰ and by society as a whole, albeit to a lesser extent than criminal defendants.⁴¹

The preamble to the Constitution itself highlights the establishment of justice as one of the principal goals to be achieved by our government. Certainly, a victim or witness deprived of the opportunity to assert his legal rights because of intimidation suffers a great loss of his constitutional liberties.⁴² The question remains, therefore, is the victim deriving the full measure of benefits from our constitutional guarantees? One might suggest that the victim is being shortchanged!⁴³ Indeed, it is only through incorporating into the criminal justice system a more victim-oriented approach to law enforcement that the scales of justice will be more equitably balanced between the accused and the victim.

Since we have recognized the need to provide attorneys for indigent defendants, perhaps an "advocacy corps" for victims is an appropriate remedy.⁴⁴ Victim advocate programs are largely conciliatory in nature with the chief goal being a restoration of harmony between the parties.⁴⁵ The term "advocacy," however, usually denotes an attorney fighting for

⁴⁰ See R. REIFF, *supra* note 5, at 100-06.

⁴¹ See M. BARD & D. SANGREY, *supra* note 38, at 76-100 (American attitudes concerning competition, fairness and responsibility result in a need to discount the presence of victims by various psychological defense mechanisms).

⁴² While it is true that neither the Constitution nor the Bill of Rights decrees that crime victims are entitled to counsel, compensation, or a day in court, it has been indicated that "a realistic assessment of the attitudes of the framers of these documents warrants the conclusion that they simply took it for granted that one of the primary functions of government was to protect the innocent from the lawless." Carrington, *supra* note 36, at 450. Other commentators argue that the victim is entitled to counsel and other rights under the Constitution's equal protection guarantee. See, e.g., R. REIFF, *supra* note 5, at 117-18 (reasoning that since offenders are entitled to free legal services, victims should be as well). Indeed, former United States Supreme Court Justice Arthur Goldberg remarked:

Even though I cannot with propriety postulate that the Constitution requires compensation for victims of violence, I can state my opinion that the victim of a crime has, in a fundamental sense, been denied, the "protection" of the laws, and that society should assume some responsibility for making him whole. What the equal protection clause of the Constitution does not command it may still inspire.

Goldberg, *supra* note 36, at 3.

⁴³ Recognizing the inadequacy of its criminal justice system, there have been many recent proposals for a "victim's bill of rights." These bills seek, *inter alia*, to make restitution mandatory, require victims' statements to be judicially considered prior to sentencing, prohibit plea-bargaining for serious felonies except in very limited circumstances, and forbid judges to suppress relevant evidence from criminal proceedings regardless of how it was obtained. Cf. R. REIFF, *supra* note 5, at 114 (proposing a victim's bill of rights that guarantees victims constitutional rights similar to those of defendants).

⁴⁴ See R. REIFF, *supra* note 5, at 72-73; E. ZIEGENHAGEN, *supra* note 1, at 135; McDonald, *supra* note 10, at 32-34.

⁴⁵ McDonald, *supra* note 10, at 32-33.

the interests of his client.⁴⁶ This type of victim's advocate undoubtedly could help effectuate the necessary changes in the criminal justice and welfare systems.⁴⁷

It is undisputed that a crime victim may, if he chooses, retain private counsel at the trial stage, so long as the district attorney consents to the arrangement and supervises the victim's counsel.⁴⁸ Counsel, additionally, should be furnished to represent the victim at plea bargaining sessions.⁴⁹ Furthermore, since the civil law enforcement process, when awarding punitive damages, heeds the moral imperatives of criminal jurisprudence, could not comparable punitive damages be assessed in criminal cases in which the victim witness fears reprisal by the defendant?⁵⁰

Although many members of the liberal establishment broadly resist fundamentalism in religious doctrine, totalitarianism in politics, and monopolistic control of the private enterprise system, these same individuals often insist upon a construction of the Constitution that favors the rights of the criminally accused.⁵¹ It seems that no other democratic nation excludes improperly obtained evidence merely because a police officer misunderstood the law.⁵² Such doctrinaires, by maintaining a rigidly puristic

⁴⁶ *Id.* at 32.

⁴⁷ See R. REIFF, *supra* note 5, at 72.

⁴⁸ See Hall, *supra* note 17, at 976.

⁴⁹ See, e.g., R. REIFF, *supra* note 5, at 187. One commentator has argued that the victim possesses ample means to influence the outcome of criminal proceedings. See Hall, *supra* note 17, at 934-80.

⁵⁰ Punitive or exemplary damages may be awarded in fraud cases where the fraud was committed intentionally and the plaintiff suffered actual damages. See *Paul Revere Life Ins. Co. v. Bass*, 523 F. Supp. 134, 137 (N.D. Cal. 1981); *Simmons Mach. Co. v. M & M Brokerage, Inc.*, 409 So. 2d 743, 756 (Ala. 1981); *Flemmer v. Ming*, 621 P.2d 1038, 1043 (Mont. 1980). As stated by J.A. Sutherland, punitive damages are allowable "whenever a case shows a wanton invasion of the plaintiff's rights or any circumstances of outrage or insult; whenever there has been oppression or vindictiveness on the part of the wrong-doer; whenever there is a wilful, malicious or reckless tort to person or property." 2 J.A. SUTHERLAND, *A TREATISE ON THE LAW OF DAMAGES* § 391 (4th ed. 1916) (footnotes omitted).

⁵¹ Some commentators have taken issue with the liberal tendency to press for an interpretation of the Constitution that favors the rights of the defendants at the expense of those of victims. See, e.g., F. CARRINGTON, *supra* note 36, at 200-32 (examining the many mechanisms founded and used by "super-civil-libertarian groups and individuals" to champion the cause of the defendants' rights); Hook, *supra* note 36, at 194-95 (referring to liberals who refuse to accord importance to crime victims' plight as "ritualistic liberals").

⁵² Professor Wagner has observed, "[i]n Europe, the essential duty of the judge is to find the truth and the whole judicial process is geared in this direction." Wagner, *Crime and the Law: Sociologico-legal Observations*, 20 CATH. LAW. 177, 194 (1974). In Germany, Israel, and English-speaking common-law countries such as Great Britain, Canada, and Australia, evidence may only be excluded from criminal proceedings if it is irrelevant. See Arzi, *Responses to the Growth of Crime in the United States and West Germany: A Comparison of Changes in Criminal Law and Societal Attitudes*, 12 CORNELL INT'L L.J. 43, 55 (1979); Straschnow, *The Exclusionary Rule: Comparison of Israeli and United States Approaches*,

interpretation in favor of the accused, do a serious disservice to the victim or witness of crime as well as to society itself.⁵³

The Constitution should not be used to provide an advantage to an accused without consideration for the victim. Any document so historically and socially significant must embrace all citizens within its umbrella of protection. This is the right of every party involved in a constitutional question and an imperative of fundamental fairness. The victim must have his day in court.

93 *MIL. L. REV.* 57, 68-69 (1981); Zander, *Police Powers in England: Report of the Royal Commission on Criminal Procedure*, 67 *A.B.A. J.* 732, 733 (1981).

⁵³ There seems to be a growing agreement that the present offender-orientation of our criminal justice system must be tempered with an increased consideration for the victim. See, e.g., A. HARLAND, *RESTITUTION TO VICTIMS OF PERSONAL AND HOUSEHOLD CRIMES* 1 (1980); Hall, *supra* note 17, at 982; Hook, *supra* note 35, at 195. A nation dedicated to a certain constitutional conformity needs to expand such conformity to a philosophical consistency by including fully the party of the second part in a criminal justice proceeding. Are not both parties in civil law afforded an equal hearing? Since criminal law evolved from civil settlements, such evolution should be continued in the development of victim compensation.