

# VICTIM/WITNESS LEGISLATION

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CONSIDERATIONS  
FOR POLICYMAKERS



U.S. Department of Justice  
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## VICTIM/WITNESS LEGISLATION: CONSIDERATIONS FOR POLICYMAKERS

Prepared by  
The Victim Witness Assistance Project  
of the  
American Bar Association  
Section of Criminal Justice

BNOL

202-331-2260

SECTION

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This manual was supported by the Law Enforcement Assistance Administration, U.S. Department of Justice Grant 80-CJ-AX-0099. Its contents do not necessarily represent the policy of the funding agency. Moreover, unless specifically indicated otherwise, the opinions and views expressed herein should not be construed to represent the policy of the American Bar Association or its Criminal Justice Section, the sponsor of the Victim Witness Assistance Project which produced this publication.

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## FOREWORD

It is common to talk about crime in terms of "statistics" or "incidents." However, to those individuals who witness it and particularly those who are victimized by it, crime is a very personal experience and often one of lengthy—if not permanent—duration.

Physical and mental disabilities, property loss or damage, and financial difficulties are among the direct results many victims and their families face. Contact with the criminal justice system frequently brings additional trauma. For instance, victims and witnesses may be intimidated by the defendant or have their character defamed in the courtroom. Their required participation at various stages of the criminal proceedings may jeopardize their employment and cause them inconvenience, expense and frustration. For many, the lack of a forum in which to air their own concerns is a cruel irony of a "justice" system which affords defendants ample opportunity to present their side of the issue.

Innocent crime victims and witnesses often fall between the cracks of society's care. Most are ineligible for financial or other assistance provided by various social service agencies. Criminal justice agencies which deal with victims and witnesses on a daily basis more often than not treat them as "pieces of evidence" to benefit the state's case, rather than as individuals with their own needs and desires.

In recognition of the unfairness of a system which works so diligently to protect the rights of defendants but does so little for victims and witnesses, a number of local, state and national groups have been working over the past several years to improve the situation. The ABA Criminal Justice Section has been part of that effort.

Prior to 1976, the Section had led the Association in urging Congress and the states to adopt several specific victim-oriented reforms, including crime victim compensation legislation and revision of the rules of evidence to protect rape victims from unnecessary invasion of privacy. With the establishment of the Victims Committee in 1976, however, the efforts on behalf of victims became a recognized Section priority.

Early on, the Committee developed and successfully promoted several amendments to the ABA's Criminal Justice Standards. As a result, the standards now call for the prosecutor to make every effort to remain

advised of the victim's attitudes before reaching a plea agreement, and for the judicial officer to revoke pretrial release when the defendant has intimidated the victim.

In 1978, the Section spearheaded adoption of an ABA resolution setting forth eight specific recommendations to implement an earlier ABA policy to combat the incidence, causes, and effects of family violence. Among other proposals, the resolution calls for police and prosecutors to provide written reasons for not pursuing domestic violence cases, and for courts to cease treating the relationship between the parties as the primary factor in pretrial release and sentencing decisions.

In 1979, the Committee undertook a major project to determine the nature, extent and possible means of reducing the pervasive problem of victim and witness intimidation. With financial assistance from the Florence V. Burden Foundation and then-ABA President S. Shepherd Tate, the Committee sponsored two days of public hearings in Washington, D.C. Following the hearings, the Committee revised its draft recommendations, taking into account the testimony of approximately eighty organizations and individuals. The entire "package" of recommendations, approved by the ABA in August of 1980, includes a model statute as well as specific proposals for law enforcement, prosecutors, the court, community groups and the bar.

Since their approval, the Committee has been working to implement the recommendations. Interest has been especially high with respect to the model statute; California, Pennsylvania and Rhode Island have enacted legislation based on this, and similar legislation is being considered in a number of other states.

Another major effort was begun in late 1979 when the Law Enforcement Assistance Administration awarded the Criminal Justice Section a grant to undertake a bar activation effort. During its first year, the Victim Witness Assistance Project served as a clearinghouse and information resource for the nation's state and local bars. It also developed some fifty suggested activities and published them in a 110-page manual, *Bar Leadership on Victim Witness Assistance*. By October, 1980—the end of the grant year—at least forty bar associations were involved in victim/witness assistance.

A second LEAA grant has enabled the Victim Witness Assistance Project to continue its bar activation work and in addition to serve as a national clearinghouse on the growing body of statewide legislation pertaining to crime victims and witnesses. Since last October, the

project has provided legislative information to legislators, executive offices, prosecutors and other law enforcement officials, judges, victim/witness assistance providers, bar associations and concerned citizens.

The project's LEAA funding will terminate on October 30th. Both as a culmination of its legislative effort and as a continuation of that effort, the project has developed this publication to provide ongoing guidance to policymakers and those wishing to influence policymakers.

From its establishment in 1976 until this August when I became Chairperson, Judge Eric Younger of Los Angeles led the Victims Committee efforts. Frank Carrington of Virginia Beach, who served with Judge Younger as Vice-Chairperson, is continuing in that capacity.

I wish to take this opportunity to acknowledge the solid foundation which Judge Younger and Mr. Carrington have established for our victim/witness activities. I also wish to assure them and all who are concerned with the plight of crime victims and witnesses that the Victims Committee will continue and build upon this foundation in this Association Year.

E. Michael McCann  
Chairperson  
Criminal Justice Section  
Victims Committee

September, 1981

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## INTRODUCTION

The way crime victims and witnesses in this country are treated is astonishing. Each year, more than 40 million victimizations occur.\* Without the cooperation of the victims and witnesses of these offenses, the criminal justice system cannot function. Nevertheless, with few exceptions, these individuals are generally either ignored by our legal and social institutions or *used* by them as tools to identify and punish offenders. Rarely are their own needs and desires considered.

The past decade or two has evidenced a number of efforts to change this situation. Hundreds of grass roots programs to improve the plight of crime victims and witnesses have sprung up. Women's groups, community organizations, church groups and bar associations have been active in establishing and operating programs. In addition, many prosecutors' offices and a number of police agencies have begun providing services to victims and witnesses.

Legislators, too, have been responding more and more to victim/witness concerns. Their efforts have expanded upon old concepts and developed new ones. They have addressed problems resulting directly from the crime itself and those caused more indirectly, through subsequent contact with the criminal justice system. Most legislatures have addressed the various problems "piecemeal;" however, others have promoted a more comprehensive approach through enacting a victim's "bill of rights" enumerating a list of provisions to ensure victims are treated with dignity, courtesy and sensitivity.

Some of the legislative "solutions" involve major expenditures of state funds; others cost very little. Some have profound implications upon the administration of criminal justice; others function outside the criminal justice system. While all are intended to benefit victims and witnesses, most contain some inherent limitations from the victim/witness perspective.

The legislation falls into four basic categories: (1) reforms which provide financial assistance to victims; (2) reforms which define or

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\**Criminal Victimization in the United States, 1978: A National Crime Survey Report*, U.S. Department of Justice Bureau of Justice Statistics, December, 1980.

recognize rights of victims and witnesses; (3) special protections for certain classes of crime victim; and (4) institutionalizing and funding services for victims and witnesses.

This monograph surveys some of the more recent state victim/witness legislation. Its purpose is not to advocate any specific type of law nor to serve as a comprehensive state-by-state index of existing statutes. Rather it is designed to inform lawmakers and others about legislative developments around the country and to point out some of the advantages and disadvantages of various approaches. Ultimately, of course, its authors hope that the monograph will be useful in promoting enactment of well-considered, practical and fair victim/witness legislation.

## CHAPTER 1

# Reforms Which Provide Financial Assistance

A victim of crime may experience not only physical or psychological injury, but also financial hardship. Money or valuables may be taken, and doctor and hospital expenses incurred. There may be a loss of future income as well. The states have addressed the problem of economic loss in three major ways.

The most significant of these is through crime victim compensation. Over thirty states have set up funds to compensate victims of violent crimes under certain specified circumstances. Under these programs the victim may recover even though the offender has not been apprehended or, if captured and convicted, is without funds.

Restitution programs represent an important source of funds for victims of property crimes, and much legislation has been offered in recent years to encourage their growth. Under these programs, it is the offender, rather than the taxpayer, who reimburses the victim. Restitution may be imposed in addition to incarceration, as a substitute for incarceration, or as a condition of probation.

A third type of legislation is applicable in those relatively few situations in which an offender capitalizes on his crime through generating publicity about it. Revenue resulting from interviews, books, or movie rights is placed in an escrow account. If the victim is successful in obtaining a civil judgment against the offender, the account can be tapped to pay that judgment.

## Victim Compensation Programs\*

### Purpose

This legislation provides financial assistance to victims of violent crimes.

### Background

Of all the legislation to aid crime victims, that which compensates victims of violent crime with state funds has proven most popular. Beginning with California in 1965, thirty-four states have now enacted such legislation. The justification for compensation legislation varies from state to state. Some states, for example, perceive an obligation to compensate those citizens whom the government has promised but failed to protect. Others are responding to the "welfare" idea that the state has a humanitarian duty to crime victims similar to that it has to certain other needy classes of citizens such as the poor and the elderly.

A Uniform Crime Victim Reparations Act, developed by the National Conference of Commissioners on Uniform State Laws, was approved by the American Bar Association in 1974. (See sample provision, p. 7.)

### Major Provisions

Coverage extends to both the victim and the victim's dependents. Both terms are defined broadly. Dependents include the victim's spouse and children, and anybody else who is supported by the victim. The definition of victim usually includes intervenors who attempt to assist the original victim and suffer injury in the process. Some statutes extend coverage to those who attempt to apprehend the perpetrator (e.g., Florida, Indiana). A few allow reimbursement to third parties for reasonable medical and funeral expenses incurred on behalf of the victim (e.g., Illinois, Ohio).

Eligibility for compensation is generally conditioned on the victim's reporting the crime and sometimes on his cooperation in the investigation and prosecution. Another common requirement is a showing of "financial hardship."

\*Several materials have been produced by the National Institute of Justice (NIJ) to help legislators and policymakers interested in crime victim compensation legislation. These are listed at the end of this section and in Appendix 2. To avoid duplication, the information in this publication simply highlights the major issues involved. The reader is referred to the NIJ publications for more detailed discussion.

No statute permits recovery by a claimant who participated in perpetration of the crime. Moreover, many statutes deny recovery to dependents of the victim if they are also dependents of the offender. Such provisions are intended to prevent the offender from profiting either directly or indirectly from the program and to discourage collusion among family members (e.g., passing off accidental injuries as the product of criminal assaults).

The statutes generally provide compensation for otherwise unreimbursed medical expenses and loss of earnings, payments for support of deceased victims' dependents and funeral costs. Virtually none cover property loss.

Beyond these basics, states reflect great variation. If the victimization resulted in a psychological injury, some allow compensation for the services of a psychiatrist (Delaware, Texas). Hawaii and Minnesota go beyond this to include compensation for pain and suffering, totally independent of out-of-pocket expenses for medical treatment of any kind. Florida permits claims for "treatment rendered in accordance with a religious method of healing," and California provides for occupational training. A few states compensate a family which has lost the services of one of its members and has to hire an outsider such as a cook or maintenance person to perform them (North Dakota, Ohio).

Most states impose a ceiling on the amount an individual may recover. Maximum awards are usually limited to \$10,000 or \$15,000, but a few jurisdictions allow claims as high as \$50,000. New York sets no limit if the claim is for medical expenses, though claims for loss of earnings are limited to \$20,000. Most states also set a floor below which requests for compensation are not accepted. Claims below \$100 for out-of-pocket expenses or for less than "two weeks continuous loss of earnings" may fall below this minimum.

The states have adopted three different approaches to administering their victim compensation programs. Some have created a new agency (Connecticut, Pennsylvania), others have incorporated the program within an existing structure (Montana, Wisconsin), and a few have reposed operational responsibility in the courts (Massachusetts, Tennessee).

Although states have adopted different means of financing victim compensation programs, the primary means is through general funds. A number of states, however, have supplemented the state funding by requiring those who plead guilty or are convicted to pay a surcharge to



the compensation program. Colorado funds its entire program through offender assessments.

The amount of the surcharge varies widely from jurisdiction to jurisdiction. Ohio and West Virginia require one found guilty of any crime other than a traffic violation to pay three dollars to the state compensation fund. The court in Missouri is required to enter judgment of \$101 against the convicted offender, \$100 of which is paid to the compensation fund and the remaining dollar is paid to cover administration costs.

New Jersey bases the fine on the nature of the crime committed. A convicted person will be assessed a penalty not less than \$25 and not more than \$10,000. In determining the amount, the court is to consider the severity of the crime and the economic impact a fine would have on the defendant's dependents.

Nevada funds its compensation program, in part, by requiring that half of all money or property an offender receives, based on his notoriety as an offender, be paid into the fund. The legislation further provides that the compensation fund has a lien against the offender's property for the amount due.

#### **Benefits to the Victim**

A significant proportion of crime victims requires medical attention. In the six million crimes of rape, robbery, assault, pocket picking and purse snatching that occurred in 1974, some 10% of the victims required medical attention and 7% required hospital treatment. The victim compensation programs may provide substantial relief to those individuals not covered under any other private or public program. Unlike restitution, recovery is not dependent on whether the perpetrator has been arrested and convicted, and, unlike civil litigation, recovery does not depend on securing a judgment against a solvent defendant.

#### **Limitations from the Victim's Perspective**

The most obvious limitation to existing victim compensation legislation is that it does not cover property loss—even though this is the most common form of victimization. The medical expenses of some badly-injured victims may far exceed the maximum award. For certain potential beneficiaries such as rape and domestic violence victims, the almost universal requirement to report the crime to law enforcement authorities and the less common requirement to cooperate with such authorities may stand as barriers to applying for benefits. The "financial hardship" provisions in most statutes and the "minimum loss" provisions in many discourage or disqualify a great number of victims. The "family exclusion" provisions have also been the subject of considerable con-

cern as they would, for example, prevent recovery by the children of an individual killed by his or her spouse. Failure of some states (e.g. California, Delaware, Illinois, Kansas, Massachusetts, Nevada, New Jersey, Ohio and Washington) to provide for speedy emergency prepayment even in those cases where it is virtually certain that the applicant will win an award is also seen as a limitation by many victims.

In addition to limitations on recovery, some statutes effectively limit the number of applicants by failing to require that potential beneficiaries be notified of the program. Undoubtedly for fiscal reasons, states rarely advertise their programs to any considerable extent unless mandated to do so. This is understandable; in 1978, the first year after New York required its law enforcement agencies to notify victims of the program, applications rose by thirty percent. Nevertheless, several other states including Alaska, California, Oregon, Washington and Wisconsin also require police notification. In some of these as well as in a number of other states, however, complicated and time-consuming application procedures apparently discourage many potential applicants.

#### **Impact on the Criminal Justice System**

The reporting and cooperation requirements may ultimately result in more convictions. Nevertheless, legislation which includes requirements for some segment of the system (e.g., police, prosecutors) to notify the victim about the compensation program might be met with resistance from the criminal justice agency in question.

#### **Recent Trends**

A bill (AB 2756) is pending in the New York legislature, which, if enacted, will remove the prohibition against recovery by family members of the offender. This—and similar legislation which recently failed in Maryland and Indiana—seeks to give the compensation board increased discretion in domestic violence and child abuse cases where circumstances preclude the offender's benefiting from an award to his related victim. (See ABA domestic violence policy, § 8, p. 86.)

Legislation pending in New York (AB 1841) and California (AB 656) would eliminate the criteria that the victim suffer "serious financial hardship" to be eligible for a compensation award.

#### **Relative Cost**

While victim compensation programs are by far more expensive than other legislative efforts to provide direct benefits to victims, it can, of course, be argued that they provide the greatest relief to those requiring it most—victims of violent crime. Costs of programs vary substantially from state to state depending on a number of factors. These include

population, minimum and maximum benefits, eligibility requirements, and program administration. The National Institute of Justice publication *Crime Victims Compensation: Program Model* shows a range in eighteen states of \$44,000 to nearly \$5.5 million.

#### Citations

Alaska Stat. Secs. 18.67.010 to .180 (Sept. 1974)  
 California Govt. Code Ann. Secs. 13959-73  
 Colorado Revised Statutes 1973, Sec. 24-4.1; SB 345 (1981)  
 Connecticut Stat., Secs. 54-201 to 54-215  
 Delaware Code Ann. tit. 1, Sec. 9901-14  
 Florida Stat. Ann., Secs. 960.01 to 960.25  
 Georgia Code Ann. Secs. 47-518 to 47-526  
 Hawaii Rev. Stat. tit. 20, Secs. 351-1 to 351-70  
 Illinois Stat. Ann., tit. 70, Secs. 71-84  
 Indiana Stat. Ann., Ch. 3.6, Secs. 16-7-3.6-1 to 16-7-3.6-19  
 Kansas Stat. Ann., Art. 73, Secs. 74-7301 to 74-7318  
 Kentucky Rev. Stats. Secs. 346.010-346.180  
 Ann. Code of Maryland Art. 26A, Secs. 1-17  
 Massachusetts Gen. Laws Ann., Ch. 25 8A, Secs. 1-17  
 Michigan M.C.L.A. Secs. 18.351-18.368  
 Minnesota Stat. Ann. Secs. 299B.01 to .16 and Minnesota Session Laws 1975, Ch. 246  
 Missouri, Comm. Sub. for HB 541, 319, 429, 478, and 228 (1981)  
 Nebraska Rev. Stat., Art. 18, Secs. 81-1801 to 81-1841  
 Nevada Rev. Stat., Ch. 217  
 New Jersey Stat. Ann. Secs. 52:4B-1 to -21  
 New Mexico Sen. Sub. for SB 138, as amended (1981)  
 New York Exec. Law Ann. Secs. 620-35  
 North Dakota Session Laws 1975, Ch. 587  
 Ohio Rev. Code Secs. 2743.51-.72  
 Oklahoma HB 1118 (1981)  
 Oregon Rev. Stat., Secs. 147.005 to 147.365  
 Pennsylvania, Art. 139, Legislative Session of 1976  
 Rhode Island General Laws Ann., Secs. 12-25-1 to 12-25-12  
 Tennessee House Bill No. 518  
 Virginia Code Secs. 19.2-368.1-.18  
 Washington Rev. Code Ann. Secs. 7.68.010 to .910 (Rescinded 1981)  
 West Virginia Code, Ch. 14 (Comm. Sub. for HB 857, 1981)  
 Wisconsin Ch. 344, Laws of 1975

#### Sample Provision

#### NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS' UNIFORM CRIME VICTIMS REPARATIONS ACT

##### SECTION 1. [Definitions.]

- (a) As used in this Act, the words and phrases in this Section have the meanings indicated.
- (b) "Board" means the Crime Victims Reparations Board created under Section 3.
- (c) "Claimant" means any of the following claiming reparations under this Act: a victim, a dependent of a deceased victim, a third person other than a collateral source, or an authorized person acting on behalf of any of them.
- (d) "Collateral source" means a source of benefits or advantages for economic loss otherwise reparable under this Act which the victim or claimant has received, or which is readily available to him, from:
- (1) the offender;
  - (2) the government of the United States or any agency thereof, a state or any of its political subdivisions, or an instrumentality of two or more states, unless the law providing for the benefits or advantages makes them excess or secondary to benefits under this Act;
  - (3) Social Security, Medicare, and Medicaid;
  - (4) state required temporary non-occupational disability insurance;
  - (5) workmen's compensation;
  - (6) wage continuation programs of any employer;
  - (7) proceeds of a contract of insurance payable to the victim for loss which he sustained because of the criminally injurious conduct; or
  - (8) a contract providing prepaid hospital and other health care services, or benefits for disability.
- (e) "Criminally injurious conduct" means conduct that
- (1) occurs or is attempted in this State,
  - (2) poses a substantial threat of personal injury or death,
- and
- (3) is punishable by fine, imprisonment, or death, or would be so punishable but for the fact that the person engaging in the conduct lacked capacity to commit the crime under the laws of this state. Criminally injurious conduct does not include conduct arising out of the ownership, maintenance, or use of a motor vehicle except when intended to cause personal injury or death.

(f) "Dependent" means a natural person wholly or partially dependent upon the victim for care or support and includes a child of the victim born after his death.

(g) "Economic loss" means economic detriment consisting only of allowable expense, work loss, replacement services loss, and, if injury causes death, dependent's economic loss and dependent's replacement services loss. Noneconomic detriment is not loss. However, economic detriment is loss although caused by pain and suffering or physical impairment.

(1) "Allowable expense" means reasonable charges incurred for reasonably needed products, services, and accommodations, including those for medical care, rehabilitation, rehabilitative occupational training, and other remedial treatment and care. The term includes a total charge not in excess of \$500 for expenses in any way related to funeral, cremation, and burial. It does not include that portion of a charge for a room in a hospital, clinic, convalescent or nursing home, or any other institution engaged in providing nursing care and related services, in excess of a reasonable and customary charge for semi-private accommodations, unless other accommodations are medically required.

(2) "Work loss" means loss of income from work the injured person would have performed if he had not been injured, and expenses reasonably incurred by him in obtaining services in lieu of those he would have performed for income, reduced by any income from substitute work actually performed by him or by income he would have earned in available appropriate substitute work he was capable of performing but unreasonably failed to undertake.

(3) "Replacement services loss" means expenses reasonably incurred in obtaining ordinary and necessary services in lieu of those the injured person would have performed, not for income but for the benefit of himself or his family, if he had not been injured.

(4) "Dependent's economic loss" means loss after decedent's death of contributions of things of economic value to his dependents, not including services they would have received from the decedent if he had not suffered the fatal injury, less expenses of the dependents avoided by reason of decedent's death.

(5) "Dependent's replacement services loss" means loss reasonably incurred by dependents after decedent's death in obtaining ordinary and necessary services in lieu of those the decedent would have performed for their benefit if he had not suffered the fatal injury, less expenses of the dependents avoided by reason of decedent's death and not subtracted in calculating dependent's economic loss.

(h) "Non-economic detriment" means pain, suffering, inconvenience, physical impairment, and other non-pecuniary damage.

(i) "Victim" means a person who suffers personal injury or death as a result of

(1) criminally injurious conduct,

(2) the good faith effort of any person to prevent criminally injurious conduct, or

(3) the good faith effort of any person to apprehend a person suspected of engaging in criminally injurious conduct.

SECTION 2. [Award of Reparations.] The Board shall award reparations for economic loss arising from criminally injurious conduct if satisfied by a preponderance of the evidence that requirements for reparations have been met.

### SECTION 3. [Crime Victims Reparations Board]

(a) A Crime Victims Reparations Board is created [in the executive branch], consisting of three members appointed by the Governor [with the advice and consent of the Senate]. At least one shall be a person admitted to the bar of this State.

(b) The term of office of each member shall be [six] years and until his successor is appointed and qualified, except that of the members first appointed one each shall be appointed to serve for a term of [two], [four], and [six] years. A person appointed to fill a vacancy shall be appointed for the remainder of the unexpired term.

(c) The Governor shall designate a member of the Board who is admitted to the bar of this State to serve as chairman at the pleasure of the Governor.

(d) Members shall [serve full time, receive an annual salary prescribed by the governor within the available appropriation not exceeding [ ] dollars,] [serve part time, and receive [ ] dollars per diem,] and be reimbursed for actual expenditures incurred in performance of their duties in the same manner as State officials generally.

### SECTION 4 [Powers and Duties of the Board.]

(a) In addition to the powers and duties specified elsewhere in this Act, the board has the powers and duties specified in this section.

(b) The duty to establish and maintain a principal office and other necessary offices within this state, appoint employees and agents as necessary, and prescribe their duties and compensation.

(c) The duty to adopt by rule a description of the organization of the board stating the general method and course of operation of the Board.

(d) The duty to adopt rules to implement this Act, including rules for the allowance of attorney's fees for representation of claimants; and to adopt rules providing for discovery proceedings, including medical examination consistent with Section 9 and 10.

Rules shall be statements of general applicability which implement, interpret, or prescribe policy, or describe the procedure or practice requirements of the Board.

(e) The duty to prescribe forms for applications for reparations.

(f) The duty to hear and determine all matters relating to claims for reparations, and the power to reinvestigate or reopen claims without regard to statutes of limitation or periods of prescription.

(g) The power to request from prosecuting attorneys and law enforcement officers investigations and data to enable the Board to determine whether and the extent to which a claimant qualifies for reparations. A statute providing confidentiality for a claimant's or victim's juvenile court records does not apply to proceedings under this Act.

(h) The duty, if it would contribute to the function of the Board, to subpoena witnesses and other prospective evidence, administer oaths or affirmations, conduct hearings, and receive relevant, nonprivileged evidence.

(i) The power to take notice of judicially cognizable facts and general, technical, and scientific facts within their specialized knowledge.

(j) The duty to make available for public inspection all Board decisions and opinions, rules, written statements of policy, and interpretations formulated, adopted, or used by the Board in discharging its functions.

(k) The duty to publicize widely the availability of reparations and information regarding the filing of claims therefor.

#### SECTION 5. [Application for Reparations; Awards; Limitations on Awards.]

(a) An applicant for an award of reparations shall apply in writing in a form that conforms substantially to that prescribed by the Board.

(b) Reparations may not be awarded unless the claim is filed with the Board within one year after the injury or death upon which the claim is based.

(c) Reparations may not be awarded to a claimant who is the offender or an accomplice of the offender, nor to any claimant if the award would unjustly benefit the offender or accomplice. [Unless the Board determines that the interests of justice otherwise require in a particular case, reparations may not be awarded to the spouse of, or a person living in the same household with, the offender or his accomplice or to the parent, child, brother, or sister of the offender or his accomplice.]

(d) Reparations may not be awarded unless the criminally injurious conduct resulting in injury or death was reported to a law enforcement officer within 72 hours after its occurrence or the

Board finds there was good cause for the failure to report within that time.

(e) The Board, upon finding that the claimant or victim has not fully cooperated with appropriate law enforcement agencies, may deny, reconsider, or reduce an award of reparations.

(f) Reparations otherwise payable to a claimant shall be reduced or denied

(1) to the extent the economic loss upon which the claim is based is recouped from other persons, including collateral sources, and

(2) to the extent the Board deems reasonable because of the contributory misconduct of the claimant or of a victim through whom he claims.

(g) (1) Reparations may be awarded only if the Board finds that unless the claimant is awarded reparations he will suffer financial stress as the result of economic loss otherwise repairable. A claimant suffers financial stress only if he cannot maintain his customary level of health, safety, and education for himself and his dependents without undue financial hardship. In making its finding the Board shall consider all relevant factors, including:

(i) the number of claimant's dependents;

(ii) the usual living expenses of the claimant and his family;

(iii) the special needs of the claimant and his dependents;

(iv) the claimant's income and potential earning capacity; and

(v) the claimant's resources.

(2) Reparations may not be awarded if the claimant's economic loss does not exceed ten per cent of his net financial resources. A claimant's net financial resources do not include the present value of future earnings and shall be determined by the Board by deducting from his total financial resources:

(i) one year's earnings;

(ii) the claimant's equity, up to \$30,000, in his home,

(iii) one motor vehicle; and

(iv) any other property exempt from execution under [the general personal property exemptions statute of this state].

(3) Notwithstanding paragraph (2):

(i) the board may award reparations to a claimant who possesses net financial resources in excess of those allowable under paragraph (2) if, considering the claimant's age, life expectancy, physical or mental condition, and expectancy of income including future earning power, it finds that the claimant's financial resources will become exhausted during his lifetime; or

(ii) the Board may (A) reject the claim finally, or (B) reject the claim and reserve to the claimant the right to reopen his claim, if it appears that the exhaustion of claimant's financial resources is probable, in which event the Board may reopen pursuant to an application to reopen if it finds that the resources available to the claimant from the time of denial of an award were prudently expended for personal or family needs.]

[(h)] Reparations may not be awarded if the economic loss is less than [\$100.].

[(i)] [ALTERNATIVE A: Reparations for work loss, replacement services loss, dependent's economic loss, and dependent's replacement services loss may not exceed \$200 per week.]

[ALTERNATIVE B: Reparations for work loss, replacement services loss, dependent's economic loss, and dependent's replacement services loss may not exceed the amount by which the victim's income is reduced below \$200 per week.]

[(j)] Reparations payable to a victim and to all other claimants sustaining economic loss because of injury to or death of that victim may not exceed [\$50,000] in the aggregate.

#### SECTION 6. [Notice to Attorney General; Function of Attorney General.]

Promptly upon receipt of an application for reparations, the Board shall forward a copy of the application and all supporting papers to the [Attorney General], who in appropriate cases may investigate the claim, appear in hearings on the claim, and present evidence in opposition to or support of an award.

#### SECTION 7. [Informal Disposition; Contested Case.]

Unless precluded by law, informal disposition may be made of a claim by stipulation, agreed settlement, consent order, or default. A claim not so disposed of is a contested case.

#### SECTION 8. [Contested Cases; Notice; Hearing; Records]

(a) In a contested case, all parties shall be afforded an opportunity for hearing after reasonable notice.

(b) The notice of hearing shall include:

(1) a statement of the time, place, and nature of the hearing;

(2) a statement of the legal authority and jurisdiction under which the hearing is to be held;

(3) a reference to the particular sections of the statutes and rules involved; and

(4) a short and plain statement of the matters asserted. To the extent that the board is unable to state the matters at the time the notice is served, the initial notice may be limited to a

statement of the issues involved. Thereafter upon application a more definite statement shall be furnished.

(c) Every interested person shall be afforded an opportunity to appear and be heard and to offer evidence and argument on any issue relevant to his interest, and examine witnesses and offer evidence in reply to any matter of an evidentiary nature in the record relevant to his interest.

(d) A record of the proceedings shall be made and shall include:

(1) the application and supporting documents;

(2) all pleadings, motions, and intermediate rulings;

(3) evidence offered, received, or considered;

(4) a statement of matters officially noticed;

(5) all staff memoranda or data submitted to the Board in connection with its consideration of the case; and

(6) offers of proof, objections, and rulings.

(e) Oral proceedings or any part thereof shall be transcribed on request of any party, who shall pay transcription costs unless otherwise ordered by the Board.

(f) Determinations of the board shall be made in writing, supported by findings of fact and conclusions of law based exclusively on the record, and mailed promptly to all parties.

#### SECTION 9. [Evidence of Physical Condition.]

(a) There is no privilege, except privileges arising from the attorney-client relationship, as to communications or records relevant to an issue of the physical, mental, or emotional condition of the claimant or victim in a proceeding under this Act in which that condition is an element.

(b) If the mental, physical, or emotional condition of a victim or claimant is material to a claim, the Board may order the victim or claimant to submit to a mental or physical examination by a physician or psychologist, and may order an autopsy of a deceased victim. The order may be made for good cause shown upon notice to the person to be examined and to all persons who have appeared. The order shall specify the time, place, manner, conditions, and scope of the examination or autopsy and the person by whom it is to be made; and the order shall require the person to file with the Board a detailed written report of the examination or autopsy. The report shall set out his findings, including results of all tests made, diagnoses, prognoses, other conclusions, and reports of earlier examinations of the same conditions.

(c) On request of the person examined, the Board shall furnish him a copy of the report. If the victim is deceased, the Board, on request, shall furnish the claimant a copy of the report.

(d) The Board may require the claimant to supplement the application with any reasonably available medical or psychological reports relating to the injury for which reparations are claimed.



SECTION 10. [Enforcement of Board's Orders.] If a person refuses to comply with an order under this Act or asserts a privilege, except privileges arising from the attorney-client relationship, to withhold or suppress evidence relevant to a claim, the Board may make any just order including denial of the claim, but may not find the person in contempt. If necessary to carry out any of its powers and duties, the Board may petition the [ ] Court for an appropriate order, but the Court may not find a person in contempt for refusal to submit to a medical or physical examination.

SECTION 11. [Award and Payment of Reparations.]

(a) An award may be made whether or not any person is prosecuted or convicted. Proof of conviction of a person whose acts give rise to a claim is conclusive evidence that the crime was committed, unless an application for rehearing, an appeal of the conviction, or certiorari is pending, or a rehearing or new trial has been ordered.

(b) The Board may suspend the proceedings pending disposition of a criminal prosecution that has been commenced or is imminent, but may make a tentative award under Section 15.

SECTION 12. [Attorney's Fees.] As part of an order, the Board shall determine and award reasonable attorney's fees, commensurate with services rendered, to be paid by the State to the attorney representing the claimant. Additional attorney's fees may be awarded by a court in the event of review. Attorney's fees may be denied on a finding that the claim or appeal is frivolous. Awards of attorney's fees shall be in addition to awards of reparations and may be made whether or not reparations are awarded. It is unlawful for an attorney to contract for or receive any larger sum than the amount allowed.

SECTION 13. [Subrogation; Actions; Allocation of Expenses.]

(a) If reparations are awarded, the State is subrogated to all the claimant's rights to receive or recover benefits or advantages, for economic loss for which and to the extent only that reparations are awarded, from a source which is or, if readily available to the victim or claimant would be, a collateral source.

(b) As a prerequisite to bringing an action to recover damages related to criminally injurious conduct for which reparations are claimed or awarded, the claimant shall give the Board prior written notice of the proposed action. After receiving the notice, the Board shall promptly

- (1) join in the action as a party plaintiff to recover reparations awarded,
- (2) require the claimant to bring the action in his individual name, as a trustee in behalf of the State, to recover reparations awarded, or
- (3) reserve its rights and do neither in the proposed action.

If as requested by the Board, the claimant brings the action as trustee and recovers reparations awarded by the Board, he may deduct from the reparations recovered in behalf of the State the reasonable expenses, including attorney's fees, allocable by the court for that recovery.

(c) If a judgment or verdict indicates separately economic loss and non-economic detriment, payments on the judgment shall be allocated between them in proportion to the amounts indicated. In an action in a court of this State arising out of criminally injurious conduct, the judge, on timely motion, shall direct the jury to return a special verdict, indicating separately the awards to non-economic detriment, punitive damages, and economic loss.

SECTION 14. [Manner of Payment; Non-assignability and Exemptions.]

(a) The Board may provide for the payment of an award in a lump sum or in installments. The part of an award equal to the amount of economic loss accrued to the date of the award shall be paid in a lump sum. An award allowable expense that would accrue after the award is made may not be paid in a lump sum. Except as provided in Subsection (b), the part of an award that may not be paid in a lump sum shall be paid in installments.

(b) At the instance of the claimant, the Board may commute future economic loss, other than allowable expense, to a lump sum but only upon a finding by the Board that:

- (1) the award in a lump sum will promote the interests of the claimant; or
- (2) the present value of all future economic loss, other than allowable expense, does not exceed [\$1000].

(c) An award for future economic loss payable in installments may be made only for a period as to which the Board can reasonably determine future economic loss. The Board may reconsider and modify an award for future economic loss payable in installments, upon its finding that a material and substantial change of circumstances has occurred.

(d) An award is not subject to execution, attachment, garnishment, or other process, except that an award for allowable expense is not exempt from a claim of a creditor to the extent that he provided products, services, or accommodations the costs of which are included in the award.

(e) An assignment or agreement to assign a right to reparations for loss accruing in the future is unenforceable, except

- (1) an assignment of a right to reparations for work loss to secure payment of alimony, maintenance, or child support; or
- (2) an assignment of a right to reparations for allowable expense to the extent that the benefits are for the cost of products, services, or accommodations necessitated by the injury or death

on which the claim is based and are provided or to be provided by the assignee.

SECTION 15. [Tentative Awards.] If the Board determines that the claimant will suffer financial hardship unless a tentative award is made, and it appears likely that a final award will be made, an amount may be paid to the claimant, to be deducted from the final award or repaid by and recoverable from the claimant to the extent that it exceeds the final award.

SECTION 16. [Reconsideration and Review of Board Decisions.]

(a) The Board, on its own motion or on request of the claimant, may reconsider a decision making or denying an award or determining its amount. The Board shall reconsider at least annually every award being paid in installments. An order on reconsideration of an award shall not require refund of amounts previously paid unless the award was obtained by fraud.

(b) The right of reconsideration does not affect the finality of a Board decision for the purpose of judicial review.

(c) A final decision of the Board is subject to judicial review on appeal by the claimant, the attorney general, or the offender [in the same manner and to the same extent as the decision of a state trial court of general jurisdiction].

SECTION 17. [Reports.] The Board shall prepare and transmit [annually] to the Governor and the Legislature a report of its activities, including the name of the claimant, a brief description of the facts, and the amount of reparations awarded in each case, and a statistical summary of claims and awards made and denied.

SECTION 18. [Uniformity of Application and Construction.] This Act shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this Act among those states enacting it.

SECTION 19. [Severability.] If any provision of this Act or the application thereof to any person is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 20. [Title.] This Act may be cited as the Uniform Crime Victims Reparations Act.

**Bibliography** (See Appendix 2 for order information)  
*Crime Victim Compensation: Policy Briefs.* Deborah M. Carrow, Abt Associates, Inc. 1980.

*Crime Victim Compensation: Program Models.* Deborah M. Carrow, Abt Associates, Inc. 1980.

## Restitution

### Purpose

This legislation confers explicit authority on the judiciary to impose restitution as an alternative or supplement to incarceration, or as a condition of probation.

### Background

Restitution in the criminal justice system refers to a method of direct reparation from an offender to a victim for injury or loss caused by criminal offense. It is a sanction imposed by the court. Judicial authority to order a defendant to make restitution to his victim is of long standing in nearly all jurisdictions. It is thought to be inherent in the sentencing power of criminal court judges, though in many states it is explicitly authorized by statute. Until recently, however, restitution was rarely employed as a sanction. The country is now witnessing what appears to be a dramatic upsurge in its utilization. The potential for rehabilitating as well as punishing the offender is appealing; it appears to offer an efficacious way to convey the law's ethical lessons.

### Major Provisions

Legislative proposals for court-ordered restitution vary principally in the degree to which they seek to guide judicial decisionmaking. Many statutes simply provide the trial judge with authority to impose restitution; he may employ it or not as he sees fit (New Jersey, South Carolina, New York). Others go further. In Wisconsin, the judge is required to "consider" restitution whenever he grants probation, and when he declines to order it he must state his reasons. Arkansas purports to make its imposition mandatory.

A bill introduced in California would require the court to order restitution if the defendant has the means to pay. A Kansas law requires restitution unless the judge finds a "compelling reason" not to order it.

In New Jersey and Pennsylvania, the parents of a juvenile offender are liable to make restitution up to \$300. In Maryland, following "a reasonable opportunity to be heard," they may be liable up to \$5,000.

### Benefits to the Victim

In theory, conventional civil actions against offenders are available to victims; in practice, however, such actions rarely provide a realistic means of obtaining financial relief. Restitution allows the victim to recover at least part of his monetary loss. In the sixteen states which do not have victim compensation programs, court-ordered restitution may be the only realistic access a victim has to any sort of financial

assistance. Even in the thirty-four other states which do have violent crime compensation programs, restitution is generally the only way a victim can recover for property loss or damage.

Where the victim and offender were friends or neighbors before the offense, restitution may offer a means of healing a rift between individuals who will continue to work or live together. This is especially the case if the victim is allowed to ventilate his feelings and influence the design of a restitution plan (either through contacts with criminal justice officials or through negotiations with the offender).

#### Limitations from the Victim's Perspective

Restitution can be imposed only in those relatively few cases where a perpetrator has been apprehended and convicted. Even in those cases, many offenders do not have the means to compensate their victims. In fact, it has been suggested that increased burdens of restitution may be the impetus for further crimes by the offender. Where court systems lack the administrative capacity for follow-up, restitution orders are commonly ignored by offenders.

#### Impact on the Criminal Justice System

Restitution is likely to be employed by the judiciary with increasing frequency. It has many advantages. When used as an alternative to incarceration, it imposes a penalty on the defendant and confers a benefit on the victim without the use of taxpayer funds and without further straining overcrowded jails. It affords a rehabilitating experience for the offender—it gives him a chance to right his wrong—yet it is a punishment.

From a practical perspective, restitution is often a viable alternative. Most victimizations involve losses small enough for the offender to repay. Of the more than two million cash thefts in the United States during 1974, 78% amounted to less than \$50 and in 95% the amount was less than \$1,000. There were 30.5 million cases in 1974 involving some property loss or damage. In only 6% of these did the loss or damage total more than \$499, and in only 3% did it exceed \$999. A recent report, *Restitution of Victims of Personal and Household Crimes*, released by the U.S. Bureau of Justice Statistics, concludes that "relatively few victimizations are so costly even in terms of gross losses, as to negate the possibility of a restitutive disposition." Increased availability of restitution will allow state-funded compensation programs to concentrate on those cases where the perpetrator of the crime has not been identified or is without means.

It is also speculated that the existence of restitution will increase crime reporting and the victim's willingness to testify.

#### Relative Cost

The administration of a restitution program involves additional expense to already beleaguered court systems. Some jurisdictions will not be able to finance such programs without additional financial support. Wisconsin has resolved this problem by assessing a surcharge equal to 10% of the amount collected from the offender to support administration of the program. Maryland allows an additional fee not to exceed 2% of the amount of the restitution ordered.

#### Sample Citations\*

Arkansas SB 454 (1981)  
California Penal Code Sec. 1203  
Colorado SB 194 (1981)  
Delaware SB 291 (1981)  
Idaho Ch. 22, sec. 19-2601  
Illinois Criminal Law and Procedure 38 sec., 1005-6-3  
Kansas SB 406 (1981)  
Maryland HB 424 (1981) SB 376 (1981)  
Montana ch. 560, HB 301  
Nevada AB 18 (1981) SB 29 (1981)  
New Hampshire HB 680 (1981)  
New Jersey Code of Criminal Justice 2C: 43-1  
New York A.4527-A Chap. 290  
Oklahoma HB No. 1136 (1981)  
Oregon HB 2711 (1981)  
Rhode Island 80—H 7629 (1980)  
South Carolina R 404, H 3217 (1980); R 509, S 374 (1980);  
R 501, H 3642 (1980)  
Wisconsin Laws of 1979, Ch. 238, sec. 973.09(1)  
Wyoming Statutes W.S. 7-13-307 through 7-13-315

#### Sample Provisions

##### WISCONSIN

973.09(1) If a person is convicted of a crime, the court, by order, may withhold sentence or impose sentence and stay its execution, and in either case place the person on probation to the department for a stated period, stating in the order the reasons therefor, and may impose any conditions which appear to be reasonable and appropriate. If the court places the person on probation, the court shall require restitution designed to compensate the victim's pecuniary loss resulting from the crime to the extent possible, unless the court finds there is substantial reason not to order

\* All Sample Citations have been enacted unless otherwise noted.



restitution as a condition of probation. If the court does not require restitution to be paid to a victim, the court shall state its reason on the record. A court may require that restitution be paid to an insurer or surety which has paid any claims or benefits to or on behalf of the victim. If the court does require restitution, it shall specify the amount consistent with sub. (lm) and shall notify the department of justice of its decision if the victim may be eligible for compensation under ch. 949. If the court does require restitution, it shall require the probationer to pay a surcharge equal to 10% of the amount of restitution to the clerk of circuit court or the department of health and social services, as applicable under sub. (lm), for administrative expenses under this section. The period of probation may be made consecutive to a sentence on a different charge, whether imposed at the same time or previously.

#### KANSAS

Whenever the Kansas adult authority orders the parole of an inmate, the authority, unless it finds compelling circumstances which would render a plan of reparation or restitution unworkable, shall order as a condition of parole that the parolee make reparation or restitution to the aggrieved party for the damage or loss caused by the parolee's crime, in an amount and manner specified in the journal entry of the court that sentenced the inmate or, if not specified in the journal entry, in an amount and manner determined by the adult authority.

**Bibliography** (See Appendix 2 for order information)  
*The Practice of Restitution: A Victim Perspective.* Richard Hofrichter for Criminal Justice and the Elderly Project, National Council of Senior Citizens. 1980.

*Restitution Programming for Correctional Agencies: A Practical Guide.* Jay Worrall, American Correctional Association, 1981.

*Restitution to Victims of Personal and Household Crimes.* Bureau of Justice Statistics, U.S. Department of Justice, New York, 1980.

*Victims, Offenders and Alternative Sanctions.* Joe Hudson and Burt Galaway, Lexington: D.C. Heath and Company, 1980.

## Escrow Funds

### Purpose

This legislation provides the victim access to income generated by the offender as a result of publicity about the crime.

### Background

Although victims have always had the option of bringing a civil suit against the offender to collect damages, they rarely do. Often the offender is "judgment proof," making any judgment against him worthless. This legislation provides that funds generated by an offender in publicizing his crime be made available to cover successful civil judgments by his victims.

### Major Provisions

Profits made by the defendant through the publication of books, articles, movies, etc. capitalizing on the criminal action are placed in an escrow account. The state, generally through the Crime Victim Compensation Board, has a lien on the funds in this account (New York, South Carolina).

Notice of the fund's existence is sent to the victims of the crime periodically (usually every six months). To recover from this fund, the victim or the victim's next-of-kin must bring a civil suit against the offender (e.g., a wrongful death action). If the defendant is convicted in the criminal action, and if the victim wins in the civil action, the victim may recover funds from the escrow account up to the amount of the civil judgment.

The victim must bring action within a specified time period, usually from two to five years. If no civil action is filed within this period, the funds are either returned to the defendant (New York, South Carolina) or are paid over to a Victim Compensation Fund (Oklahoma). Escrow fund statutes also commonly contain a clause providing for funds to be paid out of the account for "legal representation" of the defendant (New York).

### Benefits to the Victim

In certain celebrated cases, the offender has been able to capitalize on his crime by signing commercially advantageous contracts. While the victim or the victim's family remains uncompensated for their loss, the offender may be paid for interviews and for book and cinema rights for

his story. Third parties\* may also benefit financially from such arrangements. This legislation enables the victim to have easier access to these funds.

#### Limitations from the Victim's Perspective

The legislation applies only in those relative few cases where a convicted offender generates funds through publicizing his crime.

The victim is responsible for bringing the civil suit. There is no provision for legal representation for victims unable to afford legal counsel. In cases where the expected judgment is large, this is not a problem since these cases are fee-generating. However, in those cases where a victim suffers a minor loss or the expected judgment is small, bringing a civil suit is not a practical means of financial relief.

#### Impact on the Criminal Justice System

Since this legislation provides for a civil remedy for crime victims, it will have no direct impact on the criminal justice system. Indirectly, however, it may encourage victims to prosecute since conviction is a prerequisite to recovery.

#### Other Considerations

Objections to this type of legislation have been raised on first amendment freedom of speech and contract considerations as well as on the equal protection clause of the fourteenth amendment. (See bibliography, below.)

#### Relative Cost

This legislation would involve no direct public costs. The amount of increased civil litigation would be minimal.

#### Sample Citations

Georgia Code Annotated Sec. 27-3401

Illinois SB 154 (Public Act 81-0906) L. 1979

New York Exec. Law § 632-a (McKinney Supp. 1978)

Oklahoma HB 1050 (1981)

South Carolina R. 425, H. 2365, § 1

Tennessee SB 63, Ch. 264, L. 1979

\*The proposed final draft of the American Bar Association *Model Rules of Professional Conduct* (May, 1981) would prohibit a lawyer from making or negotiating an agreement granting him or her literary or media rights to a portrayal or account based in substantial part on information relating to the representation. This is an attempt to recognize that a client's best interests may not be served by an attorney hoping to benefit financially from publicity about the case.

#### Sample Provision SOUTH CAROLINA

*Funds escrowed of persons charged with certain crimes*

SECTION 1. Every person, firm, corporation, partnership, association or other legal entity contracting with any person or the representative or assignee of any person, accused of a crime in this State, with respect to the reenactment of such crime, by way of a movie, book, magazine article, radio or television presentation, live entertainment of any kind, or from the expression of such person's thoughts, feelings, opinions or emotions regarding such crime, shall pay over to the clerk of court of the county in which the crime is alleged to have been committed any monies which would otherwise, by terms of such contract, be owing to the persons so convicted or his representatives. The clerk of court shall deposit such monies in an interest bearing escrow account for the benefit of and payable to any victim of crimes committed by such person, provided, that such person is eventually convicted of the crime and, provided, further, that such victim, within five years of the date of the crime, brings a civil action in a court of competent jurisdiction and recovers a money judgment against such person or his representatives.

#### Bibliography

"Compensating the Victim from the Proceeds of the Criminal's Story—The Constitutionality of the New York Approach," *Columbia Journal of Law and Social Problems*, Vol. 14 (1978).

"Criminals-Turned-Authors: Victims' Rights v. Freedom of Speech," *Indiana Law Journal*, Vol. 54 (1979)

"Corrections Law Developments: Barring the Convict from the Proceeds of His Story," *Criminal Law Bulletin*, Vol. 16, No. 3 (May-June 1980).

## CHAPTER 2

# Reforms Which Recognize Victim/Witness Rights

This cluster of legislation is designed to assist the victim and other witnesses in dealing with the criminal justice system. It is not primarily aimed at reducing financial hardships, though some of its components will have this effect. The overriding purpose is to ease the burdens the victim/witness faces during the investigation and trial stages.

Rights addressed by this legislation include:

- Victim/witness notification
- Protecting witnesses from intimidation
- Property return
- Ombudsman for the victim
- Counsel for the victim
- Victim impact in criminal justice proceedings
- Use of depositions
- Witness compensation
- Employers' obligations

Most states have enacted separate bills in one or more of these categories. In many instances, such a "piecemeal" approach is the most prudent way to insure any victim/witness reform. However, over the past few years there has been a movement to take a more comprehensive look at the problems of the victim and witness in the system and to attack them as a whole. As a result, legislation has been introduced into a number of state legislatures setting forth a "bill of rights" for crime victims and witnesses. This typically lists responsibilities criminal justice practitioners and others have to ensure that victims and wit-

nesses are treated with dignity and sensitivity. Wisconsin, Washington and Oklahoma have already enacted such legislation (1979 AB 1043; 1981 Subs. HB 128; and 1981 HB 1005, respectively). Bills have also been introduced in New Jersey, New York, Massachusetts and Maryland.

The "basic bill of rights for victims and witnesses" as set forth in the Wisconsin legislation follows:

*950.04 Basic bill of rights for victims and witnesses. Victims and witnesses of crimes have the following rights:*

*(1) To be informed by local law enforcement agencies and the district attorney of the final disposition of the case. If the crime charged is a felony or is specified in ch. 940, the victim shall be notified whenever the defendant or perpetrator is released from custody.*

*(2) To be notified that a court proceeding to which they have been subpoenaed will not go on as scheduled, in order to save the person an unnecessary trip to court.*

*(3) To receive protection from harm and threats of harm arising out of their cooperation with law enforcement and prosecution efforts, and to be provided with information as to the level of protection available.*

*(4) To be informed of financial assistance and other social services available as a result of being a witness or a victim of crime, including information on how to apply for the assistance and services.*

*(5) To be informed of the procedure to be followed in order to apply for and receive any witness fee to which they are entitled.*

*(6) To be provided, whenever possible, a secure waiting area during court proceedings that does not require them to be in close proximity to defendants and families and friends of defendants.*

*(7) To have any stolen or other personal property expeditiously returned by law enforcement agencies when no longer needed as evidence. If feasible, all such property, except weapons, currency, contraband, property subject to evidentiary analysis and property the ownership of which is disputed, shall be returned to the person within 10 days of being taken.*

*(8) To be provided with appropriate employer intercession services to ensure that employers of victims and witnesses will cooperate with the criminal justice process in order to minimize an employee's loss of pay and other benefits resulting from court appearances.*

*(9) To be entitled to a speedy disposition of the case in which they are involved as a victim or witness in order to minimize the length of time they must endure the stress of their responsibilities in connection with the matter.*

*(10) To have the family members of all homicide victims af-*

*forded all of the rights under subs. (1) to (4) and (6) to (9) and analogous services under § 950.05, whether or not they are witnesses in any criminal proceedings.*

For purposes of organization and clarity, the monograph will consider the various components of victim rights legislation separately.

## Victim Notification Programs

### Purpose

To keep the victim informed of the status of the court proceedings against the defendant.

### Background

To a layperson, a criminal case can be a complicated matter. It involves a number of proceedings—preliminary hearing, grand jury, plea bargaining sessions—which not only appear duplicative, but any one of which can result in a dismissal of the case. Victims commonly complain that they do not understand what is transpiring and that they were not notified before a prosecutorial decision to reduce the charge or dismiss the case. Proposed legislation in a number of states is designed to alleviate this situation by keeping the victim informed of the status of the case in question.

### Major Provisions

This legislation requires that the victim be kept informed of criminal justice activities affecting the case. In some cases, the notification requirement refers to *all* crucial activities; in others, it refers to specified events (e.g., plea negotiations, parole decisions).

A New York proposal would require the police officer or district attorney assigned to the case to make sure the victim receives a victim notice form. Victims who wish to be informed of various criminal justice activities and decisions are to indicate this on the form. Once filed, the form is appended to the accusatory instrument and forwarded to the custodial institution involved. The victim is then notified of any plea bargaining, dismissals, reversals or modifications of a judgment by an appellate court, or any change in the status of an incarcerated offender.

A Connecticut statute provides that victims who submit stamped, self-addressed postcards to the state's attorney shall be notified of the time and place of sentencing hearings in major felony cases.

Ohio has legislation pending which would require the prosecution to notify a victim of its intention to recommend plea bargaining to the court. A similar bill in Iowa (HB 258) remained in committee at the end of that state's 1981 legislative session.

California has legislation pending which would require the victim or next-of-kin to receive 30 days' written notice of an offender's parole hearing, when request for the notice is filed with the state.

### Benefits to the Victim

The victim is likely to experience the administration of justice in a more personal and favorable way. The statutory notification scheme should also help alleviate some of the confusion and alienation a victim often feels and encourage victim cooperation in the prosecution.

### Limitations from the Victim's Perspective

This legislation requires only that the victim *be informed* of the criminal justice proceedings against the accused. There are no provisions for the victim to *participate*. This may possibly increase frustration on the part of the victim.

### Impact on the Criminal Justice System

Non-cooperation of victims and witnesses is frequently cited as the reason prosecutions do not proceed to convictions. A systematic procedure for keeping victims and witnesses advised of case events may encourage their cooperation.

### Other Considerations

Beyond the goal of encouraging victim cooperation, keeping the victim informed is a matter of courtesy. The victim is an interested party, not just another source of evidence, and, as a party, is entitled to be kept informed of the status of the case.

### Sample Citations

California AB 847 (pending at publication date)

Indiana 35-5-6-1.5 (1978)

New York SB 2816 (pending at publication date)

Ohio HB 183 (pending at publication date)

### Sample Provision

OHIO (pending at publication date)

(B) No prosecuting authority shall recommend a plea bargain to the court before which a case is being or is to be tried unless all of the following apply:

- (1) The recommendation is filed, in writing, with the court;
- (2) The recommendation is made prior to the defendant's plea of guilty or no contest;
- (3) The prosecuting authority has complied with division (C) of this section prior to filing the recommendation with the court, or has made a good faith effort to comply with division (C) of this section but was unable to comply because of his inability to locate the victims after a reasonable effort to do so;

(4) The prosecuting authority, as part of the recommendation, certifies in writing that he has complied with division (C) of this section, or that he has made a good faith effort to comply with that division but was unable to comply because of his inability to locate the victim after a reasonable effort to do so.

(C) Prior to filing a plea bargain recommendation with a court, a prosecuting authority shall do all of the following:

(1) Inform the victim of the offense or count to which the recommendation pertains that the prosecuting authority has entered into discussions with the defendant, the attorney for the defendant, or the court concerning the possibility of a plea bargain;

(2) Inform the victim of the contents of the plea bargain recommendation;

(3) Notify the victim of the time and place at which the recommendation will be filed and that the victim may be present when the court considers the recommendation.

(D) No court before which a criminal case is being or is to be tried shall accept or consider a plea bargain recommendation of a prosecuting authority unless the prosecuting authority has complied with the requirements described in divisions (B) and (C) of this section.

## Protecting Victims and Witnesses from Intimidation

### Purpose

This legislation seeks to curb the intimidation of witnesses by making it a crime to attempt maliciously to prevent or dissuade witnesses from cooperating in the prosecution of criminal cases.

### Background

Witness intimidation has undoubtedly existed for a long time. Only recently, however, has it commanded significant and comprehensive legislative attention.

On the recommendation of its Victims Committee, the American Bar Association's Criminal Justice Section held two days of public hearings in June, 1979 to assess the scope and dimensions of the problem. The Committee concluded that intimidation was widespread and pervasive throughout the criminal justice system, and that it extended to defense witnesses as well as prosecution witnesses. The Committee also found that few means existed to combat it.

Following the hearings, the Committee developed a "package" of recommendations to reduce intimidation. This was approved by the ABA's policy-making House of Delegates in August, 1980. Included in the package was a model statute which has provided the basis for recent legislation in Pennsylvania, Rhode Island and California.

### Major Provisions

The model act defines "witness" to include a person who may have knowledge of the crime but has not yet been approached by the prosecution or defense as well as a person under subpoena. An individual is guilty of a misdemeanor under the act if he "knowingly and maliciously prevents or dissuades any witness or victim from attending or giving testimony at any trial or proceeding." Such an act is a felony whenever it is (1) accompanied by an express or implied threat of force; (2) done in furtherance of a conspiracy; (3) committed by a person who has previously been convicted of a violation of an intimidation statute; or (4) committed for pecuniary gain or for any other consideration acting upon the request of another. The success or failure of any intimidation attempt is not relevant to guilt or innocence since the model act makes attempt as serious a crime as intimidation itself.

The model act provides express authority for the court, at its discretion upon good cause, to issue a "protective order" forbidding the defendant

or a third party to communicate with the witness or come within a prescribed geographic distance. As an additional safety measure, the model act permits the court, in extreme circumstances, to order law enforcement agencies to provide security for a threatened witness.

#### Benefits to the Witness

The chief merit of this legislation is its comprehensiveness. It closes numerous loopholes that characterize existing "tampering" laws. It seeks to protect non-subpoenaed witnesses and third parties as well as subpoenaed witnesses. Moreover, it provides protection not only from defendants but also from spectators in the courtroom.

#### Limitations from the Victim/Witness/Perspective

As brought out in the hearings, intimidation takes three general forms: actual intimidation (e.g., threats to life or property); "cultural" intimidation from the witness's neighbors and family; and "perceived" intimidation, where no real threat has taken or is likely to take place, but there is a fear of such on the part of the witness. The model statute is extremely limited in dealing with the latter two forms of intimidation. Even with respect to actual intimidation, the model statute for all practical purposes applies only to unsuccessful attempts (since successful intimidation is not reported or discovered). While the court can "upon good cause" issue certain orders to prevent intimidation, the victim or witness and the judge may not agree on the required "good cause" definition. Moreover, application of the pretrial release and contempt sanctions is contingent on the victim or witness' being put in a situation of at least potential danger (e.g., where a defendant disobeys the order to maintain a prescribed geographical distance).

#### Impact on the Administration of Justice

Flagrant intimidation has long been the subject of criminal prosecutions. However, legislation based on the ABA model statute will provide greater protection for witnesses by making prosecutable those cases which previously fell through the cracks of the law. Closing these loopholes can be expected to bring a modest increase in such prosecutions.

#### Other Considerations

Allowing the court to order police protection for witnesses may meet with strong resistance from understaffed law enforcement agencies.

#### Relative Cost

Except for the provision regarding police protection (which is unlikely to be frequently used), there are no cost implications of consequence. There may be a few more prosecutions.

#### Sample Citations

California AB 2909, Ch. 686 (1980)

Pennsylvania 18 P.S. § 4951-52 (1979)

Rhode Island HB 7510 (amend. § 11-32-3 and 4, General Laws) (1980)

#### Sample Provisions

### AMERICAN BAR ASSOCIATION MODEL STATUTE

#### SECTION 1. DEFINITIONS

The following words have significance attached to them hereunder throughout this chapter.

(a) "Malice" means an intent to vex, annoy, harm, or injure in any way another person, or to thwart or interfere in any manner with the orderly administration of justice.

(b) "Witness means any natural person

(1) having knowledge of the existence or nonexistence of facts relating to any crime or

(2) whose declaration under oath is received or has been received as evidence for any purpose; or

(3) who has reported any crime to any peace officer, prosecutor, probation or parole officer, correctional officer or judicial officer or

(4) who has been served with a subpoena issued under the authority of any court in the state, or of any other state or of the United States, or

(5) who would be believed by any reasonable person to be an individual described in Subsections (1), (2), (3), or (4) hereof.

(c) "Victim" means any natural person against whom any crime as defined under the laws of this state or any other state or of the United States is being or has been perpetrated or attempted to be perpetrated.

#### SECTION 2. MISDEMEANOR—INTIMIDATION OF WITNESSES AND VICTIMS

Except as provided in Section 3, every person who knowingly and maliciously prevents or dissuades or attempts to so prevent or dissuade any witness or victim from attending or giving testimony at any trial, proceeding or inquiry authorized by law or who attempts to prevent or dissuade another person who has been the victim of a crime or who is a witness to a crime or a person acting on behalf of the victim of a crime from

(a) making any report of such victimization to any peace officer or state or local or federal law enforcement officer or probation or parole or correctional officer or prosecuting agency or to any judge;

(b) causing a complaint, indictment, information, probation or parole violation to be sought and prosecuted and assisting in the prosecution thereof;



(c) arresting or causing or seeking the arrest of any person in connection with such victimization, is guilty of a misdemeanor.

### SECTION 3. FELONIOUS INTIMIDATION OF WITNESSES AND VICTIMS

Every person doing any of the acts described in the misdemeanor section on intimidation of witnesses and victims in Section 2 knowingly and maliciously under any one or more of the following circumstances, is guilty of a felony:

(a) Where such act is accompanied by an express or implied threat of force or violence, upon a witness or victim or any third person or the property of any victim, witness, or any third person,

(b) Where such act is in furtherance of a conspiracy,

(c) Where such act is committed by any person who has been convicted of any violation of this chapter, any predecessor law hereto or any Federal statute or statute of any other state which, if the act prosecuted was committed in this state, would be a violation of this chapter, or

(d) Where such act is committed by any person for pecuniary gain or for any other consideration acting upon the request of any other person. All parties to such a transaction are guilty of a felony.

### SECTION 4. ATTEMPTS

Every person attempting the commission of any act described in the foregoing sections is guilty of the offense attempted without regard to success or failure of such attempt. The fact that no person was injured physically, or in fact intimidated, shall be no defense against any prosecution under this chapter.

### SECTION 5. COURT ORDERS

Any court with jurisdiction over any criminal matter may in its discretion upon good cause (which may include but is not limited to credible hearsay or the declaration of the prosecutor or defense attorney) that intimidation or dissuasion of any person who is a victim or who is a witness has occurred or is reasonably likely to occur, issue orders including, but not limited to the following:

(a) An order that a defendant not violate any provision of this chapter.

(b) An order that a person before the court other than a defendant, including, but not limited to, a subpoenaed witness or other person entering the courtroom of said court, not violate any provisions of this chapter.

(c) An order that any person described in this subsection maintain a prescribed geographic distance from any specified witness or victim.

(d) An order that any person described in this subsection have no communication whatsoever with any specified witness or any

victim, except through an attorney under such reasonable restrictions as the court may impose.

(e) An order calling for a hearing to determine if an order as described in (a) through (d) should be issued.

(f) An order that a particular law enforcement agency within the jurisdiction of the court provide protection for a victim and/or witness.

### SECTION 6. VIOLATIONS OF ORDERS

Any person violating any order made pursuant to Section 5 may be punished in any of the following ways:

(a) For any substantive offense described in this chapter, where such provision of an order is a violation of any provisions of Section 2 through 4

(b) As a contempt of the court making such order;

(1) No finding of contempt shall be a bar to prosecution for a substantive offense under this chapter, but

(i) any person so held in contempt shall be entitled to credit for any punishment imposed therein against any sentence imposed upon conviction of said substantive offense and

(ii) any conviction or acquittal for any substantive offense under Section 2 through 5 shall be a bar to subsequent punishment for contempt arising out of the same act.

(c) By revocation of any form of pre-trial release and/or the forfeiture of bail and the issuance of a bench warrant for the defendant's arrest or remanding him into custody, said revocation may, after a hearing and upon a showing by clear and convincing evidence, in the sound discretion of the court, be made whether the violation order complained of has been committed by the defendant, personally, or in any way caused or encouraged to have been committed by said defendant.

### SECTION 7. PRE-TRIAL RELEASE

Any pre-trial release of any defendant, whether on bail or under any other form of recognizance, shall be deemed, as a matter of law, to include a condition that the defendant neither do, nor cause to be done, nor knowingly permit to be done on his behalf, any act proscribed by this chapter hereof and any willful violation of said condition is subject to sanction as prescribed in Section 6(c) whether or not the defendant was the subject of an order under Section 5 (i.e., the section relating to Court Orders).

(a) From and after the effective date of this chapter, any receipt for any bail or bond given by the clerk of any court, by any court, by any surety or bondsman and/or any written promise to appear on one's own recognizance shall contain in a conspicuous location, notice of this Section 7.



**Bibliography** (See Appendix 2 for order information)  
*Reducing Victim/Witness Intimidation: A Package and "How To Do It" Suggestions for Implementing the ABA Recommendations.*  
American Bar Association Criminal Justice Section, 1981.

## **Property Return**

### **Purpose**

This legislation expedites returning to the victim property which the police seized during their investigation.

### **Background**

When the police recover property belonging to the victim of a property crime, they will commonly retain it as evidence until the case is concluded. This means that the victim will be deprived of his television set, stereo system or watch, perhaps for months. For this reason, many victims complain that they are victimized not only by the criminal who originally took their property, but also by the law enforcement officials who retain it for so long.

### **Current Legislation**

Kansas has recently enacted a creative statute that allows for prompt return of the victim's property while, at the same time, fully accommodates the government's legitimate interest in preserving the evidence. The Kansas procedure calls for photographing the seized property. Handwritten on the photograph is a description of the item in question made under oath by the investigating officer. The photograph is then admissible in evidence.

Once the photograph is taken and the affidavit of the officer rendered, the property is returned to the owner.

### **Benefits and Limitations from the Victim's Perspective**

Although there is still a time lapse in returning the property and thus some attendant inconvenience to the victim, this procedure minimizes the delay and is vastly superior to procedures in most other jurisdictions. If well implemented, it can impress on the victim the state's desire to treat fairly those who have had their valuables stolen.

### **Impact on the Criminal Justice System**

Adoption of legislation such as the Kansas statute would not have a serious impact on the administration of justice. However, the system would profit from a decreased need for storage space. In addition, criminal justice employees would be relieved of continuing demands by aggravated victims for return of their property. Nevertheless, many jurisdictions may resist this type of legislation. It requires not only bureaucratic changes, but also the combined support of two major bureaucracies—police and prosecutor.

#### Relative Cost

Costs are small; there will be some additional tasks for investigators.

#### Sample Citation

Kansas HB 2910, ch. 173, L. 1980

#### Sample Provision

##### KANSAS

SECTION 1. K.S.A. 1979 Supp. 60-472 is hereby amended to read as follows: 60-472. In any prosecution for a crime involving the wrongful taking of property, photographs of the property alleged to have been wrongfully taken may be deemed competent evidence of such property and may be admissible in the prosecution to the same extent as if such property had been introduced as evidence. Such photographs shall bear a written description of the property alleged to have been wrongfully taken, the name of the owner of the property taken, the location where the alleged wrongful taking occurred, the name of the investigating law enforcement officer, the date the photograph was taken and the name of the photographer. Such writing shall be made under oath by the investigating law enforcement officer and the photograph identified by the signature of the photographer. Upon the filing of such photograph and writing with the law enforcement authority or court holding such property as evidence, such property may be returned to the owner from whom the property was taken.

## Ombudsman for the Victim

#### Purpose

This legislation provides for advocates to aid victims and witnesses in understanding the criminal justice process and their role in it.

#### Background

A criminal case can be a complicated matter. Witnesses often complain that they do not understand why or how certain decisions affecting the case were made. Legislation in several states seeks to remedy this situation by requiring that the victim be kept informed of the status of his case or by allowing him to participate in plea bargaining and sentencing decisions (Indiana, New Hampshire). The legislation under consideration here addresses the problem in a different manner—by allowing for the appointment of a victim's advocate.

#### Major Provisions

Legislation enacted in Oklahoma authorizes each district attorney in the state to appoint a victim/witness coordinator whose function is to advise victim/witnesses of their rights as particularized in the Oklahoma Victim's Bill of Rights. These rights include: notification when a court proceeding to which they have been subpoenaed will not go on as scheduled; protection from harm or threats of harm arising out of their cooperation with law enforcement and prosecution efforts, and information regarding financial assistance and other social services available as a result of being a victim or witness of a crime.

Proposed legislation in Ohio allows "neighborhood organizations" to hire attorneys to assist crime victims who reside in the neighborhood served by that organization. The attorney serves to advise the victim of his rights and to keep him informed of the status of his case as the prosecution goes forward. His term is for one year. A "neighborhood organization" is defined as a "nonprofit organization or association that is organized in an advocacy-oriented manner to a geographical area generally delineated by a recognizable neighborhood boundary."

#### Benefits to the Victim

Providing the victim or witness with a personal representative is likely to result in more extensive implementation of victim's rights and greater utilization of programs set up to aid victim/witnesses. It will give the victim/witness a greater sense that his needs and interests are a matter of genuine public concern, and an improved understanding of the strengths and weaknesses of our criminal justice system.

### Limitations from the Victim/Witness Perspective

The range of services provided is limited; it tends more toward providing information to a victim than personal representation in the way a lawyer represents a client. Given the large number of witnesses and victims in a jurisdiction, it will be difficult for the advocate to reach all those who need assistance.

### Impact on the Criminal Justice System

The legislation's impact on the criminal justice system could be great or small, depending a great deal on the aggressiveness of the advocate. Some criminal justice agencies might welcome assistance in providing services and information which will make the victim/witness more comfortable and therefore potentially more valuable to the system; others may view the advocate as an unwelcome interference in their business of investigating and prosecuting crimes.

### Relative Cost

Salary of the advocates.

### Sample Citations

Oklahoma HB 1005 (1981)

Ohio SB 117 (pending at publication date)

### Sample Provisions

#### OKLAHOMA

#### SECTION 2.

Victim-witness coordinators shall assure that victims and witnesses of crimes have the following rights:

(1) To be notified that a court proceeding to which they have been subpoenaed will not go on as scheduled, in order to save the person an unnecessary trip to court;

(2) To receive protection from harm and threats of harm arising out of their cooperation with law enforcement and prosecution efforts, and to be provided with information as to the level of protection available;

(3) To be informed of financial assistance and other social services available as a result of being a witness or a victim of a crime, including information on how to apply for the assistance and services;

(4) To be informed of the procedure to be followed in order to apply for and receive any witness fee to which they are entitled;

(5) To be provided, whenever possible, a secure waiting area during court proceedings that does not require them to be in close proximity to defendants and families and friends of defendants;

(6) To have any stolen or other personal property expeditiously

returned by law enforcement agencies when no longer needed as evidence. If feasible, all such property, except weapons, currency, contraband, property subject to evidentiary analysis and property the ownership of which is disputed, shall be returned to the person;

(7) To be provided with appropriate employer intercession services to ensure that employers of victims and witnesses will cooperate with the criminal justice process in order to minimize an employee's loss of pay and other benefits resulting from court appearances; and

(8) To be notified at least ten days in advance of any pardon and parole board hearings concerning the convicted person, of whom they were the victim or a witness against, in order that they might attend and participate in said hearings, and, further, to be notified as soon as is practicable following any such hearing of the recommendation of the pardon and parole board, and, further, to be notified as soon as is practicable of the governor's approval or denial of said convicted person's parole.

(9) To have the family members of all homicide victims afforded all of the rights under this section, whether or not they are witnesses in any criminal proceedings.

### OHIO (Pending at publication date)

An attorney employed by a neighborhood organization under authority granted under this section shall maintain an office in the neighborhood. The attorney shall make a reasonable effort to provide the following services to crime victims who reside in the neighborhood served by the neighborhood organization and who sign a written consent form authorizing the attorney to provide the services in relation to a particular criminal act:

(1) Assistance and advice in determining whether to file charges in relation to the criminal act, including an explanation of the likelihood of obtaining a conviction of the alleged offender and an explanation of the procedures involved in the filing of charges against and prosecution of the alleged offender;

(2) An explanation of the legal and practical ramifications of the prosecution of the alleged offender and of the counseling services with respect to the ramifications;

(3) Assistance and cooperation with law enforcement agencies and prosecuting authorities in their investigatory procedures relating to the criminal act, including, but not limited to, lineups and depositions;

(4) After commencement of a prosecution of the alleged offender, an explanation to the victim of each stage of the prosecution as it is reached and of the alternatives available to the prosecuting authority at each stage and periodic reviews for the victim of the events occurring at each stage;

(5) Regular discussions with each law enforcement agency and prosecuting authority involved with proceedings arising out of the

*criminal act, about the progress being made in the investigation of the criminal act or in the prosecution of the alleged offender and about the general intentions of the particular agency or authority regarding the investigation or prosecution.*

*(6) An explanation of, and assistance in the completion of, any forms necessary to apply for the types of recovery that may be available to the victim under sections 2743.51 to 2743.72, 3109.09, or 3109.10 of the Revised Code;*

*(7) Any other service that the attorney, with the approval of the employing neighborhood organization, believes will be of assistance to the victim in relation to the criminal act.*

## Counsel for the Victim

### Purpose

This legislation allows victims whose own conduct is drawn into question during a criminal proceeding to retain counsel to represent their interests.

### Background

A criminal case involves two parties, the state and the accused. Neither the victim of the crime nor the witnesses to it have any special status; they are not parties to the litigation. When the defense alleges that a government witness has behaved improperly—by charging, for example, that the complainant in a rape case actually solicited the defendant, or that the witness rather than the accused is the real embezzler—the prosecutor will generally as a matter of course rebut this testimony in order to save his case. But he may do it in a way that leaves the witness dissatisfied. This is not surprising since the government is concerned primarily with securing a conviction, not rescuing the reputation of its witnesses beyond that which is necessary to preserve their credibility. This novel legislation provides the victim with a remedy by allowing him to retain counsel for specific purposes.

### Major Provisions

The victim is allowed to retain counsel when his own conduct is alleged to be improper. Although legislative proposals provide little detail, apparently the accusation against the victim need not rise to criminal charges; charges of moral turpitude will be sufficient to trigger the victim's right to counsel. Although the role of counsel is not spelled out, it seems clear that he will be most active at the pretrial stage when plea bargaining occurs. His role is not confined to informal proceedings; the victim's advocate has the right to present legal arguments to the court regarding the admissibility of evidence; he may not, however, call or cross-examine witnesses.

### Benefits to the Victim

The victim's advocate is likely to be influential in the plea bargaining process. He may, for example, object to a reduction in charges where he feels the offender is getting off too easy or where he feels a reduction reflects adversely on the credibility or character of the victim. He may encourage plea bargaining in order to spare the victim the ordeal of testifying at a public trial.

Moreover, an advocate for the victim serves to sensitize the prosecutor to the victim as a person with feelings and interests to be protected.

### Limitations from the Victim Perspective

The victim must compensate the attorney with his own funds; there are no provisions for providing counsel to those unable to afford legal services.

The victim's attorney has a limited role. He can participate in informal pretrial proceedings, such as plea bargaining, but he has no right to call witnesses on behalf of the victim or cross-examine defense witnesses who impugn the character of his client. His only course is to induce the prosecutor to call a certain witness or follow a certain line of inquiry on cross-examination. The victim's advocate may, however, make legal argument regarding the admissibility of evidence affecting his client's reputation.

### Impact on the Administration of Justice

There is the possibility that the introduction of another lawyer into the criminal trial will complicate and prolong it without substantially improving the situation of the victim. Carried to extreme, the trial could turn into a defense of the victim, rather than an evaluation of the charges against the defendant. Although one can point to prosecutors indifferent to defense charges against the victim, the extent of the problem is difficult to document. The most important consequence of this type of legislation is likely to be its potential for inhibiting the prosecution from dismissing or reducing charges. A victim's attorney will be less influenced by considerations such as crowded dockets and tricky evidentiary questions that shape the state's attorney's perspective.

### Other Considerations

There is little support for this proposal in the legal community. Prosecutors will view the legislation as critical of their own performance. Both prosecutors and defense attorneys are likely to consider it as an unnecessary—and unwelcome—intrusion into the criminal justice process.

### Relative Cost

This legislation would involve no direct public cost, since independent counsel would be secured by the victim rather than provided by the state.

### Sample Citations

Calif. SB 862 (1980)

N.Y. Legislative Proposal No. 15f  
(amend. C.P.L.) and § 60.43

### Sample Provision

#### NEW YORK (Legislative Proposal)

*Rules of evidence, victims' right to counsel in certain cases.*

1. In any prosecution commenced on or after the effective date of this section, for an offense or an attempt to commit an offense defined in article one hundred thirty of the penal law the victim of the alleged offensive conduct shall be entitled to be represented by counsel and such counsel shall be permitted to be present and offer legal argument at any stage of the prosecution wherein the admissibility of evidence of the victim's sexual conduct is at issue.

2. In any prosecution commenced on or after the effective date of this section where the defendant offers as an affirmative defense or in any other manner alleges improper, culpable or illegal conduct on the part of the victim, the court may, in its discretion, allow the victim to be represented by counsel and each counsel shall be permitted to be present and offer legal argument at any stage of the prosecution wherein the conduct of the victim is at issue.

## Victim Impact in Criminal Justice Proceedings

### Purpose

This legislation allows victims to inform the prosecutor, judge or jury of the crime's impact on their lives. The "victim impact statement" is a factor to be considered in specified decisions affecting the disposition of the offender.

### Major Provisions

The majority of the "victim impact" legislation pertains to sentencing. It allows—and in some states (Ohio, for example) requires—the court to consider the extent of the injury to the victim before imposing sentence. In some instances, the victim is authorized to make an oral presentation to the court. In others, a statement is included in the presentence report. Depending on the legislation, the statement is prepared either by the victim himself or by the department responsible for the report (e.g., probation).

Indiana has recently amended its statute governing plea negotiations to provide for limited participation by the victim. The statute requires the prosecutor to inform the victim of his right to offer an opinion on any recommendation the government plans to file with the court.

South Carolina has enacted legislation requiring the solicitor to consider a victim's recommendations before admitting an alleged offender into a pretrial intervention program.

Victim statements usually contain such items as (1) a list of specific economic losses; (2) identification of physical or psychological injuries and their seriousness; and (3) changes in the victim's work or family status resulting from the offense.

### Benefits to the Victim

The victim has the opportunity to present his view of the case. This is likely to include matters not relevant to "guilt or innocence" and therefore not introduced during trial or taken into account during plea negotiations. In addition to providing such information, he may advise the court as to an appropriate disposition or sentence.

### Limitations from the Victim's Perspective

The victim's role is informational and advisory; he has no legal recourse if his suggestions are ignored by the court.

### Impact on the Criminal Justice System

Historically, punishment has been measured as much by the *mens rea*, the state of mind of the perpetrator, as by the *actus rea*, the result caused

by the offender which can be fortuitous. By emphasizing the consequences to the victim rather than the motives of the offender, victim impact statements are likely to result in stiffer sentencing—which is probably the result intended by the proponents of this type legislation. The desirability of this is debatable, for a number of reasons. Defense attorneys in particular can be expected to object to what may be seen as "lobbying for tougher sentences" especially when difficult-to-measure psychological factors are considered. Concern has also been expressed over the possibility of emotional outbursts when victims are allowed to present their statements orally before the court, which may unfairly influence the judge and jury.

### Relative Costs

Legislation which requires the probation office to complete a victim impact investigation prior to sentencing involves additional fact-gathering. However, much of the information can be gathered easily from the police report or the victim. Added cost should be minimal.

Legislation which allows the victim to submit an impact statement to the court would avoid the investigation costs. There would be some added administrative burden in notifying victims of the option to submit their statement.

### Sample Citations

Indiana Art. 4, 35-4.1-4-10; Art. 5, 35-5-6-1.5; Art. 5, 35-5-6-4

Nevada SB 12 (1981)

New Hampshire SB 79 Chap. 330 (1979)

Ohio SB 384 (1980)

South Carolina R 404, H 3217, § 11 (1980)

### Sample Provisions

#### OHIO

SECTION 1. That section 2929.12 be amended and section 2947.051 of the Revised Code be enacted to read as follows:

SECTION 2929.12 (A) In determining the minimum term of imprisonment to be imposed for felony, and in determining whether to impose a fine for felony and the amount and method of payment of a fine, the court shall consider the risk that the offender will commit another crime and the need for protecting the public from the risk; the nature and circumstances of the offense; the victim impact statement prepared pursuant to section 2947.051 of the revised code, if a victim impact statement is required by that section; the history, character, and condition of the offender and his need for correctional or rehabilitative treatment; and the ability and resources of the offender and the nature of the burden that payment of a fine will impose on him.

## NEVADA

176.145 The report of the presentence investigation must contain:

1. Any prior criminal record of the defendant;
2. Such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant;
3. Information concerning the effect that the crime committed by the defendant has had upon the victim, including but not limited to any physical or psychological harm or financial loss suffered by the victim, to the extent that such information is available from the victim or other sources, but the provisions of this subsection do not require any particular examination or testing of the victim, and the extent of any investigation or examination is solely at the discretion of the court or department and the extent of such information to be included in the report is solely at the discretion of the department;
4. A recommendation of a definite term of confinement, amount of fine or both; and
5. Such other information as may be required by the court.

## AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE STANDARDS (2 ed. 1980)

Several American Bar Association Criminal Justice Standards relate directly to victim impact on the system.

### Sentencing Alternatives and Procedures

#### 18-3.2 Sentencing principles: general criteria

(b) The sentencing court should impose a sentence within the applicable guideline range unless it finds that a substantial aggravating or mitigating circumstance exists which was not adequately taken into consideration in the formulation of such guideline and which in balance justifies the imposition of a greater or lesser sentence

...

(ii) In the case of aggravating factors:

...

- (B) a victim was particularly vulnerable;
- (C) a victim was treated with particular cruelty for which the individual offender should be held responsible;
- (D) the offense involved injury or threatened violence to others committed to gratify the offender's desire for pleasure or excitement; or
- (E) the degree of bodily harm caused, attempted, or foreseen by the offender was substantially greater than average for the given crime.

## Pleas of Guilty

### 14-3.1

Propriety of the plea discussions and plea agreements  
(d) The prosecuting attorney should make every effort to remain advised of the attitudes and sentiments of victims and law enforcement officials before reaching a plea agreement.

### 14-3-3

Responsibilities of the judge

(d) Whenever the judge is presented with a plea agreement or consents to a conference in order to listen to the parties concerning charge or sentence concessions, the court may require or allow any person, including the defendant, the alleged victim, and others, to appear or testify.



## Use of Depositions

### Purpose

This legislation encourages the use of depositions to secure the testimony of witnesses unlikely to be available to testify at the time of trial.

### Background

The Sixth Amendment to the Constitution guarantees a defendant the right to confront his accusers. He can cross-examine witnesses to test the accuracy of their account and to identify any motives they might have to fabricate. Ordinarily, if a witness is unwilling or unable to appear at the trial, the party who would have called that witness is deprived of his testimony. Sometimes this testimony is so critical that in its absence the case must be dismissed. There are occasions, however, when the use of a deposition—sworn pretrial testimony subject to cross-examination—is appropriate. The most common of these is where it is unlikely that a witness will live to the time of the trial. Under these circumstances, the court has inherent authority to grant a motion requesting that a witness be deposed. Historically, this power has been used sparingly.

### Major Provisions

Several states, New York and Connecticut among them, have enacted legislation that expressly authorizes the deposing of a witness. It is unclear to what extent this legislation codifies the common law or expands it. Under this legislation, either party, government or defense, can seek judicial approval to have a witness deposed. Approval is discretionary with the trial judge. In some states the deposition may be videotaped.

Florida has passed a bill that focuses on the predicament of young children who have been physically or sexually abused. As with the Connecticut and New York statutes, videotaping is permitted; however, the prior approval of the judge is required.

### Benefits and Limitations to the Victim

The victim is spared the public character of a courtroom proceeding, but the process of being deposed is otherwise an adversary one. The witness's testimony is sworn and subject to cross-examination. For mentally disturbed victims or young children, the value of videotaped depositions is especially important. It serves to enhance the value of the testimony since the trier of fact will not have to rely on a cold written

record, but will be able to see the witness testifying. At the same time it allows an unstable, or traumatized victim to avoid the rituals attendant to formal courtroom procedures.

### Impact on the Criminal Justice System

It is most unlikely that the enactment of this type legislation will increase greatly the use of depositions. Rather it will serve to make more explicit the circumstances under which a deposition may be taken without violating the defendant's rights. In cases where an assault victim might not live until trial or the mental condition of a rape victim is too precarious to risk requiring her to publicly recount her victimization, depositions can be of great value to the state. (Their value to the victim of course depends on his or her feelings about the importance of the prosecution.) The use of videotaping will allow the judge or jury to observe nonverbal testimony which may also be relevant to the outcome of the case.

### Relative Cost

Costs would be minimal.

### Sample Citations

Connecticut Practice Book, Vol. No. 1, Sec. 791, 796  
Florida SB 85 (F.S. 918.17) (L. 1979)  
Missouri SB 356 1981 (failed 1981)  
New York A.9192-B, Ch. 291 (1980)

### Sample Provisions

#### FLORIDA

*918.17 Sexual battery or child abuse cases; videotaping of testimony of victims under age 12 permitted.—*

*(1) Upon application to the court and reasonable notice to the defendant, the state may apply for an order to videotape out of open court the testimony of a child 11 years of age or younger who has been the victim of a sexual battery under § 794.011 or to videotape the testimony of a child 11 years of age or younger who has been the victim of aggravated child abuse under § 827.03 or child abuse under § 827.04. The court may grant an order to videotape testimony as provided herein only if it finds that:*

*(a) The victim of the offense is a child 11 years of age or younger; and*

*(b) There is substantial likelihood that such child will suffer severe emotional or mental strain if required to testify in open court.*

*(2) The trial judge shall preside at such proceeding and shall rule on all questions as if at trial.*



(3) The application referred to in subsection (1) shall be made prior to trial, and the videotaping of the testimony shall be made only after the trial has commenced. The videotaped testimony shall be admissible as evidence in the trial of the cause.

#### MISSOURI (SB 356, Failed 1981)

Section 1. 1. Upon the hearing of an application by a prosecuting attorney, served upon an accused or his counsel not more than five days before the date the deposition will be taken, and a finding that the witness is an essential witness, the state may take the deposition of the witness. A person is an essential witness if he is an eyewitness to a felony. Any other person is an essential witness if a conviction could not be obtained without his testimony because the testimony would establish an element of the felony that cannot be proven in any other manner. An accused and his spouse are not essential witnesses under any circumstances.

2. The court shall make such orders in connection with the taking of the deposition as will fully protect the rights of personal confrontations and cross-examination of the witness by the defendant. Upon application of the prosecuting attorney, the accused shall be ordered to attend the taking of the deposition. The reasonable personal and traveling expenses of the accused and his counsel shall be taxed as costs and paid as provided by law.

3. The deposition may be taken for any reason if the witness is an essential witness. The deposition may be videotaped. At the trial or upon any hearing any deposition obtained in accordance with this section, so far as it is otherwise admissible under the rules of evidence, may be used by the state for any reason stated in Supreme Court Rule 25.13. In addition, the deposition may be used if the witness refuses to testify if this refusal is not produced by action of the state.

## Witness Compensation

### Purpose

This legislation increases witness fees for court appearances.

### Background

Being a witness in a criminal case involves a variety of burdens, not the least of which is financial. If a witness is self-employed, he may lose several days' income. If he works for another, he may not be paid at all. Police witnesses are often required to appear on their own time. When the trial is lengthy or involves numerous court appearances, the hardship mounts.

To reduce the burden, witness fees have long been authorized. However, they have been extremely modest—so modest, in fact, that many witnesses fail to claim them. In at least one state, the fee is 75 cents, and in at least two others it is only 50 cents a day. As of 1973, according to the National Advisory Commission on Standards and Goals, only nineteen states allowed witness fees of \$5 a day or more and in only six of these did the fee per appearance exceed \$9.\* The situation has not changed appreciably in the past eight years.

### Recent Legislation

Several states are currently considering legislation that would significantly raise the amount of the witness fee. A California bill, for example, proposes an increase from \$12 to \$35 a day. Legislation proposed in New York would increase the remuneration from \$2 to whatever the prevailing minimum wage is, and include expenses for parking as well.

### Relative Cost

Undoubtedly because of the high cost involved, legislators have been reluctant to provide for significant witness fees. Moreover, the "stick" of compulsory process diminishes the practical importance of this "carrot" to witness participation in the criminal justice process. The amount of the witness fee and the number of witnesses likely to claim it are of course the major factors to be considered in computing the cost of this type of legislation.

\* Courts, National Advisory Commission on Standards and Goals 194-95 (1973).

### Sample Citations

California AB 1477 (Pending as of publication date)  
Florida SB 1251 (1980)  
Nebraska LB 228 (1981)  
Nevada AB 303 (1981)  
New York Legislative Proposal #15c (1981)

### Sample Provisions

#### PROPOSED NEW YORK

SECTION 610.50 *Securing attendance of witnesses by subpoena; fees*

(1) A witness subpoenaed by the people in a criminal action is entitled to an attendance fee equal to eight hours wages at the legal minimum wage, as set forth in section six hundred fifty-two of the labor law then prevailing for adults for each day of attendance. A witness whose attendance is less than four hours shall be paid a fee equal to four hours wages at the legal minimum wage for adults. Such fees shall be payable by the treasurer of the county upon the certificate of the court or the clerk thereof, stating the number of days and/or half-days the witness actually attended.

2. A witness who travels by common carrier shall be paid for the actual expenses of travel on the basis of the means of transportation reasonably utilized and the distance necessarily traveled to and from such witness's residence by the shortest practical route on going to and returning from the place of attendance. Such a witness shall utilize a common carrier at the most economical rate reasonably available. A receipt or other evidence of actual cost shall be furnished.

#### NEBRASKA

50.225 *Witnesses required to attend in the courts of this state are entitled to receive the following compensation:*

1. For attending in any criminal case, or civil suit or proceeding before a court of record, master, commissioner, justice of the peace, or before the grand jury, in obedience to a subpoena, [\$15] \$25 for each day's attendance, including Sundays and holidays.

2. Mileage must be paid at the rate of [15] 19 cents a mile for each mile necessarily and actually traveled from and returning to the place of residence by the shortest and most practical route, but:

(a) A person is not obliged to testify in a civil action or proceeding unless his mileage and at least 1 day's fees have been paid him; and

(b) Any person in attendance at the trial and sworn as a witness is entitled to witness fees irrespective of service of subpoena.

3. *Witness fees in civil cases must be taxed as disbursement costs against the defeated party upon proof by affidavit that they have been actually incurred. Costs may not be allowed for more than two witnesses to the same fact or series of facts, nor may a party plaintiff or defendant be allowed any fees or mileage for attendance as a witness in his own behalf.*

## Employer's Obligations

### Purpose

This legislation is intended to alleviate job-related barriers to victim/witness participation in criminal proceedings.

### Major Provisions

In general, this legislation provides that an employer may not dismiss, discharge or penalize an employee absent from work in response to a subpoena in a criminal case. An Illinois statute specifically states, however, that an employer need not pay such an employee for lost time, and a Wisconsin statute requires this only if the crime in question is work-related. Pending Hawaii legislation is more far-reaching. It would not only prohibit the employer from taking adverse action against the employee, but would require the employer to compensate the worker for time lost in responding to a subpoena in *all* criminal cases, not just work-related ones.

### Benefits to the Victim/Witness

Victims and witnesses are sometimes confronted with the option of choosing between two unattractive alternatives. They may elect to be a witness in court proceedings and risk being dismissed from employment by an unsympathetic employer or they may ignore a subpoena, go to work and risk contempt of court. The predicament is especially troubling for those witnesses who want to cooperate. This type of legislation will enable witnesses to cooperate without fear of jeopardizing their employment.

### Limitations from the Victim/Witness Perspective

Loss of wages are generally not covered. Subtle types of employer retaliation are not addressed. The legislation does not protect self-employed victims and witnesses.

### Impact on the Criminal Justice System

The most common reason prosecutors give for dismissing or not pursuing cases is non-cooperation of victims and witnesses. This legislation can be expected to increase that cooperation, resulting in a greater number of convictions.

### Other Considerations

A burden is placed on employers whose work schedule is disrupted while the employee is absent from work, often for an indeterminate amount of time. Without this legislation, the employer would be able to

discharge the employee and hire someone in his or her place. Employment of temporary help is often impractical and, where practical, expensive and time-consuming. Legislation, such as a draft bill in Hawaii, which requires continued payment of wages to an absent witness employee may require considerable expense to those employers who must also pay a temporary employee. Employers in small businesses would bear the brunt of this legislation.

### Relative Cost

This legislation would involve no direct public costs. Enforcement costs would be minimal.

### Sample Citations

Hawaii draft (amend. Ch. 621, HA Rev. Stats) § 621

Illinois HB 456 (Public Act 81-0808) L. 1979

New York Legislative Proposal #15d

Wisconsin AB 1043 (Stats. 103.87)

### Sample Provisions

#### ILLINOIS

*SECTION 8. No employer shall discharge or terminate, or threaten to discharge or terminate, from his employment, or otherwise punish or penalize any employee of his who is a witness to a crime, because of time lost from regular employment resulting from his attendance at any proceeding pursuant to subpoena issued in any critical proceeding relative to such crime. Any employer who shall knowingly or intentionally violate this section shall be proceeded against and punished for contempt of court. This section shall not be construed as requiring an employer to pay an employee for time lost resulting from attendance at any proceeding.*

#### WISCONSIN

*SECTION 3. 103.87 of the statutes is created to read:*

*103.87 Employee not to be disciplined for testifying. No employer may discharge an employee because the employee is subpoenaed to testify in an action or proceeding pertaining to a crime or pursuant to ch. 48. On or before the first business day after the receipt of a subpoena to testify, the employee shall give the employer notice if he or she will have to be absent from employment because he or she has been subpoenaed to testify in an action or proceeding pertaining to a crime or pursuant to ch. 48. If a person is subpoenaed to testify in an action or proceeding as a result of a crime, as defined in § 950.02(1), against the person's employer or an incident involving the person during the course of his or her employment, the employer shall not decrease or withhold the employee's pay for any time lost resulting from compliance*

*with the subpoena. An employer who violates this section may be fined not more than \$200 and may be required to make full restitution to the aggrieved employee, including reinstatement and back pay.*

### CHAPTER 3

## "Special Victim" Legislation

Over the past several years, there has been a considerable amount of legislation aimed at benefiting certain classes of individual thought to be particularly vulnerable to crime. These include the elderly, children, women, the handicapped, teachers, police and even bus drivers. Lobbyists for at least some of these "special interest" groups are quite strong, and in many instances have succeeded in getting legislation enacted.

"Special victim" legislation falls into several categories. It may create a new crime, such as neglecting to report child or elderly abuse. It may institute special procedures, such as protective orders which may be used to separate parties in domestic violence situations. It may fund programs or services to meet the needs (or document the needs) of certain victims, such as rape or domestic violence victims. One of the most controversial forms of "special victim" legislation is that which imposes mandatory sentences on those convicted of crimes against a certain type of victim.

This chapter does not purport to examine all types of "special victim" legislation. (Child abuse and neglect, for example, is a major area not considered here. The reader is referred to Appendix 2 for several excellent publications on this topic.) Rather, it gives an overview of some of the problems and legislative remedies of three particular types of "special victim:" the elderly, the victim of sexual assault, and the victim of domestic violence.

## The Elderly

### Purpose

This legislation provides added protection from crime for elderly persons by (1) permitting or mandating enhanced punishment for those who victimize the elderly; and (2) creating a new criminal offense—to abuse, neglect, or exploit the elderly, or fail to report such abuse, neglect, or exploitation to the authorities.

### Background

Contrary to popular conception, the incidence of crime against older Americans is not higher than against other age groups. In fact, primarily because of their more sheltered life style, it is lower. However, its impact is harsher. The elderly are more vulnerable, more fearful, and less able to recoup property losses or recover from injuries. For this reason, state legislatures are struggling to find ways to insulate the elderly from criminal conduct and to minimize the harm to them once they have become victims. The legislation discussed below represents two approaches that are likely to receive increased consideration as "grey power" continues to make itself felt.

### Major Provisions

A few states have enacted laws that permit or mandate the sentencing judge to impose an additional penalty of up to five years against an offender who commits a crime against an elderly person (Rhode Island, Wisconsin). Elderly is defined as at least 60 in Rhode Island, 62 in Wisconsin, and 65 in Nevada.

Other states (California, New York) have enacted legislation prohibiting plea negotiations or probation for those charged with crimes against the elderly.

Another approach subjects to criminal punishment (fine only) those individuals who have knowledge of abuse or neglect of the elderly but fail to report it to the Department of Human Resources or the police department (Vermont, Nevada). The legislation makes it a misdemeanor for a physician, clergyman, social worker, attorney, or other professional in a position to observe signs of abuse or neglect, not to forward a report within three working days after it is observed.

The Nevada statute also provides that any person who willfully causes or permits an older person to suffer unjustifiable physical pain or mental suffering as a result of abuse, neglect, or exploitation is guilty of a

gross misdemeanor. If substantial bodily or mental harm results to the older person, the offender is subject to imprisonment for not less than one year, and as many as six years.

### Benefits to the Victim

The enactment of legislation to increase penalties for crimes against the elderly is unlikely to have much impact. While the possibility exists that this legislation will have a significant deterrent effect—offenders will select their victims with more care so as to avoid the elderly—more likely it will not. Only infrequently do judges now impose the maximum sentence on offenders who assault or rob elderly persons. The conferring of even more authority is similarly likely to go unused.

On the other hand, penalizing those who fail to report incidence of abuse or neglect is likely to be beneficial. It will encourage social workers, physicians and others who are reluctant to get involved to go to the authorities. Requiring those with knowledge of abuse to come forward may prevent the feeling of isolation and helplessness of the elderly. Mandatory reporting of suspected child abuse has resulted in more cases coming to the attention of the police.

### Limitations from the Victim's Perspective

Neither of these statutory provisions addresses the problem of helping the elderly once victimized. State victim assistance programs need to be sensitized to the particular needs of the elderly so that emergency compensation funds are available, and other assistance programs accessible.

### Impact on the Criminal Justice System

Imposing a mandatory sentence on one found guilty of a crime against the elderly may encounter strong opposition from defense attorneys. Legislation which fails to require that the offender, "know or should have known," that the victim was over a statutorily defined age, but instead imposes additional penalties on any offender convicted of a crime against the elderly, imposes a penalty on one who may have lacked the requisite *mens rea* for the offense.

### Relative Cost

Legislation requiring longer sentences might add slightly to prison population and the costs related to it.

Imposing penalties on one who fails to report a case of abuse or neglect may encourage reports and ultimately litigation.

### Sample Citations

Nevada AB 157 (1981)  
Vermont HB 282 (18 VSA ch. 22) (1980)  
Rhode Island ch. 158, sec. 11-5-10 (1980)  
Wisconsin ch. 113 (1979)

### Sample Provisions

#### RHODE ISLAND

Section 1. Chapter 11-5 of the General Laws entitled "Assaults" is hereby amended by adding thereto the following section:

11-5-10. ASSAULT ON PERSONS 60 YEARS OF AGE OR OLDER.—Any person who shall commit an assault and battery upon a person sixty (60) years of age or older causing bodily injury shall be deemed to have committed a felony and shall be imprisoned not exceeding five (5) years or fined not exceeding one thousand dollars (\$1,000) or both.

#### NEVADA

##### SEC. 4.

1. A report must be made within 3 working days after an instance of abuse, neglect, or exploitation is suspected to the local office of the welfare division or to the aging services division of the department of human resources or to any police department or sheriff's office when there is reason to believe that an older person has been abused, neglected or exploited. If the report of abuse, neglect or exploitation involves an act or omission of the welfare division, aging services division or a law enforcement agency, the report must be made to an agency other than the one alleged to have committed the act or omission. Each agency, after reducing the report to writing, shall forward a copy of the report to the aging services division of the department of human resources.

2. Reports must be made by:

(a) Every physician, dentist, chiropractor, optometrist, resident and intern licensed in this state who examines, attends or treats an older person who appears to have been abused, neglected or exploited.

### Bibliography

*Criminal Justice and the Elderly: The Programs in Practice.* National Council of Senior Citizens, Legal Research and Services for the Elderly, Washington, D.C., 1979.

## Domestic Violence: Protective Orders

### Purpose

This legislation confers explicit authority on the judiciary to issue "protective orders" on behalf of victims of domestic violence.

### Background

Domestic disturbances are a part of daily living that most people take for granted. However, domestic physical abuse accounts for 40% of homicides of females in the U.S. Often the peace efforts of a police officer are ineffective. The ability of a police officer to make a warrantless arrest is limited. There is a strong need for enforceable relief.

### Major Provisions

This legislation authorizes a court to grant injunctive relief to prevent further incidents of domestic violence. Connecticut formerly allowed only spouses to seek such relief; however, this statute has been changed to conform to other states' (Alaska, Arizona) which allow any family or household member to bring action.

Some statutes are quite specific and far-reaching as to what type relief may be granted. For example, the Arizona law permits the court to:

- award one person exclusive possession of the parties' residence on a showing that there is reasonable cause to believe that physical harm may otherwise result;
- enjoin either or both parties from committing a violation of one or more offenses;
- restrain either or both parties from coming near the residence, place of employment, or school of the other person.

Domestic violence injunction statutes typically allow for *ex parte* relief if the petitioner can persuade the court that he or she is in immediate danger and that giving the defendant prior "notice and opportunity to be heard" would jeopardize his or her safety.

In most states *ex parte* relief remains in effect only until there is an opportunity for a full hearing (Iowa, Massachusetts). Legislation enacted in Arizona provides that an *ex parte* order must state on its face that the defendant is entitled to a hearing on written request.

The legislation usually specifies a maximum time period during which the injunction may remain in effect. The maximum time varies widely,



from 3 days in New Jersey to 2 years in Wisconsin. In Pennsylvania, it is one year from the date of issuance. Legislation in Arizona provides that, unless renewed, an order expires six months after service on the defendant.

Most state legislation provides methods for enforcing civil court injunctions beyond the traditional punishment of contempt of court, which is both time-consuming and expensive if the plaintiff is required to hire an attorney. Many statutes allow a peace officer to arrest a person on a misdemeanor charge if he has probable cause to believe that a violation of an injunction has occurred (North Carolina, Minnesota). This provision for police enforcement streamlines the procedures when a defendant is in the process of violating an order by providing for an immediate arrest.

#### Benefits to the Victim

The assault laws contain no spousal exemption, and assault on a spouse is a criminal, not a civil, matter. Nevertheless, the criminal justice system has been notoriously poor in prosecuting even felonious spousal assault. This legislation provides victims of domestic violence with a civil remedy so that they do not have to rely exclusively on the criminal courts.

The protection order laws generally offer broader, more flexible, and more immediate relief than can be obtained by filing a criminal charge. Also, the decision to file for a protection order lies solely with the victim of abuse.

#### Limitations from the Victim's Perspective

Some statutes exclude unrelated adults residing in the household. Others exclude divorced spouses.

In about two-thirds of the states, petitioners must be able to afford counsel when seeking injunction relief. Also in a majority of states it is difficult to obtain an injunction on weekends and holidays.

Even when state legislation provides for police intervention for a violation of a protective order, some police agencies are unwilling to honor the victim's paper copy of the injunction, or an injunction issued in another county.

Judges are often reluctant to use the eviction provisions, under the rationale that a man's home is his castle.

#### Impact on the Criminal Justice System

Obtaining protective orders is not an exclusive remedy for a victim of domestic abuse; it can be done in conjunction with seeking relief through the criminal process. The greater perceived or actual threat of punishment under the criminal laws may make them more effective than the civil laws in changing abusive behavior.\*

#### Relative Cost

The cost of this legislation would be minimal.

#### Sample Citations

Alaska Stat. §§ 09.55.600 to 09.55.640, 12.55.135, 22.15.100  
Arizona HB 2365, Ch. 244; amend. § 13 3602, § 1 (1981)  
California Civil Code §§ 4359, 5102 (West 1970 & Supp. 1980)  
Connecticut Gen. Stat. Ann. § 46-b-38  
Georgia SB 79, Act 606 (1981)  
Iowa House File 709, Iowa Code § 236  
Maryland Ann. Code Art. 4, §§ 402(a), 404, 501 to 506  
Massachusetts Gen. Laws Ann. Ch. 209A, §§ 1 to 4, Ch. 208, § 34C (West Supp. 1980-81)  
Minnesota Stat. Ann. § 518B.01  
North Carolina Gen. Stat. § 50B-1 to 50B-7

#### Sample Provision

##### ARIZONA

13-3602. Order of protection; procedure; contents; arrest for violation; penalty

A. A person may file a verified petition, as in civil actions, with a magistrate, justice of the peace or superior court judge for an order of protection for the purpose of restraining a person from committing an act included in domestic violence.

B. The petition shall state the:

1. Name and address of the plaintiff for purposes of service.
2. Name and address, if known, of the defendant.
3. Specific statement, including dates, of the domestic violence alleged.
4. Relationship between the parties pursuant to section 13-3601, subsection A and whether there is pending between the parties an action for annulment, legal separation, or dissolution of marriage.
5. Name of the court in which any prior or pending proceedings or order concerning the conduct which is sought to be restrained.

\* Response to Violence in the Family. Center for Women's Policy Studies, Washington, D.C., 1980.

#### 6. Desired relief.

The amount and payment of filing fees for a petition filed under this section is the same as in other civil actions. Filing fees and fees for services of process may be deferred or waived under any rule, statute or other law applicable to civil actions. Each court shall provide, without charge, forms for purposes of this section for assisting parties without counsel.

C. The court shall review the petition, any other pleadings on file and any evidence offered by the plaintiff to determine whether the orders requested should issue without further hearing. If the court determines that there is reasonable cause to believe that the defendant may commit an act of domestic violence or that the defendant has committed an act of domestic violence, the court shall issue an order as provided for in subsection D of this section. If the court denies the requested relief, it may schedule a further hearing within ten days, with reasonable notice to the defendant.

D. An order of protection issued by a court may include any of the following:

1. Either or both parties may be enjoined from committing a violation of one or more of the offenses included in domestic violence.

2. One party may be granted the use and exclusive possession of the parties' residence on a showing that there is reasonable cause to believe that physical harm may otherwise result.

3. Either or both parties may be restrained from coming near the residence, place of employment or school of the other party or other specifically designated locations or persons on a showing that there is reasonable cause to believe that physical harm may otherwise result.

4. Relief necessary for the protection of the alleged victim and other specifically designated persons proper under the circumstances.

E. At any time during the period during which the order is in effect, the defendant is entitled to a hearing on written request. A hearing requested by a defendant shall be held within ten days from the date requested unless the court finds compelling reasons to continue the hearing. The hearing shall be held at the earliest possible time. An ex parte order issued under this section shall state on its face that the defendant is entitled to a hearing on written request and shall include the name and address of the judicial office where the request may be filed. After the hearing, the court may modify, revoke or continue the order.

#### Bibliography

See p. 71 and Appendix 2.

## Domestic Violence: Funding

### Purpose

This legislation provides funding for domestic violence services (primarily shelters) through state agencies.

### Major Provisions

State funds for domestic violence are generated through a marriage license surcharge in some states (Ohio). Indiana imposes a surcharge on the filing of a divorce. Other programs are funded through categorical appropriation (Oklahoma, Texas) or line item funding.

Wisconsin has enacted legislation allowing for a domestic abuse assessment. This assessment is a 10 percent surcharge on all court fines in criminal cases in which the defendant is convicted of criminal conduct involving domestic abuse. The funds collected from this surcharge are deposited in the state treasury for awards and contracts for domestic abuse services.

The Nevada legislation provides that the funds go to creating county advisory boards on domestic violence, providing grants of financial assistance to organizations serving victims of domestic violence, and providing for review and evaluation of domestic service programs.

### Benefits to Victims

The importance of shelter and safety services for the victim of domestic violence cannot be exaggerated.

State funding schemes have made it possible for shelters, hotlines and programs to exist in many areas around the country. Such funding assures some continuity for programs operating on a shoestring budget.

### Limitations from the Victim's Perspective

In many instances the funding from the state is not sufficient to support necessary services (e.g., 24-hour hotline, counseling). The enactment of legislation providing for state appropriations to be used to aid victims of domestic violence, in some cases, gives the appearance of addressing the problem while in fact it provides only minimal support to an existing program.

### Impact on the Criminal Justice System

Police officers are often relieved by the presence of a shelter in the community because it enables them to offer a victim who may not want to



press charges a safe alternative. Moreover, a shelter will reduce repeat calls from the same households during the same night.

#### Relative Cost

Effective programs are expensive as it is usually recommended that they include services operated on a year-round, 24-hour per day basis.

#### Sample Citations

Florida Ann. §§ 409.602 to 409.605, 741.01 (West Supp. 1980)  
Indiana Code Ann. §§ 4-23-17.5 to 4-23-17.5-9  
Kansas Stat. Ann. §§ 23-108, 23-110  
Michigan Comp. Laws Ann. § 400.1501  
Nevada SB 371, Chap. 198 (1981)  
Ohio Rev. Code Ann. §§ 3113.33 to 3113.39  
Oklahoma HB 1634 (1980)  
Texas Fam. Code Ann. title 1, § 7.4  
Washington Rev. Code Ann. §§ 70.123.010 to 70.123.900  
Wisconsin Stat. Ann. §§ 15.197(16), 20.435(8)(c), 46.95, 50.01(1), 973.05, 973.055

#### Sample Provision

##### NEVADA

122.060

1. The clerk is entitled to receive as his fee for issuing the [marriage] license the sum of \$13.

2. The clerk shall also at the time of issuing the license collect the sum of \$3 to pay it over to the county recorder as his fee for recording the certificate described in NRS 122.130.

3. The clerk shall also at the time of issuing the license collect the additional sum of \$4 for the State of Nevada. The fees collected for the state must be paid over to the county treasurer by the county clerk on or before the 5th day of each month for the preceding calendar month, and must be placed to the credit of the state fund. The county treasurer shall remit quarterly all such fees deposited by the clerk to the state treasurer for credit to the state general fund.

4. The clerk shall also at the time of issuing the license collect the additional sum of \$5 for the county fund for assistance to victims of domestic violence. The fees collected for this purpose must be paid over to the county treasurer by the county clerk on or before the 5th day of each month for the preceding calendar month, and must be placed to the credit of that fund.

#### Bibliography

See p. 71 and Appendix 2.

## Domestic Violence: Mandatory Record-Keeping

#### Purpose

This legislation seeks to document the incidence of domestic violence.

#### Background

While a substantial amount of police time is devoted to handling quarrels between husbands and wives, relatively little importance is attached to the handling of such matters by police administrators, particularly in large urban areas. The patrolman who responds to the disturbance usually either informs the parties of their right to initiate a prosecution or undertakes some informal resolution of the dispute, such as ordering the husband to leave the house until he sobers up. The officer usually avoids making an arrest, even though the assault might have been a serious one, because he views the matter as a private, noncriminal civil law problem. Recently, under pressure from various women's groups, the police have begun to exercise their arrest powers more frequently and to reserve informal dispute settlement for minor cases. This legislation, mandating record-keeping by law enforcement agencies, is part of the trend of the last several years to encourage the police to do more to protect women from assaults by men with whom they live and upon whom they may be financially dependent. (ABA policy, p. 85.)

#### Major Provisions

This legislation requires law enforcement agencies to maintain written records of all incidents of domestic violence reported to them (Washington, Michigan). Ohio requires that an annual report to the public be prepared.

In some jurisdictions, the judiciary is also given responsibility for collecting data on the incidence of domestic violence (New York, Washington).

#### Benefits to Victims

Mandatory reporting of domestic violence may increase public awareness of the magnitude of the problem. It may sensitize the police to treat it more seriously. And it may encourage legislatures to consider other remedial legislation.

#### Limitations from the Victim's Perspective

The data may be incomplete because some data collection systems are inadequate. A law enforcement officer's decision not to make an arrest is typically an informal one, not subject to any permanent, easily retrievable record-keeping. This means that, as a practical measure,

record-keeping is likely to measure only the incidence of police arrests, not calls to the police for service nor, of course, unreported incidences.

#### **Impact on the Criminal Justice System**

Since the problem of domestic violence has been well-established, some may question the usefulness of requiring ongoing record-keeping of specific incidences; others, of course, may see such data as essential to developing meaningful methods of preventing and combating the problem. The police or judicial employees responsible for collecting and compiling the data will have an immediate additional task to perform. Moreover, particularly for the police, the long-range implications may be significant if the data are used to promote either increased dispute counseling by the police or increased reliance on arrest.

#### **Relevant Cost**

When the law enforcement agency has a computerized information retrieval system, as nearly all the large departments do, it should be an easy matter to gather data on arrests.

#### **Sample Citations**

Connecticut Pub. Act. No. 79-321, 1979 Conn. Regis. Serv. (1979)  
Illinois Ann. Stat. Ch. 38, § 206-5.1 (1980)  
Kentucky Rev. Stat. § 209.010 to 209.090 (1977)  
Michigan Comp. Laws Ann. §§ 28.251 to 28.257  
New York Jud. Law § 216(1)(d)-(f)  
New York Exec. Order No. 090  
Ohio Rev. Code Ann. § 3113.32  
Washington Rev. Code Ann. §§ 70.123.010 to 70.123.900

#### **Sample Provision**

##### **ILLINOIS**

##### *206-5.1. Reporting of domestic crime*

*Section 5.1. Reporting of domestic crime. All law enforcement agencies in Illinois which have received complaints and had its officers investigate any alleged commission of a domestic crime, shall indicate the incidence of any alleged commission of said crime with the Department through the Illinois Uniform Crime Reporting System as part of the data reported pursuant to Section 8 of this Act.*

*Domestic crime for the purpose of this Section means any crime attempted or committed between husband and wife or between members of the same family or household.*

#### **Bibliography (See Appendix 2 for order information)**

*Adult Domestic Violence: Constitutional, Legislative and Equitable Issues.* Ann Marie Boylan and Nadine Taub, Legal Services Corporation, 1981.

*State Domestic Violence Laws and How To Pass Them: A Manual for Lobbyists.* Julie E. Hamos, National Coalition Against Domestic Violence, 1980.

## Sexual Assault: Confidential Communications

### Purpose

This legislation affords the victim of a sexual assault an evidential privilege regarding certain communications with her counselor.

### Background

Evidential privileges are controversial matters in the law. The privileges that come most familiarly to mind are the ones which protect a witness against self-incrimination, and those which shield confidential communications between husband and wife, attorney and client, and in many jurisdictions to those between priest and penitent, and physician and patient. Unlike legal rules designed to exclude evidence that is considered unreliable, misleading, or prejudicial, privileges play a different role: they do not aid in the ascertainment of truth; quite the opposite, by definition, they exclude relevant testimony. Their sole warrant is the protection of interests and relationships regarded as of sufficient social importance to justify some impairment of the truth-seeking process.

### Major Provisions

Confidential communications between a victim of a sexual assault and a counselor are privileged. The privilege prevents disclosure by the counselor or any other third party. "Sexual assault counselor" is defined as one who has special expertise in counseling and who is employed at a state-funded rape crisis center. "Confidential communications" include information concerning the victim's prior sexual experiences and her own feelings and beliefs but information about the alleged offense itself is not privileged.

### Benefits to the Victim

A person seeking counseling as a result of a traumatic experience is more likely to be open and trusting if she feels that her confidences will not be revealed to others, especially at a public trial. Deeply troubled persons quite naturally fear the embarrassment of disclosure of private matters concerning their feelings about sex and violence and their prior sexual histories.

### Limitations from the Victim's Perspective

The privilege does not cover all communications and may not apply at all if the victim chooses a private psychologist or psychiatrist (although a number of jurisdictions have a separate doctor/client privilege which would probably apply in such cases).

### Impact on the Criminal Justice System

The development of judge-made privileges virtually halted a century ago. In more recent times, the attitude of commentators, whether from the bench, bar, or the schools, has tended to view privileges as a hindrance to litigation: they exclude relevant evidence. Nonetheless, the privileges have survived repeated attempts to circumscribe them. For many people their existence represents a vindication of values of privacy and security too important to surrender even to the need for accurate fact-finding in the judicial process. Growing concern in recent times with increase of official prying into the lives of individuals has reinforced support for traditional privileges and no doubt aided in the creation of new ones, such as the victim-counselor privilege under consideration here.

### Relative Cost

None

### Sample Citations

California SB 862 (1980)

Pennsylvania HB 509 (pending at publication date)

### Sample Provision

#### CALIFORNIA

1035.4 As used in this article, "confidential communication between the sexual assault counselor and the victim" means information transmitted between the victim and the sexual assault counselor in the course of their relationship and in confidence by a means which, so far as the victim is aware, discloses the information to no third persons other than those who are present to further the interests of the victim in the consultation or those to whom disclosures are reasonably necessary for the transmission of the information or an accomplishment of the purposes for which the sexual assault counselor is consulted. The term includes all information regarding the victim's prior or subsequent sexual conduct, and opinions regarding the victim's sexual conduct or reputation in sexual matters. The term does not include advice given by the sexual assault counselor on potential testimony in court.

Information received by the sexual assault counselor which constitutes relevant evidence of the facts and circumstances involving an alleged sexual assault about which the victim is complaining and which is the subject of a criminal proceeding is not a confidential communication.

### Bibliography

Cf. McCormick, *EVIDENCE*, (1972)

See also p. 76 and Appendix 2.

## Sexual Assault: Medical Examination and Treatment

### Purpose

This legislation provides medical examinations and treatment to victims of rape and sexual offenses.

### Major Provisions

Under this legislation, a victim of a rape or sexual offense is entitled to medical treatment when the services are rendered for the purpose of gathering information about the offense and evidence of the crime. The hospital or doctor may recover the cost of the services from the state. The Maryland statute provides that if victims are covered by insurance, they must subrogate their right to recover under the policy to the Department of Health and Mental Hygiene. Similar legislation enacted in North Carolina reduces payment of medical expenses to the extent recouped through another source. An Oklahoma statute contains no provisions for adjusting an award when the victim has health insurance.

New Mexico has enacted legislation which requires the development of a statewide comprehensive plan to deal with sexual crimes, prosecution, and treatment. This plan provides free medical and psychological treatment to victims of sexual crimes. The statute covers all treatment needed by the victim, not just the initial examination. Also, the statute does not require the victim to pursue criminal prosecution of a suspect in order to qualify for medical and psychological treatment.

### Benefits to the Victim

The indigent victim of rape or sexual offense can seek immediate medical assistance in private as well as public hospitals without concern about cost.

The New Mexico legislation provides for treatment of psychological injury which is often more extensive than any medical injury suffered by the victim. Additionally, it allows a victim to receive treatment who refuses to cooperate in the prosecution of the suspect.

### Limitations from the Victim's Perspective

With the exception of the New Mexico statute, the legislation is aimed more at assisting law enforcement agencies than at providing help for the victim. Payment for medical expenses is only forthcoming when the examination is used for gathering information and evidence. The bills offer no assistance to the victim of a sexual offense who is in need of medical assistance, but is embarrassed or afraid to report the crime to the police.

### Impact on the Criminal Justice System

There may be a slight increase in the reporting of sexual offenses if a victim perceives it as a necessity to receive free medical assistance.

### Relative Cost

New Mexico appropriated \$317,600 for the first year of its program, which began in 1978. Legislation covering only preliminary medical treatment would cost less per capita than the New Mexico plan. Additionally, legislation often places a limit on the amount of the payment. A pending Florida bill, for example, would limit payment to \$150 regardless of the violation.

### Sample Citations

Florida SB 12 (pending at publication date)  
Maryland SB 443, Chap. 317, Art. 43 (1980)  
New Mexico Ch. 27, Laws of 1978  
North Carolina HB 72, Chap. 72 (1981)  
Oklahoma HB 1183 (1981)

### Sample Provisions

#### NEW MEXICO

*Section 5. SEXUAL CRIMES PROSECUTION AND TREATMENT PROGRAM.—*

*A. The administrator shall develop, with the cooperation of the criminal justice department, other authorized law enforcement agencies and existing community-based victim treatment programs, a statewide comprehensive plan to train law enforcement officers and criminal justice and medical personnel in the ability to deal with sexual crimes; to develop strategies for prevention of such crimes; to provide assistance in the assembly of evidence for the facilitation of prosecution of such crimes; and to provide medical and psychological treatment to victims of such crimes.*

#### MARYLAND

*(a) Whenever a doctor or a hospital provides any physical examination of any victim of an alleged rape or sexual offense for the purpose of establishing and gathering information and evidence as to the ALLEGED crime, the service shall be furnished without charge to the person and the doctor or hospital shall be entitled to be [reimbursed] PAID by the Department of Health and Mental Hygiene for the costs of providing these services.*

*[(b) If the person receiving the services is covered in whole or part by a policy of insurance as to the services, the person shall subrogate to the Department any right or right of action which the person may have under the insurance policy to recover the costs for payment of these services.]*

(c) Any provision of a policy of insurance written or entered into after July 1, 1977 which precludes or prohibits subrogation for recovery of payment for these services, where the costs of establishing and gathering the information and evidence would otherwise be covered, is void and of no effect.]

[(d)] (B) The Department of Health and Mental Hygiene may establish standards and rules and regulations to carry out the provisions of this section.

**Bibliography** (See Appendix 2 for order information)

*Forcible Rape: An Analysis of Legal Issues.* Battelle Law and Justice Study Center.

*Jurors and Rape: A Study in Psychology and Law.* Part II, "Rape Laws: The Accomplishments of Legislative Reform." Hubert S. Feild and Leigh Bienen, 1980.

**CHAPTER 4**

**Legislation Institutionalizing and Funding  
Victim/Witness Services**

Legislation in this chapter has been advanced and supported by victim/witness advocates who want to insure a permanent position for victim/witness assistance, both within the state bureaucracy and at the local program level. The legislation is intended to provide guidance to and coordination among local programs. It also sets forth criteria for state-supported programs and establishes administrative structures for funding them. Finally, it describes several sources of state funds for victim/witness assistance programs.

The discussion which follows divides the legislation into two general categories: (1) statewide coordination of victim/witness assistance, and (2) state subsidies for direct service programs. It should be noted, however, that in many instances, the two areas overlap significantly.

## Statewide Coordination of Victim/Witness Assistance

### Purpose

This legislation centralizes responsibility and provides coordination for local victim/witness assistance programs. It also sets up administrative structures for funding such programs.

### Background

Over the last decade a host of services and programs to aid victims and witnesses have sprung up. The range is broad: victim compensation, restitution, counseling, and even some limited participation in plea bargaining. A victim is unlikely to be aware of them all. Moreover, assistance programs need to be kept up to date on developments in the field and activities of other service providers. As a result, there has been a perceived need for an umbrella agency to coordinate the various programs and to provide direction to them. When state-generated funds are available for programs, some centralized mechanism for distributing them is essential.

### Major Provisions

The coordination provided for by this type of legislation might entail establishing a new victim coordination office (as provided in a pending Pennsylvania bill), or it might utilize an existing commission, such as Nebraska does. Responsibilities of statewide coordinators generally include overseeing community-based programs, disbursing available federal or state funds to them, and serving as a clearinghouse of victim/witness-related information. A recent Oklahoma statute provides for more localized coordination. It allows each district attorney to appoint a victim/witness coordinator responsible for insuring, as far as practical, that victims and witnesses receive the services enumerated in the "bill of rights" section of the legislation.

### Benefits to the Victim/Witness

Increased coordination for victim/witness assistance may help to insure that programs are given the visibility necessary for their success. Clients and criminal justice practitioners (as well as other service providers) may become more aware of available services. Moreover, state and local officials may be more responsive to the needs of victims and witnesses if there is some centralized focus to them.

### Limitations from the Victim/Witness Perspective

The creation of an additional level of bureaucracy between the victim or witness and the services available may create more red tape.

## Impact on the Criminal Justice System

The coordination of existing programs may lead to a more efficient network of services to victims and witnesses. This may indirectly encourage victim/witness participation in the criminal justice process.

### Relative Cost

The cost of coordination legislation can vary significantly depending on a number of factors. The Oklahoma statute, for example, requires state money for salaries of appointed victim/witness coordinators; however, it does not provide funding for local programs. The Nebraska legislation provides the potential for a comprehensive assistance program. The actual scope of the statute, of course, depends on the amount appropriated by the legislature for grants to victim and witness assistance centers. (In 1981/82, \$44,235 was appropriated.)

### Sample Citations

Nebraska LB 477 (1981)

Oklahoma HB 1005 (1981)

Pennsylvania SB 130 (pending 1981)

### Sample Provision

#### NEBRASKA

*Sec. 2. There is hereby created a fund to be known as the Crime Victim and Witness Assistance Fund. Such fund shall contain such amounts as may be appropriated by the Legislature and shall be used only for the purposes set forth in this act. Such fund shall be administered by the Nebraska Commission on Law Enforcement and Criminal Justice.*

#### *Sec. 3.*

*(1) Any public or private nonprofit agency may apply to the Nebraska Commission on Law Enforcement and Criminal Justice for selection and funding as a victim and witness assistance center pursuant to this act.*

*(2) The commission shall consider the following factors, together with any other factors it deems appropriate, in selecting applicants to receive funds and be designated as a victim and witness assistance center:*

*(a) The number of volunteers that the proposed center will utilize;*

*(b) The stated goals of the applicant;*

*(c) The potential number of people that may be served by the proposed center and the needs of the community for such a center;*

*(d) Evidence of community support for the establishment of the proposed center; and*



- (e) The organizational structure of the agency which will operate the proposed center and provide services to victims and witnesses of crimes; and
- (3) Upon evaluation of all applicants, the Nebraska Commission on Law Enforcement and Criminal Justice shall select a number of public or private nonprofit agencies which the commission deems qualified for designation to receive funding for the establishment and operation of such centers;
- (4) The commission shall, upon the establishment of such centers, conduct appraisals of their performance to determine which of the centers shall receive continuation grants. The commission shall report its finding to the Governor and Clerk of the Legislature.

## State Subsidies for Programs Providing Direct Services to Victims and Witnesses

### Purpose

This legislation makes available state funds for local programs which provide direct services to victims and witnesses.

### Background

Funding for most victim witness assistance programs is extremely shaky. With the recent federal cutbacks (particularly with respect to the Law Enforcement Assistance Administration), programs are competing with each other and with other groups for a variety of public and private sources of funds. Several states have enacted legislation to make available state funds for the programs.

### Major Provisions

California and Connecticut statutes provide for revenues collected from offenders in the form of fines and assessments to be used for victim/witness assistance programs. California, for example, fines violent offenders between \$10 and \$10,000. The moneys collected are deposited in an Indemnity Fund, and are available for appropriation by the legislature for payment of crime victim compensation claims and for support of established local comprehensive victim/witness assistance programs. In addition, all persons convicted of criminal offenses are assessed \$4 for every \$10 of a fine, penalty or forfeiture collected by the courts. The funds are distributed according to percentage formula to five state funds. The Indemnity Fund receives 24.58% of the amount collected. Through these sources, approximately \$3 million is being generated toward support of some thirty-four victim/witness assistance programs in the state.

In Connecticut, an "abuser's tax" on criminals and certain traffic offenders is deposited in the crime victim compensation fund. The administrators of the fund are permitted—but not required—to use some of these revenues to support victim/witness assistance programs.

Unlike California and Connecticut, Wisconsin uses general tax revenues (\$700,000 for 1981/82) to reimburse counties which provide enumerated services to enforce a "basic bill of rights for victims and witnesses." A New York budget appropriation for FY81-82 provides \$1.5 million to the compensation board to distribute to local victim/witness assistance programs. In 1981 Nebraska created a Crime Victim and Witness Assistance Fund, and appropriated \$44,235, most of which is for support of local programs.

**CONTINUED**

**1 OF 2**

### Impact on the Criminal Justice System

Police and prosecutors are likely to respond favorably to subsidy legislation. On the one hand, the funded programs will probably relieve the pressure individuals investigating and prosecuting a case feel when confronted with victims and witnesses they are not in the position to assist. On the other hand, victims and witnesses who receive services are more likely to cooperate with law enforcement officials.

### Relative Cost

Depending on the approach taken, this legislation can either be very expensive or quite inexpensive. Utilizing offender fines and assessments is obviously much less expensive than appropriating general fund monies. Other factors bearing on the cost are administrative requirements, number of programs requiring funds, and projected amount of individual subsidies.

### Sample Citations

California AB No. 698 (Chapter 166), 1981  
Connecticut P.A. No. 80-390, 1981  
Nebraska LB 477, 1981  
New York Budget FY 1981/82  
Wisconsin AB 1043, 1979; AB No. 66, 1981

### Sample Provision

#### CALIFORNIA

##### Section 13967.

(a) Upon a person being convicted of a crime of violence committed in the State of California resulting in the injury or death of another person, if the court finds that the defendant has the present ability to pay a fine and finds that the economic impact of the fine upon the defendant's dependents will not cause such dependents to be dependent on public welfare the court shall, in addition to any other penalty, order the defendant to pay a fine commensurate with the offense committed, and with the probable economic impact upon the victim, of at least ten dollars (\$10), but not to exceed ten thousand dollars (\$10,000).

(b) The fine imposed pursuant to this section shall be deposited in the Indemnity Fund in the State Treasury, the proceeds of which shall be available for appropriation by the Legislature to indemnify persons filing claims pursuant to this article and to provide assistance to established local comprehensive programs for victims and witnesses, including but not limited to, pilot local assistance centers for victims and witnesses established pursuant to the provisions of Article 2 (commencing with Section 13835) of Chapter 4 of Title 6 of Part 4 of the Penal Code, and to provide funding for the programs provided pursuant

to Article 3 (commencing with Section 13836) of Chapter 4 of Title 6 of Part 4 of the Penal Code and Article 4 (commencing with Section 13837) of Chapter 4 of Title 6 of Part 4 of the Penal Code.

(c) It is the intent of the Legislature that funds appropriated pursuant to this section for local assistance centers for victims and witnesses shall be in addition to any funds appropriated as provided in Section 13835.8 of the Penal Code.

(d) Funds appropriated pursuant to this section shall be made available through the Office of Criminal Justice Planning to those public or private nonprofit programs for the assistance of victims and witnesses which:

(1) Provide comprehensive services to victims and witnesses of all types of crime. It is the intent of the Legislature to make funds available only to programs which do not restrict services to victims and witnesses of a particular type or types of crimes.

(2) Are recognized by the county board of supervisors as the major provider of comprehensive services to such victims and witnesses.

(3) Are selected by the county board of supervisors as the eligible program to receive such funds.

(4) Assist victims of violent crimes in the preparation and presentation of their claims to the State Board of Control for indemnification pursuant to this article.

(5) Cooperate with the State Board of Control in obtaining and verifying data required by this article.

SEC. 4. Section 13967 of the Government Code, as amended by Section 3.1 of Chapter 530 of the Statutes of 1980, is repealed.

SEC. 5. Section 13967 of the Government Code, as added by Section 3.5 of Chapter 530 of the Statutes of 1980, is repealed.

SEC. 6. Section 1464 of the Penal Code, as amended by Section 1 of Chapter 1047 of the Statutes of 1980, is amended to read:

1464. There shall be levied an assessment in an amount equal to four dollars (\$4) for every ten dollars (\$10) or fraction thereof, upon every fine, penalty, or forfeiture imposed and collected by the courts for criminal offenses, including all offenses involving a violation of a section of the Vehicle Code or any local ordinance adopted pursuant to the Vehicle Code, except offenses relating to parking or registration or offenses by pedestrians or bicyclists, or where an order is made to pay a sum to the general fund of the county pursuant to subparagraph (iii) of paragraph (3) of subdivision (a) of Section 258 of the Welfare and Institutions Code.

Where multiple offenses are involved, the assessment shall be based upon the total fine or bail for each case. When a fine is suspended, in whole or in part, the assessment shall be reduced in proportion to the suspension.

When any deposit of bail is made for an offense to which this section applies, and for which a court appearance is not mandatory, the

person making such deposit shall also deposit a sufficient amount to include the assessment prescribed by this section for forfeited bail. If bail is returned, the assessment made thereon pursuant to this section, shall also be returned.

In any case where a person convicted of any offense, to which this section applies, is in prison until the fine is satisfied, the judge may waive all or any part of the assessment, the payment of which would work a hardship on the person convicted or his immediate family.

After a determination by the court of the amount due, the clerk of the court shall collect the same and transmit it to the county treasury. It shall then be transmitted to the State Treasury to be deposited in the Assessment Fund, which is hereby created. The transmission to the State Treasury shall be carried out in the same manner as fines collected for the state by a county.

The moneys so deposited shall be distributed as follows:

(a) Once a month there shall be transferred into the Fish and Game Preservation Fund an amount equal to 0.42 percent of the funds deposited in the Assessment Fund during the preceding month, but in no event shall the amount be less than the assessment levied on fines or forfeitures for violation of state laws relating to the protection or propagation of fish and game. Such moneys are to be used for the education or training of department employees which fulfills a need consistent with the objectives of the Department of Fish and Game.

(b) Once a month there shall be transferred into the Indemnity Fund an amount equal to 24.58 percent of the funds deposited in the Assessment Fund during the preceding month. Such funds shall be available for appropriation by the Legislature in accordance with the provisions of subdivision (b) of Section 13967 of the Government Code.

(c) Once a month there shall be transferred into the Peace Officers' Training Fund an amount equal to 27.50 percent of the funds deposited in the Assessment Fund during the preceding month.

(d) Once a month there shall be transferred into the Driver Training Penalty Assessment Fund an amount equal to 37.36 percent of the funds deposited in the Assessment Fund during the preceding month.

(e) Once a month there shall be transferred into the Corrections Training Fund an amount equal to 10.14 percent of the funds deposited in the Assessment Fund during the preceding month.

## APPENDIX 1

# American Bar Association Policies\*

## Domestic Violence

Be It Resolved, That the American Bar Association supports federal, state and local efforts to combat the incidence, causes and effects of family violence and supports the implementation of programs to protect the victims of family violence.

Approved February, 1978

Be It Resolved, That the American Bar Association, in implementation of the policy adopted in February, 1978, supporting efforts to combat family violence, recommends the following:

(1) That shelters or other secure temporary residential facilities, together with counselling and other support services, be established for the victims of domestic violence.

(2) That law enforcement officers who respond to domestic violence calls, after insuring that the victims of domestic assaults and their dependents have been removed to safe places as provided in #1, investigate the incidents, prepare written reports, and, in the event they conclude no criminal charges are appropriate, file written statements of the reasons for the decisions.

(3) That prosecutors who decline to file criminal charges in domestic assault cases referred to them by the police, state in writing the reasons for their decision not to prosecute, and provide the complainant with information as to alternative procedures.

(4) That specific data related to the frequency, seriousness, and other characteristics of spousal assault, including disposition of complaints and the stated reasons for the particular disposition, as well as data on existing programs designed to respond to such assaults, be collected and analyzed by appropriate government agencies.

(5) That the courts, in the determination of pretrial release, sentencing or imposition or revocation of probation or parole, not treat the relationship between the parties as the primary factor.

(6) That the state create a mechanism for responding to intrafamilial violence by establishing diversion programs and by providing counselling and other support services.

\*See also sections on victim compensation, intimidation and victim impact.

(7) That statutes providing for arrest for violation of protective orders (civil or criminal restraining orders) be enacted and enforced without regard to the relationship between the parties.

(8) That the victims of domestic violence not be excluded from coverage under victim compensation legislation where they demonstrate the requisite quantum of injury and where they actually live separate and apart from assaulting spouses.

Approved August, 1978

### Rape

Be It Resolved, That the American Bar Association authorizes the President of the Association or his designee to urge redefinition of rape and related crimes in terms of "persons" instead of "women," and revision of rules of evidence in order to protect the prosecuting witness from unnecessary invasion of privacy and psychological and emotional harm by:

a. Elimination of corroboration requirements which exceed those applicable to other assaults,

b. Revision of the rules of evidence relating to cross-examination of the complaining witness,

c. Re-evaluation of rape penalties,

d. Development of new procedures for police and prosecutors in processing rape cases,

e. Establishment of rape treatment and study centers to aid both the victim and the offender.

Approved February 1975

## APPENDIX 2

### Bibliography of Victim/Witness Legislative and Policy Guides

#### Child Abuse

*Child Abuse and Neglect: State Reporting Laws.* Herner and Company. Revised 1979. Department of Health and Human Services Publication No. (OHDS) 80-30265. Free. Order from National Center on Child Abuse and Neglect, Children's Bureau, U.S. Department of Health and Human Services, Washington DC 20201.

*Child Sexual Abuse and the Law.* American Bar Association National Legal Resource Center for Child Advocacy and Protection. 1981. \$8.50. Order from the ABA National Legal Resource Center for Child Advocacy and Protection, 1800 M Street, NW, Washington DC 20036.

#### Crime Victim Compensation

*Crime Victim Compensation: Policy Briefs.* Deborah M. Carrow, Abt Associates, Inc. 1980. \$2.00. Order from Government Printing Office, N. Capitol Street, Washington DC 20402. Order No. 027-000-01048-2.

*Crime Victim Compensation: Program Models.* Deborah M. Carrow, Abt Associates, Inc. \$6.00. Order from Government Printing Office, N. Capitol Street, Washington DC 20402. Order No. 027-000-00889-5.

#### Domestic Violence

*Adult Domestic Violence: Constitutional, Legislative and Equitable Issues.* Ann Marie Boylan and Nadine Taub. 1981. Free. Order from Legal Services Corporation Research Institute, 733 15th Street, NW, Washington DC 20005.

*State Domestic Violence Laws and How To Pass Them: A Manual for Lobbyists.* Julie E. Hamos, National Coalition Against Domestic Violence. 1980. Free. Order from National Clearinghouse on Domestic Violence, PO Box 2309, Rockville MD 20852.

"State Legislation on Domestic Violence" (annual analysis of state family violence laws), in "Response" newsletter. Center for Women Policy Studies. August/September 1981. Order from Center for Women Policy Studies, 2000 P Street, NW, Washington DC 20036.

### Intimidation

*Reducing Victim/Witness Intimidation: A Package and "How To Do It" Suggestions for Implementing the ABA Recommendations.* American Bar Association Criminal Justice Section. 1981. Free while supply lasts. Order from American Bar Association Criminal Justice Section, 1800 M Street, NW, Washington DC 20036.

### Rape

*Forcible Rape: An Analysis of Legal Issues.* Battelle Law and Justice Study Center. \$4.25. Order from Government Printing Office, N. Capitol Street, Washington DC 20402. Order No. 027-000-00627-2.

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### Restitution

*The Practice of Restitution: A Victim Perspective.* Richard Hofrichter for Criminal Justice and the Elderly Project, National Council of Senior Citizens. 1980. \$7.00. Order from National Council of Senior Citizens, 925 15th Street NW, Washington DC 20005.

*Restitution Programming for Correctional Agencies: A Practical Guide.* Jay Worrall, American Correctional Association. 1981. Free. Order from American Correctional Association, 4321 Hartwick Road, College Park MD 20740.

*Restitution to Victims of Personal and Household Crimes.* Bureau of Justice Statistics, U.S. Department of Justice. 1980.

*Victims, Offenders and Alternative Sanctions.* Joe Hudson and Burt Galaway. Lexington: D.C. Heath and Company, 1980. Order from Lexington Books, D.C. Heath and Company, Lexington MA 02173.

# END