The Victims' Rights Act of 1988, the Florida Constitution, and the New Struggle for Victims' Rights

Patrick B. Calcutti

Follow this and additional works at: http://ir.law.fsu.edu/lr

Part of the Legislation Commons, and the State and Local Government Law Commons

Recommended Citation
http://ir.law.fsu.edu/lr/vol16/iss3/11

This Comment is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Law Review by an authorized editor of Scholarship Repository. For more information, please contact bkaplan@law.fsu.edu.
COMMENTS

THE VICTIMS' RIGHTS ACT OF 1988, THE FLORIDA
CONSTITUTION, AND THE NEW STRUGGLE FOR
VICTIMS' RIGHTS

PATRICK B. CALCUTT*

"[T]he Legislature recognizes that the criminal justice system of
this state has for too long excluded victims from meaningful
participation in the criminal justice process, adding to the pain and
anguish already suffered by reason of the criminal acts committed
against them. . . ."

THE AMENDMENT to the Florida Constitution, guaranteeing
crime victims the right "to be informed, to be present, and to be
heard when relevant, at all crucial stages of criminal proceeding" represents the first time any state has chosen to elevate the rights of vic-

* The author wishes to acknowledge and express his appreciation for the insight and collaboration of Maury Kolchakian and the substantive improvements made by David Theriaque and his editorial committee in preparation of this Comment.


land. A number of other victims' bills were introduced: Senate Bill 278, sponsored by Senator Lehtinen; Senate Bill 427, sponsored by Senators Lehtinen and Ileana Ros-Lehtinen, Repup., Miami; Senate Bill 744, sponsored by Senator Bob Johnson, Repub., Sarasota; House Bill 629, sponsored by Representative Renke; and House Bill 1667, sponsored by Representatives Renke and Canady.

2. Fla. SJR 135 at 1, 1987 Fla. Laws 2469 (Fla. Const. art. I, § 16(b)). The entire text reads:

Victims of crime or their lawful representatives, including the next of kin of homicide victims, are entitled to the right to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with constitutional rights of the accused.

Id.
tims to constitutional status.\(^3\) Anticipating overwhelming voter approval of the amendment to article I, section 16, subsection b of the Florida Constitution in the November election, the Legislature enacted the Victims’ Rights Act of 1988.\(^4\) The Act is designed to be a comprehensive scheme strengthening victims’ current statutory rights and implementing the ambitious objectives of the constitutional amendment.

Yet, in other respects, the 1988 legislation represents only the latest in a series of increasingly ambitious attempts to correct, by degrees, a perceived imbalance in the criminal justice system—a system which affords the accused a wide range of constitutional safeguards, but provides little for the victim. In this Comment, the author analyzes the likely success of the Victims’ Rights Act of 1988, focusing particularly on the shortcomings of the state’s restitution and victim compensation provisions. Prior to this analysis, the author surveys the law in other jurisdictions, summarizes Florida’s prior law, and closely examines the provisions of the new legislation.

I. THE LAW IN OTHER STATES

Legislative initiatives addressing the needs of crime victims and witnesses fall into two general categories. First, and most common, are financial assistance programs. These programs include restitution (where the offender directly compensates the victim) and state-operated victim compensation programs.\(^5\) The second category consists of laws protecting special classes of particularly vulnerable victims\(^6\) and providing far reaching victims’ “Bills of Rights.”\(^7\) The typical “Bill of Rights” protects victims and witnesses against intimidation, and guarantees crime victims the right to be informed of the existence of compensation and assistance programs, to be notified of the status of investigations and trial proceedings, and to participate in criminal proceedings involving the offender.\(^8\)

---

6. Id. at 228-32.
7. Id. at 233-36.
8. Id. at 228.
A. Compensation and Restitution

The federal government, the District of Columbia, the Virgin Islands, and almost every state have established some type of victim compensation program. Each program establishes eligibility requirements for claimants. For example, typical programs require the victim to promptly report the crime, to file the claim within a specified time period, and to demonstrate financial need in order to receive an award. Some programs provide for awards to the next of kin, if the victim dies as a result of a crime. Furthermore, some programs allow intervenors or “good samaritans” to receive compensation for injuries sustained while attempting to thwart a crime, aid a victim, or apprehend a fleeing suspect.

However, certain classes of victims are ineligible for awards. Some jurisdictions have “family relationship” exclusions which prevent the offender’s relatives, by blood or marriage, from receiving an award. Others feature “sexual relationship” exclusions which may foreclose recovery for victims of spousal abuse and acquaintance or marital rape.

Almost every state program has a minimum loss provision which operates to exclude potential claimants whose damages are less than the threshold amount. These provisions reduce the administrative costs by protecting compensation programs from large numbers of small claims. Some programs require victims to demonstrate financial hardship before they make awards, and some may reduce or deny a claim if the victim contributed to his or her own injuries. Finally, the typical compensation program excludes recovery for pain and suffering and property loss. While the victim may maintain a sepa-
rate right of action against the offender for both, the financial condition of most offenders can render this right meaningless.\textsuperscript{21}

In the few states lacking victim compensation programs, restitution may provide the victim with the only means of recovery short of a civil action.\textsuperscript{22} When a court orders restitution, the offender is required to personally compensate the victim for any losses resulting from the crime.\textsuperscript{23} In most jurisdictions, the sentencing court is given wide discretion in issuing restitution orders and in determining the amount of restitution.\textsuperscript{24} However, some states have enacted laws making an order of restitution mandatory,\textsuperscript{25} often as a condition of probation.\textsuperscript{26}

In addition to conventional restitution provisions, many jurisdictions have enacted "Son of Sam" laws\textsuperscript{27} which typically require that any money earned by offenders from a literary or other account of their crimes be retained by the state and used to compensate their victims.\textsuperscript{28} After the statutory retention period expires, some states return the remainder to the offender;\textsuperscript{29} others place the remainder into the general crime victims’ compensation fund.\textsuperscript{30}

\footnotesize
\textsuperscript{22} See Anderson & Woodard, supra note 5, at 226.
\textsuperscript{23} Id.
\textsuperscript{27} These provisions are named after New York serial killer David Berkowitz, who was captured in 1977 after shooting 13 people. When New York State Senator Emmanuel R. Gold "heard that 'publishers were lining up outside the police station' for Berkowitz's story ... the senator acted so that Berkowitz's victims might at least recover his unsavory profits." Snider, Coming Soon to a Theater Near You, Cal. Law., Apr. 1987, at 29, 30 (quoting Jack J. McPaddin, legislative aide to Sen. Gold).
\textsuperscript{28} Id.
B. Participation in the System and Victims' Rights

Several states have gone beyond pocketbook measures, such as victim compensation programs, and have enacted legislation establishing a "Bill of Rights" for crime victims and witnesses.\(^{31}\) The typical "Bill of Rights" guarantees victims and witnesses the right to be free from intimidation,\(^{32}\) to be informed of the existence of compensation programs and other assistance,\(^{33}\) to be notified of the final disposition of the case\(^{34}\) and of the offender's release from custody,\(^{35}\) and to participate in the criminal proceedings, including sentencing and parole hearings.\(^{36}\) Furthermore, virtually every jurisdiction has enacted laws to protect certain groups considered especially vulnerable to crime, such as the elderly,\(^{37}\) sexual assault victims,\(^{38}\) and children.\(^{39}\)

II. Florida's Prior Law

In 1984, the Florida Legislature passed a comprehensive act which included broad guidelines for the fair treatment of crime victims and witnesses.\(^{40}\) The next year it strengthened and affirmed this commit-
ment by creating a Comprehensive Crime Victims and Witnesses Services office charged with the following responsibilities:

(a) To emphasize the rights and needs of crime victims and witnesses statewide.
(b) To ensure that the rights of victims and witnesses are properly publicized and encouraged.
(c) To administer federally funded victim and witness assistance services programs.
(d) To coordinate the flow of information between all agencies and organizations which provide services for victims and witnesses of crime.
(e) To assist the development and administration of crime victim and witness programs and services.\(^4\)

Prior to the Victims' Rights Act of 1988, victims had the right to receive information regarding compensation, treatment programs, protection from intimidation, and their role in the criminal justice process.\(^4\) Victims could request advance notification of judicial proceedings involving the offender.\(^4\) Certain felony victims had the right to be consulted by the state attorney to express their views concerning case disposition.\(^4\) A victim or witness who, as a result of a crime or cooperation with a law enforcement agency or state attorney, was subjected to financial hardship could be assisted in explaining to creditors the reason for such hardship.\(^4\) To assist the state agencies in implementing these rights, the law required that victim assistance education be offered to state attorneys and to persons attending law enforcement facilities.\(^4\)

Under Florida's prior law, victims had the right to be present and to be heard at all sentencing hearings.\(^4\) The victim could submit a statement limited to the facts of the case and to the extent of any harm


\(^{42}\) Ch. 85-326, § 3, 1985 Fla. Laws 1966, 1967-68 (codified at FLA. STAT. § 960.05(2) (1987)).

\(^{43}\) FLA. STAT. § 960.001(1)(a), (b) (1987).

\(^{44}\) Id. § 960.001(1)(d).

\(^{45}\) Id. § 960.001(1)(e).

\(^{46}\) Id. § 960.001(1)(g).

\(^{47}\) Id. § 960.001(1)(i).

\(^{48}\) Id. § 921.143. The next of kin of a homicide victim may exercise this right. Id.
caused by the crime for which the offender was being sentenced.49 A court could depart from the uniform sentencing guidelines when credible facts proven by a preponderance of the evidence demonstrated that the victim suffered excessively at the hands of the defendant.50 Additionally, victims, upon request, had the right to be notified by the state attorney of the offender's anticipated release date.51

Victims were entitled to receive restitution from offenders when so ordered by a court.52 If the court did not order full restitution, it was required to state on the record reasons for its failure to do so.53 Besides requiring restitution, the state could perfect a lien in its favor upon the proceeds from any account of a crime for which the offender was convicted.54 The prior "Son of Sam" law required the proceeds to be distributed in specified percentages to the offender's dependents, to victims based upon the extent of their damages, and to the General Revenue Fund to cover prosecution and imprisonment costs.55 The remainder was to be paid to the offender upon completion of sentence.56

Finally, victims were eligible to receive awards from the Crimes Compensation Trust Fund (CCTF).57 All criminal defendants were charged an additional court cost of twenty dollars, nineteen dollars of which was deposited into the CCTF.58 In addition, when the CCTF paid benefits to, or on behalf of, a victim, the offender was required to reimburse the fund for the amount paid.59

49. Id. § 921.143(2). In Booth v. Maryland, 107 S. Ct. 2529 (1987), the Supreme Court invalidated on eighth amendment grounds a Maryland statute permitting the introduction of victim impact statements at the sentencing phase of capital murder trials. The Court held that such statements are inflammatory, irrelevant, distracting, and capable of creating "an impermissible risk that the capital sentencing decision will be made in an arbitrary manner." Id. at 2534. Following Booth, the Supreme Court of Florida invalidated the provisions of section 921.143 only "insofar as they permit the introduction of victim impact evidence as an aggravating factor in death sentencing." Grossman v. State, 525 So. 2d 833, 842 (Fla. 1988). Both decisions strictly limited their holdings to death penalty cases. Consequently, the consensus is that victim impact evidence still may be introduced in all noncapital cases. See Note, Constitutional Law: Victim Impact Statements and the Eighth Amendment—Booth v. Maryland, 11 Harv. J.L. & Pub. Pol'y 583 (1988).

51. Id. § 944.605.
52. Id. §§ 775.089, 921.187(2), 948.03(1)(e).
53. Id. §§ 775.089(1)(b), 921.187(2), 948.03(1)(e).
54. Id. § 944.512(1).
55. Id. § 944.512(2)(a)-(c).
56. Id. § 944.512(2)(d).
57. Id. § 960.21. The CCTF "consist[s] of all moneys appropriated by the Legislature . . . and of moneys . . . recovered . . . by subrogation or other action, recovered through restitution, received from the Federal Government, received from additional court costs, received from fines, or received from any other public or private source." Id. § 960.21(2).
58. Id. § 960.20.
59. Id. § 960.17. Reimbursement became a condition of probation. Id.
III. THE VICTIMS' RIGHTS LEGISLATION AND THE CONSTITUTIONAL AMENDMENT

The two primary purposes of the Victims' Rights Act of 1988 are to strengthen the current Victims' "Bill of Rights" and to implement the constitutional amendment. The Act creates and amends several provisions of the Florida Statutes to establish concrete guidelines for the enforcement of crime victims' newly gained constitutional rights.\(^6\) Pursuant to the 1988 legislation and article I, section 16, subsection b of the Florida Constitution, crime victims and witnesses will have the right:

1. to be present and to be heard at all critical stages of criminal proceedings;
2. to be informed of their constitutional and statutory rights as a matter of course at the earliest possible time;
3. to be notified when offenders escape or are released from custody;
4. to be free from intimidation and harassment at all times during official investigations and proceedings;
5. to receive restitution and/or compensation for injuries sustained as a result of a crime; and
6. to have their constitutional and statutory rights enforced by injunction.

A. The Right to be Present and to be Heard

Both article I, section 16, subsection b of the Florida Constitution and section 960.001(1)(a)(5), Florida Statutes, guarantee crime victims, who are not themselves incarcerated, the right "to be present, and to be heard when relevant, at all crucial stages of a criminal proceeding,"\(^61\) to the extent that the exercise of this right does not impinge upon the constitutional rights of the accused.\(^62\) The Victims' Rights Act of 1988 fleshes out these general terms by providing specific procedures which the courts and various state agencies must follow. For example, the Act requires the Sentencing Commission to reevaluate the uniform sentencing guidelines for fairness to crime vic-


\(^61\) Fla. Const. art. I, § 16(b); Ch. 88-96, § 13, 1988 Fla. Laws 444, 455 (codified at Fla. Stat. § 960.001(1)(a)(5) (Supp. 1988)).

\(^62\) Incarcerated victims are limited to "the right to be informed and to submit written statements at all crucial stages of the criminal proceedings and parole proceedings." Ch. 88-96, § 13, 1988 Fla. Laws 444, 453 (codified at Fla. Stat. § 960.001(1)(a)(6) (Supp. 1988)).
victims. A sentencing court is permitted to depart from the guidelines when credible facts—which now may include a victim impact statement—demonstrate that the victim suffered excessively "at the hands of the defendant." Similarly, in Parole and Probation Commission meetings victims must be allowed to submit an oral or written statement "regarding their views as to the granting, denying, or revoking of [the offender's] parole."

B. The Right to be Informed

Inclusion of the right to be informed in the text of the constitutional amendment reflects two major concerns of victims' advocates and sponsors of victims' legislation: first, that an injustice is done when criminals are promptly informed of their constitutional rights upon arrest, while victims are left bewildered and uncertain of where to turn for assistance; and second, that vaguely worded constitutional and statutory rights may go unenforced unless victims are given notice of, and a chance to exercise, those rights. To address these concerns, the Victims' Rights Act amends chapter 960 to require that law enforcement officers distribute "a victim's rights information card or brochure at the crime scene, during the criminal investigation, and in any other appropriate manner."

The Governor's Victim's Rights Coordinator, Maury Kolchakian, envisions the brochure as having the victim's broad constitutional and statutory rights enumerated on one page similar to the familiar Miranda rights card. The other page would list the services provided to victims in that particular city or county and the names of various agencies, both public and private, to which the victim could turn for assistance. The types of services are expanded to include "[c]risis intervention services, supportive or bereavement counseling, [and] social service support referrals." Furthermore, the Act places upon law enforcement officers an

64. Id. (amending Fla. Stat. § 921.001(7) (1987)). But see cases cited supra note 49 (victim impact evidence no longer admissible at the sentencing phase of capital cases).
66. Interview with Maury Kolchakian, supra note 3.
67. Id.
70. Interview with Maury Kolchakian, supra note 3.
71. Id. The Escambia County Sheriff's Department Victim Services Program brochure lists the victim's rights, the services available, a brief explanation of the program, and even a poem and a quote from President Reagan. The brochure was printed courtesy of the Pensacola Junior Woman's Club (copy on file, Florida State University Law Review).
affirmative duty to inform victims about their right to request and receive restitution, and their right to submit victim impact statements at sentencing.

The Act also requires the Criminal Justice Standards and Training Commission to "establish standards for instruct[ing] law enforcement officers in the subjects of victims assistance and rights." The Commission will ensure that every officer seeking initial certification after January 1, 1989, receives a minimum of four hours of instruction. These provisions seek to familiarize street level officers with the rights of the victim as well as the accused, and to ensure that victims are informed of these rights "as a matter of course at the earliest possible time."

C. The Right to be Notified

In addition to the notification requirements of Florida's prior law, the state attorney now must "make every effort" to notify a victim or witness if an offender escapes from any correctional, juvenile, or involuntary commitment facility. Furthermore, the Department of Corrections, the Parole Commission, or the state attorney must notify a victim within six months prior to an offender's anticipated release from custody. This requirement applies to any release program provided by law, including early release. The appropriate agency also must provide advance notification of any post-judicial proceedings relating to the offender, including modification of sentence and collateral attack on a judgment.

D. The Right to be Free from Intimidation and Harassment

Existing protections against the intimidation and harassment of witnesses and victims during official proceedings are extended by the new law to include the time period during official investigations. Under

73. Id. (amending FLA. STAT. § 960.001(1)(h) (1987)).
74. Id. (amending FLA. STAT. § 960.001(1)(a) (1987)).
75. Id. § 7, 1988 Fla. Laws at 452 (codified at FLA. STAT. § 943.172 (Supp. 1988)).
76. Id. According to the Commission, however, 15 hours of victims' instruction already are required. Staff of Fla. S. Comm. on Approp., CS for CS for CS for SB 634 (1988) Staff Analysis 6 (rev. May 30, 1988) (on file with committee).
77. Ch. 88-96, § 13, 1988 Fla. Laws 444, 455 (amending FLA. STAT. § 960.001(1)(a) (1987)).
78. Ch. 88-381, § 1, 1988 Fla. Laws 2039, 2043 (codified at FLA. STAT. § 960.001(1)(n) (Supp. 1988)).
80. Id.
81. Id. § 13, 1988 Fla. Laws at 456-57 (amending FLA. STAT. § 960.001(1)(d) (1987)).
82. Id. § 4, 1988 Fla. Laws at 450 (amending FLA. STAT. § 914.22(1), (2) (1987)).
the new provisions, any person who causes a victim or witness to tamper with evidence, evade legal process, or who attempts to influence the testimony of a victim or witness during an official investigation is guilty of a third degree felony. Furthermore, the law provides a misdemeanor penalty for intentionally harassing a victim or witness, in an attempt to hinder that person's cooperation in an official investigation.

Recognizing that "discovery depositions have been used by criminal defense attorneys, in some cases, to harass witnesses, intimidate victims and delay prosecution," the Legislature requested that the Florida Supreme Court appoint a Commission on Criminal Discovery.

The Commission will consider issues such as providing protection for victims, limiting depositions to only essential witnesses, and prohibiting the defendant from attending the deposition without showing good cause to be present. Until the Commission's recommendations are adopted, the only new protection regarding discovery deposition abuse provided by the Victims' Rights Act is that victims and witnesses are not required to attend discovery depositions in correctional facilities.

E. The Right to Receive Restitution and/or Compensation

The Victims' Rights Act strengthens the right to receive restitution and compensation in four major ways. First, the Act amends the prior victims' rights law by requiring a court to state, on the record and in detail, clear and compelling reasons for its failure to order restitution as a part of any penalties and as a condition of probation or community control. When an offense results in bodily injury to the victim,
an order of restitution for medical and related expenses is mandatory, not permissive.\textsuperscript{91}

Second, the court is required to enter an income deduction order for satisfaction of restitution after considering the defendant’s present \textit{and} future earning ability and financial needs.\textsuperscript{92} When the court enters an income deduction order, it will furnish the offender a statement reflecting the total amount of income to be deducted, any interest or fees, and other terms and conditions.\textsuperscript{93} The Legislature attempted to ensure that an income deduction order would not interfere with an offender’s employment opportunities by providing that an employer “may not discharge, refuse to employ, or take disciplinary action against an employee because of the enforcement of an income deduction order.”\textsuperscript{94}

Third, the Act amends the “Son of Sam” law so that victims may be compensated fully when a convicted felon profits from a literary or other account of the crime for which convicted. For example, the Act expansively defines “conviction” to include a plea of guilty or nolo contendere, regardless of adjudication of guilt.\textsuperscript{95} Furthermore, the offender will no longer receive the remainder of any proceeds after the specified distribution to the felon’s dependents, the victim, and the state. Instead, the balance will be deposited into the CCTF to make awards to victims through the Bureau of Crimes Compensation and Victim and Witness Services.\textsuperscript{96}

Fourth, the Act provides for a new mechanism to raise private funds on behalf of crime victims. The Governor is authorized to establish “a direct-support organization to assist in addressing the needs of victims of crime.”\textsuperscript{97} Its primary purpose will be to receive, invest, administer, and expend funds on behalf of crime victims.\textsuperscript{98}

\textsuperscript{91} Id. § 2, 1988 Fla. Laws at 446 (amending FLA. STAT. § 775.089(2) (1987)).
\textsuperscript{92} Id. (amending FLA. STAT. § 775.089(6), (7) (1987)).
\textsuperscript{93} Id. (codified at FLA. STAT. § 775.089(12)(a)(4) (Supp. 1988)). The clerk of the court is authorized to enforce the order. Id. (codified at FLA. STAT. § 775.089(12)(b)(1) (Supp. 1988)).
\textsuperscript{94} Ch. 88-96, § 2, 1988 Fla. Laws 444, 450 (codified at FLA. STAT. § 775.089(12)(b)(6) (Supp. 1988)). Violators are subject to a civil fine of $250 for the first offense and $500 for each thereafter. Id.
\textsuperscript{95} Id. § 8, 1988 Fla. Laws 444, 452 (amending FLA. STAT. § 944.512(1) (1987)).
\textsuperscript{96} Id. (amending FLA. STAT. § 944.512(2)(d) (1987)).
\textsuperscript{97} Id. § 14, 1988 Fla. Laws at 458-59 (codified at FLA. STAT. § 960.002(1) (Supp. 1988)).
\textsuperscript{98} The organization will operate under contract with the Executive Office of the Governor as a not for profit corporation. Id. (codified at FLA. STAT. § 960.002(1)(a) (Supp. 1988)). The Governor’s Office indicates that the direct support organization will be modeled after the Florida Governor’s Council on Physical Fitness and Amateur Sports, which also raises funds through donations to operate its program. See Interview with Maury Kolchakian, \textit{supra} note 3.
F. The Right to Have the Act’s Provisions Enforced by Injunction

To the five-point program provided by Florida’s prior law, the Victims’ Rights Act adds a sixth: the right to have these provisions enforced by injunction. The Executive Office of the Governor is required to review each governmental agency’s guidelines for the protection of victims and witnesses to determine whether that agency has complied with the mandate of the constitutional amendment and to encourage consistency in its enforcement throughout the state.99 If any agency fails to afford victims their constitutional and statutory rights, or fails to comply with the requirement to develop and implement such guidelines, the Governor may apply to the circuit court for injunctive relief to compel compliance.100

In addition to the Governor’s powers of relief, the Act authorizes a court to issue a protective injunction for persons who have been victims of repeat violence.101 Furthermore, a law enforcement officer who has probable cause to believe that a person knowingly committed an act of repeat violence in defiance of such an injunction may arrest the offender without a warrant.102

IV. ANALYSIS: WHAT WORKS AND WHAT DOESN’T

Obviously, the right “to be informed, to be present, and to be heard” is meaningless without concrete guidelines for its enforcement. Thus, the question which should be foremost on the minds of many victims’ advocates is whether the Victims’ Rights Amendment and its accompanying legislation will really work to elevate the rights of crime victims beyond their present status. Inevitably, in order to answer this question two more must be resolved. First, what do crime victims want from the system? Second, to what degree is the state committed to the concept of victims’ rights?

A. What Crime Victims Want

Some crime victims just want to be made whole; that is, their chief desire is to see their stolen property returned or their medical bills paid.103 At the other extreme, the desire for vengeance or the hope

99. Id. § 13, 1988 Fla. Laws 444, 458 (codified at Fla. Stat. § 960.001(2)(b), (c) (Supp. 1988)).
100. Id. (codified at Fla. Stat. § 960.001(2)(d) (Supp. 1988)).
103. Interview with Maury Kolchakian, supra note 3.
that society "cares" motivates some victims to want to testify at trial, recommend punishment, or even witness an offender's execution.\textsuperscript{104}

For the first type of victim, satisfaction may lie in Florida's victim compensation program and its various restitution provisions. While restitution has existed for centuries,\textsuperscript{105} the concept of paying fines to the state is a recent phenomenon, brought about by the growth of the state.\textsuperscript{106} Some commentators worry that the adoption of state programs to compensate victims shifts the burden, rightfully borne by the offender, to the state.\textsuperscript{107} The concern is that "the separation of offender and victim inherent in a victim compensation program may not be beneficial to the criminal justice system. In light of the goal of criminal reformation, restitution is more appropriate than a state funded compensation program or fines."\textsuperscript{108}

However, restitution has major deficiencies. First, restitution is premised upon the arrest and conviction of the offender. Yet, statistics show that this is an unlikely occurrence; nationwide, less than half of all violent crimes, and only one-fourth of all robberies, were cleared by arrest.\textsuperscript{109} Second, the financial outlook for most offenders who are caught is bleak. Scant prison wages are generally insufficient to provide for the offender's family, let alone costs, fines, and attorneys' fees.\textsuperscript{110} Restitution, then, may only be a viable remedy "when offenders can quickly be returned to society through probation or parole."\textsuperscript{111} This could put victims of violent crimes in the situation of being forced to choose between having the offender behind bars, thereby forgoing maximum restitution, or having the offender on the street and living in fear of repeat violence.

In apparent recognition of the shortcomings inherent in restitution, Florida, in 1977, became the thirty-fourth state to pass legislation compensating victims of violent crimes.\textsuperscript{112} Florida's program, how-

\begin{thebibliography}{112}
\bibitem{104} Id.
\bibitem{108} Smith, supra note 106, at 57 (footnote omitted). Florida's role in funding the compensation program is limited at best. See infra text accompanying notes 142-43.
\bibitem{111} Id.
\bibitem{112} The Florida Crimes Compensation Act, ch. 77-452, 1977 Fla. Laws 1819 (current version at \textit{FLA. STAT. §} 960.01-.28 (1987)).
\end{thebibliography}
ever, is riddled with exceptions and exclusions. Consequently, victims may have as much difficulty recovering for their injuries from the state as they did from the offender.\textsuperscript{113}

Like most states, Florida requires that any claimant for compensation cooperate with the state attorney and law enforcement agencies as a prerequisite to receiving compensation.\textsuperscript{114} The requirement is designed to aid the police in apprehending the criminal, as well as to help ensure that the state attorney will have witnesses to testify, if necessary.\textsuperscript{115} There is the hope that the requirement will encourage victims to participate in the criminal justice system.\textsuperscript{116} Unfortunately, studies show that states with these requirements do not have, for example, higher reporting rates for violent crimes.\textsuperscript{117}

Florida also excludes compensation for victims who contribute to their injuries,\textsuperscript{118} or who have a familial or sexual relationship with the offender.\textsuperscript{119} These exclusions appear to be rooted in a somewhat outdated concept of individual responsibility. The state's premise is that claimants who in some sense participate in their own victimization should not benefit at the expense of other, more worthy recipients.\textsuperscript{120} However, the reality is that:

\begin{quote}
[\text{the poor and minorities are much more susceptible to victimization, and in fact, more likely to be committing crimes themselves. These people largely live in a degrading and desperate atmosphere . . . . In this setting, it is almost a matter of chance as to who will strike first, and therefore, who will become the "criminal" and who will become the "victim" . . . . Many victims have previously committed crimes, and many criminals have been previously victimized.}\textsuperscript{121}
\end{quote}

In other words, there is a blurring between the class of victims and the class of offenders, especially when domestic violence is involved.\textsuperscript{122}

Florida's "serious financial hardship" exclusion is also troubling. The Bureau of Crimes Compensation and Victim and Witness Services

\begin{footnotes}
\item[113] See Friedsam, supra note 110, at 875-90.
\item[114] FLA. STAT. § 960.13(1)(b) (1987).
\item[115] See Smith, supra note 106, at 69.
\item[116] Id.
\item[118] FLA. STAT. § 960.13(6) (1987).
\item[119] Id. § 960.04(2).
\item[120] See Smith, supra note 106, at 73, 74.
\item[122] Consider the case where a husband abuses his wife over a period of years; then, in desperation, the wife kills the husband. Apparently, under section 960.04(2), neither the abused wife nor the deceased husband's estate may receive compensation.
\end{footnotes}
may deny an award if the claimant "will not suffer serious financial hardship as a result of . . . the injury." Drafters of the Uniform Crime Victims' Reparations Act noted the danger of transforming victim compensation into a welfare-recipients-only program: "[i]f the [needs] test is included . . . a real threat to the integrity of the program is posed because a strict 'needs' requirement will limit benefits of the program to persons already on welfare and thus be merely an exercise in bookkeeping." Following the lead of the majority of states, Florida's victims' rights legislation fails to provide recovery for pain and suffering and for property loss. Both of these exclusions should be considered to weaken the Legislature's attempt to adequately compensate crime victims. There are certain crimes, especially those involving sexual violence, where the only real "damage" is pain and suffering. "For example, in three-fourths of [all reported] cases of forcible rape the victim suffers no physical harm apart from the sex act itself." Yet, a 1985 study revealed that nineteen percent of all female rape victims attempted suicide, and sixteen percent had nervous breakdowns. Clearly, if victims cannot recover for pain and suffering in such instances, they are likely to go uncompensated.

The exclusion of property losses can have inequitable results. For instance, while the poor and the elderly are likely to be victims of property losses, they also are unlikely to have personal property insurance. Nor may they rely on the authorities to recover stolen property. In 1985, only one-third of all stolen property was recovered; for electronics and household goods the figure was less than five percent.

One possible bright spot is the 1988 amendment to the "Son of Sam" provision, which provides that either the victim, the state, or the CCTF will receive all proceeds from literary or other accounts of a crime—the offender’s share is reduced to zero. Unfortunately, "'Son of Sam' laws take aim at criminals' literary proceeds, but they don’t always hit the target.' First, and most obviously, when crimi-

127. Smith, supra note 106, at 80.
128. Id.
129. Id.
131. Snider, supra note 27, at 29.
nals do not receive any proceeds, their victims receive no compensation. A worthless damages right does nothing to further the state’s interests in promoting the rights of victims or shifting the financial burden of victim compensation to the criminal. Second, many writers avoid paying royalties to the criminal by dealing indirectly through others, writing fictionalized accounts of the crime, relying on public records, or simply getting the criminal’s story for free. Third, commentators almost unanimously have concluded that “Son of Sam” laws are violative of the first amendment, although no court has so ruled. Fourth, and perhaps “the most striking aspect of many Son of Sam laws is that they are generally unknown and unenforced.”

For these and other reasons, victim compensation programs often do not reach those most in need of assistance. One additional reason Florida’s program is unable to meet the needs of more victims lies in the manner in which it is funded. The Legislature has not matched its ringing declarations of victims’ rights with state dollars. Instead of direct appropriations, funding for victim compensation is primarily derived from the offender through “mandatory additional court costs and surcharges on fines and bail bonds.”

There is an irony here: if victim compensation is intended to make up for the deficiencies inherent in restitution, then it should not be competing for those same limited financial resources. If restitution fails due to the inability of an offender to pay, then a victim compensation program funded primarily by costs and fines assessed against the offender also must fall short.

In 1982, the Legislature did establish a program to pay for the initial physical examination of victims of sexual battery. The maxi-
mum payment is $150 and is payable directly to the medical facility.\textsuperscript{141} During 1987, the Bureau of Crimes Compensation and Victim and Witness Service (Bureau) paid out $839,920 on 6,302 individual claims; three were denied.\textsuperscript{142} As for general compensation claims, the Bureau, with its limited resources, made 2,353 awards on 1,710 claims in 1987, for a total of $6,655,988.\textsuperscript{143} However, 1,525 more claims—almost half of the total filed—were denied.\textsuperscript{144} Given the restrictions, exceptions, and exclusions which emasculate chapter 960, the large percentage of denials is not surprising. In fiscal year 1985, the top three reasons for denial of claims were: (1) the victims’ failure to supply information needed to determine eligibility; (2) their inability to demonstrate serious financial hardship; and (3) their failure to cooperate with law enforcement authorities.\textsuperscript{145} None of these reasons seem to have any bearing on the relative worthiness of the victim to receive compensation. Instead, each reason may represent, respectively, the state’s penchant for complicated paperwork, its desire to distribute limited funds to those most acutely in need, and its hope that the victim will participate in the successful prosecution of the offender.

As for victims who want to actively participate in the system, Florida’s new law provides for their involvement in every stage of the proceeding. The extension of state protection against victim and witness intimidation to the time during official investigations is a much-needed step. Also welcome are the provisions in the Act which guarantee victims the right to testify at parole hearings, and to receive advance notification when the offender is released or escapes from custody.

Some commentators, including Professor Yale Kamisar, have expressed reservations about victim participation at sentencing and parole hearings.\textsuperscript{146} They argue that such involvement is not appropriate in criminal proceedings and fear that the victim will be too vindictive, will not take into account mitigating circumstances, and will recommend a heavier sentence than that which would be in the public interest.\textsuperscript{147} These commentators also fear that there will be disparities

\begin{itemize}
\item \textsuperscript{141} Id.
\item \textsuperscript{142} 1987 \textsc{Annual Report}, \textit{supra} note 138, at 14-15, 29.
\item \textsuperscript{143} Id. at 14.
\item \textsuperscript{144} Id.
\item \textsuperscript{145} \textsc{Bureau of Crimes Compensation and Victim/Witness Services}, 1985 \textsc{Annual Report} 23.
\item \textsuperscript{147} Abrahamson, \textit{supra} note 146, at 547.
\end{itemize}
among sentences and parole determinations due to the introduction of victim impact evidence.  

However, these fears appear unfounded—at least in Florida. First, the new law admittedly permits a departure from the uniform sentencing guidelines when credible facts, which may include a victim impact statement, demonstrate that the victim suffered excessively at the hands of the defendant. However, the victim must demonstrate excessive suffering by a preponderance of the evidence, and a departure of more than one cell may be grounds for appeal. Second, for the immediate future, Florida’s overcrowded prisons and early release programs should banish any fears that the offender will be punished too harshly, at least in terms of time spent behind bars. Finally, studies show that victim participation is less vindictive than expected. When victims do take part in the sentencing decision, they are generally more interested in alternative sentences, which include restitution, than in pure vengeance.

A problem may arise in the matter of notifying the victim prior to the offender’s release from custody. Florida’s prison overcrowding is so severe that often neither the offender nor the Department of Corrections has many days’ notice before the offender is released. Due to the futility of setting an arbitrary advance notification date, the Act only guarantees that victims will be notified at some time prior to the offender’s anticipated release date, but no more than six months in advance of such time. This seeks to avoid, in a federally-mandated early release program, the potential conflict between the inmate’s rights under the eighth amendment and the victim’s right to be notified under article I, section 16, subsection b of the Florida Constitution.

Victims’ advocates also have been discouraged by the Florida Supreme Court’s casual treatment of victims’ rights when it appointed the Criminal Discovery Commission. The House of Representatives’ concurrent resolution “urged [the court] to include a balanced representation of law enforcement, prosecution, public and private crimi-

148. See Kiesel, supra note 146, at 26.
154. Interview with Maury Kolchakian, supra note 3.
155. See supra text accompanying notes 79-81.
nal defense counsel, victims rights organizations, the judiciary, the Florida Bar, and the Legislature in the appointment of members to the commission.” However, the commission’s membership consists of three judges, a state attorney, eight practicing attorneys, and two law professors. Apparently, representatives of the police, victims’ rights groups, and the Legislature have been excluded. The combination of the weak language of the resolution and the supreme court’s lack of commitment to changing Rule 3.220(d) of the Florida Rules of Criminal Procedure will likely result in few changes in the way victims are treated during discovery deposition.

Victims who desire compensation or restitution for their injuries, then, may find Florida’s new Victims’ “Bill of Rights” somewhat lacking. On the other hand, with a few exceptions, the new law offers concrete opportunities for victims to become involved in every stage of the criminal justice system, if they so desire.

B. Sowing the Seeds of Compromise

Initially, victims’ advocates wished to address the perceived imbalance in the criminal justice system. They pointed out that the government provided an array of constitutional safeguards for the accused but none for the victim. They proclaimed: “[p]riorities which devote millions to convicted criminals, and only thousands to innocent victims, must be re-examined and rejected.” In contrast, the defense bar feared that tampering with the system to include consideration for victims would impinge on the rights of the accused. The courts and law enforcement agencies viewed victims’ rights as an unnecessary distraction from their duty to arrest, try, convict, and sentence criminals. Staggering caseloads and runaway violent crime rates contributed to the latter view.

Today, the rhetoric appears to have changed—“groups whose principal concern originally was the rights of the victim now take care to note that they do not seek to impinge on the constitutional rights” of the accused. Witness, as evidence, the qualifying phrase in article I,
section 16, subsection b of the Florida Constitution, permitting victims to exercise their right "to the extent that this right does not interfere with the constitutional rights of the accused." Likewise, "[g]roups originally antagonistic to the victims' movement . . . now perceive the importance of protecting victims." In short, both groups have come to the realization that "the interests of the victim and the constitutional rights of the defendant in the criminal justice system are both worthy of attention and are not necessarily mutually exclusive."

Thus, victims' advocates owe their recent success in passing victims' legislation—not to their ability to run roughshod over their opposition—but to their realization that victims' rights could not be advanced without the willing cooperation of the courts, state attorneys, and law enforcement agencies. The backers of victims' legislation had learned three valuable lessons: first, given the Legislature's acknowledged reluctance to directly appropriate funds for victims, they recognized that any attempt to heap additional responsibilities on the courts, prosecutors, and police without additional funding would draw their immediate opposition. Second, they realized that the system, with its focus on the accused, had incredible inertia, and could only be changed gradually. Finally, they recognized that any provisions permitting victims to bring legal action to enforce their rights would potentially drive an adversarial wedge between victims and the system which is designed to protect them.

C. The State's Commitment to Victims' Rights

The success of the Victims' Rights Act and the constitutional amendment hinges not only on what victims hope to receive from the system, but to what degree the state is willing to carry out its stated goals. Adverse to directly appropriating funds for victims' programs, the Legislature continued to seek ever more creative ways to fund them. In addition to fines, surcharges, and court costs, the lawmakers pinned their funding hopes on the direct support organization created within the Executive Office of the Governor. It is hoped that the organization will assemble and coordinate proven private fun-

164. Id.
165. Id.
166. Interview with Maury Kolchakian, supra note 3.
167. Id.
168. Id.
draising efforts, and that the imprimatur of the state and the organization's proximity to the Governor will enhance these efforts.\textsuperscript{170} Additionally, the Comprehensive Crime Victims and Witnesses Services office already has developed and implemented a grant program in which it is administering $1.2 million received from the United States Department of Justice under the Victims of Crime Act (VOCA).\textsuperscript{171} Under this program, funds are available to local victim services programs. In 1987, forty-one VOCA grants were awarded in nineteen of the state's twenty judicial circuits.\textsuperscript{172}

Gradual changes strengthening the rights of crime victims become readily apparent by comparing provisions in the Victims' Rights Act with Florida's prior law. Under the former provisions, a court had to order restitution unless it found reasons not to do so and stated those reasons on the record;\textsuperscript{173} the "Son of Sam" law permitted the remainder of any proceeds to go to the offender;\textsuperscript{174} and victims were "routinely given" information regarding their rights and the various assistance services available.\textsuperscript{175} The Act requires a court to order restitution unless it finds clear and compelling reasons not to do so, and states those reasons on the record in detail;\textsuperscript{176} no proceeds of accounts of the crime go to the offender, rather, the remainder is deposited into the CCTF to make awards to victims;\textsuperscript{177} and information regarding victims' rights and assistance services must be "given as a matter of course at the earliest possible time."\textsuperscript{178}

One not so gradual change, however, was the addition of the provision, which reads in part: "the Governor may apply to the circuit court of the county where the headquarters of [an] agency is located for injunctive relief against any agency which has failed to comply with any of the requirements of this section."\textsuperscript{179} This seems to be contradictory to a current provision in the same chapter, left unchanged by the Act, which provides: "[n]othing in this section or in the guidelines adopted pursuant to this section shall be construed as creating a cause of action against the state or any of its agencies or political sub-

\begin{footnotesize}
\begin{itemize}
\item[170.] Interview with Maury Kolchakian, supra note 3.
\item[172.] 1987 Annual Report, supra note 138, at 15.
\item[174.] Id. § 944.512(2)(d).
\item[175.] Id. § 960.001(1)(b).
\item[177.] Id. § 8, 1988 Fla. Laws at 452-53 (amending Fla. Stat. § 944.512(2)(d) (1987)).
\item[178.] Id. § 13, 1988 Fla. Laws at 455 (amending Fla. Stat. § 960.001(1)(a) (1987)).
\item[179.] Id. (codified at Fla. Stat. § 960.001(2)(d) (Supp. 1988)).
\end{itemize}
\end{footnotesize}
VICTIMS' RIGHTS ACT

divisions.' 180 Apparently, the first provision is intended to give the Governor a privilege denied to victims in the second—the ability to force state agencies to guarantee victims their constitutional and statutory rights. It is uncertain how willing the Governor will be to exercise this injunctive power. It is certain, at least in the minds of experienced victims' advocates, that this power is more appropriately exercised by the Governor than by the victim. 181 Granting the Governor this power signals both a theoretical commitment to upholding the rights of crime victims at the state level and the recognition that local agencies may be unable or unwilling to fully exercise this power. 182

V. Conclusion

As is often the case when lawmakers strike off into relatively uncharted territory, the Victims' Rights Act and the constitutional amendment may not meet the expectations of their sponsors. This is not to say that there were no victories; there were genuine gains for every setback.

The good news first: the direct support organization created within the Office of the Governor should bolster the current law in its greatest area of weakness—funding for victim compensation programs. Almost as promising is the provision for the victims' rights information brochure to be given out at the crime scene or other appropriate times. Not only will it enable victims to learn about their rights and available assistance services, but it will allow the police to fulfill their role quickly so that they can move on to investigating the crime and arresting the offender. Furthermore, the Governor has the power of injunctive relief to ensure that all agencies breathe life into the constitutional amendment.

At first glance, the promise of greater victim participation at sentencing and parole hearings seems full of possibilities. However, this may be an empty hope. If presenting victim impact evidence at sentencing is designed to encourage longer jail terms, it may fail due to prison overcrowding and early offender release programs as long as these conditions continue. It remains to be seen if presenting victim impact evidence can result in more creative sentences that include restitution.

Another low point is Florida's insistence on overlapping restitution and compensation as remedies through which victims can be made

181. Interview with Maury Kolchakian, supra note 3.
182. Id.
whole. No combination of conditions, liens, and income deduction orders will make hardened or indigent criminals suddenly spout forth money for their victims. The state funding plan is like trying to put two hands into the same pocket at the same time. Its continued reluctance to directly fund victim compensation may be an attempt to avoid turning the program into welfare. But the provision requiring claimants to demonstrate financial hardship surely defeats this purpose, if it ever was one.

Thus, in some respects, a new battle has replaced the old. Now, it is not victims fighting for a place in the system; the current consensus is that they belong. But a new battle now rages between the state and its own limited resources. Vying for these resources are overcrowded jails, rising crime rates, and competing welfare and infrastructure programs. Clearly, the rights of crime victims will not be secure until these issues are resolved.