

# VICTIMS' RIGHTS: VERMONT'S NEW LAW

## INTRODUCTION

Historically, crime victims' concerns and problems were largely disregarded by the criminal justice system.<sup>1</sup> The system focused primarily on the defendant's and the state's interest in the adversarial process.<sup>2</sup> Most legal professionals did not regard the crime's resultant effects upon the victim as a *legal* problem.<sup>3</sup> As a result, victims were harmed not only by their assailants, but also by the criminal justice system's disregard for the victims' rights.<sup>4</sup> Not surprisingly, many victims became alienated from the judicial system that had evolved to protect them.<sup>5</sup> As a result of their alienation, crime victims became reluctant to come forward and report crimes.<sup>6</sup> Victims were also unwilling to cooperate with the investigation and prosecution of the crime. In many instances, prosecutors found that the victim witnesses' noncooperation became the primary reason for the court's dismissal of criminal cases.<sup>7</sup>

Vermont recently adopted legislation that addresses the above-mentioned problems and concerns associated with crime victims.<sup>8</sup> The law was adopted in the wake of a decade-long national movement to bring victims' rights to the attention of our criminal justice system.<sup>9</sup> Vermont's new law begins to fill the gaps in a criminal justice system that largely ignores victims' concerns. The law creates a statewide victims' assistance program that addresses the victims' interest in the criminal prosecution of his or her assailant.<sup>10</sup> The new law positively affects a crime victim throughout the

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1. Riley, *Victims' Rights Symposium, Letters of Introduction*, 11 PEPPERDINE L. REV. xiii (1984).

2. Carrington & Nicholson, *The Victims' Movement: An Idea Whose Time Has Come*, 11 PEPPERDINE L. REV. 1 (1984); Hudson, *The Crime Victim and the Criminal Justice System: Time for a Change*, 11 PEPPERDINE L. REV. 23, 23-24 (1984).

3. Riley, *supra* note 1, at xiii.

4. Gittler, *Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems*, 11 PEPPERDINE L. REV. 117 (1984).

5. Carrington & Nicholson, *The Victims' Movement: An Idea Whose Time Has Come*, 11 PEPPERDINE L. REV. 1, 3-5 (1984).

6. Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J. L. & PUB. POL'Y 357, 357-58 (1986).

7. Kelly, *Victims' Perception of Criminal Justice*, 11 PEPPERDINE L. REV. 15, 15-16 (1984).

8. VT. STAT. ANN. tit. 13, §§ 5301-5307 (Supp. 1986).

9. See generally Carrington & Nicholson, *supra* note 4, at 5-10.

10. VT. STAT. ANN. tit. 13, § 5304 (Supp. 1986).

victim's contact with the prosecutorial and judicial system. Vermont's statutory recognition of crime victims' rights was long overdue.

## I. THE LEGISLATION

On September 1, 1986, Vermont's law became effective.<sup>11</sup> The law creates a formal assistance program and explicitly recognizes victims' rights.<sup>12</sup> It focuses on the reduction of a crime victim's financial, emotional, and physical harm resulting from a crime perpetrated against the victim.<sup>13</sup> Further, the law is designed to prevent a person from being victimized by law enforcement officials and the criminal justice system.<sup>14</sup> Under the law, crime victims must "be treated with courtesy and sensitivity by the court system and the state's attorney's office."<sup>15</sup> Further, the statute includes a provision that states "[t]hose responsible should ensure that the process of criminal prosecution moves smoothly and expeditiously."<sup>16</sup> These statutory directives are needed to prevent the alienation of victims from the criminal justice system.

The statute also directs the executive director of the state's attorneys to "create and maintain a victims assistance program."<sup>17</sup> Under this directive, state's attorneys are authorized to hire victim advocates who are responsible for providing victims with the following: (1) information; (2) notification; and (3) services.<sup>18</sup> These three aspects are the main focus of the new law.

### A. *Information*

Under the information mandate of the Victims' Assistance Program, the victim advocate must inform the victim "as to the level of protection available, procedures to be followed in order to receive applicable witness fees, the right to seek restitution as an element of the final disposition of the case and the right to appear

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11. Vt. STAT. ANN. tit. 13, §§ 5301-5307 (Supp. 1986).

12. *Id.*

13. Vt. STAT. ANN. tit 13, § 5303 (Supp. 1986).

14. *Id.*

15. *Id.*

16. *Id.* The statute does not provide a definition of "those responsible." However, within the context of this provision, it appears that "those responsible" refers to members of the court system and the state's attorney's office.

17. Vt. STAT. ANN. tit. 13, § 5304 (Supp. 1986).

18. *Id.* §§ 5304, 5306.

at sentencing . . . .”<sup>19</sup> Consequently, the victim advocates become a support mechanism for victims and a guide through the legal labyrinth.

The statute leaves the victim advocate with the discretion on how to inform the victims of their rights and the procedures to follow. Other states require that those agencies involved with informing the victim must provide informative “booklets, pamphlets and other pertinent written information” to victims regarding their rights under the victims’ assistance laws.<sup>20</sup> The availability of required written information would ensure that victims would be informed of their rights even in a situation where the victim advocate is unavailable at that time.<sup>21</sup>

### B. Notification

Victim advocates must timely notify victims of “when a court proceeding involving their case is scheduled to take place and when a court proceeding to which they have been summoned will not take place as scheduled.”<sup>22</sup> Victims “shall also be notified as to the final disposition of the case and shall be notified when the defendant is released from custody or escapes . . . .”<sup>23</sup>

Vermont’s notification requirement is important to the victim for two reasons. First, notification of the case’s progress is important to the victim because the victim has been directly harmed by the crime and, therefore, has a valid interest in the case.<sup>24</sup> Second, notification of the offender’s sentence or release from custody is essential to the victim because such notification can alleviate some of the anxiety the victim experiences and the legitimate fear of revictimization.<sup>25</sup>

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19. *Id.* § 5304(1). Under the Vermont statute, services are extended only to victims of crime. Some state statutes also extend these services to witnesses of crime. *See MASS. GEN. L. ch. 258B § 3 (1984).*

20. N.Y. EXEC. LAW § 625-a (McKinney Supp. 1987). *See generally STARK & GOLDSTEIN, THE RIGHTS OF CRIME VICTIMS 30 (1985).*

21. Cooch, *Victims of Crime Have a Voice at Orange County Court*, White River Valley Herald, Nov. 27, 1986, at 1. At present there are 12 victim advocates throughout Vermont. Many of the new positions are part-time. Thus, the victim advocate availability may be limited.

22. VT. STAT. ANN. tit. 13, § 5304(2) (Supp. 1986).

23. *Id.*

24. PRESIDENT’S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 64 (1982) [hereinafter FINAL REPORT].

25. *Id.*

### C. Services

To reduce the emotional, physical and financial consequences that result from criminal victimization, the new law entitles the crime victim to receive several services.<sup>26</sup> The services offer the victim emotional support and assistance in coping with the legal maze. The principal statutory services provide: (1) short-term counseling; (2) assistance with law enforcement agencies; (3) reduction of economic loss to the victim; and (4) restitution advice.<sup>27</sup>

#### 1. Short-Term Counseling

In attempting to address the emotional consequences of victimization, the law entitles a victim to receive short-term counseling and support from the victim advocates.<sup>28</sup> Short-term counseling can provide some relief from the initial trauma of victimization. However, a victim's emotional or psychological harm may need to be addressed by a specific agency or private individual who can provide more comprehensive treatment.<sup>29</sup> As a result, the statute provides that a victim is entitled to referral to further counseling services.<sup>30</sup>

#### 2. Assistance with Law Enforcement Agencies

Aside from counseling, the victim advocate assists the victim in "dealing with law enforcement agencies."<sup>31</sup> Specifically, the victim advocate aids the victim in obtaining protection "from harm and threats of harm arising out of [victim] cooperation with the court system . . . ."<sup>32</sup> The victim advocate will communicate with the police. Assistance in "dealing with" law enforcement encourages victim participation in the criminal justice system.<sup>33</sup> Further, police protection prevents the victims from being harmed again as a result of their cooperation with law enforcement officials.<sup>34</sup>

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26. VT. STAT. ANN. tit. 13, § 5304(3)(A)-(G) (Supp. 1986). Other services not provided for in this section include transportation and return of property.

27. *Id.*

28. *Id.* § 5304(3)(A).

29. FINAL REPORT, *supra* note 24, at 105-07. The report notes that the psychological effects of victimization "may be profound and long-lasting." *Id.* at 106.

30. VT. STAT. ANN. tit. 13, § 5304(3)(A) (Supp. 1986).

31. *Id.* § 5304(3)(F).

32. *Id.* § 5304(3)(D).

33. See generally FINAL REPORT, *supra* note 24, at 57-61.

34. See STARK & GOLDSTEIN, THE RIGHTS OF CRIME VICTIMS 281-91 (1985). A 1976

### 3. Reduction of Economic Loss to the Victim

The law is also directed at providing services to reduce the victim's economic loss resulting from the victim's subsequent involvement in the criminal justice system.<sup>36</sup> The victim advocates help victims "in obtaining financial assistance and minimizing loss of pay or other benefits resulting from involvement in the criminal justice process . . . ."<sup>36</sup> However, the Vermont statute does not include a victims' compensation fund.<sup>37</sup>

### 4. Restitution Advice

Ultimately, the primary means of obtaining financial assistance under the new law is through restitution.<sup>38</sup> The victims are entitled to "assistance in documenting and preparing requests for restitution and insurance reimbursement."<sup>39</sup> The new law directs the victim advocate to inform the victims that they are allowed to seek restitution.<sup>40</sup>

In Vermont, the court is permitted to award restitution to a crime victim under section 7043 of title 13 and section 252(b)(6) of title 28 of the Vermont Statutes Annotated.<sup>41</sup> However, a victim may be unable to recover all of his or her damages within the criminal proceeding.<sup>42</sup> The victim must seek unliquidated damage awards in a separate civil trial.<sup>43</sup> Thus, a victim can fully recover for all damages only if the victim brings a separate civil action.

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study of all witnesses who refused to cooperate in the prosecution of crime showed that "28% . . . did so due to 'fear of reprisal.'" *Id.* at 281.

35. VT. STAT. ANN. tit. 13, § 5304(3) (Supp. 1986).

36. *Id.* § 5304(3)(B).

37. Anderson & Woodard, *Victim and Witness Assistance: New State Laws and the System's Response*, 68 JUDICATURE 221, 223 (1985). "At present, 39 states, the District of Columbia and the Virgin Islands have enacted legislation providing compensation for at least some classes of crime victims." *Id.* at 223.

38. Although the Vermont's Victims' Rights statute addresses only the right to seek restitution, the court is allowed to award it within Vermont's statutory scheme. *See infra* note 41.

39. VT. STAT. ANN. tit. 13, § 5304(3)(C) (Supp. 1986).

40. *Id.* § 5304(1).

41. VT. STAT. ANN. tit. 13, § 7043(a) (Supp. 1986). The statute states that the court must consider restitution in every case in which a crime victim has suffered a material loss or incurred medical expenses. *See also* VT. STAT. ANN. tit. 28, § 252(b)(6) (1985). The court can impose as a probation condition that the offender make restitution to the victim.

42. *See State v. Jarvis*, 146 Vt. 636, 509 A.2d 1005 (1986).

43. *Jarvis*, 140 Vt. at 638, 509 A.2d at 1006. *See also* VT. STAT. ANN. tit. 13, § 7043(g) (Supp. 1986).

Recently, in *State v. Jarvis*,<sup>44</sup> the Vermont Supreme Court considered the issue of restitution in a criminal proceeding.<sup>45</sup> In *Jarvis*, the defendant pleaded guilty to kidnapping and was sentenced to ten to twenty years in prison.<sup>46</sup> The defendant received a suspended sentence after serving four years.<sup>47</sup> As a probation condition, he was directed to pay the victim of his crime \$5,000 in restitution.<sup>48</sup> The defendant appealed the probation condition arguing that his victim's pain and suffering was not a proper matter for restitution.<sup>49</sup> The court held for the defendant and concluded that the restitution statutes did not include the right to award unliquidated damages in a criminal proceeding.<sup>50</sup> The court stated that "[d]amages that are not readily ascertainable, such as pain and suffering, emotional trauma, loss of earning capacity and wrongful death awards are not proper subjects of restitution."<sup>51</sup> Consequently, even though the victim's advocate must inform the victim that restitution may be sought in a criminal proceeding, such restitution is limited to liquidated amounts. Full recovery for economic loss can be recovered only by bringing a separate civil action.<sup>52</sup>

A victim's restitution is further limited by the defendant's ability to pay.<sup>53</sup> The court's restitution order in the criminal sentencing must fix the amount of restitution to what the defendant "can or will be able to pay."<sup>54</sup> Therefore, even though the new law recognizes victims' rights, the crime victim may not be fully compensated for his or her actual economic loss and may be subjected to burdensome court proceedings.

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44. 146 Vt. 636, 509 A.2d 1005 (1986).

45. *Id.* at 637, 509 A.2d at 1005.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 638, 509 A.2d at 1006.

51. *Id.* at 639, 509 A.2d at 1006.

52. Gittler, *supra* note 4, at 138-39. Some of the inconveniences of bringing a civil suit are the following: victims may not be aware of tort remedy; victims may lack the resources to bring suit; victims are unable to obtain the assistance of counsel on a contingent fee basis; victims are not willing to undergo the inconvenience of bringing a damage suit if damages are small and the offender is insolvent; and victims, after going through a criminal proceeding, may not have the energy or stamina needed for a civil trial. *Id.*

53. VT. STAT. ANN. tit. 13, § 7043(c) (Supp. 1986).

54. *Id.*

## II. POTENTIAL EFFECTIVENESS OF THE VICTIMS' RIGHTS LAW

Vermont's recognition of victims' rights is a positive step toward relieving victims' alienation from the criminal justice system. Statutory recognition of victims' rights also acknowledges that victims should not be blamed for their victimization. However, the extent to which victims' rights will be recognized by the criminal justice system will depend on the statute's implementation by prosecutors, victim advocates, law enforcement agents, and court officials.

As noted previously, the victim advocate gives notification, information and other related services to the victim.<sup>55</sup> The role of the victim advocates should not be understated.<sup>56</sup> The victim advocate's role is an essential element in ensuring that a crime victim's rights are recognized. Consequently, it becomes crucial that enough victim advocates be available among the state's attorneys' offices to ensure that each victim will have meaningful access to the advocate. If the victim does not have adequate access, the purpose of the law will be frustrated and the victim will continue to be alienated from the criminal justice system.

Further, the law is directed toward reducing the victim's economic loss that is caused by both the criminal victimization and the victim's subsequent involvement with the criminal justice system. It is important that the crime victim receive the necessary information that will minimize the victim's economic loss. Minimizing economic loss will encourage a victim to participate in the criminal justice system because often, a crime victim cannot bear the expenses that result from his or her victimization. Previously, the criminal justice system simply ignored the victim's economic interest resulting in the alienation of the victim. Thus, the victim's participation in the system decreased.<sup>57</sup>

In an attempt to resolve victims' economic problems the statute provides that victims receive information about their right to seek restitution. Restitution, in turn, reduces the victim's economic losses while imposing responsibility on the offender for the dam-

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55. See *supra* text accompanying notes 13-27.

56. See *supra* note 21.

57. See Gittler, *supra* note 4, at 139. One study showed that "relatively few victimizations are so costly as to negate the possibility of restitutive disposition even bearing in mind the very low income levels of defendants." *Id.* See also Hudson, *The Crime Victim and the Criminal Justice System: Time for a Change*, 11 PEPPERDINE L. REV. 23, 45 (1984).

ages that he or she has inflicted.<sup>58</sup> Restitution is also a cost-effective alternative to long-term imprisonment.<sup>59</sup> Full restitution, including recovery for pain, suffering and emotional trauma, provides an opportunity for the court to make a victim economically whole.<sup>60</sup> Under the present Vermont law, whether a victim receives any restitution depends on a defendant's ability to pay.<sup>61</sup> Moreover, the victim can recover fully for economic losses only by bringing a civil action. The crime victim can first request certain liquidated damages in the criminal proceeding after the defendant has pleaded guilty or been convicted.<sup>62</sup> However, the victim must bring a separate civil action if the victim wants to recover for unliquidated damages such as recovery for emotional trauma.<sup>63</sup> This procedure does not promote the victim's full economic recovery because the burden is on the victim to go through both the criminal and the civil systems in order to recover for economic losses that occurred as a result of their criminal victimization.

Courts require separate proceedings in awarding unliquidated damages to ensure that the defendant's due process rights will not be compromised. For example, the *Jarvis* court feared that the defendant's due process rights would be compromised if unliquidated damages and awards for pain and suffering were allowed at the sentencing.<sup>64</sup> Nevertheless, there are viable alternatives that would adequately balance the victim's and defendant's rights.<sup>65</sup> For example, components of the French and West German prosecution systems could be synthesized into the American criminal justice system.<sup>66</sup> Under this model, the system would provide that the vic-

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58. Hudson, *The Crime Victim and the Criminal Justice System: Time for a Change*, 11 PEPPERDINE L. REV. 23, 45 (1984).

59. *Id.*

60. *Id.* at 38. "[T]he most deeply felt need for most crime victims is not revenge but an opportunity to be made whole." *Id.* See also FINAL REPORT, *supra* note 24, at 78-79.

61. *See supra* note 53.

62. *See supra* text accompanying notes 41 and 43.

63. *See supra* text accompanying note 43.

64. *Jarvis*, 145 Vt. at 640, 509 A.2d at 1007.

65. *See* Hudson, *supra* note 57, at 44 n.97. Some countries have adopted the concept of *partie civile*, which allows a victim to implead his or her civil damages into the criminal case. This device allows the victim to recover in one proceeding. Countries that use this procedure are France, West Germany, Sweden, and Israel. *Id.* See Cardenas, *supra* note 6, at 384-98. Cardenas includes a discussion of the comparative law and a proposal to synthesize such a concept into the American criminal system.

66. Cardenas, *supra* note 6, at 392-98. A detailed explanation of this synthesis of French and West German prosecution systems into the American criminal justice approach is beyond the scope of this development topic. However, a succinct and thoughtful discussion is presented in the above cited article by Mr. Cardenas.

tim become a party to the proceeding against the criminal.<sup>67</sup> There would be both a prosecution by the state and a private action by the victim.<sup>68</sup> The simplest means of achieving this would be that when the state's attorney has commenced an action against the offender, the victim would join his or her private action for damages.<sup>69</sup> However, sanctions would be imposed against a victim for pursuing frivolous claims or abuses of the process.<sup>70</sup> This would ensure that the defendant's rights were not compromised. Such a "reorientation" of the criminal justice system would lessen the victim's alienation and encourage the victim's participation in the criminal justice system.<sup>71</sup> Further, such a proceeding would promote judicial economy because the victim could recover in one proceeding.<sup>72</sup>

The new law does not include a provision allowing a victim to be compensated for losses suffered unless the assailant is apprehended.<sup>73</sup> This problem has been addressed in many states where laws have been adopted to provide compensation to a crime victim even though the defendant is not apprehended.<sup>74</sup> Such laws alleviate some of the economic losses that a victim experiences as a result of the victimization.

### CONCLUSION

Vermont's victims' rights statute was necessary to ensure that victims' rights would not be overlooked by the criminal justice system. Reform in the area of victims' rights will encourage victims to participate in the criminal justice system and thereby alleviate their alienation from the system designed to protect them. Hopefully, statutory recognition of victims' rights will increase victim participation in the system and generate a reduction of crime in Vermont. However, much of the success of the new law depends

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67. *Id.* at 392.

68. *Id.*

69. *Id.*

70. *Id.* at 395. Cardenas notes that "the danger of unfounded private actions would be reduced by the common law civil remedy for malicious prosecution and abuse of process." Even though most states allow immunity to the public prosecutor, the action could be used against a private individual bringing a frivolous claim for damages against the defendant. *Id.*

71. *Id.* at 390.

72. *Id.* at 396.

73. See *supra* note 37 and accompanying text.

74. *Id.*

upon its implementation. Victims' services also must be adequately funded to ensure meaningful access to them by the victim. In order for an individual to experience a sense of justice in society, the individual must be guaranteed that the individual's rights will be protected. Without the recognition of the victim's rights, a true balance in justice cannot be achieved.

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