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## Monetary Recoveries for State Crime Victims

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# MONETARY RECOVERIES FOR STATE CRIME VICTIMS

JEFFREY A. PARNES\*, LAURA LEE,\* & EDMUND LAUBE\*

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## I. INTRODUCTION

Every year about twenty million Americans are crime victims.<sup>1</sup> More than sixteen million are victims of crimes involving property.<sup>2</sup> Many criminal code victims (and many others undesignated as victims under the criminal laws) suffer personal injury as well as other readily ascertainable losses. Crimes often involve state statutes that are only enforceable in state courts. For all state crime victims, there is typically an array of avenues to monetary recoveries for related losses. These are chiefly provided by constitutions, statutes, and common law rulings. Unfortunately, many victims go without recovery even when assets are or may be available. Are there better ways to secure recoveries for losses resulting from crimes?

Recoveries typically are available through three avenues: a criminal case (with or without a formal charge); a related civil case (including a presuit settlement); and a related administrative or special court proceeding. A single crime victim may employ more than one avenue, at times simultaneously.

This paper examines the three avenues of recoveries available to state crime victims, though it also briefly explores recoveries in the federal courts. State crime victim recovery avenues often are, and should be, broader than recovery avenues available in federal courts. While there are currently no express federal constitutional crime victim rights, many state constitutions expressly recognize at least some such rights, including recovery rights.<sup>3</sup> While certain state constitutional crime victim recovery rights are largely, if not exclusively, dependent upon enabling legislation, others are not.<sup>4</sup> Explicit state constitutional recognition of crime victim recovery should at least elevate crime victim interests when legislatures and courts act.

Broader state crime victim recovery avenues are also generally more available because unlike federal district courts, they are not limited by subject matter jurisdictional constraints. Article III of the Constitution leaves many recovery claims, involving both federal and state crimes, outside federal court authority. State trial court jurisdictional authority typically is unlimited.

Because of the breadth and availability of state recovery avenues, crime victims often utilize them even for federal law crimes. First of all, diversity of citizenship and amount in controversy requirements for the Article III courts often are not met where there are federal crimes. Furthermore, any supplemental authority in the federal courts is discretionary and has been largely unrecognized in federal statutes.<sup>5</sup> There is also no explicit federal legislation on Article III court jurisdiction involving many crime victim recoveries tied to federal crimes. By contrast, most state trial courts enjoy expansive jurisdictional authority, including subject matter authority

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<sup>1</sup> MICHAEL R. RAND, U.S. DEP'T OF JUSTICE, NATIONAL CRIME VICTIMIZATION SURVEY: CRIMINAL VICTIMIZATION, 2008, at 1 (2009) (21,312,400 people).

<sup>2</sup> *Id.* (16,455,890 people).

<sup>3</sup> *Infra* Part II.A.

<sup>4</sup> *Infra* Part III.A.

<sup>5</sup> *See* 28 U.S.C.A. § 1367 (West 2010).

over recoveries sought by federal crime victims. For example, the Illinois circuit courts are constitutionally vested with jurisdiction over “all justiciable matters.”<sup>6</sup>

The broader avenues for crime victim recoveries in state courts are also facilitated by procedures that could never be employed in the federal courts. For example, the federal constitutional civil jury trial right that applies in federal district courts does not operate in state courts.<sup>7</sup> State constitutional civil jury trial procedures at times do not follow federal practices. Even when the state constitutional language on civil juries appears comparable to the Seventh Amendment federal civil jury trial right, state constitutional civil jury trials may be conducted differently in both large and small ways.<sup>8</sup>

In this Article, we explore the constitutional, statutory, and common law foundations of the three recovery avenues available to crime victims. We also explore the federal-state and interstate differences in these avenues, along with the associated barriers to recovery. Finally, we propose better ways in which to facilitate state crime victim recoveries.

## II. CONTENTS AND ENFORCEMENT OF STATE CONSTITUTIONAL CRIME VICTIM RECOVERIES

### A. Contents

In contrast to the federal Constitution, several American state constitutions address crime victim recoveries. The Louisiana Constitution provides for “the right to seek restitution.”<sup>9</sup> In the Rhode Island Constitution, there is a right for a “victim of crime . . . to receive, from the perpetrator of the crime, financial compensation.”<sup>10</sup> In South Carolina, “victims of crime” have a right to “prompt and full restitution from the person or persons convicted.”<sup>11</sup> The California Constitution says: “It is the unequivocal intention of the People . . . that all persons who suffer losses as a result of criminal activity shall have the right to seek and secure restitution from the persons convicted . . . [for] losses they suffer.”<sup>12</sup> It further provides that “[r]estitution shall be ordered . . . in every case . . . in which a crime victim suffers a loss.”<sup>13</sup> In Rhode Island,<sup>14</sup> Wisconsin,<sup>15</sup> Texas,<sup>16</sup> and Georgia<sup>17</sup> there are

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<sup>6</sup> ILL. CONST. art. VI, § 9. *See also* IND. CONST. art. VII, § 8 (“The Circuit Courts shall have such civil and criminal jurisdiction as may be prescribed by law.”).

<sup>7</sup> *Walker v. Sauvinet*, 92 U.S. 90, 92 (1876).

<sup>8</sup> This is because of differences such as the amount in controversy, the number of jurors needed, and the need for unanimity. *See, e.g.*, U.S. CONST. amend. VII (\$20); HAWAII CONST. art. I, § 13 (\$5000); *People v. Lobb*, 161 N.E.2d 325, 331 (Ill. 1959) (requiring unanimity and twelve jurors); *Colgrove v. Barrin*, 413 U.S. 149, 157 (1973) (requiring six jurors); OR. CONST. art. VII, § 5 (three-fourths of jury may render verdict).

<sup>9</sup> LA. CONST. art. I, § 25.

<sup>10</sup> R.I. CONST. art. I, § 23.

<sup>11</sup> S.C. CONST. art. I, § 24.

<sup>12</sup> CAL. CONST. art. I, § 28(b)(13)(A).

<sup>13</sup> *Id.* § 28(b)(13)(B). *See also* ARIZ. CONST. art. II, § 2.1(A)(8) (“To preserve and protect victims’ rights to justice and due process, a victim of crime has a right . . . [t]o receive prompt

constitutional provisions on crime victim “compensation” available from state funds. As these examples show, recoveries by crime victims under American state constitutions may apply in civil cases, criminal cases, as well as administrative proceedings that may involve payments made by the state rather than the criminals.

State constitutions vary on who constitutes a crime victim entitled to possible recoveries. Some states, such as California,<sup>18</sup> Illinois,<sup>19</sup> Texas,<sup>20</sup> and Wisconsin,<sup>21</sup> broadly recognize crime victim recoveries by not expressly limiting them to those hurt by convicted criminals. Other states, such as Arizona<sup>22</sup> and Oklahoma,<sup>23</sup> have narrower constitutional provisions that make recovery only available from those

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restitution from the person or persons convicted of the criminal conduct that caused the victim’s loss or injury.”).

<sup>14</sup> R.I. CONST. art. I, § 23 (“A victim of crime shall, as a matter of right . . . be entitled to receive, from the perpetrator of the crime, financial compensation for any injury or loss caused by the perpetrator of the crime, and shall receive such other compensation as the state may provide.”).

<sup>15</sup> WIS. CONST. art. I, § 9m (“This state shall ensure that crime victims have all of the following privileges and protections as provided by law . . . [including] restitution [and] compensation . . .”).

<sup>16</sup> TEX. CONST. art. I, § 31(a)-(b) (“The compensation to victims of crime fund created by general law and the compensation to victims of crime auxiliary fund created by general law are each a separate dedicated account . . . . [M]oney deposited to the credit of the compensation to victims of crime fund or the compensation to victims of crime auxiliary fund . . . may be expended as provided by law only for delivering or funding victim-related compensation, services, or assistance.”).

<sup>17</sup> GA. CONST. art. III, § 6, para. 6(f) (“The General Assembly shall be authorized to allocate certain funds, to appropriate funds, to provide for a continuing fund, or to provide for any combination thereof for the purpose of compensating innocent victims of crime and for the administration of any laws enacted for such purpose.”).

<sup>18</sup> CAL. CONST. art. I, § 28(b)(13) (“a victim shall be entitled to . . . restitution”).

<sup>19</sup> ILL. CONST. art. I, § 8.1(a)(10) (“Crime victims, as defined by law, shall have . . . [t]he right to restitution.”).

<sup>20</sup> TEX. CONST. art. I, § 30 (“A crime victim has . . . the right to restitution.”).

<sup>21</sup> WIS. CONST. art. I, § 9m (“This state shall ensure that crime victims have all the following privileges and protections as provided by law . . . restitution [and] compensation . . .”).

<sup>22</sup> ARIZ. CONST. art. II, § 2.1(A)(8) (“[A] victim of crime has a right . . . [t]o receive prompt restitution from the person or persons convicted of the criminal conduct that caused the victim’s loss or injury.”). *See also* ARIZ. REV. STAT. ANN. § 41-2401 (2010) (victims can collect from a compensation fund).

<sup>23</sup> OKLA. CONST. art. II, § 34 (“[A]ny victim or family member of a victim of a crime has the right . . . to be awarded restitution by the convicted person for damages or losses . . .”). *See also* OKLA. STAT. ANN. tit. 21, § 142.1 (West 2010) (victims can collect from a compensation fund).

convicted, thereby making preindictment and many postindictment settlements of crime victim claims more difficult.<sup>24</sup>

There are further distinctions between states on who constitutes a crime victim. Some state constitutions, as in Arizona<sup>25</sup> and Rhode Island,<sup>26</sup> employ the term “victim” without recognizing in the legislature express definitional authority. By contrast, in other states the General Assembly is empowered to define the victims entitled to constitutional crime victim recovery.<sup>27</sup>

The Oklahoma Constitution expressly includes family members as victims entitled to restitution.<sup>28</sup> Other states more narrowly define eligible victims. In New Jersey<sup>29</sup> and New Mexico,<sup>30</sup> the state constitutional definitions encompass only certain crimes or only certain victims. The Louisiana Constitution employs a broad

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<sup>24</sup> At times, whether only convicted criminals are contemplated is unclear to us. *See* ALASKA CONST. art. I, § 24 (“Crime victims, as defined by law, shall have . . . the right to restitution from the accused . . . .”); IDAHO CONST. art. I, § 22 (“A crime victim, as defined by statute, has the . . . right[] . . . [t]o restitution, as provided by law, from the person committing the offense that caused the victim’s loss.”); TENN. CONST. art. I, § 35 (“[V]ictims shall be entitled to . . . [t]he right to restitution from the offender.”).

<sup>25</sup> ARIZ. CONST. art. II, § 2.1(C) (“‘Victim’ means a person against whom the criminal offense has been committed or, if the person is killed or incapacitated, the person’s spouse, parent, child or other lawful representative, except if the person is in custody for an offense or is the accused.”).

<sup>26</sup> R.I. CONST. art. I, § 23 (“A victim of crime shall, as a matter of right, be treated by agents of the state with dignity, respect and sensitivity during all phases of the criminal justice process. Such person shall be entitled to receive, from the perpetrator of the crime, financial compensation for any injury or loss caused by the perpetrator of the crime, and shall receive such other compensation as the state may provide.”).

<sup>27</sup> *See* ALASKA CONST. art. I, § 24 (“[c]rime victims, as defined by law”); CONN. CONST. art. I, § 8 (“a [crime] victim, as the General Assembly may define by law”); IDAHO CONST. art. I, § 22 (“[a] crime victim, as defined by statute”); ILL. CONST. art. I, § 8.1 (“[c]rime victims, as defined by law”); MICH. CONST. art. I, § 24 (“[c]rime victims, as defined by law”); MO. CONST. art. I, § 32 (“crime victims, as defined by law”); WIS. CONST. art. I, § 9m (“[c]rime victims, as defined by law”).

<sup>28</sup> OKLA. CONST. art. II, § 34 (“[A]ny victim or family member of a victim has the right . . . to be awarded restitution . . . .”).

<sup>29</sup> N.J. CONST. art. I, § 22 (“For the purposes of this paragraph, ‘victim of a crime’ means: (a) a person who has suffered physical or psychological injury or has incurred loss of or damage to personal or real property as a result of a crime or an incident involving another person operating a motor vehicle while under the influence of drugs or alcohol, and (b) the spouse, parent, legal guardian, grandparent, child or sibling of the decedent in the case of a criminal homicide.”).

<sup>30</sup> N.M. CONST. art. II, § 24(A)(8) (“A victim of arson resulting in bodily injury, aggravated arson, aggravated assault, aggravated battery, dangerous use of explosives, negligent use of a deadly weapon, murder, voluntary manslaughter, involuntary manslaughter, kidnapping, criminal sexual penetration, criminal sexual contact of a minor, homicide by vehicle, great bodily injury by vehicle or abandonment or abuse of a child or that victim’s representative shall have the following rights as provided by law . . . the right to restitution from the person convicted of the criminal conduct that caused the victim’s loss or injury . . . .”).

definition of “victim” for the purposes of certain nonrecovery rights, but defers to the legislature for a definition of victims eligible for recoveries.<sup>31</sup>

State constitutional provisions also vary on where a crime victim recovery right may be pursued. As noted above, state-funded schemes are sometimes contemplated. Some state constitutions declare a broad right to restitution, suggesting recoveries can be pursued in several different fora. In Missouri, crime victims have the right to restitution, “which shall be enforceable in the same manner as any other civil cause of action, or as otherwise provided by law.”<sup>32</sup> Other states, including Connecticut,<sup>33</sup> Oregon,<sup>34</sup> and Virginia,<sup>35</sup> provide for express crime victim recovery rights only in criminal cases.

Not all state constitutions that contain explicit nonrecovery rights, like rights regarding notices of proceedings<sup>36</sup> and opportunities to present evidence,<sup>37</sup> also contain provisions on crime victim recoveries.<sup>38</sup> Thus, occasionally nonmonetary crime victim rights are constitutionally recognized without any recovery avenues being explicitly recognized.<sup>39</sup>

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<sup>31</sup> LA. CONST. art. I, § 25 (“Any person who is a victim of crime shall be treated with fairness, dignity, and respect, and shall be informed of the rights accorded under this Section. As defined by law, a victim of crime shall have the right . . . to seek restitution . . .”).

<sup>32</sup> MO. CONST. art. I, § 32 (“Crime victims, as defined by law, shall have the following rights, as defined by law . . . [t]he right to restitution, which shall be enforceable in the same manner as any other civil cause of action, or as otherwise provided by law . . .”).

<sup>33</sup> CONN. CONST. art. I, § 8(b) (“In all criminal prosecutions, a victim, as the General Assembly may define by law, shall have the following rights . . . the right to restitution . . .”).

<sup>34</sup> OR. CONST. art. I, § 42 (“[T]he following rights are hereby granted to victims in all prosecutions for crimes and in juvenile court delinquency proceedings . . . the right to receive prompt restitution from the convicted criminal who caused the victim’s loss or injury . . .”).

<sup>35</sup> VA. CONST. art. I, § 8-A (“That in criminal prosecutions, the victim . . . may be accorded . . . [t]he right to restitution . . .”).

<sup>36</sup> *See, e.g.*, NEB. CONST. art. I, § 28 (“A victim of crime . . . shall have . . . [t]he right to be informed of all criminal court proceedings . . .”).

<sup>37</sup> *See, e.g.*, ALA. CONST. art. I, § 6.01(a) (“Crime victims, as defined by law or their lawful representatives, including the next of kin of homicide victims, are entitled to the right . . . to be heard when authorized, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the person accused of committing the crime.”).

<sup>38</sup> *See* FLA. CONST. art. I, § 16; IND. CONST. art. I, § 13. Florida’s crime victim rights provision was the first in the nation. William A. Buzzett & Deborah K. Kearney, *Commentary to the 1988 and 1998 Amendments*, FLA. CONST. art. I, § 16 (West Supp. 2010).

<sup>39</sup> *See* ALA. CONST. art. I, § 6.01(a) (providing only that crime victims are entitled to “the right to be informed, to be present, and to be heard when authorized, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the person accused”); IND. CONST. art. I, § 13 (victim rights are found under the provision on the rights of the criminally accused: “Victims of crime . . . shall have the right to be treated with fairness, dignity, and respect throughout the criminal justice process; and . . . to be informed of and present during public hearings and to confer with the prosecution . . .”).

Some American state constitutions leave the details of crime victim recoveries to the legislature.<sup>40</sup> Two constitutions expressly recognize a responsibility for crime victim restitution in the “Legislature, or the people by initiative or referendum.”<sup>41</sup> Although the Montana Constitution does not contain an explicit right to crime victim recovery, it does direct the legislature to provide “[l]aws for the punishment of crime” to be “founded on the principles of prevention, reformation, public safety, and restitution for victims.”<sup>42</sup> By contrast, in Oregon the constitution is silent with respect to the role of the legislature in constitutional crime victim recovery.<sup>43</sup>

Unlike many states where crime victims “shall have” or “shall be entitled to” certain rights,<sup>44</sup> the constitutional provisions on crime victims rights in Wisconsin simply place duties regarding crime victims on the state.<sup>45</sup> In Texas<sup>46</sup> and Georgia<sup>47</sup> there are recognized legislative responsibilities for providing state funds to compensate crime victims. In Virginia the constitution imposes affirmative duties on state employees, officers, and agents, regarding certain crime victim rights, but has permissive language regarding other rights, including restitution.<sup>48</sup>

<sup>40</sup> CONN. CONST. art. I, § 8 (restitution enforceable as “provided by law”); MO. CONST. art. I, § 32 (“Crime victims, as defined by law shall have the following rights, as defined by law . . . [t]he right to restitution, which shall be enforceable . . . as otherwise provided by law . . .”).

<sup>41</sup> ARIZ. CONST. art. II, § 2.1(D); OKLA. CONST. art. II, § 34(C).

<sup>42</sup> MONT. CONST. art. II, § 28(1).

<sup>43</sup> OR. CONST. art. I, § 42 (“the following rights are hereby granted to victims in all prosecutions for crimes and in juvenile court delinquency proceedings: . . . [t]he right to receive prompt restitution from the convicted criminal who caused the victim’s loss or injury”).

<sup>44</sup> See ALASKA CONST. art. I, § 24 (“[c]rime victims, as defined by law, shall have the following rights”); CAL. CONST. art. I, § 28(b) (“a victim shall be entitled to the following rights”); N.C. CONST. art. I, § 37 (“[v]ictims of crime, as prescribed by law, shall be entitled to the following basic rights”); TENN. CONST. art. I, § 35 (“[t]o preserve and protect the rights of victims of crime to justice and due process, victims shall be entitled to the following basic rights”).

<sup>45</sup> WIS. CONST. art. I, § 9m (“This state shall treat crime victims, as defined by law, with fairness, dignity and respect for their privacy. This state shall ensure that crime victims have all of the following privileges and protections as provided by law . . .”).

<sup>46</sup> TEX. CONST. art. I, § 31 (“The compensation to victims of crime fund created by general law and the compensation to victims of crime auxiliary fund created by general law are each a separate dedicated account in the general revenue fund. . . . [M]oney deposited to the credit of the compensation to victims of crime fund or the compensation to victims of crime auxiliary fund from any source may be expended as provided by law only for delivering or funding victim-related compensation, services, or assistance.”).

<sup>47</sup> GA. CONST. art. III, § 6, para. 6(f) (“General Assembly shall be authorized to allocate certain funds, to appropriate funds, to provide for a continuing fund, or to provide for any combination thereof for the purpose of compensating innocent victims of crime and for the administration of any laws enacted for such purpose.”).

<sup>48</sup> VA. CONST. art. I, § 8-A (“That in criminal prosecutions, the victim shall be accorded fairness, dignity and respect by the officers, employees and agents of the Commonwealth and its political subdivisions and officers of the courts and, as the General Assembly may define and provide by law, may be accorded rights to reasonable and appropriate notice, information,



As noted, many state constitutions accompany recovery rights with additional crime victim rights. Accompanying nonrecovery rights include rights to be treated with fairness, respect, and dignity;<sup>49</sup> to be present at certain proceedings;<sup>50</sup> and to be heard, consulted or informed of the progress of the criminal case.<sup>51</sup>

State constitutions without explicit crime victim recovery rights sometimes invite judicial construction. Similar to the Ninth Amendment to the federal Constitution, a state constitution can leave open the possibility of a nonexplicit constitutional right,<sup>52</sup> meaning a judicially-recognized right. The Arizona Constitution says: “The enumeration in the Constitution of certain rights for victims shall not be construed to deny or disparage others granted by the Legislature or retained by victims.”<sup>53</sup>

A few American state constitutions recognize particularly strong crime victim recovery rights. Although the Idaho Constitution grants its legislature “the power to enact laws to define, implement, preserve, and expand the rights guaranteed to victims,” it also says that the constitutional rights “shall be self-enacting.”<sup>54</sup> Without a self-execution clause and with some room for legislation, the Rhode Island Constitution declares that a “victim of crime . . . shall be entitled to receive, from the perpetrator of the crime, financial compensation for any injury or loss caused by the perpetrator . . . and shall receive such other compensation as the state may provide.”<sup>55</sup> The California Constitution provides that crime victims, as a matter of right, receive some priority, stating that “[a]ll monetary payments, monies, and property collected . . . shall be first applied to pay the amounts ordered as restitution to the victim.”<sup>56</sup>

### B. Enforcement

Most American high courts have not significantly considered their own state constitutional provisions on crime victim recoveries. Thus, many enforcement issues remain uncertain. Courts have, however, considered enforcement of other express constitutional crime victim rights. The results have varied.

#### 1. Alaska

The Alaska Court of Appeals rejected a criminal defendant’s challenge to his conviction based, *inter alia*, on the presence of the witness/crime victim in the

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restitution, protection, and access to a meaningful role in the criminal justice process. These rights may include, but not be limited to . . . [t]he right to restitution . . .”).

<sup>49</sup> See, e.g., OKLA. CONST. art. II, § 34(A).

<sup>50</sup> See, e.g., ALASKA CONST. art. I, §24 (when the accused has the right to be present).

<sup>51</sup> See, e.g., TENN. CONST. art. I, §35.

<sup>52</sup> The Ninth Amendment states that the “enumeration in the Constitution, of certain rights” should not be construed “to deny or disparage others retained by the people.” U.S. CONST. amend. IX.

<sup>53</sup> ARIZ. CONST. art. II, § 2.1(E).

<sup>54</sup> IDAHO CONST. art. I, § 22(10).

<sup>55</sup> R.I. CONST. art. I, § 23.

<sup>56</sup> CAL. CONST. art. I, § 28.

courtroom.<sup>57</sup> Her presence was founded on article I, section 24 of the Alaska Constitution, which says: “Crime victims, as defined by law, shall have . . . the right . . . to be present at all criminal or juvenile proceedings where the defendant has the right to be present.”<sup>58</sup> The criminal defendant argued that the provision was not self-executing and (at the time of his trial) had no implementing legislation.<sup>59</sup> The appellate court found no error.<sup>60</sup>

The court cited an Alaska constitutional provision saying that “to the extent possible, all provisions of this constitution shall be construed to be self-executing.”<sup>61</sup> While the court recognized that the constitutional language, “‘crime victim’ by ‘law’” and the “rights ‘as provided by law,’” did authorize “the legislature to enact procedures to govern crime victims’ exercise of the listed rights—and perhaps to define the scope of those rights in particular situations,”<sup>62</sup> the court nevertheless found the person before it was clearly a “victim” of the defendant’s crimes having the constitutional right to be present since the defendant had the right to be present.<sup>63</sup> The court declared that the case at hand was “one of the ‘core’ situations described” in the Alaska Constitution, making implementing legislation unnecessary.<sup>64</sup> Thus, core attributes of the constitutional right to crime victim recovery<sup>65</sup> might also be judicially defined in Alaska even when there is no legislation.

## 2. New Jersey

A somewhat different issue involving a crime victim’s presence at a criminal proceeding was resolved, in part, on constitutional grounds in New Jersey two years earlier.<sup>66</sup> There, the trial court held that a juvenile victim had standing to oppose a newspaper’s request to be present at the trial of another juvenile charged with sexual assault.<sup>67</sup> The court ruled that because press access would result in “specific harm to the victim,” the press could not be present.<sup>68</sup> The court utilized the state constitutional Victims’ Rights Amendment, which says not only that “[a] victim of a crime shall be entitled to those rights and remedies as may be provided by the Legislature,” but also that the victim has the right to be “treated with fairness,

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<sup>57</sup> *Landon v. Alaska*, No. A-6479, 1999 WL 46543, at \*1 (Alaska. Ct. App. Feb. 3, 1999).

<sup>58</sup> *Id.* at \*2

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at \*2-3.

<sup>61</sup> *Id.* (citing ALASKA CONST. art. XII, § 9).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> ALASKA CONST. art. I, § 24 (“Crime victims, as defined by law, shall have the following rights as provided by law . . . the right to restitution from the accused”).

<sup>66</sup> *State ex rel. K.P.*, 709 A.2d 315 (N.J. Super. Ct. Ch. Div. 1997).

<sup>67</sup> *Id.* at 322.

<sup>68</sup> *Id.* at 328.

compassion and respect by the criminal justice system.”<sup>69</sup> The court concluded that the latter, a “fundamental right,” supported a finding of “an unarticulated right to oppose a petition by the press,”<sup>70</sup> especially as the victim had shown sufficient potential harm to justify closure.<sup>71</sup> The New Jersey Constitution is silent on crime victim recovery.

### 3. Wisconsin

By contrast, the Wisconsin Supreme Court has held that the opening sentence of its constitutional crime victim rights provision, guaranteeing “crime victims, as defined by law,” treatment “with fairness, dignity and respect,” was merely a “statement of purpose” describing “the policies to be promoted by the State” and, as such, offered no enforceable, self-executing rights.<sup>72</sup> Thus, the provision could not be used by the Crime Victims Rights Board to justify a private reprimand of a district attorney for causing harm to the crime victim’s family by playing a particularly traumatic 911 tape at a sentencing hearing.<sup>73</sup>

The Wisconsin court considered three sources for constitutional interpretation: “the plain meaning of the words in the context used; the constitutional debates and the practices in existence at the time of the writing of the constitution; and the earliest interpretation of the provision by the legislature as manifested in the first law passed following adoption.”<sup>74</sup>

As to plain meaning, the court compared the broad language of the opening sentence with the “detailed list of privileges and protections” in the following sentences,<sup>75</sup> concluding that the differences suggested the first sentence was merely a “general guide.”<sup>76</sup> Next, as to constitutional debates, the court noted that the legislature had removed the language on fairness, dignity and respect “from the list of enumerated rights.”<sup>77</sup> With regard to existing practices, the court observed that the two-part structure of a preexisting statute, with a broad opening statement followed by specifically enumerated rights, was followed in the constitution.<sup>78</sup> The court concluded that the reason for constitutionalizing already existing statutory

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<sup>69</sup> *Id.* at 321. See also N.J. CONST. art. I, § 22 (“A victim of crime shall not be denied the right to be present at public judicial proceedings except when, prior to completing testimony as a witness, the victim is properly sequestered in accordance with law . . .”).

<sup>70</sup> *Id.* at 322.

<sup>71</sup> *Id.* at 328.

<sup>72</sup> *Schilling v. Wisconsin*, 692 N.W.2d 623, 625 (Wis. 2005) (examining WIS. CONST. art. I, § 9m).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 627.

<sup>75</sup> *Id.* at 628.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 629.

<sup>78</sup> *Id.*

rights was to ensure the rights permanently.<sup>79</sup> Thus, the constitutional provision “was adopted to give weight to” the crime victim statute, but not to change it.<sup>80</sup>

Finally, the Wisconsin court considered the “first significant law passed” following the constitutional amendment.<sup>81</sup> While this law created a new section of specifically enumerated rights, it placed fairness and dignity concerns in another section called “Legislative intent,”<sup>82</sup> suggesting the two sections were to be handled differently by the courts. Only the section on enumerated rights delegated to the judiciary the power to create remedies.<sup>83</sup> The court concluded there was no “enforceable, self-executing right” regarding “fairness, dignity and respect.”<sup>84</sup>

Regarding crime victim recoveries, the Wisconsin Constitution says that the “state shall ensure that crime victims have all the following privileges and protections as provided by law,” including “restitution” and “compensation.”<sup>85</sup> Notwithstanding this mandate for legislative assurance, constitutional crime victim recovery rights in Wisconsin may nevertheless depend on the precise statutory language.

#### 4. Nebraska

The Nebraska Supreme Court similarly held that its constitutional provision recognizing that a crime victim has the “right to be informed of, be present at, and make an oral or written statement at sentencing, parole, pardon, commutation, and conditional release proceedings” was not self-executing.<sup>86</sup> Thus, a crime victim was denied the right to be heard at a Board of Pardons commutation proceeding.<sup>87</sup> The Nebraska decision differed from the Wisconsin ruling in that the Nebraska “right” (to make a statement) was more individual or personal than the Wisconsin admonition on state responsibility (to treat with fairness). However, the Nebraska court also focused on the role of the legislature, noting the constitutional declaration that the “Legislature shall provide by law for the implementation of the rights granted in this section” and that there “shall be no remedies other than as specifically provided by the Legislature for the enforcement of the rights granted.”<sup>88</sup> The court rejected the argument that a statute generally providing for civil liability for anyone who “causes . . . any citizen . . . the deprivation of any rights . . . secured by . . . the

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<sup>79</sup> *Id.* at 631.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* (providing that remedies are required constitutionally “only for violations of the ‘privileges and protections’ enumerated in the second sentence of Article I, Section 9m of the Wisconsin Constitution”).

<sup>84</sup> *Id.* at 632.

<sup>85</sup> WIS. CONST. art. I, § 9m.

<sup>86</sup> *State ex rel. Lamm v. Nebraska Bd. of Pardons*, 620 N.W.2d 763, 768-69 (Neb. 2001) (citing NEB. CONST. art. I, § 28).

<sup>87</sup> *Id.* at 763.

<sup>88</sup> *Id.* at 768-69.

Constitution . . . of the State of Nebraska” afforded the crime victim a right to a remedy for violation of the statement right.<sup>89</sup> The court succinctly concluded:

A constitutional provision is not self-executing if such provision merely indicates a line of policy or principles without supplying the means by which such policy or principles are to be carried into effect, if the language of the constitutional provision is directed to the Legislature, or if the language of a constitutional provision indicates that subsequent legislation is contemplated or necessary for effectuation of such provision.<sup>90</sup>

In Nebraska, a crime victim has a constitutional right “to be informed of all criminal court proceedings.”<sup>91</sup> This alone seems inadequate to support a constitutionally-based crime victim recovery right unattached to statute.

### 5. California

A similar result was reached in California where a crime victim had not been notified of a sentencing hearing even though he had a statutory right to notice of and “to attend all sentencing proceedings.”<sup>92</sup> The victim argued that a resulting probation order should be set aside, relying, in part, upon Article I, Section 28 of the California Constitution, which includes “a bill of rights for victims of crime” that encompasses not only the right to restitution, but also “the more basic expectation that persons who commit felonious acts causing injury to innocent victims will be appropriately detained . . . and sufficiently punished.”<sup>93</sup> The court found that the constitutional and statutory language was “directory, as distinguished from mandatory.”<sup>94</sup> It observed there were “[n]o procedures to enforce the duty of

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 769. A Nebraska Attorney General Opinion reviewed Nebraska case law, finding the constitutional assurances as to “free instruction in the common schools” are not self-executing. Student Fees and the Right to Free Instruction in Public Schools, No. 02004 Op. Neb. Att’y Gen. (2002).

<sup>91</sup> NEB. CONST. art. I, § 28 (“(1) A victim of a crime, as shall be defined by law, or his or her guardian or representative shall have: The right to be informed of all criminal court proceedings; the right to be present at trial unless the trial court finds sequestration necessary for a fair trial for the defendant; and the right to be informed of, be present at, and make an oral or written statement at sentencing, parole, pardon, commutation, and conditional release proceedings. This enumeration of certain rights for crime victims shall not be construed to impair or deny others provided by law or retained by crime victims. (2) The Legislature shall provide by law for the implementation of the rights granted in this section. There shall be no remedies other than as specifically provided by the Legislature for the enforcement of the rights granted by this section. (3) Nothing in this section shall constitute a basis for error in favor of a defendant in any criminal proceeding, a basis for providing standing to participate as party to any criminal proceeding, or a basis to contest the disposition of any charge.”).

<sup>92</sup> *People v. Superior Court of L.A. Cnty.*, 154 Cal. App. 3d 319, 322 (Cal. Ct. App. 1984) (citing CAL. PENAL CODE § 119.1 (West 2010) wherein the responsibility for notice is given to the probation officer).

<sup>93</sup> *Id.* at 322.

<sup>94</sup> *Id.* at 321-22.

notification or remedies for the failure to do so.”<sup>95</sup> Therefore, the court denied the victim’s petition, concluding that it had “no authority to afford any relief.”<sup>96</sup>

The constitutional restitution right in California is similar to the notice right. A victim is entitled to restitution<sup>97</sup> but there are “no procedures to enforce” remedies.<sup>98</sup> Thus, California is unlikely to support crime victim recovery without a statute.

## 6. Arizona

A victim in Arizona was similarly left without relief when the Arizona Supreme Court refused to extend the right to be heard to a victim who wished to file litigation papers apart from the state.<sup>99</sup> The case involved a criminal defendant’s petition for postconviction relief.<sup>100</sup> In order to have her own right to file, the court said that the victim would need to be an aggrieved party.<sup>101</sup> The court held that having the right to be heard did not make the victim an aggrieved party.<sup>102</sup>

In coming to its conclusion, the Arizona court first looked to the constitutional language. One provision grants crime victims the right “[t]o be heard at any proceeding involving a post-arrest release decision . . . [and] to be heard at any proceeding when any post-conviction release from confinement is being considered.”<sup>103</sup> The court decided that the victim could not use the first part of this provision to support a right to file her own papers because it refers to “release” not “relief.”<sup>104</sup> Since the proceeding concerned the defendant’s petition for post-conviction relief<sup>105</sup> and not post-conviction release, the court held the constitutional provision was inapplicable.<sup>106</sup>

The court also rejected the victim’s argument that the second part, the right to be heard on matters of release, “includes the right to file her own separate petition.”<sup>107</sup> It reasoned that the right to be heard was not “clearly” defined, noting the enabling statute did not mention any right to file a separate petition.<sup>108</sup> The statute only said

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<sup>95</sup> *Id.* at 322.

<sup>96</sup> *Id.* *But see* Melissa J. v. Superior Court of Alameda Cnty., 190 Cal. App. 3d 476 (Cal. Ct. App. 1987) (finding relief can be afforded a victim whose monthly restitution was halted by a court without notice of the hearing to the victim).

<sup>97</sup> CAL. CONST. art. I, § 28 (“victim shall be entitled to . . . restitution”).

<sup>98</sup> *Superior Court of L.A. Cnty.*, 154 Cal. App. 3d at 322.

<sup>99</sup> *Arizona v. Lamberton*, 899 P.2d 939 (Ariz. 1995).

<sup>100</sup> *Id.* at 940.

<sup>101</sup> *Id.* (citing ARIZ. R. CRIM. P. 32.9).

<sup>102</sup> *Id.* at 941.

<sup>103</sup> *Id.* (citing ARIZ. CONST. art. II, § 2.1(A)).

<sup>104</sup> *Id.* at 942.

<sup>105</sup> *Id.* at 940 (based on cruel and unusual punishment).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

that the victim had a “right to be notified of post-conviction review and appellate proceedings.”<sup>109</sup>

Finally, the Arizona court found there was a way for the victim to be heard without filing a separate petition; it observed that the victim could be heard on appeal via the trial court record and that the state often voices victim interests in postconviction relief papers.<sup>110</sup> The high court affirmed the dismissal of the victim’s separate petition.<sup>111</sup>

In Arizona, crime victim recovery in a criminal case may need to depend upon state cooperation. The constitution only says that responsibility for crime victim restitution is in the “legislature, or the people by initiative or referendum.”<sup>112</sup> Yet, unlike in postconviction relief settings, the state in restitution settings may be less likely to voice victim interests. This may be so because, as will be discussed later, restitution to the victim can interfere with forfeitures to the state.

The above examples of varied state enforcement of crime victim rights illustrate that even where American state constitutions speak to crime victims recoveries, they typically would not secure significant enforceable rights in the absence of legislation. It appears that legislation is more obligatory in states with constitutions directly alluding to such recoveries. But ultimately, legislative discretion generally reigns. We next examine statutes on crime victim recoveries in states with and without constitutional provisions.

### III. STATUTORY APPROACHES TO CRIME VICTIM RECOVERIES

#### A. Introduction

While several American state constitutions expressly recognize crime victim recoveries, such recoveries are typically limited by dependence on enabling legislation as well as by narrow definitions of relevant crimes and victims. For example, the stated purpose of the New Mexico Victims of Crime Statute is “to assure that . . . the provisions of Article 2, Section 24 of the constitution of New Mexico are implemented.”<sup>113</sup> By contrast, the Supreme Court of Wisconsin declared that its constitutional amendment on crime victims “was adopted to give weight to” preexisting statutory crime victim rights.<sup>114</sup> However, because legislative schemes for crime victim recoveries have been generally implemented, explicit constitutional foundations are unnecessary. Quite strong statutory crime victim recovery rights appear in several states with no express constitutional provisions. For example,

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<sup>109</sup> *Id.* (citing ARIZ. REV. STAT. ANN. § 13-4411 (West 2010)).

<sup>110</sup> *Id.* at 942.

<sup>111</sup> *Id.* at 942-43.

<sup>112</sup> ARIZ. CONST. art. II, § 2.1(D) (“The legislature, or the people by initiative or referendum, have the authority to enact substantive and procedural laws to define, implement, preserve and protect the rights guaranteed to victims by this section, including the authority to extend any of these rights to juvenile proceedings.”).

<sup>113</sup> N.M. STAT. ANN. § 31-26-2(D) (West 2010).

<sup>114</sup> *Schilling*, 692 N.W.2d at 631.

Indiana allows a victim standing<sup>115</sup> to enforce the statutory right to pursue restitution.<sup>116</sup> Some states mandate that government officials advise crime victims of available recovery schemes.<sup>117</sup> Pennsylvania allows for the preservation of a criminal defendant's assets in anticipation of a criminal case order involving victim restitution.<sup>118</sup>

Whether or not constitutional provisions are in play, there are three major avenues to crime victim recoveries. These are recoveries on civil claims, including in civil cases; recoveries from government through administrative or special court proceedings; and recoveries during criminal investigations or cases.<sup>119</sup>

Constitutional<sup>120</sup> and statutory<sup>121</sup> provisions often recognize that crime victims can themselves pursue recoveries from convicted or alleged criminals, or from the criminally accused, in civil cases.<sup>122</sup> Such provisions recognize private interests rather than the public interests that are normally associated with criminal case sentencing.

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<sup>115</sup> IND. CODE ANN. § 35-40-2-1 (West 2010) (“A victim has standing to assert the rights established by this article.”). In the federal courts, limited crime victim standing to enforce statutory rights has been criticized. *See Improving Restitution in Federal Criminal Cases: Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 110th Cong. 7-10 (2008) (statement of Paul G. Cassell, Professor) [hereinafter *Cassell Testimony*].

<sup>116</sup> IND. CODE ANN. § 35-40-5-7 (“A victim has the right to pursue an order of restitution and other civil remedies against the person convicted of a crime against the victim.”).

<sup>117</sup> *See* FLA. STAT. ANN. § 960.0021 (West 2010) (while there is no constitutional right to seek restitution in the Florida Constitution, “victims must be properly advised in the courts” of “the right . . . [t]o seek crimes compensation and restitution.”); MINN. STAT. ANN. § 611A.02 (West 2010) (a peace officer must notify a victim of the rights of crime victims “to apply for reparations to cover losses . . . resulting from a violent crime and the . . . right to request restitution.”).

<sup>118</sup> 42 PA. CONS. STAT. ANN. § 9728(e) (West 2010).

<sup>119</sup> Far less legislation addresses crime victim recoveries in anticipation of possible later civil cases or during criminal investigations that precede any formal charges.

<sup>120</sup> *See* ARIZ. CONST. art. II, § 2.1 (“[A] victim of crime has a right . . . [t]o be present . . . [t]o confer with the prosecution [and] [t]o receive prompt restitution.”); CONN. CONST. art. I, § 8(b) (West 2010) (“In all criminal prosecutions, a victim . . . shall have . . . the right to communicate with the prosecution . . . the right to restitution which shall be enforceable in the same manner as any other cause of action or as otherwise provided by law . . . .”); OKLA. CONST. art. II, § 34(A) (West 2010) (“[A] victim of crime has the right . . . to be awarded restitution by the convicted person for damages or losses as determined and ordered by the court . . . .”).

<sup>121</sup> *See, e.g.*, FLA. STAT. ANN. § 960.0021 (“[I]n order to ensure that crime victims can effectively understand and exercise their rights . . . victims must be properly advised . . . . The courts may fulfill their obligation to advise crime victims by . . . [m]aking the following announcement . . . ‘[i]f you are the victim of a crime with a case pending before this court, you are advised that you have the right . . . [t]o seek crimes compensation and restitution.’”).

<sup>122</sup> So even where there has not been, and will not be, a criminal case (and thus no one convicted or criminally accused), a victim harmed by the commission of a crime can pursue the alleged wrongdoer in a civil case. When there is a criminal case, a crime victim may be able to pursue recovery from the criminally accused, or might have to wait until conviction.



Civil case recovery rights at times anticipate the use of a criminal case resolution.<sup>123</sup> State statutory as well as constitutional provisions promote a crime victim's recovery in a later civil case by recognizing the right of the victim to be heard during the criminal case,<sup>124</sup> thereby possibly securing an established record of injuries. Such provisions can also recognize a right to confer with the prosecution.<sup>125</sup> Similar rights have been statutorily recognized in the federal courts.<sup>126</sup>

Crime victim recoveries in administrative or special court proceedings involving state funds also recognize private interests. Awards occur outside criminal cases. Like civil cases, these awards can employ earlier criminal case outcomes.<sup>127</sup>

Crime victim recoveries may also be ordered during criminal case sentencing. Only under some state statutes are such recoveries deemed restitution.<sup>128</sup> At

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<sup>123</sup> See R.I. GEN. LAWS ANN. § 12-28-5(a) (West 2010) (“Upon . . . final conviction of a felony after a trial by jury, a civil judgment shall automatically be entered . . . conclusively establishing . . . liability to the victim for any personal injury and/or loss . . . .”); *id.* § 12-28-5.1 (“When the court orders a defendant to make financial restitution to the victim of a crime of which the defendant had been convicted or to which the defendant has pleaded guilty or nolo contendere, a civil judgment shall automatically be entered . . . against the defendant on behalf of the victim for that amount.”).

<sup>124</sup> See, e.g., VA. CONST. art. I, § 8-A (West 2010) (“That in criminal proceedings, the victim shall be accorded fairness, dignity and respect . . . and, as the General Assembly may define and provide by law, may be accorded rights to reasonable and appropriate notice, information, restitution, protection, and access to a meaningful role in the criminal justice process. These rights may include . . . [t]he right to address the circuit court at the time sentence is imposed . . . [t]he right to restitution [and] the right to confer with the prosecution.”).

<sup>125</sup> The right to confer with prosecution is the first named right in the victims' rights section of the Tennessee Constitution. TENN. CONST. art. I, § 35 (“To preserve and protect the rights of victims of crime to justice and due process, victims shall be entitled to the following basic rights . . . [t]he right to confer with the prosecution.”).

<sup>126</sup> See, e.g., 18 U.S.C.A. § 3771(a) (West 2010) (“A crime victim has the following rights . . . [t]he right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding . . . [t]he reasonable right to confer with the attorney for the Government in the case.”).

<sup>127</sup> See GA. CODE ANN. § 17-15-6(b) (West 2010) (“Claims must be investigated . . . regardless of whether alleged criminal has been apprehended, prosecuted, or convicted . . . .”); IDAHO CODE ANN. § 72-1018 (West 2010) (“The commission shall award compensation benefits . . . if satisfied by a preponderance of the evidence . . . . Proof of conviction . . . is conclusive evidence that the crime was committed . . . .”).

<sup>128</sup> *But see* HAW. REV. STAT. § 801D-4(d) (West 2010) (“Notwithstanding any law to the contrary, payment of restitution and judgments to victims, or surviving immediate family members of a victim, shall be a precondition for release on parole for any imprisoned person whom the Hawaii paroling authority determines has the financial ability to make complete or partial restitution payments or complete or partial judgment payments to the victim of the person's crime, or to the surviving immediate family members of a victim.”); IND. CODE ANN. § 35-40-5-7 (West 2010) (“A victim has the right to pursue an order of restitution and other civil remedies against the person convicted of a crime against the victim.”); IOWA CODE ANN. § 915.100 (West 2010) (“Victims . . . have the right to recover pecuniary damages,” with monetary remedies at sentencing; “[t]he right to restitution includes . . . [i]n all criminal cases in which there is a plea of guilty, verdict of guilty, or special verdict upon which a judgment of conviction is rendered, the sentencing court shall order that restitution be made by each

sentencing, crime victim recoveries secured from criminals chiefly satisfy public rather than private interests,<sup>129</sup> as they promote punishment<sup>130</sup> or rehabilitation<sup>131</sup> rather than compensation. Because they are not meant to be fully compensatory, limited or no recoveries at sentencing generally cannot be challenged by crime victims.<sup>132</sup> Furthermore, sentencing recovery orders usually cannot be “open-ended” deferrals and thus cannot be imposed without consideration of a criminal’s ability to pay,<sup>133</sup> which is quite different from the guidelines on recoveries in civil cases.

### B. Terminology

One significant challenge in exploring the three avenues to crime victim recovery is terminology. The same term, such as “restitution,” may be employed when speaking of the victim’s independent right to seek recovery in a civil court, the

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offender to victims of the offender’s criminal activities.”); KY. REV. STAT. ANN. § 431.200(5) (West 2010) (“The court in which the conviction is had . . . may order restitution or give judgment . . . for reparation in damages . . .”); MONT. CODE ANN. § 46-18-201 (2009) (“[T]he sentencing judge shall . . . require . . . full restitution to the victim . . .”).

<sup>129</sup> FRANK CARRINGTON & JAMES A. RAPP, VICTIMS’ RIGHTS: LAW AND LITIGATION § 3.02[1] (1991) (“Orders of restitution . . . are primarily intended to serve the penal goals of the state: they are ‘sanctions’ imposed by the criminal justice system.”). *See also* Matthew Dickman, Comment, *Should Crime Pay?: A Critical Assessment of the Mandatory Victims Restitution Act of 1996*, 97 CALIF. L. REV. 1687, 1701 (2009) (citing Burt Galaway, *Toward the Rational Development of Restitution*, in RESTITUTION IN CRIMINAL JUSTICE 77, 82 (Joe Hudson & Burt Galaway eds., 1977)).

<sup>130</sup> *See* *Rudd v. Florida*, 543 So. 2d 819 (Fla. Dist. Ct. App. 1989) (trial court’s second restitution order imposed on the criminal defendant without the introduction of new evidence violated double jeopardy protections; “[r]estitution orders which are part of the sentence of community control are criminal in nature”); *Iowa v. Mayberry*, 415 N.W.2d 644, 646-47 (Iowa 1987) (whether a restitution order at sentencing was “a fine, a civil claim, or a hybrid is not entirely clear,” but an order of restitution at sentencing is a fine for the purposes of the criminal defendant’s Eighth Amendment claim; the restitution order here was not excessive as it was reasonably related to the relevant damages).

<sup>131</sup> *See* ALA. CODE § 15-18-68(a) (West 2010) (“In determining the manner, method, or amount of restitution to be ordered, the court may take into consideration . . . [t]he anticipated rehabilitative effect on the defendant regarding the manner of restitution or the method of payment.”); MISS. CODE ANN. § 99-37-3(2) (West 2010) (“In determining whether to order restitution which may be complete, partial or nominal, the court shall taken into account . . . [t]he rehabilitative effect on the defendant of the payment of restitution and the method of payment.”).

<sup>132</sup> *See* *State v. Leingang*, 763 N.W.2d 769, 773-74 (N.D. 2009) (after reviewing both federal and state cases, the court held that a victim could not challenge an order allowing a guilty plea withdrawal, though the guilty plea included an unpaid restitution order); *See also* *United States v. Rich*, 603 F.3d 722, 730 (9th Cir. 2010) (abatement of criminal conviction due to defendant’s death while conviction was on appeal nullified the accompanying restitution order as it was “penal” as well as “compensatory”).

<sup>133</sup> *But see* *E.J. v. State*, 1 So. 3d 251, 252 (Fla. Dist. Ct. App. 2008) (recognizing deferral orders tied to “certain specific events” occurring in the future can be made during criminal case sentencing).

victim's right to recover from a government fund, and the victim's ability to recover at a sentencing.<sup>134</sup>

Further, the term "restitution" is used in both constitutions and statutes. These two legal sources in a single state may not even be related. In Arizona<sup>135</sup> and Oklahoma,<sup>136</sup> for example, a victim has the constitutional right to receive restitution from a person who has been convicted of a crime causing the victim's injury in a context suggesting restitution involves recovery at sentencing.<sup>137</sup> However, by statute a criminal court judge in Arizona must advise a crime victim that "[he or she has] rights . . . to receive restitution from a person who is convicted of causing [his or her] loss."<sup>138</sup> The statutory right to restitution appears to encompass recoveries outside of a sentencing order. In Texas<sup>139</sup> and Michigan,<sup>140</sup> there is merely a constitutional "right to restitution," with varying implementing statutes that, at times, mention both restitution and compensation.<sup>141</sup> Florida, whose constitution has no

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<sup>134</sup> See CARRINGTON & RAPP, *supra* note 129, § 3.02[3] n.17. Of course, there are other challenges with the term restitution. It has meaning, and prompts some confusion, in settings unrelated to crime victim recoveries. See, e.g., *Swain v. Cach, LLC*, 699 F. Supp. 2d 1109, 1115-16 (N.D. Cal. 2009) ("At issue is whether Plaintiff may assert an independent cause of action for unjust enrichment. Under California law, '[u]njust enrichment is not a cause of action . . . or even a remedy, but rather a general principle, underlying various legal doctrines and remedies. It is synonymous with restitution.' . . . Thus, unjust enrichment is a theory of recovery, not an independent legal claim.").

<sup>135</sup> ARIZ. CONST. art. II, § 2.1(A) ("[A] victim of crime has a right: (1) To be treated with fairness . . . throughout the criminal justice process . . . (8) To receive prompt restitution from the person or persons convicted of the criminal conduct that caused the victim's loss or injury.").

<sup>136</sup> OKLA. CONST. art. II, § 34(A) ("To . . . ensure that victims are treated with fairness . . . throughout the criminal justice process . . . [t]he victim . . . has the right . . . to be awarded restitution by the convicted person for damages or losses as determined and ordered by the court . . .").

<sup>137</sup> By contrast, the Missouri Constitution provides for "[t]he right to restitution, which shall be enforceable in the same manner as any other civil cause of action, or as otherwise provided by law . . ." MO. CONST. art. I, § 32.

<sup>138</sup> Compare ARIZ. REV. STAT. ANN. § 13-4438 (2010), with *id.* § 13-603 ("If a person is convicted of an offense, the court shall require the convicted person to make restitution to the person who is the victim of the crime . . ."). The Restitution chapter of Arizona's Criminal Code details the range of monetary remedies that can be ordered by the court. See *id.* §§ 13-801 to 13-806.

<sup>139</sup> TEX. CONST. art. I, § 30(a) ("A crime victim has the following rights: (1) . . . to be treated with fairness . . . throughout the criminal justice process . . . (4) the right to restitution . . .").

<sup>140</sup> MICH. CONST. art. I, § 24(1) ("Crime victims . . . have . . . [t]he right to restitution.").

<sup>141</sup> The Texas Constitution says legislators "may enact laws to define the term victim and to enforce" the constitutional rights of crime victims. TEX. CONST. art. I, § 30(c). In the Texas Code of Criminal Procedure, under the heading Proceedings After Verdict, in the chapter regarding Judgment and Sentence:

[T]he court that sentences a defendant convicted of an offense may order the defendant to make restitution to any victim of the offense . . . . If the court does

explicit recognition of crime victim restitution, provides by statute for crime victim rights to both “restitution” and “compensation.”<sup>142</sup> Monetary recoveries at sentencing governed solely by statutes are often, but not always, deemed “restitution.”<sup>143</sup>

At least one state constitution explicitly provides many details on the “compensation” of crime victims through government funds.<sup>144</sup> Other states that have constitutional<sup>145</sup> or statutory<sup>146</sup> rights to victim-initiated monetary recoveries also have statutory schemes in place or crime victim recoveries from the state.<sup>147</sup> At times, a recovery from such a fund is deemed “restitution.”<sup>148</sup>

In the federal courts, the term “restitution” encompasses both a victim’s right to recover at sentencing<sup>149</sup> and an award against a criminal benefiting the federal government in order to support victim assistance and substance abuse programs.<sup>150</sup>

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not order restitution or orders partial restitution . . . the court shall state . . . the reasons for not making the order or for the limited order.

TEX. CODE CRIM. PROC. ANN. art. 42.037 (West 2010). In the Texas Code of Criminal Procedure, under the heading Miscellaneous Proceedings, the chapter regarding Crime Victims’ Rights, “[a] victim . . . is entitled to . . . the right to be informed, when requested . . . concerning . . . restitution . . . [and] the right to receive information regarding compensation to victims of crime . . .” *Id.* art. 56.02.

By contrast, in the Michigan Constitution crime victims are defined by law, and their rights, including restitution, are “as provided by law” and rights enforcement “may” be provided for statutorily. MICH. CONST. art. I, § 24.

<sup>142</sup> FLA. STAT. ANN. § 960.0021 (West 2010) (“victims must be properly advised . . . [of the right] [t]o seek crimes compensation and restitution”).

<sup>143</sup> *Compare, e.g.,* WYO. STAT. ANN. § 7-9-101 (West 2010) (“‘Restitution’ means full or partial payment of pecuniary damage to a victim”), *with* ALA. CODE § 15-18-66 (West 2010) (“Full, partial or nominal payment of pecuniary damages to the victim or to its equivalent in services performed or work or labor done for the benefit of the victim as determined by the court of record.”). *See also* WYO. STAT. ANN. § 7-9-111 (expressly recognizing a victim’s right to civil action if the victim is not satisfied with the criminal court’s restitution plan).

<sup>144</sup> TEX. CONST. art. I, § 31 (“The compensation to victims of crime fund . . . and the compensation to victims of crime auxiliary fund . . . are each a separated dedicated account . . . [which] may be expended as provided by law only for delivering or funding victim-related compensation, services, or assistance.”).

<sup>145</sup> *See, e.g.,* OKLA. CONST. art. II, § 34 (“[A]ny victim or family member of a victim of a crime has the right . . . to be awarded restitution by the convicted person for damages or losses as determined and ordered by the court . . .”).

<sup>146</sup> FLA. STAT. ANN. § 960.0021 (West 2010) (“[V]ictims must be properly advised . . . [of the right] [t]o seek crimes compensation and restitution.”).

<sup>147</sup> *See id.* §§ 960.01-28; 21 OKLA. STAT. ANN. tit. 21, §§ 142.1-20 (West 2010); TEX. CODE CRIM. PROC. ANN. art. 56.31-64 (West 2010).

<sup>148</sup> *Compare, e.g.,* FLA. STAT. ANN. § 960.0021 (“[V]ictims must be properly advised . . . [of the right] [t]o seek crimes compensation and restitution.”), *with* MINN. STAT. ANN. § 611A.51-611A.68 (West 2010) (administrative compensation awards through state supported funds is referred to as “victim reparation”).

<sup>149</sup> *See* 18 U.S.C.A. § 3771 (West 2010) (“A crime victim has the following rights . . . [t]he right to be reasonably heard at any public proceeding in the district court involving release,

Beside restitution, there are other challenging terms when examining crime victim recoveries. Who qualifies as a “crime victim” entitled to recovery often differs in a single state depending upon context. For example, the New Mexico Constitution expressly defines a crime victim who has both procedural and substantive rights in criminal cases as:

A victim of arson resulting in bodily injury, aggravated arson, aggravated assault, aggravated battery, dangerous use of explosives, negligent use of a deadly weapon, murder, voluntary manslaughter, involuntary manslaughter, kidnapping, criminal sexual penetration, criminal sexual contact of a minor, homicide by vehicle, great bodily injury by vehicle or abandonment or abuse of a child or that victim’s representative.<sup>151</sup>

However, a New Mexico statute on crime victims, which implements these rights, is broader by including as a victim “an individual against whom a criminal offense is committed” and some family members of crime victims.<sup>152</sup> Furthermore,

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plea, sentencing, or any parole proceeding . . . [t]he reasonable right to confer with the attorney for the Government in the case . . . [t]he right to full and timely restitution as provided in law); *id.* § 3663(a)(1)(A) (“The court, when sentencing a defendant . . . may order, in addition to or, in the case of a misdemeanor, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense . . . .”); *id.* § 3663A (“Notwithstanding any other provision of law, when sentencing a defendant convicted . . . the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense . . . .”).

<sup>150</sup> *See id.* § 3663(c)(1) (“Notwithstanding any other provision of law . . . in which there is no identifiable victim, the court may order that the defendant make restitution . . . .”); *id.* § 3663(c)(2)(A) (“An order of restitution under this subsection shall be based on the amount of public harm caused by the offense . . . .”); *id.* § 3663(c)(2)(B) (“In no case shall the amount of restitution ordered under this subsection exceed the amount of the fine which may be ordered for the offense charged in the case.”); *id.* § 3663(c)(3) (“Restitution under this subsection shall be distributed as follows: (A) 65 percent of the total amount of restitution shall be paid to the State entity designated to administer crime victim assistance in the State in which the crime occurred. (B) 35 percent of the total amount of restitution shall be paid to the State entity designated to receive Federal substance abuse block grant funds.”).

<sup>151</sup> N.M. CONST. art. II, § 24(A). It is expressly stated in the crime victim rights section of the New Mexico Constitution that the noted crime victim rights do not take effect until the legislature enacts statutes. *Id.* art. II, § 24(C) (“The provisions of this amendment shall not take effect until the legislature enacts laws to implement this amendment.”).

<sup>152</sup> N.M. STAT. ANN. § 31-26-3(F) (West 2010) (“As used in the Victims of Crime Act . . . ‘victim’ means an individual against whom a criminal offense is committed. ‘Victim’ also means a family member or a victim’s representative when the individual against whom a criminal offense was committed is a minor, is incompetent or is a homicide victim . . . ‘criminal offense’ means . . . negligent arson resulting in death or bodily injury . . . aggravated arson . . . aggravated assault . . . aggravated battery . . . dangerous use of explosives . . . negligent use of a deadly weapon . . . murder . . . voluntary manslaughter . . . involuntary manslaughter . . . kidnapping . . . criminal sexual penetration . . . criminal sexual contact of a minor . . . armed robbery . . . homicide by vehicle . . . great bodily injury by vehicle . . . abandonment or abuse of a child . . . stalking or aggravated stalking . . . aggravated assault against a household member . . . assault against a household member with intent to commit a violent felony . . . battery against a household member . . . aggravated battery against a

the New Mexico statute on crime victim recoveries at sentencing defines a victim as “any person who has suffered actual damages as a result of the defendant’s criminal activities.”<sup>153</sup>

Another example of the conflicting terminology within one state is Texas, where a crime victim recovery at a sentencing is seemingly narrower (no property claims) than crime victim recovery from a state fund (property claims).<sup>154</sup>

Who qualifies as a crime victim also differs among states. Some state statutes allow varying kinds of family members of criminal code victims to themselves be victims in criminal case recovery settings, while others do not.<sup>155</sup>

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household member”). *See also id.* § 31-26-2 (“Recognizing the state’s concern for victims of crime, it is the purpose of the Victims of Crime Act to assure that: A. the full impact of a crime is brought to the attention of a court; B. victims of violent crimes are treated with dignity, respect and sensitivity at all stages of the criminal justice process; C. victims’ rights are protected by law enforcement agencies, prosecutors and judges as vigorously as are the rights of criminal defendants; and D. the provisions of Article 2, Section 24 of the Constitution of New Mexico are implemented in statute.”); *id.* § 31-26-6 (“The rights and duties established pursuant to the provisions of the Victims of Crime Act take effect when an individual is formally charged by a district attorney for allegedly committing a criminal offense against a victim. Those rights and duties remain in effect until final disposition of the court proceedings attendant to the charged criminal offense.”).

<sup>153</sup> *Id.* § 31-17-1(A)(1). “Criminal activities” are also broader in statute than in the constitution. *See id.* § 31-17-1(A)(3) (“[C]riminal activities’ includes any crime for which there is a plea of guilty or verdict of guilty, upon which a judgment may be rendered and any other crime committed after July 1, 1977 which is admitted or not contested by the defendant . . .”).

Sometimes states with narrow constitutional definitions also have similarly narrow statutory definitions. *See, e.g.,* N.J. CONST. art. I, § 22 (“‘victim of a crime’ means: a) a person who has suffered physical or psychological injury or has incurred loss of or damage to personal or real property as a result of a crime or an incident involving another person operating a motor vehicle while under the influence of drugs or alcohol, and b) the spouse, parent, legal guardian, grandparent, child or sibling of the decedent in the case of a criminal homicide.”); N.J. STAT. ANN. § 52:4B-37 (West 2010) (“As used in this act, ‘victim’ means a person who suffers personal, physical or psychological injury or death or incurs loss of or injury to personal or real property as a result of a crime committed by an adult or an act of delinquency that would constitute a crime if committed by an adult, committed against that person. ‘Victim’ also includes the nearest relative of the victim of a criminal homicide.”).

<sup>154</sup> *Compare* TEX. CODE CRIM. PROC. ANN. art. 56.01(3) (West 2010) (“‘Victim’ means a person who is the victim of the offense of sexual assault, kidnapping, aggravated robbery, trafficking of persons, or injury to a child, elderly individual, or disabled individual or who has suffered personal injury or death as a result of the criminal conduct of another.”), *and* TEX. CODE CRIM. PROC. ANN. art. 42.037(a) (West 2010) (“In addition to any fine authorized by law, the court that sentences a defendant convicted of an offense may order the defendant to make restitution to any victim of the offense”), *with* TEX. CODE CRIM. PROC. ANN. art. 42.037(b) (West 2010) (“If the offense results in damage to or loss or destruction of property of a victim of the offense, the court may order the defendant: (A) to return the property to the owner of the property or someone designated by the owner; or (B) if return of the property is impossible or impractical or is an inadequate remedy, to pay an amount equal to the greater of (i) the value of the property on the date of the damage, loss, or destruction; or (ii) the value of the property on the date of sentencing, less the value of any part of the property that is returned on the date the property is returned.”).

There are further interstate differences between crime victims within a single recovery setting. Consider crime victim recoveries from state funds. In Florida, “victim” in a state fund setting encompasses not just the person harmed most directly by an offender’s actions, but also a child who observed the crime and suffered resulting emotional or psychological stress.<sup>156</sup> Elsewhere, crime victim recoveries from state funds are limited to specific victims.<sup>157</sup> In Texas, a crime victim entitled to a state-funded recovery need not be harmed in Texas and need not be a resident of Texas.<sup>158</sup> Even a Texas resident who suffers harm outside of the United States can

<sup>155</sup> Compare, e.g., ARIZ. REV. STAT. ANN. § 13-4401(19) (West 2010) (“‘Victim’ means a person against whom the criminal offense has been committed, including a minor, or if the person is killed or incapacitated, the person’s spouse, parent, child, grandparent or sibling”), and *id.* § 13-4438 (“a judge of the superior court shall make the following statement: If you are the victim of a crime with a case pending before this court, you are advised that you have rights . . . to receive restitution from a person who is convicted of causing your loss”), with *id.* § 13-804(A) (“Upon a defendant’s conviction for an offense causing economic loss to any person, the court, in its sole discretion, may order that all or any portion of the fine imposed be allocated as restitution to be paid by the defendant to any person who suffered an economic loss caused by the defendant’s conduct.”).

<sup>156</sup> FLA. STAT. ANN. § 960.03(14) (West 2010) (“Victim means: (a) A person who suffers personal physical injury or death as a direct result of a crime; (b) A person younger than 18 years of age who was present at the scene of a crime, saw or heard the crime, and suffered a psychiatric or psychological injury because of the crime, but who was not physically injured; or (c) A person against whom a forcible felony was committed and who suffers a psychiatric or psychological injury as a direct result of that crime but who does not otherwise sustain a personal physical injury or death.”).

<sup>157</sup> For example, in New Mexico the state funded scheme narrowly defines a victim under the same crime-specific categories found in the criminal code provisions and the constitution. N.M. STAT. ANN. § 31-22-3(I) (West 2010) (“As used in the Crime Victims Reparation Act . . . ‘victim’ means: (1) a person in New Mexico who is injured or killed by any act or omission of any other person that is a crime enumerated in [N.M. Stat. § 31-22-8]; (2) a resident of New Mexico who is injured or killed by such a crime occurring in a state other than New Mexico if that state does not have an eligible crime victims compensation program; or (3) a resident of New Mexico who is injured or killed by an act of international terrorism . . . .”); *id.* § 31-22-8 (“The crimes to which the Crime Victims Reparation Act applies and for which reparation to victims may be made are the following enumerated offenses and all other offenses in which any enumerated offense is necessarily included: (1) arson resulting in bodily injury; (2) aggravated arson; (3) aggravated assault or aggravated battery; (4) dangerous use of explosives; (5) negligent use of a deadly weapon; (6) murder; (7) voluntary manslaughter; (8) involuntary manslaughter; (9) kidnapping; (10) criminal sexual penetration; (11) criminal sexual contact of a minor; (12) homicide by vehicle or great bodily injury by vehicle . . . (13) abandonment or abuse of a child; (14) aggravated indecent exposure [and] (15) aggravated stalking”).

<sup>158</sup> TEX. CODE CRIM. PROC. ANN. art. 56.32(11) (West 2010) (“‘Victim’ means . . . (A) an individual who: (i) suffers personal injury or death as a result of criminally injurious conduct or as a result of actions taken by the individual as an intervener, if the conduct or actions occurred in this state; and (ii) is a resident of this state, another state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a possession or territory of the United States; (B) an individual who: (i) suffers personal injury or death as a result of criminally injurious conduct or as a result of actions taken by the individual as an intervener, if the conduct or actions occurred in a state or country that does not have a crime victims’ compensation program . . . (ii) is a resident of this state; and (iii) would be entitled to

be a victim for state funded recovery purposes,<sup>159</sup> as can a person who acts on behalf of a victim or who pays for a victim's losses.<sup>160</sup>

With an understanding of the possible mix of constitutional and statutory provisions as well as the challenges posed by inconsistent terminology, we now explore more fully crime victim recoveries in civil claims, agency or special court proceedings involving state funds, and criminal cases.

### C. Civil Claim Recoveries

All American states provide opportunities for some crime victims to independently pursue recovery in civil cases from the criminally alleged, accused, or convicted. In such cases, the judicial and/or prosecutorial cooperation, often necessary for recoveries during criminal case sentencing, is unnecessary. Recoveries are available for crime victims independent of any criminal prosecution, case, or sentence.<sup>161</sup> However, state funds are not available to them in such civil cases.

A victim's claim against a criminal typically arises under common law tort.<sup>162</sup> State legislatures occasionally impose duties on specially created offices, prosecutors, or peace officers to assist victims with such civil cases.<sup>163</sup> Civil claim

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compensation under this subchapter if the criminally injurious conduct or actions had occurred in this state . . .”).

<sup>159</sup> *Id.* (“‘Victim’ means . . . (C) an individual who: (i) suffers personal injury or death as a result of criminally injurious conduct caused by an act of international terrorism . . . committed outside of the United States; and (ii) is a resident of this state.”). *See also* KY. REV. STAT. ANN. § 346.025 (West 2010) (“‘Victim’ shall also include nonresidents of this state who suffer losses as a direct result of criminal acts occurring within this state.”).

<sup>160</sup> TEX. CODE CRIM. PRO. ANN. art. 56.32(2) (“‘Claimant’ means, except as provided by Subsection (b), any of the following individuals who is entitled to file or has filed a claim for compensation under this subchapter: (A) an authorized individual acting on behalf of a victim; (B) an individual who legally assumes the obligation or who voluntarily pays medical or burial expenses of a victim incurred as a result of the criminally injurious conduct of another; (C) a dependent of a victim who died as a result of criminally injurious conduct; (D) an immediate family member or household member of a victim who: (i) requires psychiatric care or counseling as a result of the criminally injurious conduct; or (ii) as a result of the criminally injurious conduct, incurs with respect to a deceased victim expenses for traveling to and attending the victim's funeral or suffers wage loss from bereavement leave taken in connection with the death of that victim; or (E) an authorized individual acting on behalf of an individual who is described by Subdivision (C) or (D) and who is a child.”).

<sup>161</sup> *See, e.g.,* CARRINGTON & RAPP, *supra* note 129, § 5.01[1][a] (based on 21A AM. JUR. 2D *Criminal Law* § 1028 (1981), the “[c]ommitment of the perpetrator to prison affords no immunity against suit, service of civil process, or enforcement of a judgment”).

<sup>162</sup> *See, e.g., id.* (“Theories of recovery are usually obvious and well recognized, including assault, battery, false imprisonment and infliction of emotional distress.”).

<sup>163</sup> *See, e.g.,* COLO. REV. STAT. ANN. § 24-4.1-302.5(1)(i) (West 2010) (“[E]ach victim of a crime shall have the following rights . . . [t]he right to be informed of the victim's right to pursue a civil judgment against any person convicted of a crime against the victim . . . as a result of the commission of the crime regardless of whether the court has ordered such person to make restitution to the victim . . . .”); *id.* § 24-4.1-303(1) (“Law enforcement agencies, prosecutorial agencies, judicial agencies and correctional agencies shall ensure that victims of crimes are afforded the rights described in section 24-4.1-302.5.”).



recovery may sometimes be labeled as restitution.<sup>164</sup> Crime victim recovery rights in civil cases should have no significant effects on the criminal case procedures.

Civil case recoveries by crime victims are at times referenced in statutes chiefly dealing with crime victim participation in criminal cases. Other statutes simply recognize that civil case recovery is available. Thus, some crime victim rights provisions include the “right” to “restitution,” which could include civil as well as criminal case recoveries.<sup>165</sup> The criminal procedure laws in some states recognize a right to seek<sup>166</sup> or to pursue<sup>167</sup> restitution, or a right to restitution “to the extent possible.”<sup>168</sup>

#### *D. Administrative and Special Court Recoveries*

Crime victim recoveries can also involve state funds. Such recoveries may be based on constitutional directives. A few state constitutions expressly recognize the opportunity for state-supported recoveries.<sup>169</sup> Other state constitutions authorize the legislature to enact laws to assist crime victims.<sup>170</sup> In Oklahoma, while there is no

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<sup>164</sup> For example, constitutional crime victim restitution at times seems untied to crime victim recovery at criminal case sentencing. *See* TEX. CONST. art. I, § 30 (“A crime victim has the following rights . . . the right to restitution . . . .”); WIS. CONST. art. I, § 9m (“This state shall ensure that crime victims have all of the following privileges and protections as provided by law . . . restitution; compensation . . . .”).

<sup>165</sup> *See* IOWA CODE ANN. § 915.13(1)(c) (West 2010) (“[t]he right to restitution for pecuniary losses”); 725 ILL. COMP. STAT. ANN. § 120/4(a)(10) (West 2010) (“right to restitution”).

<sup>166</sup> Louisiana statutorily and constitutionally provides a right only to seek restitution. LA. REV. STAT. ANN. § 46:1844(M) (West 2010); LA. CONST. art. I, § 25. Yet the same statute says that “[i]f the defendant is found guilty, the court or parole board shall require the defendant to pay restitution . . . .” LA. REV. STAT. ANN. § 46:1844(M)(1).

<sup>167</sup> *See, e.g.*, IND. CODE ANN. § 35-40-5-7 (West 2010).

<sup>168</sup> *See, e.g.*, 18 PA. CONS. STAT. ANN. § 11.201(6) (recognizes a right of a crime victim to “be restored, to the extent possible, to the precrime economic status through the provision of restitution, compensation and the expeditious return of property”).

<sup>169</sup> *But see* TEX. CONST. art. I, § 31(a)-(b) (“The compensation to victims of crime fund created by general law and the compensation to victims of crime auxiliary fund created by general law are each a separate dedicated account in the general revenue fund. . . . [M]oney deposited to the credit of the compensation to victims of crime fund or the compensation to victims of crime auxiliary fund from any source may be expended as provided by law only for delivering or funding victim-related compensation, services, or assistance.”); WIS. CONST. art. I, § 9m (“This state shall ensure that crime victims have all of the following privileges and protections as provided by law . . . restitution; compensation . . . .”); R.I. CONST. art. I, § 23 (“A victim of crime . . . shall be entitled to receive, from the perpetrator of the crime, financial compensation for any injury or loss caused by the perpetrator of the crime, and shall receive such other compensation as the state may provide.”); GA. CONST. art. III, § 6, para. 6(f) (“The General Assembly shall be authorized to allocate certain funds, to appropriate funds, to provide for a continuing fund, or to provide for any combination thereof for the purpose of compensating innocent victims of crime and for the administration of any laws enacted for such purpose.”).

<sup>170</sup> *See, e.g.*, ARIZ. CONST. art. II, § 2.1(D) (“The legislature, or the people by initiative or referendum, have the authority to enact substantive and procedural laws to define, implement,

explicit state constitutional provision for crime victim recovery, a state statute provides that it is the “intent of the Legislature to provide a method of compensating and assisting those persons who become victims of criminal acts.”<sup>171</sup> In Georgia, the constitution authorizes the General Assembly to compensate “innocent victims of crime.”<sup>172</sup> In some state schemes, one can seek recovery from state funds though not an actual victim of a crime as defined in the criminal code. Such claimants sometimes include family members of crime victims.<sup>173</sup>

State-funded compensation is sometimes paid with funds derived from criminal case cost assessments.<sup>174</sup> At other times, there are different assessments.<sup>175</sup> Federal

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preserve and protect the rights guaranteed to victims . . . .”). Such rights, by the text of the constitution, include the right

To be present at and, upon request, to be informed of all criminal proceedings where the defendant has the right to be present [and] [t]o confer with the prosecution, after the crime against the victim has been charged, before trial or before any disposition of the case and to be informed of the disposition.

*Id.* art. II, § 2.1(A). *See also* MO. CONST. art. I, § 32(5) (“The general assembly shall have power to enforce this section by appropriate legislation.”). Rights provided in the Missouri Constitution include “[t]he right to be present at all criminal justice proceedings at which the defendant has such right . . . [t]he right to information about how the criminal justice system works, the rights and the availability of services, and upon request of the victim the right to information about the crime.” *Id.* art. I, § 32(1).

<sup>171</sup> OKLA. STAT. ANN. tit. 21, § 142.1 (West 2010).

<sup>172</sup> GA. CONST. art. III, § 6, para. 6(f).

<sup>173</sup> *See* N.Y. EXEC. LAW § 624(1) (McKinney 2010) (surviving family members and dependents of those murdered as crime victims); ALA. CODE § 15-23-3 (West 2010) (“(3) VICTIM. A person who suffered serious personal injury or death as a result of criminally injurious conduct. . . . (4) DEPENDENT. A natural person wholly or partially dependent upon the victim for care or support, and includes a child of the victim born after the death of the victim where the death occurred as a result of criminally injurious conduct. . . . (5) CLAIMANT. Any of the following persons applying for compensation under this article: . . . A victim . . . . A dependent . . . . A person authorized to act on behalf of a victim or a dependent of a deceased victim if such victim died as a result of criminally injurious conduct.”).

<sup>174</sup> *See, e.g.*, FLA. STAT. ANN. § 938.03 (West 2010) (costs imposed in guilty plea, nolo contendere plea, and conviction settings).

<sup>175</sup> In Alaska statutory fines imposed upon convicted offenders are not expressly directed to state-funded recovery schemes. ALASKA STAT. ANN. § 12.55.035(b) (West 2010) (“Upon conviction of an offense, a defendant . . . may be sentenced to pay . . . \$500,000 for murder in the first or second degree, attempted murder in the first degree, murder of an unborn child, sexual assault in the first degree, sexual abuse of a minor in the first degree, kidnapping, promoting prostitution in the first degree . . . \$250,000 for a class A felony . . . \$100,000 for a class B felony . . . \$50,000 for a class C felony . . . \$10,000 for a class A misdemeanor . . . \$2,000 for a class B misdemeanor . . . \$500 for a violation.”). In other states, fines are directed toward state funds. *See, e.g.*, IDAHO CODE ANN. § 72-1025 (West 2010) (“In addition to any other fine which may be imposed upon each person found guilty of criminal activity, the court shall impose a fine or reimbursement . . . : For each conviction or finding of guilt of each felony count, a fine or reimbursement of not less than seventy-five dollars (\$75.00) per felony count . . . ; For each conviction or finding of guilt of each misdemeanor count, a fine or reimbursement of thirty-seven dollars (\$37.00) per misdemeanor count . . . . In addition to

monies are available to states to support their crime victim recovery programs.<sup>176</sup> Many states mandate that losses already compensated through a collateral source, like a criminal case recovery, are not recoverable from a state fund. In Oklahoma the relevant Board may require the victim to “seek or accept” any possible financial benefits from other sources.<sup>177</sup> Georgia requires that a victim seek recovery from the offender in order to be eligible to receive compensation.<sup>178</sup> While Alabama does not expressly require a “claimant to seek or accept any collateral source contribution,”<sup>179</sup> an award may be reduced or eliminated due to actual collateral source contributions.<sup>180</sup> Where a victim has already recovered from a state fund, a court can sometimes direct payments from the criminal to the state for reimbursement.<sup>181</sup>

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any fine or reimbursement ordered under subsection (a) or (b) above, the court shall impose a fine or reimbursement of not less than three hundred dollars (\$300) per count for any conviction or finding of guilt for any sex offense . . . . The fines or reimbursements imposed under the provisions of this section shall be paid into the crime victims compensation account.”).

<sup>176</sup> See, e.g., 42 U.S.C.A. § 10601 (West 2010) (“There is created in the Treasury a separate account to be known as the Crime Victims Fund . . . . The Fund shall be available as follows: . . . The first \$10,000,000 deposited in the Fund shall be available for grants under section 10603a [involving grants to states for child abuse assistance programs] of this title. . . . Of the remaining amount to be distributed from the Fund in a particular fiscal year . . . 47.5 percent shall be available for grants under section 10602 [grants to state supported crime victim compensation and assistance programs] of this title . . .”).

<sup>177</sup> OKLA. STAT. ANN. tit. 21, § 142.7 (West 2010). Compare ALASKA. STAT. ANN. § 18.67.090 (West 2010) (“If compensation is awarded under this chapter and the person receiving it also receives a collateral sum . . . that has not been deducted from it, the board may require that the person refund either the amount of the collateral sum or the amount of compensation paid to the person . . . whichever is less.”). In Alaska, civil litigation may change the time in which a victim receives a compensation award. In response to a questionnaire, the Administrator of Alaska’s Violent Crimes Compensation Board stated that the Board typically defers awards until the outcome of civil litigation. Questionnaire from Professor Jeffrey A. Parness for Kate Hudson, Adm’r, Violent Crimes Comp. Bd. (July 13, 2009).

<sup>178</sup> GA. CODE ANN. § 17-15-8(a)(4) (West 2010) (“unless the board or director determines that such action would not be feasible”).

<sup>179</sup> ALA. CODE § 15-23-9 (West 2010).

<sup>180</sup> *Id.* § 15-23-12(b). See also 740 ILL. COMP. STAT. ANN. § 45/10.1(e) (West 2010).

<sup>181</sup> See ALA. CODE § 15-23-14(d) (“Whenever compensation is awarded to a claimant who is entitled to restitution from a criminal defendant, the commission may initiate restitution hearings in such criminal proceedings or intervene in the same. The commission shall be entitled to receive restitution in such proceedings to the extent that compensation was awarded.”); COLO. REV. STAT. ANN. § 24-4.1-110(3) (West 2010) (“If a defendant is ordered to pay restitution . . . to a person who has received compensation awarded under this part 1, an amount equal to the compensation awarded shall be transmitted from such restitution to the board for allocation to the fund.”); IDAHO CODE ANN. § 72-1023 (West 2010) (“If a claimant seeks compensation . . . and compensation is awarded, the account is entitled to full subrogation against a judgment or recovery received by the claimant against the offender or from or against any other source for all compensation paid . . . .”); IOWA CODE ANN. § 915.92 (West 2010) (“If a person receiving compensation under the program seeks indemnification which would reduce the compensation . . . the department is subrogated to the recovery to the

State-funded (as well as civil case) recoveries may differ from recoveries at criminal case sentencing because only for the latter might there be a requirement of a guilty plea or a conviction.<sup>182</sup> Upon a plea for one offense, however, a criminal defendant may be able to agree to compensate a victim for losses stemming from another offense for which there is no plea or conviction,<sup>183</sup> or perhaps even no formal charge.

State-funded schemes for crime victim recovery often have caps. In Alaska, awards cannot exceed \$40,000 unless the claimant has more than one dependent, which prompts a cap of \$80,000.<sup>184</sup> California limits the recovery to \$35,000, unless

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extent of payments by the department to or on behalf of the person. . . . However, legal action by the department does not affect the right of a person to seek further relief in other legal actions.”); KY. REV. STAT. ANN. § 346.170 (West 2010) (“No right of action at law against a person who has committed a criminal act for damages as a consequence of such act shall be lost as a consequence of receiving benefits . . . . If compensation is 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 compensation is awarded from a source which is, or, if readily available to the victim or claimant would be, a collateral source.”); MINN. STAT. ANN. § 611A.61 (West 2010) (“The state shall be subrogated, to the extent of reparations awarded, to all the claimant’s rights to recover benefits or advantages for economic loss from a source which is or, if readily available to the victim or claimant would be, a collateral source. Nothing in this section shall limit the claimant’s right to bring a cause of action to recover for other damages.”); W. VA. CODE ANN. § 14-2A-22 (West 2010) (“If an award of compensation is made . . . and is not reduced on account of the availability of payment by a collateral source, the state, upon the payment of the award or a part of the award, shall be subrogated to all of the claimant’s rights to receive or recover benefits or advantages for economic loss for which an award of compensation was made . . . .”). *See also* Oregon v. Romero-Navarro, 197 P.3d 30, 32-33 (Or. Ct. App. 2008) (holding that because the Criminal Injuries Compensation Account paid the victim’s parents for burial expenses at sentencing, the trial court could order the defendant to pay restitution to the fund as the Account was a “victim” under the statute on restitution, OR. REV. STAT. ANN. § 137.103(4)(c) (West 2010), because it had “expended moneys on behalf of a victim”).

<sup>182</sup> *See* ALA. CODE § 15-23-13 (“[A]n 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 . . . .”); IDAHO CODE ANN. § 72-1018(2) (West 2010) (same); R.I. GEN. LAWS ANN. § 12-25-19(f) (West 2010) (“An award may be made under this section whether or not any person is prosecuted or convicted of any offense arising out of the act, or if the act is the subject of any other legal action.”). *But see* ARIZ. CONST. art. II, § 2.1(A)(8) (“a victim of crime has a right . . . [t]o receive prompt restitution from the person or persons convicted of the criminal conduct that caused the victim’s loss or injury”).

<sup>183</sup> *See, e.g.*, 730 ILL. COMP. STAT. ANN. § 5/5-5-6(d) (West 2010) (“In instances where a defendant has more than one criminal charge pending against him in a single case, or more than one case, and the defendant stands convicted of one or more charges, a plea agreement negotiated by the State’s Attorney and the defendants may require the defendant to make restitution to victims of charges that have been dismissed or which it is contemplated will be dismissed under the terms of the plea agreement, and under the agreement, the court may impose a sentence of restitution on the charge or charges of which the defendant has been convicted that would require the defendant to make restitution to victims of other offenses as provided in the plea agreement.”).

<sup>184</sup> ALASKA STAT. § 18.67.130(c) (West 2010).

federal funds are available.<sup>185</sup> In Alabama and Indiana there is a \$15,000 cap.<sup>186</sup> At least one state differentiates the caps based on the types of expenses.<sup>187</sup>

While many state-funded schemes require crime victims to file applications with an administrative agency,<sup>188</sup> with the applications determined by the agency,<sup>189</sup> in Illinois a victim files with the Court of Claims.<sup>190</sup> An Illinois victim must release relevant reports, documents, and other information to the Attorney General's Office.<sup>191</sup> Failure to comply with the Attorney General's requests for information will result in dismissal.<sup>192</sup> The Illinois Court of Claims then considers the application as well as a report by the Attorney General.<sup>193</sup> Although the application

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<sup>185</sup> CAL. GOV'T CODE § 13957(b) (West 2010). If federal funds are available, the cap is \$70,000. *Id.*

<sup>186</sup> ALA. CODE § 15-23-15(b); IND. CODE § 5-2-6.1-35(a)(1) (West 2010). *See also* 740 ILL. COMP. STAT. ANN. § 45/10.1(f) (West 2010) (\$27,000 cap).

<sup>187</sup> IOWA CODE ANN. § 915.86(1)-(2), (6) (West 2010) ("Reasonable charges incurred for medical care not to exceed twenty-five thousand dollars. Reasonable charges incurred for mental health care not to exceed five thousand dollars . . . . Loss of income from work the victim would have performed and for which the victim would have received remuneration if the victim had not been injured, not to exceed six thousand dollars. . . . Reasonable funeral and burial expenses not to exceed seven thousand five hundred dollars.").

<sup>188</sup> *See* FLA. STAT. ANN. § 960.07 (West 2010) ("A claim for compensation may be filed by a person eligible for compensation . . . . Claims may be filed in the Tallahassee office of the department in person or by mail."); IDAHO CODE ANN. § 72-1012 ("An applicant . . . may apply in writing in a form that conforms substantially to that prescribed by the commission."); R.I. GEN. LAWS ANN. § 12-25-19 ("[T]he victim . . . may apply to the office for compensation.").

<sup>189</sup> *See* FLA. STAT. ANN. § 960.09 ("The department shall have authority to allow, deny, controvert, and litigate claims . . . and to delegate to the Crime Victims' Services Office such authority."); IDAHO CODE ANN. § 72-1012 ("An applicant for an award of compensation may apply in writing in a form that conforms substantially to that prescribed by the commission."); *id.* § 72-1018(1) ("The commission shall award compensation benefits . . . if satisfied by a preponderance of the evidence that the requirements for compensation have been met."); R.I. GEN. LAWS ANN. § 12-25-18 ("The office [of the general treasurer] . . . shall designate a program administrator. . . . The administrator shall investigate each application for compensation, verify the information contained on the application and in all supporting documentation and award or deny compensation . . .").

<sup>190</sup> 740 ILL. COMP. STAT. ANN. 45/6.1 ("A person is entitled to compensation under this Act if . . . [w]ithin 2 years of the occurrence of the crime, or within one year after a criminal indictment of a person for an offense, upon which the claim is based, he files an application, under oath, with the Court of Claims . . .").

<sup>191</sup> *Id.* at 45/7.1

<sup>192</sup> *Id.* at 45/8.1 ("If an applicant does not submit all materials substantiating his claim as requested . . . by the Attorney General, the Attorney General shall notify the applicant in writing . . . that he has 30 days in which to furnish those items . . . . The Attorney General shall report an applicant's failure to comply within 30 days of the foregoing notice to the Court of Claims. . . . No award of compensation shall be made for any portion of the applicant's claim that is not substantiated by the applicant.").

<sup>193</sup> *Id.* at 45/9.1.

must be filed with the Court of Claims, an attorney may not collect a fee for assisting a victim-applicant with the application.<sup>194</sup> “Reasonable” attorney’s fees may, however, be recovered if counsel represents the victim at a hearing.<sup>195</sup>

Outside of Illinois, victims usually apply to a special board.<sup>196</sup> Like the Illinois Attorney General, state boards typically cannot represent victims.<sup>197</sup> Claimants must file claims in a timely manner. A victim in Kentucky has five years after the commission of a crime.<sup>198</sup> A victim in Indiana only has 180 days.<sup>199</sup>

When waiting for an application to be processed, victims in some states can request an emergency award. Such a recovery can be based on the probability that the application will be granted and that the victim will suffer undue hardship if an immediate award is not made.<sup>200</sup> In Connecticut, an emergency award may go as high as \$2,000.<sup>201</sup> In Indiana, an emergency award is capped at \$500.<sup>202</sup> Rhode Island leaves the amount of any emergency award to the discretion of the board or program director, but limits emergency burial expenses to \$5,000.<sup>203</sup> Generally, there is no award if there are no funds.<sup>204</sup> Many states also impose requirements on

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<sup>194</sup> *Id.* at 45/12 (“If the applicant is represented by counsel . . . in making [the] application under this Act or in any further proceedings provided for in this Act, that counsel or agent may receive no payment for his services in preparing or presenting the application before the Court of Claims.”).

<sup>195</sup> *Id.*

<sup>196</sup> *See, e.g.*, ALA. CODE §§ 15-23-4, -8 (West 2010).

<sup>197</sup> *See* 740 ILL. COMP. STAT. ANN. 45/4.1 (“[T]he Attorney General shall . . . represent the interests of the State . . . .”); MICH. COMP. LAWS ANN. § 18.353(1) (West 2010) (“The commission shall do all of the following: . . . Investigate and determine claims for awards and reinvestigate or reopen cases as the commission considers necessary. . . . Direct medical examination of victims. . . . Review all appeals, hold hearings, administer oaths or affirmations, examine any person under oath or affirmation, issue subpoenas requiring the attendance and giving of testimony of witnesses and the production of books, papers, documentary or other evidence. . . . Take or cause to be taken affidavits or depositions within or without the state.”); S.C. CODE ANN. § 16-3-1130(1), (3) (2010) (“A claim, once accepted for filing and completed, must be assigned to a field representative. The field representative shall examine the papers filed in support of the claim and cause an investigation to be conducted into the validity of the claim. The investigation shall include but not be limited to an examination of police, court, and official records and reports concerning the crime and an examination of medical and hospital reports relating to the injury upon which the claim is based. . . . The field representative conducting the investigation shall file with the deputy director a written report setting forth a recommendation and his reason for the recommendation. The deputy director shall render a written decision and furnish the claimant with a copy of the decision.”).

<sup>198</sup> KY. REV. STAT. ANN. § 346.060(2) (West 2010).

<sup>199</sup> IND. CODE ANN. § 5-2-6.1-16(b) (West 2010).

<sup>200</sup> ALASKA STAT. ANN. § 18.67.120 (West 2010).

<sup>201</sup> CONN. GEN. STAT. ANN. § 54-217 (West 2010).

<sup>202</sup> IND. CODE ANN. § 5-2-6.1-36(a).

<sup>203</sup> R.I. GEN. LAWS ANN. § 12-25-21.1(b)-(c) (West 2010).

crime victims, including clean hands<sup>205</sup> and cooperation throughout any criminal process.<sup>206</sup> At times, recovery is only available for harm due to violence.<sup>207</sup>

Besides providing for recoveries, some state-funded schemes provide services to crime victims as well. In Virginia, the scheme funds a crime victims ombudsman.<sup>208</sup> The Rhode Island scheme assists crime victims by informing them of their rights.<sup>209</sup> In Georgia, ten percent of the fund is designated for victim service providers and for dissemination of materials about crime victim recovery.<sup>210</sup>

There are some interstate differences in funding. Usually there is an assessment against an offender that is placed into a fund.<sup>211</sup> The amounts collected vary. Some states, like Colorado, have a flat assessment regardless of the offense, with no

<sup>204</sup> See, e.g., GA. CODE ANN. § 17-15-9 (West 2010) (“[U]nless and until sufficient funds become available,” awards are “paid in chronological order.”).

<sup>205</sup> See, e.g., ALA. CODE § 15-23-12(a)(2) (West 2010).

<sup>206</sup> See, e.g., COLO. REV. STAT. ANN. § 24-4.1-108(1)(c) (West 2010).

<sup>207</sup> See IND. CODE ANN. § 5-2-6.1-7 (defining “victim” as “an individual who suffers bodily injury or death as a result of a violent crime”); GA. CODE ANN. § 17-15-7(g) (“No award . . . for loss of property.”). But see COLO. REV. STAT. ANN. § 24-4.1-109(1.5)(a)(I)(A), (B) (allowing recoveries for damage to residential property including reimbursement of insurance deductible).

<sup>208</sup> VA. CODE ANN. § 19.2-368.3:1 (West 2010).

<sup>209</sup> R.I. GEN. LAWS ANN. § 12-25-29.

<sup>210</sup> GA. CODE ANN. § 17-15-14. See also IOWA CODE ANN. § 915.83 (West 2010) (“The department shall . . . [p]ublicize through the department, county sheriff departments, municipal police departments, county attorney offices, and other public or private agencies, the existence of the crime victim compensation program, including the procedures for obtaining compensation under the program.”); MINN. STAT. ANN. § 611A.56 (West 2010) (“[T]he board shall . . . publicize widely the availability of reparations and the method of making claims . . .”). Also note that referrals for victim compensation can come from other sources. Minnesota notes in its 2008 annual report that while 49% of victim referrals come from a victim service provider, 39 of 1819 claims were referred by a funeral home, while 49 referrals came from “unknown” sources. MINN. CRIME VICTIMS REPARATIONS BD., MINN. DEP’T OF PUB. SAFETY, ANNUAL REPORT FISCAL YEAR 2008, at 7 (2008).

<sup>211</sup> See, e.g., FLA. STAT. ANN. § 938.03 (West 2010) (“Any person pleading guilty or nolo contendere to, or being convicted of . . . any felony, misdemeanor . . . or criminal traffic offense . . . shall pay as an additional cost . . . the sum of \$50. . . . These costs shall not be waived . . . . The clerk of the court shall . . . forward \$49 of each \$50 . . . to be deposited in the Crimes Compensation Trust Fund.”). In fiscal year (“FY”) 2008, “court fines and restitution amounts contributed over \$2.7 million, or 79%, of program funding” in Delaware. VIOLENT CRIMES COMP. BD., STATE OF DEL., 2008 ANNUAL REPORT 7 (2008). In West Virginia, for FY 2008, state funds collected through fines and costs to defendants totaled \$1,633,260. CRIME VICTIMS COMP. BD., W.V. COURT OF CLAIMS, ANNUAL REPORT 2009, at 3 (2008). In Minnesota, 24% of the compensation fund for FY 2008 came from “restitution payments . . . unclaimed restitution, funds from civil awards paid to victims, and inmate wage deductions transferred from the Minnesota Department of Corrections.” MINN. CRIME VICTIMS REPARATIONS BD., MINN. DEP’T OF PUB. SAFETY, ANNUAL REPORT FISCAL YEAR 2008, at 9 (2008). In Idaho, fines, restitution, and subrogation accounted for \$2,321,600 in FY 2008. IDAHO INDUS. COMM’N, STATE OF IDAHO, ANNUAL REPORT 2008, at 5 (2008).

judicial discretion.<sup>212</sup> Others have a range depending upon the level of the crime, with some judicial discretion. Oklahoma assesses offenders from \$50 to \$10,000 for each injurious felony,<sup>213</sup> \$45 to \$1,000 for each other felony, and \$30 to \$300 for each misdemeanor.<sup>214</sup> In Alabama, the assessment is \$50 to \$10,000 for each felony and \$25 to \$1,000 for each misdemeanor.<sup>215</sup> In determining discretionary assessments, courts often consider “the severity of the crime, the prior criminal record, and the ability of the defendant to pay, as well as the economic impact of the victim compensation assessment on the dependents of the defendant.”<sup>216</sup>

State-funded recoveries are also available for victims in federal criminal cases. The federal Crime Victims Fund<sup>217</sup> assists states in funding their crime victim recovery schemes. Unlike state funds that provide monies directly to crime victims, the federal fund simply awards grants to states.<sup>218</sup> Since 2002, the Crime Victims Fund makes annual grants constituting about sixty percent of the monies available to state funds.<sup>219</sup> To receive grants, state funds must qualify. Eligible funds must be operated by the state, offer compensatory awards to victims,<sup>220</sup> and promote victim cooperation with law enforcement.<sup>221</sup> Grant recipients must also certify that the state will not cut funds already available,<sup>222</sup> that the fund does not discriminate between citizens and non-citizens<sup>223</sup> or between victims of state offenses and federal offenses,<sup>224</sup> that the fund will not deny claimants based on their family or residential relationship with the alleged offender,<sup>225</sup> and that the fund will not support a claimant

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<sup>212</sup> COLO. REV. STAT. ANN. § 24-4.1-119(1)(a) (\$163 for felonies and \$78 for misdemeanors).

<sup>213</sup> OKLA. STAT. ANN. tit. 21, § 142.18(A) (West 2010).

<sup>214</sup> *Id.* § 142.18(B).

<sup>215</sup> ALA. CODE § 15-23-17(b) (West 2010).

<sup>216</sup> ALA. CODE § 15-23-17(b). *See also* OKLA. STAT. ANN. tit. 21, § 142.18(A) (“In addition to the imposition of any costs, penalties or fines imposed pursuant to law, any person convicted of, pleading guilty to or agreeing to a deferred judgment procedure . . . shall be ordered to pay a victim compensation assessment of at least Fifty Dollars (\$50.00), but not to exceed Ten Thousand Dollars (\$10,000) . . . . In imposing this penalty, the court shall consider factors such as the severity of the crime, the prior criminal record, the expenses of the victim of the crime, and the ability of the defendant to pay, as well as the economic impact of the victim compensation assessment on the dependents of the defendant.”).

<sup>217</sup> 42 U.S.C.A. § 10601 (West 2010).

<sup>218</sup> *Id.* § 10602(a)(1) (“[T]he Director shall make an annual grant from the Fund to an eligible crime victim compensation program . . .”).

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* § 10602(b)(1).

<sup>221</sup> *Id.* § 10602(b)(2).

<sup>222</sup> *Id.* § 10602(b)(3) (“such State certifies that grants received under this section will not be used to supplant State funds otherwise available to provide victim compensation”).

<sup>223</sup> *Id.* § 10602(b)(4).

<sup>224</sup> *Id.* § 10602(b)(5).

<sup>225</sup> *Id.* § 10602(b)(7).



who has “been convicted of an offense under Federal law with respect to any time period during which the person is delinquent in paying a fine, other monetary penalty, or restitution imposed for the offense.”<sup>226</sup> The federal Crime Victims Fund also assists with crime victim legal aid<sup>227</sup> and with child abuse prevention and treatment.<sup>228</sup> Furthermore, it supports victims of domestic<sup>229</sup> and international terrorism.<sup>230</sup>

#### *E. Criminal Case Recoveries*

Beside civil claim and state-funded recoveries, crime victims can recover during criminal case sentencing. Restitution is the term often used, though the same term is also used for recoveries in civil cases or from state funds. State approaches to criminal case recoveries differ, including variations on what is recoverable, collection procedures, and enforcement.

Recoveries at sentencing typically require a conviction, upon either trial or plea.<sup>231</sup> However, some states allow recoveries when a criminal defendant pleads

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<sup>226</sup> *Id.* § 10602(b)(8).

<sup>227</sup> *Id.* § 10603d (“The Director may make grants . . . to develop, establish, and maintain programs for the enforcement of crime victims’ rights as provided by law. . . . Grant amounts under this section may not be used to bring a cause of action for damages.”).

<sup>228</sup> *Id.* § 10603a.

<sup>229</sup> *Id.* § 10603b(b) (“The Director may make supplemental grants . . . to States, victim service organizations, and public agencies (including Federal, State, or local governments) and nongovernmental organizations that provide assistance to victims of crime, which shall be used to provide emergency relief, including crisis response efforts, assistance, compensation, training, and technical assistance, and ongoing assistance, including during any investigation or prosecution, to victims of terrorists acts or mass violence occurring within the United States.”).

<sup>230</sup> *Id.* § 10603b(a)(1) (“The Director may make supplemental grants . . . to States . . . victim service organizations, public agencies (including Federal, State, or local governments) and nongovernmental organizations that provide assistance to victims of crime, which shall be used to provide emergency relief, including crisis response efforts, assistance, training, and technical assistance, and ongoing assistance, including during any investigation or prosecution, to victims of terrorist acts or mass violence occurring outside the United States.”); *id.* § 10603c(b) (“The Director may use the emergency reserve . . . to carry out a program to compensate victims of acts of international terrorism that occur outside the United States for expenses associated with that victimization.”).

<sup>231</sup> *See, e.g.,* ALA. CODE § 15-18-65 (West 2010) (“[I]t is essential . . . that all perpetrators of criminal activity . . . be required to fully compensate all victims of such conduct . . .”).

*nolo contendere*.<sup>232</sup> Notably, at least several states allow recoveries at sentencing for uncharged offenses and for charges dismissed pursuant to plea agreements.<sup>233</sup>

States sometimes mandate that recovery be ordered at sentencing. Iowa, for example, mandates that “[i]n all criminal cases in which there is a plea of guilty, verdict of guilty, or special verdict upon which a judgment of conviction is rendered, the sentencing court shall order that restitution be made.”<sup>234</sup> Other states recognize some judicial discretion, as in Florida where judges can find “clear and compelling reasons not to order such restitution.”<sup>235</sup> Florida does require a judge to state the reasons for not ordering restitution.<sup>236</sup> In Maryland, a “victim is presumed to have a right to restitution.”<sup>237</sup>

In assessing recoveries at sentencing, many states require victims to prove their damages.<sup>238</sup> In South Carolina, the court “must hold a hearing to determine the

<sup>232</sup> See MONT. CODE ANN. § 46-18-201(5) (West 2010) (“[I]f a person has been found guilty of an offense upon a verdict of guilty or a plea of guilty or *nolo contendere* and the sentencing judge finds that a victim . . . has sustained a pecuniary loss, the sentencing judge shall, as part of the sentence, require payment of full restitution to the victim . . .”); N.M. STAT. ANN. § 31-17-1 (West 2010) (“[C]riminal activities’ includes any crime for which there is a plea of guilty or verdict of guilty . . . and any other crime committed after July 1, 1977 which is admitted or not contested by the defendant . . .”).

<sup>233</sup> See NEB. REV. STAT. ANN. § 29-2280 (LexisNexis 2010) (“With the consent of the parties, the court may order restitution for the . . . loss sustained by the victim of an uncharged offense or an offense dismissed pursuant to plea negotiations.”); *State v. Green*, 28 So. 3d 1105, 1109 (La. Ct. App. 2009) (applying comparable law, LA. CODE CRIM. PROC. art. 883.2 (2010)). *But see* *State v. Colon*, 925 N.E.2d 212, 214-15 (Ohio Ct. App. 2010) (finding that an aggravated arson conviction upon trial cannot support restitution for stolen property admitted to by criminal defendant in the arson case).

<sup>234</sup> IOWA CODE ANN. § 910.2 (West 2010). See also ALA. CODE § 15-18-67 (“When a defendant is convicted of a criminal activity or conduct which has resulted in pecuniary damages or loss to a victim, the court shall hold a hearing to determine the amount or type of restitution due to the victim or victims of such defendant’s criminal acts. Such restitution hearings shall be held as a matter of course and in addition to any other sentence which it may impose, the court shall order that the defendant make restitution or otherwise compensate such victim for any pecuniary damages.”); 730 ILL. COMP. STAT. ANN. 5/5-5-6 (West 2010) (mandating restitution for all convictions under the 1961 Criminal Code where there is personal injury or property damage).

<sup>235</sup> FLA. STAT. ANN. § 775.089(1)(a) (West 2010).

<sup>236</sup> *Id.* § 775.089(1)(b) (requiring the court to state reasons also when it “orders restitution of only a portion of the damages”).

<sup>237</sup> MD. CODE ANN., CRIM. PROC. § 11-603(b) (West 2010) (if restitution is requested and evidence of actual expenses or injury is presented).

<sup>238</sup> See, e.g., KY. REV. STAT. ANN. § 431.200 (West 2010) (“The court in which the conviction is had, if applied to by verified petition made within ninety (90) days of the date the sentence was pronounced, may order restitution or give judgment . . . for reparation in damages . . . . In a petition for restitution or reparation, the court shall cause the defendant, if in custody, to be brought into court, and demand of him if he has any defense to make to the petition. If he consents to the restitution or to reparation in damages in an agreed sum, the court shall give judgment accordingly. Otherwise a jury shall be impaneled to try the facts and ascertain the amount and the value of the property, or assess the damage, as the case may be.”).

amount of restitution due the victim” as a result of the defendant’s criminal acts.<sup>239</sup> This hearing must be held unless the defendant agrees to an amount on the record.<sup>240</sup> In Alabama, the court “shall hold a hearing” to determine the recoveries,<sup>241</sup> with the court entering findings of facts after a hearing where the defendant, victim, district attorney, and other interested parties may be heard.<sup>242</sup>

Some responsibility for securing recoveries at sentencing is assigned to prosecutors and other law enforcement officials. A Utah statute provides that “[a]ny law enforcement agency conducting an investigation for criminal conduct which would constitute a felony or class A misdemeanor shall provide in their investigative reports whether a claim for restitution exists, the basis for the claim, and the estimated or actual amount of the claim.”<sup>243</sup> In Oklahoma, the district attorney, during a plea bargain “in every case where the victim has suffered economic loss, shall, as a part of the plea bargain, require that the offender pay restitution to the crime victim.”<sup>244</sup> In Pennsylvania, “[i]t shall be the responsibility of the district attorneys . . . to make a recommendation . . . as to the amount of restitution.”<sup>245</sup> In Wyoming, while the “prosecuting attorney shall present to the court any claim for restitution submitted by any victim,”<sup>246</sup> there is no duty to investigate or to independently seek recovery for the victim.<sup>247</sup> In Oregon, prosecutors must investigate and present evidence of crime victim losses.<sup>248</sup>

Some states require judges to consider a defendant’s ability to pay when determining recovery, while others expressly prohibit this. In Alabama, “the court may take into consideration . . . [t]he financial resources of the defendant . . . [and]

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<sup>239</sup> S.C. CODE ANN. § 17-25-322(A) (West 2010).

<sup>240</sup> *Id.*

<sup>241</sup> ALA. CODE § 15-18-67.

<sup>242</sup> *Id.* § 15-18-69 (allowing these parties to be heard on the issue of restitution).

<sup>243</sup> UTAH CODE ANN. § 77-38a-201 (West 2010).

<sup>244</sup> OKLA. STAT. ANN. tit. 22 § 991f(E)(4) (West 2010). Furthermore, the district attorney “shall be authorized to act as a clearing house for collection and disbursement of restitution payments.” *Id.*

<sup>245</sup> 18 PA. CONS. STAT. ANN. § 1106(c)(4)(i) (West 2010). The district attorney has the obligation to elicit information from the victim, and in the event that the victim has not responded to the district attorney’s request for restitution information, the district attorney “shall, based on other available information, make a recommendation to the court for restitution.” *Id.* § 1106(c)(4)(ii).

<sup>246</sup> WYO. STAT. ANN. § 7-9-103 (West 2010).

<sup>247</sup> *Id.* § 7-9-111 (“[T]he prosecuting attorney has no obligation to investigate alleged pecuniary damages or to petition the court for restitution on behalf of a victim. In the event that the victim is not satisfied with the restitution plan approved or modified by the court, the victim’s sole and exclusive remedy is a civil action.”).

<sup>248</sup> OR. REV. STAT. ANN. § 137.106(1) (West 2010) (“When a person is convicted of a crime . . . that has resulted in economic damages, the district attorney shall investigate and present to the court, prior to the time of sentencing, evidence of the nature and amount of the damages.”).

[t]he ability of the defendant to pay restitution.”<sup>249</sup> In contrast, a court in Alaska “may not, in ordering the amount of restitution, consider the defendant’s ability to pay restitution.”<sup>250</sup> Similarly, in Florida judges can only consider the victim’s loss in determining the amount of restitution.<sup>251</sup> In Arizona, a court “shall not consider the economic circumstances of the defendant in determining the amount of restitution,”<sup>252</sup> but should consider these circumstances when determining the manner of payment.<sup>253</sup> Some state courts must consider the possible rehabilitative effects of restitution orders on criminal defendants.<sup>254</sup>

Whether or not a criminal defendant’s financial ability is considered, any earlier ability to pay becomes irrelevant if a criminal defendant’s resources are depleted after the crime but prior to any recovery order. Pennsylvania helps victims by allowing for an asset preservation order relating to a criminal defendant’s property in anticipation of a later recovery order:

[T]he court may enter a restraining order or injunction to preserve the availability of property which may be necessary to satisfy an anticipated restitution order . . . if . . . there is a substantial probability that:

- (A) the Commonwealth will prevail on the underlying criminal charges or allegation of delinquency;
- (B) restitution will be ordered exceeding \$10,000 in value;
- (C) the property appears to be necessary to satisfy such restitution order; and
- (D) failure to enter the order will result in the property being . . . unavailable for payment of the anticipated restitution order . . . .<sup>255</sup>

These standards are somewhat comparable to the standards for interlocutory injunctions in civil cases.<sup>256</sup>

<sup>249</sup> ALA. CODE § 15-18-68 (determining manner, method, or amount of restitution).

<sup>250</sup> ALASKA STAT. ANN. § 12.55.045(g) (West 2010).

<sup>251</sup> FLA. STAT. ANN. § 775.089(6)(a) (West 2010) (statute is silent on defendant’s financial abilities); *id.* § 775.089(6)(b) (“The criminal court, at the time of enforcement of the restitution order, shall consider the financial resources of the defendant.”).

<sup>252</sup> ARIZ. REV. STAT. ANN. § 13-804(C) (2010).

<sup>253</sup> *Id.* § 13-804(E).

<sup>254</sup> *See, e.g.*, ALA. CODE § 15-18-68 (“In determining the manner, method, or amount of restitution to be ordered, the court may take into consideration all of the following: . . . [t]he anticipated rehabilitative effect on the defendant regarding the manner of restitution or the method of payment.”); ARK. CODE ANN. § 5-4-205(e)(2) (West 2010) (“In determining the method of payment, the court shall take into account . . . [t]he rehabilitative effect on the defendant of the payment of restitution and the method of payment.”); MISS. CODE ANN. § 99-37-3 (West 2010) (“In determining whether to order restitution which may be complete, partial or nominal, the court shall take into account . . . [t]he rehabilitative effect on the defendant of the payment of restitution and the method of payment.”).

<sup>255</sup> 42 PA. CONS. STAT. ANN. § 9728(e)(2)(i) (West 2010) (the burden on the defendant must be outweighed by the need to preserve the property).

Statutes often delineate the specific losses recoverable at sentencing. Medical expenses, lost wages, counseling expenses, lost or damaged property, and funeral expenses are often included.<sup>257</sup> Colorado permits recoveries for “anticipated future expenses” as well as past losses.<sup>258</sup> California provides for interest on crime victim recovery orders.<sup>259</sup>

Some states restrict recoverable losses to actual pecuniary losses proximately caused by criminal conduct, thus excluding pain and suffering. A Connecticut statute says:

Restitution ordered by the court . . . shall be based on easily ascertainable damages for injury or loss of property, actual expenses incurred for treatment for injury to persons and lost wages resulting from injury. Restitution shall not include reimbursement for damages for mental anguish, pain and suffering or other intangible losses, but may include the costs of counseling reasonably related to the offense.<sup>260</sup>

While punitive, pain and suffering, and loss of consortium recoveries are unavailable at sentencing in Georgia, criminal procedure laws do suggest that such recoveries are available in separate civil actions.<sup>261</sup>

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<sup>256</sup> See PA. R. CIV. P. 1531(a) (“A court shall issue a preliminary or special injunction only after written notice and hearing unless it appears to the satisfaction of the court that immediate and irreparable injury will be sustained before notice can be given or a hearing held, in which case the court may issue a preliminary or special injunction without a hearing or without notice. In determining whether a preliminary or special injunction should be granted and whether notice or a hearing should be required, the court may act on the basis of the averments of the pleadings or petition and may consider affidavits of parties or third persons or any other proof which the court may require.”); *Everett v. Harron*, 110 A.2d 383, 387 (Pa. 1955) (“In general, these conditions are, that unless relief is granted a substantial right of the plaintiff will be impaired to a material degree; that the remedy at law is inadequate; and that injunctive relief can be applied with practical success and without imposing an impossible burden on the court or bringing its processes into disrepute.” (quoting *Kenyon v. City of Chicopee*, 70 N.E.2d 241, 244-45 (Mass. 1946))).

<sup>257</sup> See CAL. PENAL CODE § 1202.4(f)(3) (West 2010); FLA. STAT. ANN. § 775.089(2)(a), (b) (West 2010).

<sup>258</sup> COL. REV. STAT. ANN. § 18-1.3-602(3)(a) (West 2010) (no recoveries for loss of consortium, loss of future earnings, physical or mental pain and suffering and punitive damages).

<sup>259</sup> CAL. PENAL CODE § 1202.4(f)(3)(G) (assessing ten percent).

<sup>260</sup> CONN. GEN. STAT. ANN. § 53a-28(c) (West 2010).

<sup>261</sup> See GA. CODE ANN. § 17-14-9 (West 2010) (“The amount of restitution ordered shall not exceed the victim’s damages”); *id.* § 17-14-3 (“[I]n addition to any other penalty imposed by law, a judge of any court of competent jurisdiction shall . . . order an offender to make full restitution . . . .”); *id.* § 17-14-10 (“In determining the nature and amount of restitution, the ordering authority shall consider . . . [t]he amount of damages . . . .”); *id.* § 17-14-2(9) (“‘Victim’ means any . . . [n]atural person or his or her personal representative or, if the victim is deceased, his or her estate; or . . . [a]ny firm, partnership, association, public or private corporation, or governmental entity . . . suffering damages caused by an offender’s lawful act . . . .”); *id.* § 17-14-2(2) (“‘Damages’ means all special damages which a victim could recover against an offender in a civil action, including a wrongful death action, based on the same act or acts for which the offender is sentenced, except punitive damages and damages for pain and

In some instances, a government can be a crime victim for purposes of victim recovery in criminal cases. Consider state entities that expend monies to cover victim injuries arising from crime.<sup>262</sup> However, law enforcement agencies that suffer property losses during attempts to apprehend suspected criminals often are not considered crime victims at sentencing.<sup>263</sup>

While crime victim recoveries at sentencing are not specifically addressed in the federal Constitution, certain crime victims under the federal Crime Victims Act have the “right to full and timely restitution as provided in law.”<sup>264</sup> However, restitution opportunities have never been available to all victims. For example, one court has ruled that plaintiffs suing under the Federal Tort Claims Act could not utilize Victim Rights Act protections when there is no “allegation of ongoing or contemplated criminal prosecution.”<sup>265</sup> A 2010 survey of Article III federal court judges found that

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suffering, mental anguish, or loss of consortium. Such special damages shall not be limited by any law which may cap economic damages. Special damages may include the reasonably determined costs of transportation to and from court proceedings related to the prosecution of the crime.”). These statutes all appear in the Restitution and Distribution of Profits to Victims of Crimes Chapter of the Criminal Procedure Statutes.

<sup>262</sup> See, e.g., IND. CODE ANN. § 35-50-5-3(a) (West 2010) (“[T]he court may . . . order the person to make restitution to the victim of the crime . . . . The court shall base its restitution order upon a consideration of . . . property damages of the victim incurred as a result of the crime . . . medical and hospital costs incurred by the victim (before the date of sentencing) as a result of the crime . . . .”). For example, in *Ault v. Indiana* the court held that because the victim was afflicted with shaken baby syndrome as a result of the defendant’s actions and the victim’s medical costs would be approximately \$10,000 a month, most of which would be covered by Medicaid, restitution was to be made jointly to the victim’s mother and the State of Indiana. *Ault v. Indiana*, 705 N.E.2d 1078, 1080-82 (Ind. Ct. App. 1999). The court reasoned that the state had no choice in its expenditure of costs and that those costs were made in “direct support of the victim of a crime.” *Id.* at 1082. *But see* *Bockler v. Indiana*, 908 N.E.2d 342 (Ind. Ct. App. 2009) (finding that the trial court was not authorized to order restitution for the depreciation of rescue equipment used during an underwater search for a fleeing defendant).

<sup>263</sup> See WIS. STAT. ANN. § 973.20 (West 2010) (“When imposing sentence . . . for any crime . . . the court . . . shall order the defendant to make full or partial restitution . . . to any victim of a crime . . . .”); *Wisconsin v. Haase*, 716 N.W.2d 526, 530 (Wis. Ct. App. 2006) (finding the trial court’s restitution order to the sheriff’s department for the replacement of a squad car was improper, reasoning that the defendant, in eluding police officers on a high speed chase, did not directly cause damage to the property of the sheriff’s department because “the loss of the squad car was a collateral expense incurred in the normal course of law enforcement”; the court did opine that the deputies themselves would have qualified as direct victims); OHIO REV. CODE ANN. § 2929.18 (West 2010) (“Restitution by the offender to the victim of the offender’s crime . . . in an amount based on the victim’s economic loss. . . . If the court imposes restitution, the court may base the amount [on multiple sources] provided that the amount the court orders as restitution shall not exceed the amount of the economic loss suffered by the victim as a direct and proximate result of the commission of the offense.”); *Ohio v. Toler*, 882 N.E.2d 28, 30-33 (Ohio Ct. App. 3d 2007) (holding that the restitution order made to the sheriff’s department for extradition expenses could not be recovered, as those costs did not stem directly from the domestic violence charge on which the defendant was convicted).

<sup>264</sup> 18 U.S.C.A. § 3771(a)(6) (West 2010).

two thirds “agreed somewhat or strongly that courts should have the authority to order restitution for victims in all cases.”<sup>266</sup>

In federal criminal cases, the Mandatory Victim Restitution Act specially dictates recoveries at sentencing for certain crimes following conviction upon trial or plea.<sup>267</sup> A victim is defined under the Act as one directly and proximately affected by criminal conduct<sup>268</sup> as well as the legal guardian of a minor, incompetent, or incapacitated victim, or the representative of a deceased victim’s estate.<sup>269</sup> The Act makes recoveries at sentencing mandatory under certain circumstances, including crimes of violence,<sup>270</sup> offenses committed by fraud or deceit,<sup>271</sup> and offenses involving the tampering of consumer products<sup>272</sup> when an “identifiable victim or victims . . . suffered a physical injury or pecuniary loss.”<sup>273</sup> The Mandatory Victims Restitution Act does not operate when “the number of identifiable victims is so large as to make restitution impracticable”<sup>274</sup> or when “determining complex issues of fact

<sup>265</sup> Daugherty v. United States, 212 F. Supp. 2d 1279, 1286 (N.D. Okla. 2002) (“Plaintiffs’ claims directly against United States also fail. . . . As the magistrate judge points out, plaintiff’s claim for restitution under the Victims of Crime Act borders on the frivolous. The right to restitution . . . appears in the context of sentencing a convicted criminal under 18 U.S.C. §§ 3663, 3664. There is no allegation of ongoing or contemplated criminal prosecution in this matter.”).

<sup>266</sup> Marcia Coyle, *Judges Give Thumbs Down to Crack, Pot, Porn Mandatory Minimums*, NAT’L L.J., June 16, 2010, available at <http://www.law.com/jsp/article.jsp?id=1202462732111> (639 of 942 judges responded to U.S. Sentencing Commission survey).

<sup>267</sup> 18 U.S.C.A. § 3663A(a)(1) (“Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense . . . the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim’s estate.”). The Act’s limits on the types of recoveries available have been rightly criticized in *Cassell Testimony*, *supra* note 115, at 3-10 (stating that “consequential” and “remote” losses are deemed by the federal appellate courts as outside the Act).

<sup>268</sup> 18 U.S.C.A. § 3663A(a)(2) (“For the purposes of this section, the term ‘victim’ means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant’s criminal conduct in the course of the scheme, conspiracy, or pattern.”).

<sup>269</sup> *Id.* § 3663A(a)(2) (“In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim’s estate . . . may assume the victim’s rights under this section, but in no event shall the defendant be named as such representative or guardian.”).

<sup>270</sup> *Id.* § 3663A(c)(1)(A)(i).

<sup>271</sup> *Id.* § 3663A(c)(1)(A)(ii).

<sup>272</sup> *Id.* § 3663A(c)(1)(A)(iii).

<sup>273</sup> *Id.* § 3663A(c)(1)(B); see also *id.* § 3663A(c)(2) (“In the case of a plea agreement that does not result in a conviction for an offense described in paragraph (1), this section shall apply only if the plea specifically states that an offense listed under such paragraph gave rise to the plea agreement.”).

<sup>274</sup> *Id.* § 3663A(c)(3)(A).

related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process."<sup>275</sup>

If a criminal defendant has been found guilty of criminal conduct outside of the Mandatory Victim Restitution Act, the federal Victim and Witness Protection Act bestows upon federal courts permissive authority to award recoveries at sentencing.<sup>276</sup> "Victim" is defined the same way in both the Mandatory Victims Restitution Act and the Victim and Witness Protection Act.<sup>277</sup> Under the Victim and Witness Protection Act, the court may order recoveries for losses encompassing property damage;<sup>278</sup> medical, psychiatric, and psychological care for victims of sex crimes;<sup>279</sup> funeral expenses;<sup>280</sup> lost income; and child care and other expenses related to aiding with the prosecution.<sup>281</sup> Furthermore, organizations designated by the victim or the victim's estate can recover under this Act.<sup>282</sup>

Under the federal Victim and Witness Protection Act, recoveries at sentencing need not involve crime victims. There can be orders benefiting government programs where there are unidentifiable victims.<sup>283</sup> When the government so

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<sup>275</sup> *Id.* § 3663A(c)(3)(B). There are other limits. See *Cassell Testimony*, *supra* note 115, at 4 (stating that certain losses are not covered and too often there are "inadequate enforcement tools"). *But see* *United States v. Masek*, 588 F.3d 1283, 1290 (10th Cir. 2009) (finding that civil settlement with victim did not foreclose additional MVRA restitution order).

<sup>276</sup> 18 U.S.C.A. § 3663 ("The court, when sentencing a defendant . . . other than an offense described in section 3663A(c), may order, in addition to or, in the case of a misdemeanor, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense, or if the victim is deceased, to the victim's estate. The court may also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.").

<sup>277</sup> See *id.* § 3663A(a)(2) (providing the definition of victim in the Mandatory Victims Restitution Act); *id.* § 3663(a)(2) (providing the definition of victim in the Victim and Witness Protection Act).

<sup>278</sup> *Id.* § 3663(b)(1)(B).

<sup>279</sup> *Id.* § 3663(b)(2).

<sup>280</sup> *Id.* § 3663(b)(3).

<sup>281</sup> *Id.* § 3663(b)(4). This Act's limits on the types of crimes and losses covered have been rightly criticized in *Cassell Testimony*, *supra* note 115, at 11-16 (proposing that recoveries be available for victims of all federal offenses, subject to judicial discretion, and that recoverable losses be expanded to include a "but for" test, as well as consequential damages and attorney's fees).

<sup>282</sup> 18 U.S.C.A. § 3663(b)(5) ("[I]n any case, if the victim (or if the victim is deceased, the victim's estate) consents, make restitution in services in lieu of money, or make restitution to person or organization designated by the victim or the estate . . .").

<sup>283</sup> *Id.* § 3663(c)(1) ("Notwithstanding any other provision of law (but subject to the provisions of subsections (a)(1)(B)(i)(II) and (ii), (footnote omitted) when sentencing a defendant convicted of an offense described in section 401, 408(a), 409, 416, 420 or 422(a) of the Controlled Substances Act . . . in which there is no identifiable victim, the court may order that the defendant make restitution in accordance with this subsection."). See also *id.* § 3663(c)(2)(A) ("An order of restitution under this subsection shall be based on the amount of public harm caused by the offense, as determined by the court . . .").



recovers, sixty-five percent of the total amount paid goes to state entity responsible for administering crime victim assistance<sup>284</sup> and thirty-five percent goes to the “State entity designated to receive Federal substance abuse block grant funds.”<sup>285</sup>

When a crime victim recovery at sentencing under the Victim and Witness Protection Act may “interfere with a forfeiture,” the court “shall not make an award.”<sup>286</sup> This forfeiture priority stands in stark contrast to crime victim priority in California.<sup>287</sup> However, under the federal Act, individual and other crime victims “receive full restitution before the United States.”<sup>288</sup>

In federal district courts, monetary recoveries at sentencing are ordered without consideration of a defendant’s ability to pay.<sup>289</sup> As with state statutory guidelines, a victim’s compensation from a collateral source can offset a recovery order under the Victim and Witness Protection Act.<sup>290</sup>

There are often substantial obstacles for victims seeking recoveries in state or federal criminal cases. Some exist regardless of what statutes may say about any affirmative duty of prosecutors to assist victims with recovery. For example, in January 2010 the Oregon Secretary of State published findings of a state-wide audit on restitution at criminal case sentencing.<sup>291</sup> The Secretary of State obtained sentencing information from criminal convictions in every Oregon county between July 1, 2007 and June 30, 2008.<sup>292</sup> With the assistance of the Oregon Department of Justice and the Marion County District Attorney’s Office, particular crimes were identified as “more likely to result in economic loss,” such as assault, theft, homicide, robbery, and forgery.<sup>293</sup> In this one-year span, only thirty-six percent of convictions involving such crimes had recovery orders.<sup>294</sup> The auditors reviewed District Attorney records in four counties to learn why recoveries often were not

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<sup>284</sup> *Id.* § 3663(c)(3)(A).

<sup>285</sup> *Id.* § 3663(c)(3)(B).

<sup>286</sup> *Id.* § 3663(c)(4).

<sup>287</sup> CAL. CONST. art. I, § 28(13)(c) (“All monetary payments, monies, and property collected . . . shall be first applied to pay the amounts ordered as restitution to the victim.”).

<sup>288</sup> 18 U.S.C.A. § 3664(i).

<sup>289</sup> 18 U.S.C.A. § 3664(f)(1)(A) (“In each order of restitution, the court shall order restitution to . . . each victim’s losses as determined by the court and without consideration of the economic circumstances of the defendant.”).

<sup>290</sup> *Id.* § 3664(j). Mandatory Victim Restitution Act (Section 3663A) recovery is ordered pursuant to the procedures in the Victim and Witness Protection Act (Section 3664) and the offset provision of the latter is applied to the former. *Id.* § 3663A(d) (“An order of restitution under this section shall be issued and enforced in accordance with section 3664.”).

<sup>291</sup> OR. SEC’Y OF STATE, AUDIT REPORT, ORDERING RESTITUTION FOR VICTIMS (2010), available at <http://www.sos.state.or.us/audits/reports/full/2010/2010-08B.pdf> [hereinafter AUDIT].

<sup>292</sup> *Id.* at 3.

<sup>293</sup> *Id.*

<sup>294</sup> *Id.* The Secretary of State address that the statistics leave room for cases where stolen items had been recovered. *Id.* at 4.

ordered.<sup>295</sup> In half of the reviewed cases, there was no order because the victim had either suffered no loss or was compensated by other means.<sup>296</sup> In one third of the remaining cases the victim did not provide requested information.<sup>297</sup> In the remaining cases, the prosecutor did not fully investigate victim's losses or did not request recoveries when losses were identified.<sup>298</sup>

Included in the cases where the victims did not provide information were domestic relations disputes between criminal defendants and victims where the victims desired to stay with the defendants or did not wish defendants to incur additional financial obligations.<sup>299</sup> In the remaining cases, the auditors noted that prosecutors did not send out inquiry forms, did not follow up after the inquiry forms had been mailed, or failed to request recoveries though losses were documented.<sup>300</sup> In cases where prosecutors did not request crime victim recoveries, the auditors noted that sometimes prosecutors forgot to request, did not notice the documentation of losses, and, in one case, chose not to request after considering the defendant's financial situation.<sup>301</sup> As to proposals on improving crime victim recovery at sentencing, many Oregon District Attorneys stated that low funding prevented them from allocating more personnel to investigating, verifying, and supervising crime victim recovery requests.<sup>302</sup> The allocation of more existing personnel to recovery issues would make less personnel available to prosecute crime, which many prosecutors felt was their prime objective.<sup>303</sup> While the Oregon findings are limited, similar problems likely face crime victims in other states.

#### F. Enforcing Monetary Recoveries for Crime Victims

Recovery orders do not ensure actual recoveries. For example, a prosecutor's failure to charge in the information all the property stolen may make full recovery by the victim difficult.<sup>304</sup> Recoveries may also be hampered by the criminal's inability to pay.

Special laws can promote more effective enforcement. Additionally, compliance may be more easily secured when orders are entered pursuant to agreements. Texas

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<sup>295</sup> *Id.* at 5. Two hundred and ten case records were reviewed (including records for Coos, Deschutes, and Marion counties).

<sup>296</sup> *Id.* at 6.

<sup>297</sup> *Id.* at 7.

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> *Id.* at 7-8.

<sup>301</sup> *Id.* at 8.

<sup>302</sup> *Id.* at 9, 15-20.

<sup>303</sup> *Id.* at 9.

<sup>304</sup> In *Simmons v. Florida*, for example, where a criminal defendant was charged in an information with stealing two ladders-valued at \$100 per ladder, the appellate court found that the trial court's restitution order of \$3400, based on the theft of 34 ladders, was in error because the restitution was not "causally connected to the offense," as there was no connection between much of the restitution order and the loss alleged in the information. *Simmons v. Florida*, 974 So. 2d 531, 531 (Fl. Dist. Ct. App. 2008).

and Virginia promote greater opportunities for settlement recoveries by enabling some crime victims to address, in a safe, face-to-face setting, those who caused harm. Texas trains “volunteers to act as mediators between victims, guardians of victims, and close relatives of deceased victims and offenders.”<sup>305</sup> It also provides “mediation services . . . if requested by a victim.”<sup>306</sup> Virginia has “a victim-offender reconciliation program to provide an opportunity to a victim after conviction, upon request and agreement of the offender, to: (1) Meet with the offender in a safe, controlled environment; (2) Give to the offender a summary of the effects; (3) Discuss a proposed restitution agreement.”<sup>307</sup>

### 1. Government Failures to Enforce Recoveries

Governmental failures to secure and enforce recoveries benefiting crime victims do not prompt separate claims against government.<sup>308</sup> A Wisconsin statute provides that “[n]o cause of action for money damages may arise against the state” for violation of victims’ rights.<sup>309</sup> Yet, there are exceptions, as where a state’s failure goes beyond simple negligence. An Arizona law provides that a “victim has the right to recover damages from a governmental entity responsible for the intentional, knowing or grossly negligent violation of the victim’s rights.”<sup>310</sup> Incidentally, in Arizona, a crime victim has a constitutional right “[t]o receive prompt restitution from the person or persons convicted of the criminal conduct that caused the victim’s loss or injury.”<sup>311</sup>

As in many states, crime victims in the federal courts do not have claims when a United States officer fails to honor victims’ rights.<sup>312</sup> The federal statutory rights of crime victims are not to “be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.”<sup>313</sup>

American governments can help crime victims secure monetary recoveries by strengthening enforcement procedures. In Indiana, there is a crime victim rights

<sup>305</sup> TEX. CODE CRIM. PROC. ANN. art. 56.13(1) (West 2010).

<sup>306</sup> *Id.* art. 56.13(2).

<sup>307</sup> VA. CODE ANN. § 19.2-11.4(A) (West 2010).

<sup>308</sup> For example, a prosecutor’s failure to charge in the information all the property stolen may make full recovery by the victim more difficult. *See, e.g., Simmons*, 974 So. 2d at 531.

<sup>309</sup> WIS. STAT. ANN. § 950.10 (West 2010). *See also* 725 ILL. COMP. STAT. ANN. 120/9 (West 2010) (“Any act of omission or commission by any law enforcement officer, circuit court clerk, or State’s Attorney . . . shall not impose civil liability upon the individual . . . or employer.”).

<sup>310</sup> ARIZ. REV. STAT. ANN. § 13-4437(B) (2010) (“A victim has the right to recover damages from a governmental entity responsible for the intentional, knowing or grossly negligent violation of the victim’s rights under the victims’ bill of rights, article II, § 2.1, Constitution of Arizona . . .”).

<sup>311</sup> ARIZ. CONST. art. II, § 2.1.

<sup>312</sup> 18 U.S.C.A. § 3771(d)(6) (West 2010) (“Nothing in this chapter shall be construed to authorize a cause of action for damages or to create, to enlarge, or to imply any duty or obligation to any victim or other person for the breach of which the United States or any of its officers or employees could be held liable in damages.”).

<sup>313</sup> *Id.* § 3771(d)(6).

statute, including a right to restitution.<sup>314</sup> There, a victim has standing to assert the crime victim rights noted in the statutes.<sup>315</sup> By contrast, in Louisiana the crime victim rights statute simply says that “[n]othing . . . precludes filing for a writ of mandamus . . . to compel the performance of a ministerial duty required by law.”<sup>316</sup>

Wisconsin has a different approach to enforcement. Although a victim cannot seek monetary damages from governments or their agents for denials of victims’ rights,<sup>317</sup> a Wisconsin statute declares that “[t]he department [of justice] may receive complaints, seek to mediate complaints and, with the consent of the involved parties, actually mediate complaints regarding the treatment of crime victims.”<sup>318</sup> Mistreatment can involve restitution rights.<sup>319</sup> Following departmental action, a victim may request review by a crime victims’ rights board. This board may:

- (a) Issue private and public reprimands of public officials . . . that violate the rights of crime victims . . . .
- (b) Refer to the judicial commission a violation or alleged violation by a judge of the rights of crime victims . . . .
- (c) Seek appropriate equitable relief on behalf of a victim . . . .
- (d) Bring civil actions to assess a forfeiture . . . .<sup>320</sup>

Some state statutes speak directly to enforcement. In Illinois, a criminal court order is enforceable as a civil judgment.<sup>321</sup> In Arizona “[a] criminal restitution order does not expire until paid in full.”<sup>322</sup> In Pennsylvania, “any lien obtained . . . shall

<sup>314</sup> IND. CODE ANN. § 35-40-5-7 (West 2010) (“A victim has the right to pursue an order of restitution and other civil remedies against the person convicted of a crime against the victim.”).

<sup>315</sup> *Id.* § 35-40-2-1 (West 2010).

<sup>316</sup> LA. REV. STAT. ANN. § 46:1844(U) (2010) (with no cause of action for costs, fees, or damages). See also *United States v. Aguirre-Gonzalez*, 597 F.3d 46 (1st Cir. 2010) (holding that victims denied rights under the federal Crime Victims’ Rights Act cannot appeal denials of their rights except through mandamus petitions); Paul G. Cassell, *Protecting Crime Victims in Federal Appellate Courts: The Need to Broadly Construe the Crime Victims’ Rights Act’s Mandamus Provision*, 87 DENV. U. L. REV. 599 (2010) (criticizing the mandamus approach and calling for broader appellate rights for victims).

<sup>317</sup> WIS. STAT. ANN. § 950.10 (West 2010) (“No cause of action for money damages may arise against the state, any political subdivision of the state or any employee or agent of the state . . . for any act or omission in the performance of any power or duty under ch. 938 . . . or under article I, section 9m, of the Wisconsin constitution . . . .”). But see *id.* § 950.11 (“A public official . . . that intentionally fails to provide a right specified under [§] 950.04(1v) to a victim of a crime may be subject to a forfeiture of not more than \$1,000.”).

<sup>318</sup> WIS. STAT. ANN. § 950.08(3).

<sup>319</sup> *Id.* § 950.04 (“Victims of crimes have the following rights . . . [t]o restitution . . . [t]o recompense . . . [t]o a judgment for unpaid restitution . . . [t]o compensation . . .”).

<sup>320</sup> *Id.* § 950.09(2). This forfeiture is allowed for intentional violations of victims’ rights and cannot exceed \$1,000. *Id.* § 950.11.

<sup>321</sup> 730 ILL. COMP. STAT. ANN. 5/5-5-6(m) (West 2010) (“A restitution order . . . is a judgment lien . . .”).

<sup>322</sup> ARIZ. REV. STAT. ANN. § 13-805(C) (West 2010).

maintain its priority indefinitely.”<sup>323</sup> In Florida, “[t]he restitution obligation is not subject to discharge in bankruptcy.”<sup>324</sup>

## 2. Criminal Defendant’s Inability to Pay

Crime victim recovery can also be hampered by a criminal defendant’s competing financial obligations. Some states prioritize payments to crime victims over other obligations of the (alleged) criminal. In Iowa, the “court shall provide for payments in the following order of priority: victim, fines, penalties, and surcharges, crime victim compensation program reimbursement, public agencies, court costs.”<sup>325</sup> In Arizona, the complete satisfaction of a restitution order must occur prior to payment of other court imposed obligations.<sup>326</sup> In Pennsylvania at least half of the monies collected at sentencing must be applied to restitution for the victim.<sup>327</sup> An Alaska statute says that a “claim by a victim arising out of an order of restitution . . . or a judgment in a civil action against an offender for damages resulting from a crime is a superior claim for money that would otherwise be paid to the state.”<sup>328</sup>

One frequent enforcement mechanism is wage garnishment. This can be pursued “[u]pon the entry of an order for restitution” as in Florida,<sup>329</sup> or in the event of noncompliance with a crime victim recovery order, as in Arizona where garnishment comes “[a]fter a hearing on an order to show cause.”<sup>330</sup> In Colorado, after an offender is five days late with a restitution payment, a “collections investigator may . . . [r]equest that the clerk of the court issue an attachment of earnings.”<sup>331</sup>

For a wrongdoer without the resources to pay at the time of a recovery order, some states require that income earned through work release be applied. In Texas, any salary earned in work release is paid to the sheriff who “shall deposit [it] into a special fund to be given to the defendant on his release after deducting . . . restitution.”<sup>332</sup> In Pennsylvania, “[t]he county correctional facility . . . or the

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<sup>323</sup> 42 PA. CONS. STAT. ANN. § 9728(d) (West 2010).

<sup>324</sup> FLA. STAT. ANN. § 775-089(10)(b) (West 2010).

<sup>325</sup> IOWA CODE ANN. § 910.2(1) (West 2010).

<sup>326</sup> ARIZ. REV. STAT. ANN. §§ 13-804(K) & 13-809(A) (West 2010).

<sup>327</sup> 42 PA. CONS. STAT. ANN. § 9728(g.1) (West 2010).

<sup>328</sup> ALASKA. STAT. ANN. § 12.61.020 (b) (West 2010). The Alaskan statute also provides that the state can collect monies otherwise owed to an offender arising out of reenactments or offender’s comments about a crime. *Id.* § 12.61.020 (a).

<sup>329</sup> FLA. STAT. ANN. § 775.089(12)(a)(1). *See also* 730 ILL. COMP. STAT. ANN. 5/5-5-6(h) (“[t]he judge may enter an order of withholding”).

<sup>330</sup> ARIZ. REV. STAT. ANN. § 13-812(A).

<sup>331</sup> COLO. REV. STAT. ANN. § 16-18.5-105(3)(b) (West 2010). *See also id.* § 18-1.3-602(1) (“‘Collections investigator’ means a person employed by the judicial department whose primary responsibility is to administer, enforce, and collect on court orders or judgments entered with respect to fines, fees, restitution, or any other accounts receivable of the court, judicial district, or judicial department.”).

<sup>332</sup> TEX. CODE CRIM. PROC. ANN. art. 42.031(b)(3) (West 2010).

Department of Corrections shall be authorized to make monetary deductions from inmate personal accounts for the purpose of collecting restitution.”<sup>333</sup>

Some states also statutorily allow for interception of future financial resources. Arizona provides that “[a]ny monies . . . owed by this state to a person who is under a restitution order shall be assigned first to discharge the restitution order, including any tax refund.”<sup>334</sup> Maryland speaks to a wrongdoer winning the lottery, requiring “the State Lottery Agency to withhold the prize and pay it towards the restitution obligor’s restitution arrearage.”<sup>335</sup>

Several states, anticipating that a wrongdoer may enter into a “notoriety of crimes” contract, seek to prevent unjust enrichment. Maryland requires that money be paid “over to the Attorney General . . . that . . . otherwise would be owed to the defendant.”<sup>336</sup> The Attorney General is then mandated to “deposit money received . . . in an interest bearing escrow account<sup>337</sup> . . . for the benefit of . . . the victim<sup>338</sup> . . . [who] has been awarded restitution.”<sup>339</sup>

In the event of nonpayment, some states have established specific oversight duties to assist crime victims. For example, Georgia mandates:

[T]he clerk of court or the probation or parole officer . . . whoever is responsible for collecting restitution, shall review the case not less frequently than twice yearly . . . . If it is determined . . . that restitution is not being paid as ordered, a written report of the violation shall be filed with the court . . . .<sup>340</sup>

Alabama mandates a monthly report by the clerk to the prosecutor and probation office.<sup>341</sup> Arizona simply requires the clerk to notify the prosecutor, the court, and the victim of any default on a restitution order.<sup>342</sup>

Once a trial court is aware of noncompliance, a hearing is usually held to determine whether nonpayment was willful. In Colorado, the “collections investigator may . . . [r]equest that the court issue a notice to show cause requiring the defendant to appear . . . and show cause why the required . . . payments were not made.”<sup>343</sup> In Maine, an “offender who has . . . defaulted . . . shall be returned to court for further disposition.”<sup>344</sup>

<sup>333</sup> 42 PA. CONS. STAT. ANN. § 9728(b)(5) (West 2010).

<sup>334</sup> ARIZ. REV. STAT. ANN. § 13-804(K).

<sup>335</sup> MD. CODE ANN., CRIM. PROC. § 11-618(b)(3) (West 2010).

<sup>336</sup> *Id.* § 11-622(2).

<sup>337</sup> *Id.* § 11-624(a).

<sup>338</sup> *Id.* § 11-624(b).

<sup>339</sup> *Id.* § 11-624(c)(1)(iii).

<sup>340</sup> GA. CODE ANN. § 17-14-14(c) (West 2010).

<sup>341</sup> ALA. CODE § 15-23-82 (West 2010).

<sup>342</sup> ARIZ. REV. STAT. ANN. § 13-810(A).

<sup>343</sup> COLO. REV. STAT. ANN. § 16-18.5-105(3)(d) (West 2010). *See also id.* § 18-1.3-602(1) (“‘Collections investigator’ means a person employed by the judicial department whose primary responsibility is to administer, enforce, and collect on court orders or judgments entered with respect to fines, fees, restitution, or any other accounts receivable of the court,

Noncompliance caused by financial inability is generally met with leniency. In Illinois, criminal courts may grant time extensions to those who unintentionally fail to pay.<sup>345</sup> In Maine, “[i]f it appears that the default is excusable, the court may give the offender additional time for payment or may reduce the amount of each installment.”<sup>346</sup> In Pennsylvania, when there is a default due to lack of resources, the appropriate authority may “sentence the defendant to a period of community service.”<sup>347</sup> Some have suggested that “[v]ictims can have input into the type and location of the community service performed.”<sup>348</sup>

In cases of willful noncompliance with a criminal court sentencing order involving crime victim recovery, the order is generally enforceable as any civil case judgment.<sup>349</sup> A court may issue a contempt order, extend probation, or order jail time with or without work release.<sup>350</sup> Some states expressly allow probation revocation for an intentional default.<sup>351</sup> In Maryland, “compliance with the judgment of restitution . . . shall be a condition of work release . . . [and] of probation.”<sup>352</sup>

### G. *The Effects of Forfeitures on Crime Victim Recoveries*

While recoveries through state supported funds are available to some crime victims, civil and criminal case recoveries against actual, accused, or alleged

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judicial district, or judicial department.”); *id.* § 16-18.5-104(3)(a) (“Upon referral . . . the collections investigator shall conduct an investigation into the financial ability of the defendant to pay the restitution . . .”).

<sup>344</sup> ME. REV. STAT. tit. 17-A, § 1329(1) (West 2010).

<sup>345</sup> 730 ILL. COMP. STAT. ANN. § 5/5-5-6(i) (West 2010).

<sup>346</sup> ME. REV. STAT. tit. 17-A, § 1329(3)(B) (2010).

<sup>347</sup> 42 PA. CONS. STAT. ANN. § 9730(b)(3) (West 2010).

<sup>348</sup> Office of Justice Programs, *Financial Assistance for Victims of Crime*, U.S. DEP’T OF JUSTICE, <http://www.ojp.usdoj.gov/ovc/assist/nvaa99/chap5-2.htm> (last visited March 3, 2011) (suggestion by Office for Victims of Crime). “The Office for Victims of Crime (OVC) was established by the 1984 Victims of Crime Act (VOCA) to oversee diverse programs that benefit victims of crime. OVC provides substantial funding to state victim assistance and compensation programs . . . [and] supports trainings designed to educate criminal justice and allied professionals regarding the rights and needs of crime victims.” Office for Victims of Crime, *Welcome to the Office for Victims of Crime*, U.S. DEP’T OF JUSTICE, <http://www.ojp.usdoj.gov/ovc/welcovc/welcome.html> (last visited March 3, 2011).

<sup>349</sup> *See, e.g.*, COLO. REV. STAT. ANN. § 16-18.5-105(3)(c) (“Whenever a defendant fails to make a payment of restitution within five days after the date that the payment is due . . . in addition to any other remedy, the collections investigator may . . . (b) Request that the clerk of the court issue an attachment of earnings requiring that a certain portion . . . be withheld and applied to any unpaid restitution . . . . An attachment of earnings . . . shall be enforceable in the same manner as a garnishment in a civil action. . . . (c) Request that the clerk of the court issue a writ of execution, writ of attachment, or other civil process to collect upon a judgment . . .”).

<sup>350</sup> *See, e.g.*, *id.* § 16-18.5-105(3)(d)(I)-(IV).

<sup>351</sup> *See, e.g.*, ALASKA STAT. ANN. § 12.55.051(a) (West 2010) (where restitution was a condition of probation); ARIZ. REV. STAT. ANN. § 13-804(E) (West 2010).

<sup>352</sup> MD. CODE ANN., CRIM. PROC. § 11-607(a)(1)(ii)-(iii) (West 2010).

criminals are available to many more victims. Civil cases may proceed before, during, or after criminal cases. When simultaneously pursued, however, criminal cases may prompt stays of related civil cases.<sup>353</sup> Criminal case recoveries are usually considered at sentencing.

As actual, accused, or alleged criminals often have only limited assets, crime victims at times compete with others for access to these assets. Governments claim direct access through forfeitures and fines.<sup>354</sup> Criminals may seek access to retain legal counsel, to secure medical treatment, or to buy goods. Some state forfeiture laws expressly disallow funds used for criminal defense.<sup>355</sup> The conflicting interests in accessing the assets of actual, accused, and alleged criminals can be easily illustrated.

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<sup>353</sup> See *Wehling v. Columbia Broad. Sys.*, 608 F.2d 1084 (5th Cir. 1979) (reversing the district court's decision to dismiss a criminal defendant's libel claim, with a remand ordering that civil discovery be stayed, upon weighing the civil defendant's discovery rights and the criminal defendant's Fifth Amendment privilege against self-incrimination); *Armstrong v. Tanaka*, 228 P.3d 79 (Alaska 2010) (employing the weighing test in *Wehling* to find that a stay of the civil proceeding was appropriate); N.Y. C.P.L.R. § 1311(1)(b) (McKinney 2010) ("An action relating to a pre-conviction forfeiture crime need not be grounded upon conviction of a pre-conviction forfeiture crime, provided, however, that if the action is not grounded upon such a conviction, it shall be necessary in the action for the claiming authority to prove the commission of a pre-conviction forfeiture crime by clear and convincing evidence. An action under this paragraph shall be stayed during the pendency of a criminal action which is related to it; provided, that upon motion of a defendant in the forfeiture action or the claiming authority, a court may, in the interest of justice and for good cause, and with the consent of all parties, order that the forfeiture action proceed despite the pending criminal action; and provided that such stay shall not prevent the granting or continuance of any provisional remedy provided under this article or any other provision of law."). *But see Morgenthau v. Basbus*, 890 N.Y.S.2d 43 (N.Y. App. Div. 2009) (holding that defendant was not permitted to stay a civil forfeiture proceeding until the disposition of the defendant's appeal of a criminal case conviction, because the appeal in a criminal proceeding is separate from the criminal action itself that would stay the civil forfeiture proceeding).

<sup>354</sup> Not all asset forfeitures arise from criminal acts. See, e.g., *People v. Keil*, 73 Cal. Rptr. 3d 600 (Cal. Dist. Ct. App. 2008) (five year firearms forfeiture for mental health care patient who would likely use firearms in unsafe ways).

<sup>355</sup> See 725 ILL. COMP. STAT. ANN. 150/12 (West 2010) ("Nothing in this Act shall apply to property which constitutes reasonable bona fide attorney's fees . . ."); CONN. GEN. STAT. ANN. § 54-36h(d) (West 2010) ("Notwithstanding [money or property relating to controlled substances crimes or money laundering] . . . no moneys or property used or intended to be used by the owner thereof to pay legitimate attorney's fees in connection with his defense in a criminal prosecution shall be subject to forfeiture under this section."); KAN. STAT. ANN. § 60-4106(a)(5)(A) (West 2010) ("An interest in property acquired in good faith by an attorney as reasonable payment or to secure payment for legal services in a criminal matter relating to violations of this act or for the reimbursement of reasonable expenses related to the legal services is exempt from forfeiture unless before the interest was acquired the attorney knew of a judicial determination of probable cause that the property is subject to forfeiture."); N.Y. C.P.L.R. § 1311(12) (McKinney 2010) ("Property acquired in good faith by an attorney as payment for the reasonable and bona fide fees of legal services or reimbursement of reasonable and bona fide expenses related to the representation of a defendant in connection with a civil or criminal forfeiture proceeding or a related criminal matter, shall be exempt from a judgment of forfeiture.").



Assume a person is allegedly selling illegal drugs from his home, which itself was not bought with the proceeds from any crime. Assume also that on the day of one illegal drug deal, the person, upon completing a transaction with a client, robs the client's friend who was merely transporting the client with the friend's car and who had no idea about any drug deal. The robbery victim likely has remedies that can access much of the robber's assets, including his house. The robbery victim would certainly be entitled to seek return of the actual money stolen, assuming proper identification.<sup>356</sup>

Unlike the stolen money, the victim would have to compete with others for access to the robber's other assets, like the house. For example, other homeowners in the same neighborhood as the robber/drug dealer may have suffered from the drug dealing. Thus, they may have a nuisance suit involving the house available to them. The robbery victim may also have to compete with the government for access to the robber/drug dealer's assets, because the government can often seek the forfeiture of property used in an illegal transaction.<sup>357</sup>

The alleged drug dealer also has an interest in accessing his own house and the alleged stolen money, at least until a crime has been proven. While this person may not be able to easily use the stolen money or drug trafficking proceeds in retaining legal counsel, other property, like the house, can be more easily used.

The government and private parties other than crime victims may claim the different assets of actual, accused, and alleged criminals. Forfeitures to governments of certain assets are authorized under both federal and state laws. Under federal statutes, there can be civil *in rem* forfeitures and criminal forfeitures.<sup>358</sup> Similar forfeitures are typically available under state statutes. Moreover, in some states there can be administrative and civil *in personam* forfeitures.

Under federal statute, property used in a crime may be seized through a civil *in rem* forfeiture.<sup>359</sup> Unlike a criminal forfeiture,<sup>360</sup> conviction is not a necessary element. Thus, as with firearm forfeitures, acquittals may not result in the return of seized property.<sup>361</sup>

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<sup>356</sup> The victim, in some circumstances, may have to compete with the government for the victim's own stolen money. For instance, federal law authorizes the federal government to seize "substitute assets" in place of forfeitable assets that cannot be located, are beyond the jurisdiction of the court, or have been sold or given to a third party. 21 U.S.C.A. § 853(p) (West 2010) ("substitute assets" include assets that have been commingled with other property that cannot easily be divided). See also *United States v. Alamoudi*, 452 F.3d 310, 315 (4th Cir. 2006) ("[A]n order authorizing forfeiture of *substitute* assets pursuant to § 853(p) does not" require a jury determination because it does not at all increase the amount of forfeiture.).

<sup>357</sup> *Von Hofe v. United States*, 492 F.3d 175, 179 (2d Cir. 2007) (Where the state government filed criminal drug charges against the defendants, the federal government, instead of filing criminal charges, filed a civil *in rem* forfeiture proceeding against the defendants' house, where approximately sixty five potted marijuana plants had been found).

<sup>358</sup> 18 U.S.C.A. § 981 (West 2010).

<sup>359</sup> *Id.*

<sup>360</sup> 21 U.S.C.A. § 853(a) (West 2010) ("Any person convicted of a violation . . . punishable by imprisonment for more than one year shall forfeit to the United States . . .").

<sup>361</sup> See 18 U.S.C.A. § 924(d)(1) ("Any firearm or ammunition involved in or used in any knowing violation of subsection (a)(4), (a)(6), (f), (g), (h), (i), (j), or (k) of section 922 [regarding unlawful acts involving firearms] . . . shall be subject to seizure and forfeiture . . .").

In a state civil *in rem* forfeiture proceeding, property may be seized pending the disposition of a related criminal action; if a person is not convicted, a civil *in rem* forfeiture may still proceed.<sup>362</sup> If a person is criminally convicted, issue preclusion can operate.<sup>363</sup>

Some state statutes also provide for civil *in personam* forfeitures.<sup>364</sup> Unlike civil *in rem* proceedings, where only property involved in criminal conduct is subject to forfeiture,<sup>365</sup> civil *in personam* proceedings may involve the forfeitures of assets unrelated to illegal conduct.<sup>366</sup>

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*Provided*, That upon acquittal of the owner or possessor, or dismissal of the charges against him other than upon motion of the Government prior to trial, or lapse of or court termination of the restraining order to which he is subject, the seized or relinquished firearms or ammunition shall be returned forthwith to the owner or possessor . . . unless the return of the firearms or ammunition would place the owner or possessor . . . in violation of the law.”); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 366 (1984) (“Congress in fact drafted § 924(d) to cover a broader range of conduct than is proscribed by the criminal provisions of § 922(a)(1) . . . . Because the sanction embodied in § 924(d) is not limited to criminal misconduct, the forfeiture remedy cannot be said to be co-extensive with the criminal penalty. What overlap there is between the two sanctions is not sufficient to persuade us that the forfeiture proceeding may not legitimately be viewed as civil in nature . . . . We accordingly conclude that the forfeiture mechanism set forth in § 924(d) is not an additional penalty for the commission of a criminal act, but rather a separate civil sanction, remedial in nature. . . . We hold that a gun owner’s acquittal on criminal charges involving firearms does not preclude a subsequent *in rem* forfeiture proceeding against those firearms under § 924(d).”); *United States v. Sandini*, 816 F.2d 869, 872 (3d Cir. 1987) (“Civil forfeiture is an *in rem* proceeding. . . . The innocence of the owner is irrelevant—it is enough that the property was involved in a violation to which forfeiture attaches.”).

<sup>362</sup> *See* GA. CODE ANN. § 16-13-49(v) (West 2010) (“An acquittal or dismissal in a criminal proceeding does not preclude civil proceedings under this [forfeiture] article.”); HAW. REV. STAT. § 712A-11(6) (West 2010) (“An acquittal or dismissal in a criminal proceeding shall not preclude civil proceedings under this [forfeiture] chapter.”). However, in some jurisdictions, an acquittal or dismissal of the criminal action can force the dismissal of the related forfeiture action. *See* COLO. REV. STAT. § 16-13-307(1.6) (West 2010) (“Upon acquittal or dismissal of a criminal action against a person named in a forfeiture action related to the criminal action, unless the forfeiture action was brought pursuant to one or more of paragraphs (a) to (f) of subsection (1.7) [which includes a defendant’s deferred sentence, or the defendant waiving the conviction requirement, among others], the forfeiture action shall be dismissed . . . .”); KY. REV. STAT. ANN. § 218A.460(2) (West 2010) (“Following conviction . . . the court shall conduct an ancillary hearing to forfeit property if requested by any party other than the defendant or Commonwealth.”).

<sup>363</sup> *See, e.g.*, GA. CODE ANN. § 16-13-49(r) (West 2010) (“A defendant convicted in any criminal proceeding is precluded from later denying the essential allegations of the criminal offense of which the defendant was convicted . . . . [A] conviction results from a verdict or plea of guilty, including a plea of *nolo contendere*.”).

<sup>364</sup> *See* ARIZ. REV. STAT. ANN. § 13-4312(A) (West 2010) (“If a forfeiture is authorized by law, it shall be ordered by a court on proceedings by the state in an *in personam* civil or criminal action . . . .”); KAN. STAT. ANN. § 60-4114 (West 2010) (“If a forfeiture is authorized by this act, it shall be ordered by the court in the *in personam* action. The action shall be in addition to or in lieu of *in rem* forfeiture procedures.”).

<sup>365</sup> HAW. REV. STAT. § 712A-12(9) (“In accordance with its findings at the [forfeiture] hearing, the court shall order an interest in property returned or conveyed to the claimant, if any, who has established by a preponderance of the evidence that the claimant’s interest is not

In both federal and state proceedings, *in rem* forfeitures can be either challenged or unchallenged. Forfeitures go unchallenged when no one steps up to claim ownership in the assets seized.<sup>367</sup> Generally, states require there that there be a judicial determination before a challenged forfeiture is declared final.<sup>368</sup> However, a judicial determination is not always required before an unchallenged forfeiture.<sup>369</sup> Unchallenged forfeitures that do not require judicial determinations are typically considered “administrative forfeitures.”<sup>370</sup> Not to be confused with the quasi-judicial actions of administrative agencies, administrative forfeiture occurs when a law enforcement agency declares assets legally forfeited without a judicial determination.<sup>371</sup> An unchallenged forfeiture, that is, one to which there is no objection raised, does not necessarily result in an administrative forfeiture. Some states require a judicial determination in certain instances of asset forfeiture even when no objections are filed.<sup>372</sup>

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subject to forfeiture. The court shall order all other property, including all interests in the property, forfeited to the State . . .”).

<sup>366</sup> See *id.* § 712A-14 (“The court shall order the forfeiture of any other property of an in personam civil or criminal defendant up to the value of the subject property if any of the property subject to forfeiture . . . [c]annot be located . . . [or] [h]as been transferred or conveyed to, sold to, or deposited with a third party . . .”).

<sup>367</sup> See, e.g., 725 ILL. COMP. STAT. ANN. 150/6(C)(1) (West 2010) (“Any person claiming an interest in property . . . may . . . file a verified claim with the State’s Attorney expressing his or her interest in the property.”).

<sup>368</sup> DEE R. EDGEWORTH, ASSET FORFEITURE: PRACTICE AND PROCEDURE IN STATE AND FEDERAL COURTS 35 (2d ed. 2008) (“[N]onjudicial forfeiture does not have widespread use within the state forfeiture system.”).

<sup>369</sup> See, e.g., HAW. REV. STAT. § 712A-10(11) (“In the event a claim and bond has not been filed in substantial compliance with this section, or if the attorney general, with sole discretion, determines that remission or mitigation is not warranted, the attorney general shall order forfeited all property seized for forfeiture.”). *But see* ARIZ. REV. STAT. ANN. § 13-4309(B) (“If the state fails to initiate forfeiture proceedings against property seized . . . such property shall be released from its seizure for forfeiture on the request of an owner or interest holder . . .”); 725 ILL. COMP. STAT. 150/6 (West 2010) (“If no claim is filed . . . the State’s Attorney shall declare the property forfeited . . .”).

<sup>370</sup> EDGEWORTH, *supra* note 368, at 3 (“Administrative forfeiture entails forfeiture of property without formal court action.”).

<sup>371</sup> *Id.*

<sup>372</sup> Compare, e.g., ARK. CODE ANN. § 17.30.116(b)-(c) (West 2010) (“Upon service or publication of notice of commencement of a forfeiture action under this section, a person claiming interest in the property shall file within 30 days after the service or publication, a notice of claim setting out the nature of the interest, the date it was acquired, the consideration paid, and an answer to the state’s allegations. If a claim and answer is not filed within the time specified, the property described in the state’s allegation must be ordered forfeited to the state without further proceedings or showings . . . . Questions of fact or law raised by a notice of forfeiture action and answer of a claimant in an action commenced under this section must be determined by the court sitting without a jury.”), and MISS. CODE ANN. § 41-29-176(6) (West 2010) (“If no petition to contest forfeiture is timely filed, the attorney for the seizing law enforcement agency shall prepare a written declaration of forfeiture of the subject property and the forfeited property shall be used, distributed or disposed of . . .”), with ARIZ.

Thus, some uncontested forfeitures must be judicially approved. Additionally, some states require judicial determinations when the value of seized assets exceeds a certain monetary amount.<sup>373</sup> Monetary amounts range from \$10,000 in Mississippi<sup>374</sup> to \$500,000 at the federal level.<sup>375</sup> A judicial determination is also mandated at times when the seized asset is real property.<sup>376</sup>

At the state level, the civil forfeiture of a criminal's assets can assist in compensating a crime victim. For example, in Arizona a victim may apply to the government for compensation from the defendant's forfeited assets prior to final judgment.<sup>377</sup> In this situation the victim must state under penalty of perjury, *inter alia*, the nature of the economic loss,<sup>378</sup> the supporting facts,<sup>379</sup> and the requested amount.<sup>380</sup> Upon request, the court "shall hold a hearing to establish whether there is a factual basis for the request."<sup>381</sup> The burden is on the victim to establish "by a preponderance of the evidence" that he or she "is an injured person who sustained economic loss."<sup>382</sup> If the government can show by a preponderance of the evidence

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REV. STAT. ANN. § 13-4314(A) ("If no petitions for remission or mitigation or claims are timely filed or if no petitioner files a claim in the court within thirty days after mailing of a declaration of forfeiture, the attorney for the state shall apply to the court for an order of forfeiture and allocation of forfeited property. . . . On the state's written application showing jurisdiction, notice and facts sufficient to demonstrate probable cause for forfeiture . . . the court shall order the property forfeited to the state.").

<sup>373</sup> See, e.g., MISS. CODE ANN. § 41-29-176(1), (6) ("When any property other than a controlled substance, raw material or paraphernalia, the value of which does not exceed Ten Thousand Dollars (\$10,000), is seized under the Uniform Controlled Substances Law, the property may be forfeited by the administrative forfeiture procedures provided for in this section . . . . If no petition to contest forfeiture is timely filed, the attorney for the seizing law enforcement agency shall prepare a written declaration of forfeiture of the subject property and the forfeited property shall be used, distributed or disposed of . . .").

<sup>374</sup> *Id.* § 41-29-176(1).

<sup>375</sup> 19 U.S.C.A. § 1607 (West 2010). See also 725 ILL. COMP. STAT. ANN. 150/6 ("If non-real property that exceeds \$20,000 in value excluding the value of any conveyance, or if real property is seized . . . the State's Attorney shall institute judicial in rem forfeiture proceedings . . .").

<sup>376</sup> See 18 U.S.C.A. § 985(a) (West 2010); EDGEWORTH, *supra* note 368, at 36 ("Neither the state nor the federal systems permit the forfeiture of real property administratively."). But see 725 ILL. COMP. STAT. ANN. § 150/6(D), (C)(2) ("If no claim is filed . . . the State's Attorney shall declare the property forfeited"; however, "if a claimant files the claim . . . then the State's Attorney shall institute judicial in rem forfeiture proceeding.").

<sup>377</sup> ARIZ. REV. STAT. ANN. § 13-4311(I) ("An injured person may submit a request for compensation from forfeited property to the court at any time before the earlier of the entry of a final judgment or an application for an order of the forfeiture of the property, or if a hearing . . . is held, not less than thirty days before the hearing.").

<sup>378</sup> *Id.* § 13-4311(I)(4).

<sup>379</sup> *Id.* § 13-4311(I)(5).

<sup>380</sup> *Id.* § 13-4311(I)(7).

<sup>381</sup> *Id.* § 13-4311(J).

<sup>382</sup> *Id.*

that the property is subject to forfeiture,<sup>383</sup> and the court finds that the “requestor is an injured person,”<sup>384</sup> the court then “shall determine the amount of the injured person’s economic loss caused by the conduct giving rise to the forfeiture of the designated property.”<sup>385</sup> As long as the property is “not contraband and is not altered or designed for use in conduct giving rise to forfeiture,” the State’s Attorney “shall sell the property” and “shall apply the resulting balance to compensate the injured person’s economic loss in the amount found by the court.”<sup>386</sup> In the event that there is insufficient money from the sale to compensate all victims, the money is distributed among victims at the court’s discretion.<sup>387</sup> In the event that there is a surplus, “the attorney for the state shall transmit ten per cent of the remaining balance . . . to the Arizona criminal justice commission for deposit in the victim compensation and assistance fund.”<sup>388</sup>

Federal statutes also provide for criminal forfeitures of certain assets.<sup>389</sup> A federal criminal forfeiture proceeding is an *in personam* proceeding while a federal civil forfeiture proceeding is an *in rem* proceeding. Unlike in civil *in rem* forfeitures, the property holder in federal criminal *in personam* forfeiture proceedings must first be convicted of a related offense.<sup>390</sup> One benefit of a criminal forfeiture case is its broader scope. A criminal forfeiture order can be entered as a money judgment, a judgment against specific property, or a judgment against substitute assets.<sup>391</sup> Because a criminal forfeiture is part of a criminal case

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<sup>383</sup> See, e.g., *id.* § 13-4311(M) (“At the hearing, the state has the burden of establishing by a preponderance of the evidence that the property is subject to forfeiture under section 13-4304 . . . .”); *id.* § 13-4304 (“all property, including all interest in such property, described in a statute providing for its forfeiture is subject to forfeiture”). Exemptions from forfeiture are found at *id.* § 13-4304(1)-(5).

<sup>384</sup> *Id.* § 13-4311(N)(3).

<sup>385</sup> *Id.*

<sup>386</sup> *Id.* § 13-4311(N)(3)(a).

<sup>387</sup> *Id.* § 13-4311(N)(3)(b).

<sup>388</sup> *Id.* § 13-4311(N)(3)(c). See also *id.* § 13-4311(N)(3)(d) (“the attorney for the state shall deposit the remainder of the balance, if any, in an appropriate anti-racketeering revolving fund”).

<sup>389</sup> 18 U.S.C.A. § 982(a)(1) (West 2010) (“The court, in imposing sentence on a person convicted . . . shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property.”). See also 21 U.S.C.A. § 853 (West 2010) (drug forfeiture); 18 U.S.C.A. § 1963 (RICO offenses).

<sup>390</sup> FED. R. CRIM. P. 32.2(b)(1)(A) (“As soon as practical after a verdict or finding of guilty, or after a plea of guilty or nolo contendere is accepted, on any count in an indictment or information regarding which criminal forfeiture is sought, the court must determine what property is subject to forfeiture under the applicable statute.”).

<sup>391</sup> See 18 U.S.C.A. § 1963(a) (in authorizing forfeiture under RICO offenses, “[w]hoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned . . . or both, and shall forfeit to the United States, irrespective of any provision of State law . . . (1) any interest the person has acquired or maintained in violation of section 1962; (2) any (A) interest in; (B) security of; (C) claim against; or (D) property or contractual right of any kind affording a source of influence over; any enterprise which the person established, operated, controlled, conducted, or participated in the conduct of, in violation of

sentence, it does not prompt a new case. Unlike the conviction itself, the criminal forfeiture order can be based on a preponderance of the evidence.<sup>392</sup> Typically, the government must state in the indictment that it intends to seek criminal forfeiture at any later sentencing.<sup>393</sup> The federal government can first seize assets in a civil *in rem* forfeiture and then move those assets into a criminal forfeiture proceeding upon conviction.<sup>394</sup>

Under federal statute, after a guilty verdict or guilty plea, a criminal court judge can determine what assets listed in the indictment may be forfeited.<sup>395</sup> If third parties seek access to the same assets, a hearing is required. This hearing is usually held by the same judge who presided over the criminal case.<sup>396</sup>

When relevant assets have not yet been seized during a civil *in rem* forfeiture proceeding, under federal statute the government can seek interlocutory relief as to

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section 1962; and (3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962”); *id.* § 1963(b) (“Property subject to criminal forfeiture under this section includes (1) real property, including things growing on, affixed to, and found in land; and (2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.”); *id.* § 1963(m) (“If any of the property described in subsection (a), as a result of any act or omission of the defendant (1) cannot be located upon the exercise of due diligence; (2) has been transferred or sold to, or deposited with, a third party; (3) has been placed beyond the jurisdiction of the court; (4) has been substantially diminished in value; or (5) has been commingled with other property which cannot be divided without difficulty; the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).”).

<sup>392</sup> See *United States v. Voigt*, 89 F.3d 1050, 1082 (3d Cir. 1996); *United States v. Cherry*, 330 F.3d 658, 669-70 (4th Cir. 2003) (citing *Libretti v. United States*, 516 U.S. 29, 42 (1995)); *United States v. Myers*, 21 F.3d 826, 831 (8th Cir. 1994). In some state cases, a criminal forfeiture action must be proven beyond a reasonable doubt. See, e.g., CAL. PENAL CODE § 186.5(d) (West 2010). Elsewhere, proof by a preponderance of the evidence is sufficient. See, e.g., TENN. CODE ANN. § 39-11-708(d) (West 2010).

<sup>393</sup> See FED. R. CRIM. P. 32.2(a); *United States v. Grammatikos*, 633 F.2d 1013, 1024 (2d Cir. 1980).

<sup>394</sup> EDGEWORTH, *supra* note 368, at 186 (citing 18 U.S.C.A. § 983(a)(3)(B) (West 2010)).

<sup>395</sup> FED. R. CRIM. P. 32.2(b)(1)(A) (“As soon as practical after a verdict or finding of guilty, or after a plea of guilty or nolo contendere is accepted, on any count in an indictment or information regarding which criminal forfeiture is sought, the court must determine what property is subject to forfeiture under the applicable statute. If the government seeks forfeiture of specific property, the court must determine whether the government has established the requisite nexus between the property and the offense. If the government seeks a personal money judgment, the court must determine the amount of money that the defendant will be ordered to pay.”).

<sup>396</sup> FED. R. CRIM. P. 32.2(c)(1) (“If . . . a third party files a petition asserting an interest in the property to be forfeited, the court must conduct an ancillary proceeding, but no ancillary proceeding is required to the extent that the forfeiture consists of a money judgment.”). See also *United States v. Lazarenko*, 610 F. Supp. 2d 1063, 1066 (N.D. Cal. 2009) (holding that bona fide purchaser status, achieved before criminal conduct occurred, can outweigh government’s forfeiture interest in same property).

the assets, including a temporary injunction.<sup>397</sup> Such a request for relief can be made when a civil *in rem* forfeiture complaint is filed.<sup>398</sup> After an opportunity for hearing, interlocutory relief can be ordered if “there is substantial probability that the United States will prevail on the issue of forfeiture and . . . failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise be made unavailable for forfeiture”<sup>399</sup> and if “the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered.”<sup>400</sup> Interlocutory relief can be granted to the government without notice under certain circumstances.<sup>401</sup>

Some states also permit interlocutory relief in civil *in rem* forfeiture proceedings.<sup>402</sup> Such relief may even come in the form of a sale of an asset after notice is given should it be found that the asset will significantly depreciate in value if not sold.<sup>403</sup>

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<sup>397</sup> 18 U.S.C.A. § 983(j)(1) (West 2010) (“Upon application of the United States, the court may enter a restraining order or injunction, require the execution of satisfactory performance bonds, create receiverships, appoint conservators, custodians, appraisers, accountants, or trustees, or take any other action to seize, secure, maintain, or preserve the availability of property subject to civil forfeiture . . .”).

<sup>398</sup> 18 U.S.C.A. § 983(j)(1)(A).

<sup>399</sup> *Id.* § 983(j)(1)(B)(i).

<sup>400</sup> *Id.* § 983(j)(1)(B)(ii).

<sup>401</sup> *Id.* § 983(j)(3) (“A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when a complaint has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought is subject to civil forfeiture and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall not expire not more than 14 days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period.”).

<sup>402</sup> *See* ARIZ. REV. STAT. ANN. § 13-4312(D) (West 2010) (“[A] temporary restraining order under this section may be entered on application of the state without notice or an opportunity for a hearing if the state demonstrates both that . . . [t]here is probable cause to believe that the property with respect to which the order is sought would, in the event of final judgment or conviction, be subject to forfeiture under this title [and] [p]rovision of notice will jeopardize the availability of the property for forfeiture. A temporary restraining order expires within ten days after the date on which it is entered unless the party against whom it is entered consents to an extension for a longer period or unless after commencing a hearing the court enters or is considering a preliminary injunction.”); KAN. STAT. ANN. § 60-4114(b) (West 2010) (“The court may issue a temporary restraining order in an action under this section on application of the plaintiff’s attorney, without notice or an opportunity for a hearing, if the plaintiff’s attorney demonstrates that . . . [t]here is probable cause to believe that in the event of a final judgment, the property involved would be subject to forfeiture under the provisions of this act; and . . . [a] provision of notice would jeopardize the availability of the property for forfeiture.”).

<sup>403</sup> *See, e.g.*, ALASKA STAT. ANN. § 17.30.120 (West 2010); VA. CODE ANN. § 19.2-386.7 (West 2010).

A restraining order against the use of assets that may be forfeited can interfere with the owner's Sixth Amendment right to counsel. In *Caplin & Drysdale, Chartered v. United States*, a criminal defendant allegedly dealt in illegal drugs.<sup>404</sup> The trial court entered a restraining order preventing the defendant from transferring any assets listed in the indictment that could be subject to a later criminal forfeiture.<sup>405</sup> The defendant moved to allow some of the assets to be used to pay counsel, but then pled guilty before any hearing.<sup>406</sup> Part of the plea agreement involved forfeiture of all the assets listed in the indictment.<sup>407</sup> The listed assets in the forfeiture order included "virtually all assets," including real estate and \$200,000 in U.S. currency.<sup>408</sup> Because of the plea, the trial court denied the motion.<sup>409</sup> The defendant's attorney then requested that the court set aside a portion of the forfeited assets, arguing that assets used for attorney's fees should be exempt from forfeiture.<sup>410</sup> If they were not, the attorney argued that the statute would be in violation of the Sixth Amendment.<sup>411</sup> The trial court granted the request but the Fourth Circuit, sitting *en banc*, reversed.<sup>412</sup> On appeal, the U.S. Supreme Court held that "a defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney, even if those funds are the only way that the defendant will be able to retain the attorney of his choice."<sup>413</sup>

While there may be no Sixth Amendment interest when the government secures assets in advance of any fee issue, right to counsel issues can arise when the government seizes assets that are unconnected to criminal conduct and are needed to pay counsel. In *United States v. Farmer*, U.S. Customs agents seized a criminal defendant's cars and other assets, including about \$540,000, believing the items

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<sup>404</sup> *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 619 (1989).

<sup>405</sup> *Id.* at 620. The forfeiture in this case was sought under the criminal forfeiture statute for acts in violation of 21 U.S.C.A. § 848 (West 2010) (continuing criminal enterprise charges, which were later held to be repealed by implication in *United States v. Stitt*, 552 F.3d 345, 352 (4th Cir. 2008)).

<sup>406</sup> *Caplin & Drysdale*, 491 U.S. at 621.

<sup>407</sup> *Id.*

<sup>408</sup> *Id.* at 620-21.

<sup>409</sup> *Id.* at 621.

<sup>410</sup> 21 U.S.C.A. § 853(c) (West 2010) (providing for forfeiture to the government even when the defendant had previously transferred to a third party, unless the transferee can establish that he was a bona fide purchaser of the property in question).

<sup>411</sup> *Caplin & Drysdale*, 491 U.S. at 623-24.

<sup>412</sup> *Id.* at 622.

<sup>413</sup> *Id.* at 626. In the plurality opinion of the court, Justice White hypothesized that a bank robber would not be able to use the proceeds of his theft of the bank's money to retain an attorney, as the defendant is not the rightful owner of the funds. *Id.* Justice White also believed that the defense attorney would be ethically barred from accepting stolen property, as an attorney would not be allowed to accept instrumentalities of a crime as payment from a criminal defendant, such as stolen property, as payment for legal services. *Id.* ("The privilege to practice law is not a license to steal." (quoting *Laska v. United States*, 82 F.2d 672, 677 (10th Cir. 1936))).



were connected to counterfeiting.<sup>414</sup> In the two years that followed, the defendant twice unsuccessfully moved to have the assets returned through the pendency of the criminal investigation.<sup>415</sup> A civil forfeiture action was never commenced.<sup>416</sup> An indictment was finally issued, which included an action for criminal forfeiture of the seized assets.<sup>417</sup> The criminal defendant then moved for a hearing, seeking release of some of the seized funds so that he could pay an attorney.<sup>418</sup> He claimed that the seizure effectively put him out of business and that at least some of the assets were unrelated to any alleged crimes.<sup>419</sup> The appellate court, citing *Caplin & Drysdale, Chartered v. United States*, stated that the Sixth Amendment right to counsel supports an individual's "right to spend his own legitimate, nonforfeitable assets" even though crime proceeds cannot be used to retain defense counsel.<sup>420</sup> The court reasoned that while it is "clear that there is no Sixth Amendment right for a defendant to obtain counsel using tainted funds," a criminal defendant "still possesses a qualified Sixth Amendment right to use wholly legitimate funds to hire the attorney of his choice."<sup>421</sup> The *Farmer* court held that due process demanded that the defendant be able to challenge the seizure of the assets because of the defendant's significant interest in obtaining a pretrial hearing regarding allegedly unrelated funds, the high risk of "erroneous deprivation" of the defendant's interest in the absence of any hearing, and lack of an undue burden on the government.<sup>422</sup>

Thus, forfeiture laws allow governments to seize only assets tied to alleged criminal acts. It appears there could be a Sixth Amendment issue in a civil suit paralleling a criminal proceeding when a crime victim seeks to preserve a criminal defendant's assets that are unconnected to alleged criminal acts. Thus, a criminal defendant's assets that are unrelated to the alleged criminal acts may be unavailable for the purpose of securing later crime victim recovery. However, in *Manning v. Manning*, the Georgia Supreme Court held that a civil plaintiff's temporary injunction against a criminal defendant's assets does not violate the Sixth Amendment right to counsel when that defendant's assets, though unrelated to criminal acts, were already the subject of an earlier judicial order.<sup>423</sup> There, the criminal defendant and the victim were divorced.<sup>424</sup> Under the terms of the divorce,

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<sup>414</sup> *United States v. Farmer*, 274 F.3d 800, 801 (4th Cir. 2001).

<sup>415</sup> *Id.* The investigation appeared to have lasted nearly two years without an indictment filed. *Id.*

<sup>416</sup> *Id.*

<sup>417</sup> *Id.* at 801-02.

<sup>418</sup> *Id.*

<sup>419</sup> *Id.* at 802.

<sup>420</sup> *Id.* at 802-03 (citing *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989)).

<sup>421</sup> *Id.* at 804.

<sup>422</sup> *Id.* at 804-06.

<sup>423</sup> *Manning v. Manning*, 508 S.E.2d 157 (Ga. 1998).

<sup>424</sup> *Id.* at 158.

the defendant was required to transfer certain assets to the victim.<sup>425</sup> At the time of the victim's death in 1995 at the hands of the ex-husband/criminal defendant, some of the designated assets still had not been transferred.<sup>426</sup> The administrator of the victim's estate sued for wrongful death, seeking an injunction against the criminal defendant's removal of those assets.<sup>427</sup> The trial court granted the injunction, freezing all of the defendant's assets and ordering the defendant to separate his property and to transfer certain property to the estate of the victim.<sup>428</sup> The Georgia Supreme Court affirmed, reasoning that the injunction was not made for the purpose of freezing assets to secure remedies that might be awarded to the victim's estate.<sup>429</sup> Rather, it was to prevent disposal of assets already belonging to the victim's estate.<sup>430</sup> The high court held that there were no Sixth Amendment problems because the assets were not rightfully in the possession of the criminal defendant.<sup>431</sup>

A very different issue arises when non-obligated assets are sought postindictment to secure later crime victim recovery. No issue would arise, however, when the seizure of some assets would not impair a defendant's access to counsel of choice because he or she has sufficient other assets. A crime victim might attempt to avoid Sixth Amendment issues by bringing civil actions with judgments that are related to specific property before criminal charges are filed.

#### IV. SECURING BETTER MONETARY RECOVERIES FOR CRIME VICTIMS

Crime victims often have both constitutional and statutory recovery rights. Recoveries may be available from the criminal perpetrators, whether or not charged, or from the government. Recoveries are available in three settings: civil claims, administrative or special court proceedings, and criminal cases. Too often, recoveries are difficult to secure and judgments are difficult to enforce. This is especially troubling where recovery rights are constitutionally-recognized and self-executing. There may be ways in which crime victim recoveries can be better facilitated without infringing upon the rights of the criminally accused.

With recoveries available in civil, administrative or special court, and criminal settings, crime victims can be confused about their recovery options. Without altering existing guidelines, all recovery options should generally be presented together somewhere, or at least cross-referenced. Handbooks on crime victim rights, including possible recovery avenues, should always be distributed to victims of significant crimes. Websites outlining possible options should be established and publicized.

Recovery avenues also differ significantly among states, which adds to the confusion. Variations exist on such important issues as who is a victim, how much a victim may recover, from whom a victim may recover, and how recovery orders are

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<sup>425</sup> *Id.*

<sup>426</sup> *Id.*

<sup>427</sup> *Id.*

<sup>428</sup> *Id.*

<sup>429</sup> *Id.*

<sup>430</sup> *Id.*

<sup>431</sup> *Id.* (citing *Caplin & Drysdale*, 491 U.S. at 626).

enforced. While interstate differences are inevitable and not in themselves particularly troublesome, some state crime victim recovery avenues are simply inadequate. Especially troublesome are schemes failing to deliver on state constitutional promises. Inadequate state laws in one state can be rectified, often easily, by following successful approaches employed by other states.

Another option to improve crime victim recovery is encouraging, if not obligating, more trial judges in state criminal cases to consider crime victim recoveries, especially when entertaining proposed plea agreements. In federal district courts and many state courts, assigned trial judges are prohibited from participating in discussions leading to possible plea agreements.<sup>432</sup> Trial judges, however, must typically address criminal defendants in open court before accepting guilty pleas.<sup>433</sup> At times, judges must inform the defendants of the judicial authority to order restitution and of possible forfeiture.<sup>434</sup> But in Arizona, a trial judge may only accept a “tendered negotiated plea” after “considering the victim’s view.”<sup>435</sup> Other states should follow Arizona by expressly requiring that pleas be conditioned on judicial consideration of possible crime victim recoveries. The jurisdictional powers of major state trial courts present fewer barriers to more complete hearings than exist for the federal district courts,<sup>436</sup> as the former often have state constitutional authority over all justiciable matters while the latter are constrained by Congressional acts.<sup>437</sup>

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<sup>432</sup> See FED. R. CRIM. P. 11(c) (“The court must not participate in [plea agreement] discussions.”); ARK. R. CRIM. P. 25.3(a) (“The judge shall not participate in plea discussions.”). *But see* ARIZ. R. CRIM. P. 17.4(a) (“At the request of either party, or sua sponte, the court may, in its sole discretion, participate in settlement discussions . . . . The trial judge shall only participate . . . with the consent of the parties. In all other cases, the discussions shall be before another judge or a settlement division.”).

<sup>433</sup> FED. R. CRIM. P. 11(b) (“Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court.”); ARK. R. CRIM. P. 24.4 (“The court shall not accept a plea of guilty or nolo contendere from a defendant without first addressing the defendant personally . . . .”); ARIZ. R. CRIM. P. 17.2 (“Before accepting a plea of guilty or no contest, the court shall address the defendant personally in open court . . . .”).

<sup>434</sup> See, e.g., FED. R. CRIM. P. 11(b)(1)(J)-(K); N.D. R. CRIM. P. 11(b)(1)(I) (“The court may not accept a plea of guilty without first, by addressing the defendant . . . in open court, informing the defendant of and determining that the defendant understands . . . the court’s authority to order restitution.”). *But see* CONN. SUP. CT. R. § 39-19 (no information on either restitution or forfeiture must be conveyed); PA. CRIMINAL PROCEDURAL RULES COMM., PROPOSED AMENDMENTS TO PA. RS. CRIM. P. 550 (PLEAS OF GUILTY BEFORE MAGISTERIAL DISTRICT JUDGE IN COURT CASES) AND 590 (PLEAS AND PLEA AGREEMENTS) (2009) (requiring admonishments to the defendant about fines, but not about restitution or forfeiture).

<sup>435</sup> ARIZ. R. CRIM. P. 17.4(d). See also *id.* at 7.4(a) (Before any plea discussions, “the prosecutor shall afford the victim an opportunity to confer with the prosecutor concerning a non-trial or non-jury trial resolution.”).

<sup>436</sup> In considering all related harms, state trial judges need not resolve all controversies. Rather, they should employ discretionary factors, not unlike those used with federal district court supplemental jurisdiction, 28 U.S.C.A. § 1367 (West 2010).

<sup>437</sup> Compare ILL. CONST. art. VI, § 9, with U.S. CONST. art. III, § 1.

In other words, criminal trial judges should usually only accept pleas when assured that crime victims were educated about possible recoveries. Where state constitutional interests exist, possible crime victim recoveries should be considered in even greater detail. Such considerations might include whether hearings are needed, perhaps with juries, on disputed facts related to recoveries.<sup>438</sup> It seems that these hearings would be conducted under different procedures in different states, given, for example, the differences in state constitutional civil jury trial rights.<sup>439</sup> Whether or not based upon a plea agreement, at sentencing a criminal defendant typically has no constitutional right to a jury determination of disputes over crime victim recoveries.<sup>440</sup>

Furthermore, priority should be given to victims over competing governmental claims to a property, especially where there are strong state constitutional or statutory crime victim recovery interests. The California policy, recognizing crime victim priority in the distribution of property subject to forfeiture, should be broadly followed.<sup>441</sup>

There should also be provisional remedies available that help assure the later availability of assets for crime victim recoveries. Remedies should be available in a related civil suit or as a supplemental matter in a criminal case.<sup>442</sup> States should follow the Pennsylvania policy allowing prosecutors to seek a “temporary restraining order” where “there is probable cause to believe that the property with respect to which the order is sought appears to be necessary to satisfy an anticipated restitution

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<sup>438</sup> The need to resolve disputed factual issues related to possible federal court recoveries could prompt jury trial rights. See *Cassell Testimony*, *supra* note 115, at 18-19 (analyzing federal criminal and civil trial jury rights).

<sup>439</sup> The federal constitutional civil jury trial right is inapplicable in state court proceedings. *Walker v. Sauvinet*, 92 U.S. 90 (1875). State civil juries often operate quite differently than federal civil juries. See N.D. CONST. art. I, § 13 (“All verdicts must be unanimous.”); OHIO CONST. art. I, § 5 (civil case juries with three-fourths majority may be legislatively authorized); PA. CONST. art. I, § 6 (civil case juries with five-sixths majority may be legislatively authorized).

<sup>440</sup> See *In re State ex rel. T.L.B.*, 218 P.3d 534, 537-38 (Okla. Civ. App. 2009) (holding that a denial of a jury trial on the matter of restitution did not violate the Sixth Amendment, as restitution is not an additional punishment and the Seventh Amendment was not violated as restitution in a criminal case is an equitable proceeding and not a suit at common law, and that the jury right provided under the Oklahoma Constitution was not violated because restitution is an equitable remedy and not an independent civil proceeding); *Illinois v. Lowe*, 606 N.E.2d 1167, 1172-73 (Ill. 1992) (holding that criminal defendant did not have a right to a jury trial on the matter of restitution, though other process rights are afforded the defendant in disputes about restitution at sentencing).

<sup>441</sup> CAL. PENAL CODE §502.01(g)(1) (West 2010) (“If the defendant is found to have the only valid interest in the property subject to forfeiture, it shall be distributed as follows . . . . First, to the victim, if the victim elects to take the property as full or partial restitution for injury, victim expenditures, or compensatory damages . . .”).

<sup>442</sup> Professor Cassell has urged that “Congress should adopt legislation giving courts greater power, at the request of prosecutors, to secure assets that could be used to reimburse victims for their losses from federal crimes,” after reviewing a General Accounting Office study showing that after crimes and before criminal court judgments, “criminals . . . commonly dissipate their criminal gains quickly and in an untraceable manner.” *Cassell Testimony*, *supra* note 115, at 25-26.

order.”<sup>443</sup> In California, the “prosecuting agency” can seek to “prevent dissipation or secreting of assets or property” any time during a criminal case.<sup>444</sup> Typically, state criminal court judges have jurisdictional authority over what amounts to civil case provisional remedies. Both civil and criminal adjudicatory powers are vested in the same trial judges in most major American state trial courts. As a result, in general jurisdiction state trial courts criminal contempt proceedings typically can be initiated in civil cases for civil litigation misconduct. Similarly, settlements between crime victims and criminal defendants in criminal cases should be able to resolve many related civil claims.

Another proposal for improvement is a more clearly defined role of the prosecutor in assisting the crime victim to recover in criminal cases. As suggested by Oregon’s Restitution Task Force, written policies and procedures, reviews by supervising attorneys, and performance reviews will greatly assist crime victims.<sup>445</sup> A crime victim often has an opportunity to recover for crime-related losses during a criminal case. Yet the role of the victim in the criminal proceeding, and thus the chance for recovery, is often too limited. In Arizona, for example, a crime victim has a constitutional<sup>446</sup> and statutory<sup>447</sup> interest in restitution in a criminal case. However, the victim may not direct the prosecution to go forward with a criminal proceeding.<sup>448</sup> This seems right. But when there is a criminal case with

<sup>443</sup> 42 PA. CONS. STAT. ANN. § 9728(f) (West 2010). *See also* MINN. STAT. ANN. § 609.532 (West 2010) (prosecutors can obtain an order directed to a financial institution to freeze the assets of an accused felon for the purpose of ensuring restitution to the victims when there is probable cause that the account holder was involved in the commission of the felony and when the loss is \$10,000 or more); UTAH CODE ANN. § 77-38a-601(1) (West 2010) (“Prior to or at the time a criminal information, indictment charging a violation, or a petition alleging delinquency is filed, or at any time during the prosecution of the case, a prosecutor may, if in the prosecutor’s best judgment there is a substantial likelihood that a conviction will be obtained and restitution will be ordered in the case, petition the court to . . . (a) enter a temporary restraining order, an injunction, or both; (b) require the execution of a satisfactory performance bond; or (c) take any other action to preserve the availability of property which may be necessary to satisfy an anticipated restitution order.”); *id.* § 77-38a-601(2)(a) (“[T]he court may take action as requested by the prosecutor if the court determines: (i) there is probable cause to believe that a crime has been committed and that the defendant committed it, and that failure to enter the order will likely result in the property being sold, distributed, exhausted, destroyed, or removed from the jurisdiction of the court, or otherwise be made unavailable for restitution . . .”).

<sup>444</sup> CAL. PENAL CODE § 186.11(e)(2).

<sup>445</sup> *See* AUDIT, *supra* note 291, at 9.

<sup>446</sup> ARIZ. CONST. art. II, § 2.1 (“[A] victim of crime has a right . . . [t]o be present . . . [t]o confer with the prosecution . . . [t]o receive prompt restitution . . .”).

<sup>447</sup> ARIZ. REV. STAT. ANN. § 13-4438 (West 2010) (“In order to assure that any victim . . . has been advised of the victim’s constitutional rights . . . a judge . . . shall make the following statement: . . . you are advised that you have rights . . . that, among others, include [the right] to be present at court proceedings . . . and to receive restitution from a person who is convicted of causing your loss.”).

<sup>448</sup> *Id.* § 13-441(c) (“The right of the victim to confer with the prosecuting attorney does not include the authority to direct the prosecution of the case.”). *See also* ALA. CODE § 15-23-66 (West 2010) (“The rights of the victim do not include the authority to direct the prosecution of the case.”).

compensable harm to a victim, the crime victim may not always be able to pursue recovery easily, even when armed with statutory, if not constitutional, authority.<sup>449</sup>

Some states create separate causes of action for willful failures by government to ensure crime victim rights.<sup>450</sup> Other states expressly declare that a crime victim does not have a claim involving any such failures.<sup>451</sup> While a victim should not have the

<sup>449</sup> See *Simmons v. Florida*, 974 So.2d 531 (Fl. Dist. Ct. App. 2008) (even with proof of 34 stolen ladders, a defendant charged with stealing two ladders cannot be sentenced to pay for the other 32; no discussion of possible ancillary jurisdiction); AUDIT, *supra* note 291, at 9 (“For example, some district attorneys have chosen not to prosecute certain crimes such as misdemeanor thefts. Consequently, victims of these crimes are not entitled to restitution and may never be compensated for their losses.”).

<sup>450</sup> See ARIZ. REV. STAT. ANN. § 13-4437(A)-(B) (“The victim has standing to seek an order, to bring a special action or to file a notice of appearance in an appellate proceeding seeking to enforce any right or to challenge an order denying any right guaranteed to victims under the victims’ bill of rights, article II, § 2.1 . . . . In asserting any right, the victim has the right to be represented by personal counsel at the victim’s expense . . . . A victim has a right to recover damages from a governmental entity responsible for the intentional, knowing or grossly negligent violation of the victim’s rights . . . .”); UTAH CODE ANN. § 77-38-11 (West 2010) (“If a person acting under color of state law willfully or wantonly fails to perform duties so that the rights in this chapter are not provided, an action for injunctive relief, including prospective injunctive relief, may be brought . . . .”); Illinois employs a good faith standard. 725 ILL. COMP. STAT. ANN. 120/4(a)(10) (West 2010) (“Crime victims shall have the following rights . . . [t]he right to restitution.”); *id.* 120/9 (“This Act does not . . . grant any person a cause of action for damages or attorneys fees. Any act of omission or commission by any law enforcement officer . . . or State’s Attorney . . . or other State agency . . . acting in good faith in rendering crime victim’s assistance . . . shall not impose civil liability . . .”).

<sup>451</sup> MO. ANN. STAT. § 595.209(1)(11) (West 2010) (“The following rights shall automatically be afforded to victims of dangerous felonies . . . victims of murder in the first degree . . . victims of voluntary manslaughter . . . and, upon written request, the following rights shall be afforded to victims of all other crimes . . . . For victims, to be informed by the prosecuting attorney of the right to restitution which shall be enforceable in the same manner as any other cause of action as otherwise provided by law . . . .”); *id.* § 595.218 (“Nothing . . . shall be construed as creating a cause of action on behalf of any person against any public employee, public agency, the state or any agency responsible for the enforcement of rights and provisions . . . .”); ARK. CODE ANN. § 16-90-1107 (West 2010) (while Arkansas does not appear to explicitly give a right to restitution or compensation, this statute, found in the Rights of Victims of Crime subchapter in the Criminal Procedure Statutes, states that “a law enforcement agency responsible for investigating a crime . . . shall promptly give in writing to the victim . . . [a]n explanation of the victim’s rights . . . [and] [i]nformation concerning the availability of . . . [c]ompensation for victims . . . .”); *id.* § 16-90-1102 (found in the Rights of Victims of Crime Subchapter of the Judgment and Sentence Generally Chapter in the Criminal Procedure Generally Statutes) (“Failure to comply . . . does not create a claim for damages . . . .”); CONN. CONST. art. I, § 8 (“In all criminal prosecutions, a victim, as the General Assembly may define by law, shall have the following rights: . . . the right to restitution which shall be enforceable in the same manner as any other cause of action or as otherwise provided by law . . . .”); CONN. GEN. STAT. ANN. § 54-85g (West 2010) (“In order to ensure that any victim coming before the court has been advised of the victim’s constitutional rights, any judge of the Superior Court shall . . . issue the following advisement: ‘If you are a victim of a crime with a case pending before this court, you are advised that you have the right . . . to restitution . . . .’”); *id.* § 54-224 (“[T]he state or any agent, employee or officer thereof shall not be liable for (1) the failure to afford the victim of a crime any of the rights provided . . . .”).

right to direct the prosecution, states should follow the Alabama policy requiring prosecutors to make reasonable efforts to confer with victims about possible plea agreements.<sup>452</sup> Such conferences could typically include discussions of available avenues of recovery as well as possible recovery in the pending case.

A crime victim's opportunity to pursue recovery in a criminal case can also be facilitated through independent offices designed to aid crime victims. Utah, for example, has a victims' rights committee.<sup>453</sup> That committee helps enforce crime victim rights, including monetary recoveries inside and outside of pending criminal cases.<sup>454</sup>

States can also facilitate crime victim recoveries by making available and encouraging the use of alternative dispute resolution mechanisms before criminal pleas are finalized. For example, a state could invite a crime victim to mediation, as in Delaware where a crime victim can pursue restitution in a nonadversarial environment.<sup>455</sup> Victim offender mediation programs have been described as "empowering victims" and "promoting restitution to the victim."<sup>456</sup> It has also been said that such programs increase crime victim recoveries because restorative justice practices, such as victim-offender mediation, have substantially higher compliance and collection rates than judicial orders.<sup>457</sup>

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<sup>452</sup> ALA. CODE § 15-23-71 ("The victim has the right to be present at any proceeding at which a negotiated plea for the person accused of committing the criminal offense against the victim will be presented to the court. The court shall not accept a plea agreement unless: (1) The prosecuting attorney advises the court that, before requesting the negotiated plea, reasonable efforts were made to confer with the victim. (2) Reasonable efforts are made to give the victim notice of . . . the terms of any sentence agreed to as part of the negotiated plea . . .").

<sup>453</sup> UTAH CODE ANN. § 77-37-5.

<sup>454</sup> *Id.* § 77-38-11 ("[A]ny Victims' Rights Committee . . . may . . . bring an action for declaratory relief or for a writ of mandamus defining or enforcing the rights of victims and the obligations of government entities . . . [and] petition to file an amicus brief in any court in any case affecting crime victims . . .").

<sup>455</sup> DEL. CODE ANN. tit. 11, § 9501(b) (West 2010) ("It is the intent of the General Assembly that each program established . . . [s]timulate the establishment and use of victim-offender mediation programs to help meet the need for alternatives to the courts for the resolution of certain criminal offenses, whether before or after adjudication . . ."); *id.* § 9501(a) ("The General Assembly finds and declares that . . . [t]he resolution of felony, misdemeanor and juvenile delinquent disputes can be costly and complex . . . [and] [v]ictim-offender mediation programs can meet the needs of Delaware's citizens by providing forums in which persons may voluntarily participate in the resolution of certain criminal offenses . . ."). See also TEX. CODE CRIM. PROC. ANN. art. 56.13 (West 2010) ("The victim services division of the Texas Department of Criminal Justice shall . . . provide mediation services . . . if requested by a victim . . .").

<sup>456</sup> Dickman, *supra* note 129, at 1715 (quoting Nancy Lucas, *Restitution, Rehabilitation, Prevention and Transformation: Victim Offender Mediation for First-Time Non-Violent Youthful Offenders*, 29 HOFSTRA L. REV. 1365, 1375 (2001)).

<sup>457</sup> *Id.* at 1715 (citing Mark S. Unbreit, *Mediating Victim-Offender Conflict: From Single-Site to Multi-Site Analysis in the U.S.*, in RESTORATIVE JUSTICE ON TRIAL: PITFALLS AND POTENTIALS OF VICTIM-OFFENDER MEDIATION - INTERNATIONAL RESEARCH PERSPECTIVES 431, 432-36 (Heinz Messmer & Hans-Uwe Otto eds. 1992)).

## V. CONCLUSION

Crime victim recoveries are typically available in American states through three separate, but related, avenues: a criminal case (with or without a formal charge); a related civil case (including a presuit settlement); and a related administrative or special court proceeding. Multiple avenues can be pursued simultaneously. These avenues often have constitutional as well as statutory foundations.

Unfortunately, crime victims often go without recovery. Barriers to recovery include intrastate and interstate confusion over terms like restitution and victim, failures to recognize constitutional rights as self-executing, and the unavailability of provisional remedies.

More can be done for victims, especially during criminal case sentencing, to overcome these barriers. Unlike federal district courts, state criminal courts typically have general jurisdictional authority allowing broader opportunities for crime victim recoveries at the close of criminal cases. Better crime victim recovery procedures are especially warranted where there are constitutional interests. Enhanced procedures should include mandated considerations of crime victim interests at criminal case sentencing; broader opportunities for provisional remedies; priorities for crime victims when the assets of perpetrators are limited; and independent crime victim assistance officers.