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NOTE

THE SWINGING PENDULUM OF VICTIMS' RIGHTS: THE ENFORCEABILITY OF INDIANA'S VICTIMS' RIGHTS LAWS

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INTRODUCTION

The victim's place within America's criminal justice system has undergone a marked shift over the past two decades. In response to growing concerns regarding the exceedingly peripheral role victims play in the prosecution of the crimes committed against them,¹ states have begun to search for ways to be more responsive and sensitive to victims' needs. As a result, state legislatures have passed an ever growing number of laws granting victims increased rights within the criminal justice process.²

Indiana joined the victims' rights movement in 1996 with the passage of its own victims' rights amendment.³ Three years later, the Indiana General Assembly gave further meaning and scope to the amendment by passing a

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1. See Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL'Y 357, 372 (1986).

2. Thirty-two states have passed victims' rights amendments to their constitutions. See ALA. CONST. amend. 557; ALASKA CONST. art. I, § 24; ARIZ. CONST. art. 2, § 2.1; CAL. CONST. art. I, § 28; COLO. CONST. art. 2, § 16a; CONN. CONST. art. XXIX; FLA. CONST. art. 1, § 16(b); IDAHO CONST. art. 1, § 22; ILL. CONST. art. I, § 8.1; IND. CONST. art. 1, § 13(b); KAN. CONST. art. 15, § 15; LA. CONST. art. I, § 25; MD. DECL. OF RIGHTS Art. 47; MICH. CONST. art. 1, § 24; MISS. CONST. art. 3, § 26A; MO. CONST. art. 1, § 32; NEB. CONST. art. I, § 28; NEV. CONST. art. 1, § 8; N.J. CONST. art. 1, para. 22; N.M. CONST. art. II, § 24; N.C. CONST. art. I, § 37; OHIO CONST. art. I, § 10a; OKLA. CONST. art. 2, § 34; OREG. CONST. art. 1, § 42; S.C. CONST. art. I, § 24; R.I. CONST. art. 1, § 23; TENN. CONST. art. 1, § 35; TEX. CONST. art. 1, § 30; UTAH CONST. art. I, § 28; VA. CONST. art. I, § 8-A; WASH. CONST. art. I, § 35; WIS. CONST. art. 1, § 9m. Similarly, the United States Congress has passed several laws ensuring that the interests of victims are better protected during the prosecutorial process. See Victim and Witness Protection Act of 1982, 18 U.S.C. §§ 1512-1515 (1994 & Supp. 2000); Victims of Crime Act of 1984, 42 U.S.C. §§ 10601-10604 (1997); Victims' Rights and Restitution Act of 1990, 42 U.S.C. §§ 10606-10607 (1997).

3. See IND. CONST. art. I, § 13(b).

victims' rights statute.⁴ However, in the fall of 1999, the strength of Indiana's victims' rights laws were put to their first test in *Newman v. Indiana Department of Correction*.⁵ In this action, Marion County Prosecutor, Scott C. Newman, along with four crime victims and prosecutors from eighteen Indiana counties, brought an action requesting that the court declare the Community Transition Act (an offender early release program)⁶ unconstitutional in that it violated the rights of Indiana crime victims. The action was short lived and dismissed by the trial court on grounds that the victims lacked standing to bring their claim.⁷

The result in *Newman* raises compelling questions regarding the effectiveness and enforceability of Indiana's victims' rights laws. While the current status of Indiana's victims' rights laws raises no question as to the state's commitment to providing victims with rights, the full scope and enforceability of those rights remain unclear. In light of these questions, this Note will examine the extent of rights afforded to victims in Indiana, and query how the state might better protect and enforce those rights.

In examining the effectiveness and enforceability of Indiana's victims' rights amendment and enabling legislation, Part I of this Note places Indiana's victims' rights movement in a larger context by providing a brief history of the victims' developing role in the criminal justice system. Part II of this Note examines the basic structure and scope of Indiana's victims' rights laws and how these laws were invoked and ultimately rejected in *Newman*. Part III of this Note examines the key issues raised in *Newman* and compares them to victims' rights challenges raised in other states. In particular, this section highlights how victims' attempts to enforce their rights tend to have limited success. These sparse successes are predicated by the reality that most victims' rights laws provide only a circumscribed scope within which victims can seek redress for the violation of their rights. However, a handful of states take a broader approach to enforcing victims' rights, and have established specific victims' rights enforcement mechanisms through the use of the writ of mandamus and the creation of victims' rights oversight committees. Parts IV and V of this Note examine these two enforcement mechanisms and advocate that some combination of these models be adopted in Indiana.

Although *Newman* provided only the most limited of opportunities to test the mettle of Indiana's victims' rights laws, it nonetheless highlighted Indiana's struggle in determining the proper place and rights of victims in Indiana. While Indiana has taken impressive steps in granting victims solid and substantial rights,⁸ as the law currently stands, Indiana victims are quite limited in how they can seek to enforce these rights. Therefore, the Indiana legislature should enact

4. See IND. CODE §§ 35-40-1-1 to -13. (2000).

5. *Newman v. Ind. Dep't of Corr.*, No. 49D01-9910-CP-1431 (Marion Super. Ct., Ind., dismissed, Jan. 18, 2000).

6. See IND. CODE §§ 11-8-1-5.5 to 5.6; § 11-12-10-1 to -4 (2000).

7. See Findings of Fact and Conclusions of Law and Order Den. Inj. Relief and Dismissing Action, *Newman v. Ind. Dep't of Corr.*, No. 49D01-9910-CP-1431 (Jan. 18, 2000).

8. See IND. CONST. art. I, § 13(b); IND. CODE § 35-40-1 to -13 (2000).

additional measures to more fully protect the rights of Indiana crime victims.

I. HISTORY OF THE VICTIMS' PLACE WITHIN THE CRIMINAL JUSTICE SYSTEM

The victim's position within the prosecutorial process has waxed and waned over the course of history. In some of the earliest manifestations of the criminal justice system, victims marshaled extensive control over prosecuting offenders.⁹ However, victims' interests in bringing offenders to justice eventually gave way to the larger interests of the state, leaving the victim separated and disconnected from the criminal process.¹⁰ However, over the past twenty years, victims have increasingly regained ground in the criminal justice process, marking a distinct shift in the scope and boundaries of the victim's role and place within the law.

In reflecting upon the growing prevalence of the victim in the law, one might posit that as our criminal justice system has evolved, the pendulum marking the balance between victims and defendants has swung far to one extreme, focusing entirely on the rights of defendants, to the exclusion of victims' rights. The victims' rights movement appears to be shifting the pendulum to a position where the victim has a more significant place within in the prosecutorial process. However, the proper location of the pendulum remains far from clear, leaving courts and legislatures continually challenged to identify the appropriate swing of its arc.

Crime victims have not always had to struggle for a place within the justice process. Dating from the Anglo-Norman era, crime victims had enormous, if not exclusive, control in prosecuting those who had committed crimes against them¹¹ under what is commonly referred to as the private prosecution model.¹² Under this model, a crime was seen primarily as an injury against an individual, rather than against the state, and the purpose of prosecution was to restore rights to the victim and obtain some form of restitution from the offending party.¹³ However, as loosely knit feudal and rural communities gave way to more organized commerce-based centers, a need for centralized government systems developed and the private model was increasingly overshadowed by a state driven, public

9. See generally Sue Anna Moss Cellini, *The Proposed Victims' Rights Amendment to the Constitution of the United States: Opening the Door of the Criminal Justice System to the Victim*, 14 ARIZ. J. INT'L & COMP. L. 839 (1997); Peggy M. Tobolowsky, *Victim Participation in the Criminal Justice Process: Fifteen Years After the President's Task Force on Victims of Crime*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 21 (1999); Thad H. Westbrook, Note, *At Least Treat Us Like Criminals!: South Carolina Responds to Victims' Pleas for Equal Rights*, 49 S.C. L. REV. 575, 577 (1998).

10. See generally Richard Barajas & Scott Alexander Nelson, *The Proposed Crime Victims' Federal Constitutional Amendment: Working Toward a Proper Balance*, 49 BAYLOR L. REV. 1 (1997); Cardenas, *supra* note 1; Cellini, *supra* note 9; Tobolowsky, *supra* note 9.

11. See Westbrook, *supra* note 9, at 577.

12. See Tobolowsky, *supra* note 9, at 23-31.

13. See Cellini, *supra* note 9, at 842; Tobolowsky, *supra* note 9, at 23-37.

prosecution model.¹⁴

The public prosecution model supports the underlying notion that the prosecution and prevention of crime is a direct and primary interest of the government.¹⁵ Commonly labeled by scholars as an “historical enigma,” the exact origin of the public prosecution model is unclear and has been subject to a variety of different legal and historical theories.¹⁶ Generally, as government and civic structures developed, an unspoken social contract was struck between the citizenry and government.¹⁷ Under this “social contract theory,” individuals “surrender[ed] certain freedoms to the government in exchange for mutual protection.”¹⁸ A state driven criminal justice system represented one form of protection government provided to its citizens, through which it sought to deter citizens from future breaches of the “social contract” by punishing and incarcerating present offenders of the contract.¹⁹ As a result of this “social contract,” society increasingly viewed criminal activity as an offense committed against the state as a whole, rather than merely as an offense committed against an individual victim.²⁰ Hence, governmental interests in deterring crime through incarceration began to overshadow the victim’s interest in seeking restitution or compensation from the offender.²¹

America’s criminal justice system has been almost entirely dominated by the public prosecution model. This dominance is further enhanced by the system’s explicit focus on defendants’ rights, to the exclusion of any mention of victims’ rights. Neither the United States Constitution, nor the Bill of Rights bear any mention of victims’ rights, while devoting several amendments (and countless cases articulating the scope of those amendments) to the rights of criminal defendants.²²

14. See Tobolowsky, *supra* note 9, at 23-26.

15. Scholar Cesare Beccaria advanced the notion that crime was not a private concern between the aggressor and the victim, but a societal concern. See Cardenas, *supra* note 1, at 366-69. Therefore, the criminal justice system should serve the interests of society, not the individual victim. See *id.*

16. See Cellini *supra* note 9, at 842-43.

17. See *id.* at 847-48.

18. *Id.* at 847.

19. See *id.*

20. See Barajas & Nelson, *supra* note 10, at 8-9.

21. See generally Cellini, *supra* note 9, at 847-48 (criminal prosecutions should serve societal interests of deterrence and retribution rather than interests of individual victims in private redress); Tobolowsky, *supra* note 9, at 25-26 (goals of the criminal justice system shifted to focus more on attempt to vindicate the harm done to society as opposed to harm to the individual).

22. See U.S. CONST. amend. IV (search and seizure rights); U.S. CONST. amend. V (grand jury, double jeopardy, self incrimination, and due process rights); U.S. CONST. amend. VI (speedy and public trial by impartial jury, confrontation, compulsory process for obtaining witnesses, assistance of counsel rights); U.S. CONST. amend. VIII (limits on excessive bail or cruel or unusual punishments). See also *Miranda v. Arizona*, 384 U.S. 436 (1966) (suspect must be given notice of his right to an attorney before the police may question the suspect); *Douglas v. California*, 372

One unfortunate consequence of the public prosecution model is that victims are relegated to a peripheral role in prosecuting the crime committed against them,²³ and the process is generally divorced from any consideration regarding the direct and specific harm suffered by the victim as a result of the perpetrator's actions. Damages suffered by the victim, whether they are physical, economical or psychological, tend to be viewed as incidental and secondary to the state's primary goal of deterring and punishing criminal activity.²⁴

However, over the past twenty years, the American criminal justice system has appeared increasingly willing to find ways to reintegrate the victim into the prosecutorial process, indicating a shift in the swing of the pendulum charting the victim's place within criminal law.²⁵ Prompted in large part by the final report issued by the President's Task Force on Victims of Crime,²⁶ states began to pass victims' rights amendments to their constitutions, coupled with supporting legislation to further articulate, enhance and protect victims' rights.²⁷ However, despite the widespread passage of victims' rights laws, the exact and appropriate

U.S. 353 (1963) (defendant has right to assistance of counsel on first appeal of right); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (defendant has fundamental right to assistance of counsel where punishment will include incarceration); *Mapp v. Ohio*, 367 U.S. 643 (1961) (evidence obtained by searches and seizures in violation of the constitution is admissible). Scholars have disagreed as to why there is no mention of victims in the United States' Constitution or Bill of Rights. Some have posited that when the first colonists came to America they "brought with them the English common law tradition of private prosecutions." Barajas & Nelson, *supra* note 10, at 9-10. Under this reasoning, because victims were able to control the prosecutorial process, there was no need to articulate victim rights in the Constitution or Bill of Rights. *See id.* Moreover, scholars have argued that regardless of the absence of specific rights articulated for victims, "victim's rights would surely have been presumed by the drafters of the Bill of Rights to be included in the Ninth Amendment's protection of unenumerated rights." Cellini, *supra* note 9, at 846. Conversely, others have argued that if there

were no public criminal prosecutions at the time of drafting the Bill of Rights . . . , the founders would not have included the Fourth, Fifth, Sixth, and Eighth Amendments, all of which protect the individual from the government in a criminal proceeding . . . [substantiating the argument that] it is perhaps self-evident what the framers felt about the relation of the interests of crime victims to criminal defendants—the rights of the defendant should predominate.

Rachel King, *Why a Victims' Rights Constitutional Amendment Is a Bad Idea: Practical Experiences from Crime Victims*, 68 U. CIN. L. REV. 357, 367-68 (2000).

23. *See* Cardenas, *supra* note 1, at 371-72.

24. *See id.*

25. *See* Barajas & Nelson, *supra* note 10, at 24.

26. PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT (1982).

27. *See supra* note 2, for list of state constitutional victims' rights amendments. *See also* ALA. CODE § 15-23-3-60 to -84 (1995); ARIZ. REV. STAT. § 13-4401 to -4437 (2000); LA. REV. STAT. ANN. § 46-1844 (West 1999 & Supp. 2000); S.C. CODE ANN. §§ 16-3-15-30 to -60 (Law. Co-op. Supp. 1999); UTAH CODE ANN. §§ 77-38-3 to -12 (1999) (giving examples of state victims' rights legislation).

place for the victim within the criminal justice system remains unclear and contentious. Critics of the movement argue that the criminal justice system is not necessarily the appropriate forum to address victim needs, positing that the law is ill equipped to remedy the vast emotional, physical and economic harms suffered by victims of crime.²⁸ More important, critics argue that increased victims' rights can result in decreased defendants' rights,²⁹ undermining core constitutional principles of due process³⁰ and the defendants' right to a fair trial.³¹ Despite these valid arguments, states continue to pass victims' rights laws, and in so doing, challenge our traditional perceptions regarding the victim's place within the criminal justice system.

One cannot ignore that the pendulum marking the victim's place within American criminal law is shifting. As this shift is still in its infancy, the full arc of the pendulum remains unclear, and the ramifications of its slow shift uncertain. Nonetheless, an understanding of the historical progression of the victim within the law provides a foundation from which one can examine current victims' rights laws and analyze the scope of rights they afford to victims, and question how these rights should be enforced.

II. INDIANA'S VICTIMS' RIGHTS LAWS

An examination of Indiana's victims' rights laws highlights the important task of identifying the appropriate scope and boundaries of these laws and questioning what method might best enforce them. Currently, while Indiana victims are afforded rights under the law,³² the enforceability of these rights has not been fully tested and the strength of Indiana's victims' rights laws is not entirely clear.

A. *Introduction to Indiana's Victims' Rights Laws*

In 1996, the Indiana General Assembly joined twenty-five of its sister states in passing a victims' rights amendment to its constitution.³³ Three years later, the Indiana General Assembly passed enabling legislation to further the purpose of the victims' rights amendment.³⁴ Noting that "many innocent persons suffer economic loss and personal injury or death as a result of criminal or delinquent acts,"³⁵ the General Assembly passed section 35-40 of the Indiana Code with the

28. See generally Lynne Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937 (1985); Lynne Henderson, *Co-opting Compassion: The Federal Victim's Rights Amendment*, 10 ST. THOMAS L. REV. 579 (1998).

29. See generally Robert P. Mosteller & H. Jefferson Powell, *With Disdain for the Constitutional Craft: The Proposed Victims' Rights Amendment*, 78 N.C. L. REV. 371 (2000).

30. See U.S. CONST. amend. V.

31. See U.S. CONST. amend. VI.

32. See IND. CONST. art. I, § 13(b); IND. CODE § 35-40-1 to -13 (2000).

33. See IND. CONST. art. I, § 13(b).

34. See IND. CODE § 35-40-1 to -30 (2000).

35. *Id.* § 35-40-1-1.

intent to “[e]nact laws that define, implement, preserve and protect the rights guaranteed to victims by Article 1, Section 13 of the Constitution of the State of Indiana . . . [and to e]nsure that Article 1, Section 13 of the Constitution of the State of Indiana is fully and fairly implemented.”³⁶

In its full form, Section 13(b) of the Indiana Constitution reads:

Victims of crime, as defined by law, shall have the right to be treated with fairness, dignity, and respect throughout the criminal justice process; and, as defined by law, to be informed of and present during public hearings and to confer with the prosecution, to the extent that exercising these rights does not infringe upon the constitutional rights of the accused.³⁷

As further articulated in the victims' rights statute, Indiana victims have the right to notice of their rights,³⁸ the right to information about the release or escape of the charged or convicted person from custody,³⁹ and the right to information, upon request, about the disposition of the criminal case involving the victim, or the conviction, sentence or release of the person accused of committing the crime against the victim.⁴⁰ Additionally, victims have the right to be heard at any proceeding involving sentencing or post-conviction release decisions.⁴¹ Victims also have the right to confer with a representative from the prosecutor's office,⁴² the right to have their safety considered in determining the release of the accused or defendant,⁴³ the right to contribute to the preparation of the presentence report,⁴⁴ and the right to pursue an order of restitution or other civil remedies against the person convicted of a crime against the them.⁴⁵ Finally, Indiana's

36. *Id.* § 35-40-1-1.

37. IND. CONST. art. I, § 13(b). Indiana's victim's rights statute contains very similar language to that of the constitutional amendment reading “[a] victim has the right to be treated with fairness, dignity and respect throughout the criminal justice process.” IND. CODE § 35-40-5-1 (2000).

38. *See* IND. CODE § 35-40-5-9 (2000).

39. *See id.* § 35-40-5-2.

40. *See id.* § 35-40-5-8.

41. *See id.* § 35-40-5-5; *see also* H.B. No. 1352, 112th General Assembly, 1st Regular Sess. (Ind. 2001). This bill seeks to require courts to order that victim impact statements prepared under Indiana Code § 35-38-1-2.5 be read aloud in the courtroom before the court imposes a sentence on a defendant convicted of murder.

42. *See id.* § 35-40-5-3. While the victim does have the right to confer with a representative from the prosecutor's office, this right does not allow the victim to direct the prosecution of the case against the accused. *See id.*

43. *See id.* § 35-40-5-4. Additionally, if a victim provides the prosecutor with an affidavit asserting that the defendant is threatening the victim or the victim's family, the prosecutor can file a motion with the court to have the defendant's bond order revoked. *See id.* § 35-40-6-6.

44. *See id.* § 35-40-5-6.

45. *See id.* § 35-40-5-7. Victims may also receive assistance from the prosecutor's office in filing restitution orders. *See id.* § 35-40-6-4(10). Also, they may participate in victim-offender

victims' rights laws do not "[p]rovide grounds for a person accused of or convicted of a crime or an act of delinquency to obtain any form of relief."⁴⁶

*B. Newman v. Indiana Department of Corrections: A First Test of
Indiana's Victims' Rights Laws*

Indiana's victims' rights amendment and legislation was put to its first test in *Newman v. Indiana Department of Correction*.⁴⁷ In this action, four crime victims and prosecutors from nineteen Indiana counties brought an action challenging the constitutionality of the an early release offender program, Community Transition Program (CTP), positing that it violated the rights of Indiana crime victims.⁴⁸

The CTP was initially passed by the Indiana Legislature in 1999 and established a system by which offenders could be released into a community transition program "between two to four months before [their] expected release date, depending upon the severity of the . . . offenses."⁴⁹ At least forty-five days before an offender was eligible for transfer into the program, the Department of Corrections had to provide the sentencing court and the prosecutor with written notice of the offender's eligibility.⁵⁰ Upon receiving notice from the Department of Corrections, the sentencing court was required to determine whether the offender should be allowed to enter the CTP. If the offender's most serious conviction was a class C or D felony, the sentencing court could order the Department of Corrections to retain control over offender and deny his entry into the program. No hearing was required for this determination. However, if the

reconciliation programs. *See id.* § 35-40-6-4(9).

46. *Id.* § 35-40-2-1. Numerous other states contain a similar limit in their victims rights laws. *See* CONN. CONST. art. XXIX; ILL. CONST. art. 1, § 8.1(d); IDAHO CONST. art. 1, § 22; KAN. CONST. art. 15, § 15(a); LA. CONST. art. I, § 25; MISS. CONST. art. 3, § 26A(2); MO. CONST. art. I, § 32.4; NEB. CONST. art. I, § 28; NEV. CONST. art. 1, § 8; N.M. CONST. art. II, § 24(B); N.C. CONST. art. 1, § 37(3); S.C. CONST. art. 1, § 24(B)(1); TENN. CONST. art. 1, § 35; TEX. CONST. art. 1, § 30(e); UTAH CONST. art. I, § 28(2); VA. CONST. art. I, § 8-A; WASH. CONST. art. I, § 35; ALA. CODE § 15-23-84 (1995); COLO. REV. STAT. § 24-4.1-303(16) (2000); LA. REV. STAT. ANN. § 46:1844.S. (West 1999 & Supp. 2000); MICH. COMP. LAWS. § 780.774 (1998); MISS. CODE ANN. § 99-36-5(3) (1999); MISS. CODE ANN. § 99-43-49 (1999); N.M. STAT. ANN. § 31-26-14 (Michie Supp. 2001); N.C. GEN. STAT. § 15A-840 (1999); TENN. CODE ANN. § 40-38-108 (1997); TEX. CRIM. PROC. CODE ANN. Art. 56.02(d) (Vernon Supp. 2001); UTAH CODE ANN. § 77-38-12(2) (1999); UTAH CODE ANN. § 77-37-5(5) (1999); WASH. REV. CODE § 7.69.050 (1992); WIS. STAT. § 950.10(2) (2000).

47. No. 49D01-9910-CP-1431 (Marion Super. Ct., Ind. *dismissed*, Jan. 18, 2000).

48. The prosecutors argued that the CTP abrogated their rights and duties as prosecutors in that the program limited their ability to enter into binding plea agreements with offenders. *See* Findings of Fact and Conclusions of Law and Order Denying Inj. Relief and Dismissing Action, *Newman v. Ind. Dep't of Corr.*, No. 49D01-9910-CP-1431, at 8 (Jan. 18, 2000).

49. *Id.* at 5.

50. *See* IND. CODE § 11-10-11.5-2 (2000).

court barred an offender's entry into the program, the court was required to issue findings of fact stating good cause for its decision.⁵¹ Conversely, if the offender was convicted of a class A or B felony, the sentencing court could assign the offender to the CTP, provided the court issued written findings to the Department of Corrections explaining its decision. If the court did not present any written findings, the offender could not enter the CTP.⁵²

In *Newman*, the victims argued that the CTP violated Article I, Section 13(b) of the Indiana Constitution, for the CTP did not establish any victim notice procedures or provide the victims with an opportunity to be heard in regard to the offender's release.⁵³ In light of these alleged violations, the victims requested that the court declare the CTP unconstitutional, and grant preliminary and permanent injunctions preventing the Department of Corrections from allowing felons to enter the CTP.⁵⁴ However, early within this action's proceedings, the trial court dismissed the case, primarily on the ground that the victims lacked standing to bring this constitutional challenge.⁵⁵

In order for the victims to succeed in their contest against the CTP, they had the "burden to show that their legal rights, status or relationships . . . [were] invaded by the Legislature's enactment of the Community Transition Program."⁵⁶ However, the *Newman* court determined that the victims failed to satisfy this threshold issue of standing because the CTP did not abrogate any rights afforded to victims under Indiana law. Basing its analysis partly on definitions provided within Indiana statute, the court noted that the CTP represented "a form of imprisonment . . . [rather than] a post-conviction release and thus [was] not subject to the 'right to be heard' requirement for all post-conviction release decisions" under the Indiana's victims' rights amendment.⁵⁷

Moreover, the trial court noted that even if the victims did have standing to contest the constitutionality of the CTP, their claims would still be dismissed. While the plaintiffs claimed that the CTP failed to provide victims with notice of an offender's release, the court reasoned otherwise, specifying that under the

51. *See id.* § 35-38-1-24.

52. *See id.* § 35-38-1-25.

53. *See* Am. Compl. For Decl. Relief, Prelim. and Permanent Inj. and Specific Performance, *Newman*, No. 49D01-9910-CP-1431, at 19-20 (filed Nov. 10, 1999).

54. *See id.* at 22.

55. *See* Findings of Fact and Conclusions of Law and Order Den. Inj. Relief and Dismissing Action, *Newman v. Ind. Dep't of Corr.*, No. 49D01-9910-CP-1431, at 17 (Jan. 18, 2000).

56. *Id.* at 3.

57. *Id.* at 13. Under Indiana law, "imprison" means to "confine in a penal facility; commit to the department of correction; or assign to a community transition program." IND. CODE § 35-41-1-15 (2000). Conversely, "post-conviction release" means "parole, work release, home detention, or any other permanent, conditional, or temporary discharge from confinement of a person who is confined in the custody of the department of correction; or a sheriff; a county jail; a secure mental health facility; or a secure juvenile facility or shelter care facility." *Id.* § 35-40-4-6. However, under the rubric of the victims' rights statute, a victim's right to be heard extends only to any "proceeding involving a sentence or a postconviction release decision." *Id.* § 35-40-5-5.

rubric of the CTP, program officials were required to inform prosecutors of an offender's potential release into the program. The prosecutors, in turn, had the statutory duty to notify victims of the change in the offender's imprisonment status.⁵⁸ Nothing in the CTP had altered this prosecutorial duty.⁵⁹ Hence, there existed a clear procedure for providing victims with notice regarding an offender's transfer into the program.

Furthermore, the court noted that as a matter of basic equity law jurisprudence, the victims' claims for equitable relief were further barred because they did not fully exercise their rights at law, as evidenced by their admitted failure to request notice as required by statute.⁶⁰ Hence, the victims' action was dismissed not only because their articulated injuries did not fall within the scope of rights afforded to them under Indiana's victims' rights laws, but also because of their own failure to properly exercise their rights as detailed by statute.

While some might posit that *Newman* represented a blow to victims' rights in Indiana,⁶¹ the result from *Newman* need not paint a wholly negative picture. First, in response to *Newman*, the Indiana legislature made changes to the CPT, directly addressing the victims' challenges in regard to the right to notice and the right to be heard. The revamped CTP details that victims must be given notice of an offender's potential release into the program and provides victims with an opportunity to submit a written statement to the sentencing court regarding the offender's potential release.⁶² Moreover, while circumscribed to its particular facts, *Newman* represented the first time Indiana's victims' rights laws were invoked and tested, providing a natural forum to further examine Indiana's commitment and ability to enforce and protect victims' rights.

III. A COMPARISON OF INDIANA VICTIMS' RIGHTS LAWS TO THOSE OF OTHER STATES

In light of the limited precedential power of *Newman*,⁶³ the effectiveness of

58. *See id.* § 35-40-6-4(2).

59. *See Findings of Fact and Conclusions of Law and Order Denying Inj. Relief and Dismissing Action*, *Newman v. Ind. Dep't of Corr.*, 49D01-9910-CP-1431 (Jan. 18, 2000) at 11.

60. *See id.* at 12, 15-16. A victim's right to be informed about an offender's release or escape from custody, is contingent upon the victim requesting such information. *See IND. CODE* § 35-40-5-2; § 35-40-10-1 (2000). Indiana Code section 35-40-10-1 states that "[a] victim shall provide to and maintain with the agency that is responsible for providing notice to the victim a request for notice If the victim fails to keep the victim's . . . [contact information] current, the agency may withdraw the victim's request for notice." *Id.* § 35-40-10-1.

61. *See* Tim Starks, *Inmate-Move Law Survives Legal Test*, EVANSVILLE COURIER & PRESS, Jan. 20, 2000, at B3; Rick Thackeray, *Prosecutors Dealt Blow in War Against Community Transition Program*, IND. LAWYER, Feb. 2, 2000, at 5.

62. *See IND. CODE* § 11-10-11.5-4.5; § 11-10-8-9; § 35-38-1-24; § 35-38-1-25; § 35-50-1-7 (2000).

63. *See Findings of Fact and Conclusions of Law and Order Den. Inj. Relief and Dismissing Action*, *Newman v. Ind. Dep't of Corr.*, No. 49D01-9910-CP-1431, at 17 (Jan. 18, 2000).

Indiana's victims' rights laws might best be gauged through a comparison of similar laws from other states. In so doing, one can generally conclude that Indiana stands on par with most of its sister states in terms of the strengths and weaknesses of its victims' rights laws. Like other states, Indiana strives to reintegrate victims into the criminal justice system in a manner that recognizes their legitimate concerns, while remaining committed to the public prosecution model and the protection of defendant rights.⁶⁴ However, like many states, Indiana falls short of clearly identifying what methods should be employed to ensure that a victim's rights are not violated.

A. Limited Nature of Victims' Rights Laws in Other States

The strength of many states' victims' rights laws are immediately hampered by the absence of any direct method to remedy victims' rights violations, coupled with a lack of mandatory language to enforce those rights.

In many instances, courts faced with victims' rights claims have declined to create judicial remedies for the violations of victims' rights in the absence of controlling statutory or constitutional authority.⁶⁵ For example, in *Bandoni v. State*,⁶⁶ the victims of a drunk driving accident brought a cause of action seeking damages from the town of Coventry and the State of Rhode Island for failing to notify them of the defendant's plea to a lesser offense and subsequently reduced sentence.⁶⁷ The victims alleged that had they known of the defendant's plea, they would have "objected to the plea bargain and requested restitution" from the defendant.⁶⁸ While the court expressed sympathy for the victims and in no way condoned "the officials' failure to notify the victims of their rights,"⁶⁹ the court denied the victims' claim for damages on the ground that there was nothing within the Rhode Island victims' rights amendment or its supporting legislation which allowed victims to bring damage actions against state officials for failure to afford them their rights.⁷⁰ The court further noted that Rhode Island's

64. See generally IND. CODE § 35-40-1-1; § 35-40-2-1 (2000).

65. See, e.g., *Gansz v. People*, 888 P.2d 256 (Colo. 1995); *State v. Adkins*, 702 So.2d 1115 (La. Ct. App. 1997); *State ex rel. Hillbig v. McDonald*, 839 S.W.2d 854 (Tex. App. 1992) (exemplifying cases in which courts were unwilling to recognize a victim's standing to bring a claim based upon a limited construction of each state's victims' rights laws).

66. 715 A.2d 580 (R.I. 1998).

67. See *id.* at 583.

68. *Id.*

69. *Id.* at 582.

70. See *id.* at 584-86. The Rhode Island victim's rights amendment states that [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 provided [sic]. Before sentencing, a victim shall have the right to address the court regarding the impact which the

Victims' Rights Amendment and enabling legislation did not afford any remedies to victims for the violation of their rights, nor was the court willing to create a judicial remedy.⁷¹

Many victims' rights laws are also written in such a manner so that their command is permissive rather than mandatory. For example, Colorado's statute directs that "[a]fter a crime has been charged . . . the district attorney shall consult, *where practicable*, with the victim concerning the reduction of charges . . . or other disposition"⁷² and that the "district attorney's office, *if practicable*, shall inform the victim of any pending motion that may substantially delay the prosecution."⁷³ North Carolina's statute creates an equally permissive tone by stating that

[t]o the extent *reasonably possible and subject to available resources*, the employees of law enforcement agencies, the prosecutorial system, the judicial system, and the correctional system should make a *reasonable effort* to assure that each victim and witness within their jurisdiction [receive rights afforded to them under the statute and amendment].⁷⁴

Therefore, while these statutes contain language charging that the prosecuting attorney "shall" inform a victim of his or her rights, this language is tempered by permissive terms such as "where practicable" or "where reasonably possible," implying that compliance with the statute is favored, but not absolute.

B. Specific Limits Within Indiana's Victims' Rights Laws

With complements to the framers of Indiana's victims' rights amendment and legislation, the force of Indiana's laws are not immediately tempered by permissive language and broad denials of remedial action. However, the law explicitly limits Indiana victims' attempts to seek redress for violation of their rights by three factors. First, victims cannot exercise their rights where doing so would "infringe upon the constitutional rights of the accused."⁷⁵ Second, victims

perpetrator's conduct has had upon the victim.

R.I. CONST. art. I, § 23. Similarly, while the victims did have a right to be "informed by the prosecuting officer of the right to request restitution," R.I. GEN. LAWS § 12-28-3(a)(15) (2000), and the right to address the court in regard to a plea negotiation, *see* R.I. GEN. LAWS § 12-28-4.1 (2000), there is nothing within the language of these statutes to indicate that the state's failure to provide the victims with this right created a cause of action for damages on behalf of the victim.

71. *See Bandoni*, 715 A.2d at 585.

72. COLO. REV. STAT. § 24-4.1-303(4) (2000) (emphasis added).

73. *Id.* § 24-4.1-303(3) (emphasis added).

74. N.C. GEN. STAT. § 15A-825 (1999) (emphasis added). *See also* ALASKA STAT. § 12.61.010(b) (Michie 2000); FLA. STAT. ch. 960.001(2) (1996); MISS. CODE ANN. § 99-43-49 (1999); TEX. CRIM. PROC. ANN. § 56.02(c) (Vernon Supp. 2001); WASH. REV. CODE § 7.69.030 (2000); WIS. STAT. § 950.04(f)-(g) (2000).

75. IND. CONST. art I, § 13(b).

cannot “challenge a charging decision or a conviction, obtain a stay of trial, or compel a new trial”⁷⁶ in light of an alleged victims’ rights violation. Finally, victims cannot bring a “claim for damages against the state of Indiana, a political subdivision, or any public official”⁷⁷ for failing to effectuate a victim’s rights under the statute. Similar limits appear in numerous other state laws.⁷⁸

1. *Victim’s Inability to Intercede in Trial.*—Indiana’s prohibition against victims’ rights actions that would “challenge a charging decision or a conviction, obtain a stay of trial, or compel a new trial”⁷⁹ represents an important constraint to any victims’ rights claim. To govern otherwise would represent a monumental shift of the victims’ rights pendulum that only a few courts have been willing to acknowledge.⁸⁰ Permitting a victim to exercise such power within a criminal proceeding harkens back to actions brought under the private prosecution model, where the victim was a direct party to the proceeding, with rights to appeal or challenge the course of the prosecution.

The Maryland case, *Cianos v. State*,⁸¹ provides a prime example of a court’s reluctance to sanction such a dramatic shift in the structure of criminal law. In *Cianos*, victims were denied their opportunity to speak at a sentencing hearing.⁸² In an effort to enforce their rights, the victims brought an action to have the Maryland Supreme Court vacate the sentence and remand the case back to the

76. IND. CODE § 35-40-2-1(1) (2000).

77. *Id.* § 35-40-2-1(2).

78. See MD. CONST. art. 47(C); NEV. CONST. art. 1, § 8(3); TEX. CONST. art. 1, § 30(e); ARIZ. REV. STAT. § 13-4436A (2000); 725 ILL. COMP. STAT. § 120/9 (2000); S.C. CODE ANN. § 16-3-1565(B) (Law Co-op. Supp. 1999) (providing examples of state constitutional amendments and statutes which limit a victim’s ability to intercede in the criminal proceedings to challenge a conviction or sentence). See also LA. CONST. art. I, § 25, N.C. CONST. art. I, § 37(2), MD. CONST. art. 47(C); MISS. CONST. art. 3, § 26(A)(2); MO. CONST. art. I, § 32.3; OHIO CONST. art. I, § 10(a); OR. CONST. art. I, § 42(2); UTAH CONST. art. I, § 28(2); VA. CONST. art. I, § 8-A; ALASKA STAT. § 12.61.015(c) (2000); LA. REV. STAT. ANN. § 46:1844(U) (West 1999); N.C. GEN. STAT. § 15A-839 (1999); S.C. CODE ANN. § 16-3-1565(C) (Law Co-op. Supp. 1999); TENN. CODE ANN. § 40-38-108 (1997); UTAH CODE ANN. § 77-38-11(3) (1999); WIS. STAT. § 950.10 (2000) (providing examples of state constitutional amendments and statutes which bar a victim from bringing a damage claim against the state or any of its agents for failing to provide victims rights). But cf. ARIZ. REV. STAT. § 13-4437.B (2000); UTAH CODE ANN. § 77-38-11 (1999); WIS. STAT. § 950.11 (2000). See also FLA. CONST. art. I, § 16(b); MISS. CONST. art. 3 § 26A(2); OR. CONST. art. I, § 42(2); VA. CONST. art. I, § 8-A; UTAH CODE ANN. § 77-38-12(4) (1999) (providing examples of state constitutional amendments and statutes which note that victims rights laws cannot undermine rights afforded to criminal defendants).

79. IND. CODE § 35-40-2-1 (2000).

80. See *In re K.P.*, 709 A.2d 315, 321 (N.J. Super. Ct. Ch. Div. 1997); *Sharp v. State*, 908 S.W.2d 752, 755-56 (Mo. Ct. App. 1995).

81. 659 A.2d 291 (Md. 1995).

82. See *id.* at 292. Maryland’s victims’ rights amendment states in part that “a victim of crime shall have the right . . . to be heard at a criminal justice proceeding.” MD. CONST. art 47(B).

trial court for resentencing.⁸³ While the Maryland Supreme Court acknowledged that the victims' right to be heard at sentencing was violated, it nonetheless denied their request for a new sentencing hearing.⁸⁴ First, the court noted that the only individuals who can appeal a final order or conviction are those who were parties to the case (in this instance, the defendant and the state).⁸⁵ Moreover, the court noted that

even if the . . . [victims] had applied for leave to appeal prior to the final judgment in this case, such action would not have stayed the criminal proceedings against . . . [the defendant]. An appeal by a victim is collateral to and may not interrupt a criminal case, and such an appeal cannot result in a reversal of the judgment and a reopening of the case.⁸⁶

Finally, the court examined the legislative history surrounding the passage of Maryland's victims' rights laws and determined that the legislature did not intend to allow victims to seek to invalidate a defendant's sentence.⁸⁷ Hence, as was borne witness in *Cianos*, while the obvious (though not necessarily legally sanctioned) remedy to an acknowledged victim's rights violation might include a stay of the proceedings or a challenge to a conviction or sentence, most state legislatures and courts prohibit such action on the part of the victim.⁸⁸

2. *Limits on a Victim's Standing to Bring a Claim.*—As *Newman* clearly exhibited, victims' tend to have limited standing rights. Indiana's victims' rights statute articulates that a "victim has standing to assert the rights established by this article."⁸⁹ As evidenced in *Newman*, the scope of standing is strictly limited to the rights articulated in the statute and in the victims' rights amendment.⁹⁰

The *Newman* court's approach to victim standing is comparable to decisions

83. See *Cianos*, 659 A.2d at 293.

84. See *id.* at 294.

85. See *id.* at 293.

86. *Id.* at 293-94.

87. See *id.* at 294. The court nonetheless noted that the victims' rights had been violated by the trial court's decision not to allow them to speak the sentencing, and hence determined that the victims were not required to pay the court costs for the action. See *id.* at 295.

88. Accordingly, Indiana's victims' rights statute prohibits a victim from challenging a "charging decision or a conviction, obtain[ing] a stay of trial, or compel[ling] a new trial." IND. CODE § 35-40-2-1(1) (2000). It does not, however, contain any specific language limiting victims' action in sentencing hearings. Therefore, under Indiana law, more room may exist for victims to challenge a sentence.

89. *Id.* § 35-40-2-1.

90. In *Newman*, because the CTP represented an alternative form of imprisonment for offenders rather than a form of post-conviction release, it did not fall within the ambit of Indiana's victims' rights legislation. Hence, the victims lacked standing to challenge the constitutionality of the program. See Findings of Fact and Conclusions of Law and Order Den. Inj. Relief and Dismissing Action, *Newman v. Ind. Dep't of Corr.*, No. 49D01-9910-CP-1431, at 13 (Jan. 18, 2000).

rendered in other states. For example, in *Gansz v. People*,⁹¹ the Colorado Supreme Court was presented with a case in which a prosecuting attorney moved to dismiss an assault charge on the ground that the charge could not be proven beyond a reasonable doubt.⁹² The trial court initially dismissed the case without a hearing, but after the victim complained, the trial judge ordered a hearing where he determined that the victim lacked standing to challenge the dismissal of the case.⁹³ On appeal, the Colorado Supreme Court noted that victims have the right to be present at and informed of all critical stages in the criminal justice process,⁹⁴ and the right to be heard at any “court proceeding which involves a bond reduction or modification, the acceptance of a negotiated plea agreement, or the sentencing of any person accused or convicted of a crime” against the victim.⁹⁵ However, the court emphasized that Colorado law did not extend a victim’s standing to challenge a district attorney’s decision to dismiss an action against a defendant.⁹⁶

*State ex rel. Hilbig v. McDonald*⁹⁷ provides an additional example of how courts limit victim standing based on the expressed intent and scope of victims’ rights laws. In this case, parents of a sexual assault victim brought an action to gain access to the prosecuting attorney’s files to aid in a civil suit the parents were filing against the defendant.⁹⁸ The Texas Court of Appeals rejected the victim’s assertion of standing, determining instead that “a crime victim does not have a constitutional or statutory right to discover evidence regarding the pending criminal case that is contained within the prosecutor’s file.”⁹⁹ Rather, the intent of Texas’ victims’ rights amendment and enabling legislation was to “give victims access to the prosecutor—not to the prosecutor’s file.”¹⁰⁰ Similarly, in *State v. Adkins*,¹⁰¹ the father of a murder victim filed a motion under Louisiana’s victims’ rights amendment requesting that the court recuse one of the prosecuting attorneys on the case.¹⁰² The court determined that the father did not have standing to bring such an action, noting that while Louisiana law gave victims’ families the right

‘to attend any hearing or trial pertaining to the offense which caused [them] . . . to become a victim,’ it . . . does not give them any right to

91. 888 P.2d 256 (Colo. 1995).

92. *See id.* at 257.

93. *See id.*

94. *See id.* at 258; *see also* COLO. REV. STAT. § 24-4.1-302.5(1)(c) (2000).

95. *Gansz*, 888 P.2d at 258 (quoting COLO. REV. STAT. § 24-4.1-302.5(1)(d) (2000)).

96. *See id.* at 258-59.

97. 839 S.W.2d 854 (Tex. App. 1992).

98. *See id.* at 856.

99. *Id.*

100. *Id.* at 859. Texas victims’ rights laws articulate that victims have the right to “confer with a representative of the prosecutor’s office.” TEX. CONST. art. 1 § 30(b)(3).

101. 702 So. 2d 1115 (La. Ct. App. 1997).

102. *See id.* at 1116.

determine who is in charge of the investigation and/or the prosecution or when the person or persons charged are brought to trial.¹⁰³

As these Colorado, Louisiana and Texas cases illustrate, courts tend to exercise great care in examining victims' rights claims and strictly limit a victim's standing to the rights detailed in their respective state constitutions. However, not all courts approach victim standing with complete austerity.

The state of Arizona fluctuates in its treatment of victim standing. For example, in *State v. Lamberton*,¹⁰⁴ a victim filed a petition opposing the trial court's grant of the defendant's motion for post conviction relief.¹⁰⁵ In examining whether the appellate court's decision to dismiss the victim's petition for review was in error, the Arizona Supreme Court determined that the victim did not have standing to bring her action.¹⁰⁶ While the court acknowledged that under Arizona law victims have the right to be heard at criminal proceedings, it stated that "we cannot conclude that victims are 'parties' with the right to file their own petitions for review."¹⁰⁷ Rather, in order for the victim to have standing to challenge the action of the trial court, she would have to assert relief for rights denied to her.¹⁰⁸ For example, if the victim were denied the right to "be informed . . . when the accused or convicted person . . . [was] released from custody or has escaped"¹⁰⁹ or denied the right to "be heard at any proceeding involving a post-arrest release decision, a negotiated plea . . . [or] sentencing"¹¹⁰ hearing, the victim would have standing to bring her claims. However, in this action, while the victim was displeased that the court granted the defendant's motion for post-conviction relief, Arizona law did not give her standing to challenge the trial court's ruling.¹¹¹

In contrast to the decision handed down by the Arizona Supreme Court in *Lamberton*, the Arizona Court of Appeals took a different approach when a victim's restitution rights were at issue.¹¹² In *FDIC v. Colosi*, a theft victim brought a special action seeking relief from a sentencing court's refusal to enter judgment against the defendant who, during his probationary period, failed to pay

103. *Id.* at 1119.

104. 899 P.2d 939 (Ariz. 1995).

105. *See id.* at 940. After granting the defendant's request for post conviction relief, the trial court set a date for resentencing, which both the victim and the state sought to stay through appeals. *See id.* The appellate court rejected the victim's petition for review on the ground that the appellate court did not have jurisdiction over the victim's claim as she was not an "aggrieved party" to the criminal proceeding. *Id.* The Arizona Supreme Court allowed the victim to bring a petition for review as to the issue of standing. *See id.*

106. *See id.*

107. *Id.* at 941.

108. *See id.* at 942.

109. ARIZ. CONST. art. 2, § 2.1(A)(2).

110. ARIZ. CONST. art. 2, § 2.1(A)(4).

111. *See Lamberton*, 899 P.2d at 942.

112. *See FDIC v. Colosi*, 977 P.2d 836 (Ariz. Ct. App. 1998).

court-ordered restitution to the victim.¹¹³ The *FDIC* court noted that because the victim was not a party to criminal-adjudicatory process the victim had no adequate remedy by way of appeal against the sentencing court's initial ruling. Therefore, in order to protect the victim's restitution rights, the court deemed it appropriate to allow the victim to bring a special action challenging the lower court's decision.¹¹⁴ Hence, where a victim's restitution rights were at issue, the Arizona court was willing to let the victim bring an action in a judicial context traditionally reserved to the state and defendant.

The New Jersey courts have given even further breadth to the boundaries of victim standing. In *In re K.P.*,¹¹⁵ the State of New Jersey, on behalf of a juvenile victim of a juvenile offender, sought to exclude the press from the courtroom during the juvenile proceedings.¹¹⁶ The State argued that New Jersey's victims' rights amendment required the "court to consider the victim's position when the court is ruling on an issue that [will] affect a victim as well as the juvenile defendant."¹¹⁷ Concurring with, and expounding upon the State's arguments, the New Jersey court cited to language in New Jersey's victims' rights amendment, which states that "[a] victim of crime shall be treated with fairness, compassion and respect by the criminal justice system,"¹¹⁸ and determined that the amendment was self-executing and provided the victim with standing to protect her constitutional rights.¹¹⁹ The court further reasoned that the victim's right to be treated with fairness, compassion, and respect would be directly affected by the presence of the press in the courtroom, and therefore the victim should be afforded the opportunity to have the proceedings closed.¹²⁰ In so holding, the court acknowledged that New Jersey's victims' rights amendment marked a "fundamental change in the criminal justice system. Instead of adopting a two-party State v. Defendant, [sic] paradigm, this provision requires that the system consider interests of third parties, specifically crime victims."¹²¹

In observing how other state courts have dealt with the issue of victim standing, the result in *Newman* is not necessarily surprising. By and large, courts appear reluctant to grant standing when to do so allows victims to bring actions that fall outside of the articulated rights granted under state victims' rights

113. See *id.* at 837. The Arizona Constitution states that 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." ARIZ. CONST. art. II, § 2.1(A)8.

114. See *FDIC*, 977 P.2d at 838.

115. 709 A.2d 315 (N.J. Super. Ct. Ch. Div. 1997).

116. See *id.* at 316.

117. *Id.* at 321.

118. N.J. CONST. art I, para. 22.

119. *In re K.P.*, 709 A.2d at 324-25.

120. See *id.* at 325.

121. *Id.* at 321.

amendments or statutes. *Lamberton*,¹²² *Gantz*,¹²³ and *McDonald*¹²⁴ all bear tribute to such a limited approach. However, where a victim seeks to compel or limit court action which is directly or impliedly connected to the rights afforded to them by law, or where granting such rights does not undercut the defendant's rights or fully supplant the victim into the prosecutorial role of the state, courts appear more willing to accept a victim's claim of standing.¹²⁵

In *Newman*, the CTP was defined by statute as a form of imprisonment rather than a post-conviction release.¹²⁶ Therefore, it did not fall within the scope of the victims' constitutional rights, consequently precluding any victims' rights challenge to the CTP.¹²⁷ However, it remains to be determined whether victim standing issues will always be addressed in such a guarded manner in Indiana. If presented with the right set of facts, the Indiana courts might follow the lead of the New Jersey court¹²⁸ and decide that because victims "shall have the right to be treated with fairness, dignity and respect throughout the criminal justice process,"¹²⁹ practices that deny crime victims fairness, dignity and respect are unconstitutional and can be challenged. Moreover, if the victim is seeking to protect his restitutionary rights, Indiana courts, like those in Arizona,¹³⁰ might be willing to acknowledge victim standing in such matters.

3. *A Victim's Right to Notice*.—Beyond the threshold question of standing, a victim's right to notice coupled with the right to be heard, raise numerous enforcement challenges. The connection between these two rights is important, for the failure to provide victims with their notice rights can lead to additional rights violations. For example, a victim's ability to exercise his or her rights to be heard at a sentencing hearing¹³¹ is directly contingent upon the victim's knowledge of that right¹³² and the victim's knowledge of the date and time of the sentencing hearing.¹³³ Therefore, it is exceedingly important that victims' notice rights are provided and enforced.

Indiana's victims' rights statute takes great pains to clearly delineate who is responsible for ensuring that a victim's notice rights are satisfied. Within this

122. 899 P.2d 939 (Ariz. 1995).

123. 888 P.2d 256 (Colo. 1995).

124. 839 S.W.2d 854 (Tex. App. 1992).

125. See *supra* notes 111-12 and accompanying text.

126. See *supra* note 57 and accompanying text.

127. *Newman v. Ind. Dep't of Corr.*, No. 49D01-9910-CP-1431 (Marion Super. Ct., Ind. dismissed, Jan. 18, 2000).

128. See *In re K.P.*, 709 A.2d 315 (N.J. Super. Ct. Ch. Div. 1997).

129. IND. CONST. art. I, § 13(b).

130. See *FDIC v. Colost*, 977 P.2d 836 (Ariz. Ct. App. 1998).

131. See, e.g., IND. CODE § 35-40-5-5 (2000) (stating victims have right to be heard at any proceeding involving sentencing or postconviction release decision).

132. See, e.g., *id.* § 35-40-5-9 (stating victims have the right to be informed of constitutional and statutory rights).

133. See, e.g., *id.* § 35-40-6-4 (providing that prosecutor's office or victims' assistance program shall timely notify the victim of all criminal justice hearings and proceedings).

statutory construct, victims must take an active role in protecting their rights by providing and maintaining a current address and phone number with the variety of agencies responsible for providing notice to the victim.¹³⁴ Hence, victims must actively seek to have their rights enforced, rather than passively expecting the rights to be bestowed upon them. However, once a victim has exercised the statutory duty to request notice, the statute shifts the burden of notice duties to prosecutor's offices, victim assistance programs, courts, and custodial bodies.

The prosecutor's office, and any victim assistance program under its authority¹³⁵ has the obligation to ensure that victims are "treated with dignity [and] respect, and . . . [that their] rights . . . are protected."¹³⁶ In particular, the prosecutor's office or victims' assistance program must inform a victim that the victim may be

present at all public stages of the criminal justice process . . . timely notify a victim of all criminal justice hearings and proceedings that are scheduled for a criminal matter in which the victim was involved[,] promptly notify a victim when a criminal court proceeding has been rescheduled or canceled . . . [and] [i]nform the victim that the court may order a defendant convicted of the offense involving the victim to pay restitution to the victim¹³⁷

Additionally, the prosecuting attorney or victims' assistance program must inform the victim of his or her rights under Indiana law,¹³⁸ the specific criminal offense for which the defendant was convicted or acquitted,¹³⁹ or notice that the charges were dismissed against the defendant accused of committing the offense against the victim,¹⁴⁰ and the terms and conditions of release of the person accused of committing a crime against the victim.¹⁴¹ Likewise, if the defendant is convicted, and the victim has so requested, the prosecutor or victims' assistance program must notify the victim of his or her rights during the sentencing phase of trial including the time, place, and date of the sentencing

134. See IND. CODE § 35-40-10-1 (2000). Several other states place a similar level of responsibility upon crime victims. See, e.g., COLO. REV. STAT. § 24-4.1-302.5(1)(q)-(r) (2000); CONN. GEN. STAT. § 51-286e(b) (2000); LA. REV. STAT. ANN. § 46:1844B (West 1999 & Supp. 2001); MD. CODE ANN. CORR. SERV. § 7-801(b) (West 1999); NEB. REV. STAT. § 81-1849 (2000); NEB. REV. STAT. § 81-1850 (2000); N.C. GEN. STAT. § 15A-825(11)-(12) (1999); TENN. CODE ANN. § 40-38-103(a) (1997); TEX. CRIM. PROC. CODE ANN. § 56.08(b) (Vernon Supp. 2001); TEX. CRIM. PROC. CODE ANN. § 56.11(d) (Vernon Supp. 2001); TEX. CRIM. PROC. CODE ANN. § 56.12(b) (Vernon Supp. 2001); VA. CODE ANN. § 19.2-11.01A.3.e (Michie 2000).

135. In Indiana, the prosecutor's office can contract with an outside agency to provide victim assistance services. See IND. CODE § 35-40-6-4 (2000).

136. *Id.* § 35-40-6-2.

137. *Id.* § 35-40-6-4.

138. See *id.* § 35-40-6-4(11).

139. See *id.* § 35-40-6-4(8)(A).

140. See *id.* § 35-40-6-4(8)(B).

141. See *id.* § 35-40-6-4(7).

proceeding.¹⁴² If the defendant seeks appellate review or attacks his conviction, the “prosecuting attorney or the office of the attorney general . . . shall inform the victim . . . of the status of the case and of the decision of the court.”¹⁴³ Finally, where the victim has requested, the prosecutor or

law enforcement agency having custody of a person accused of a crime against the victim shall notify the victim of the scheduling of the bond hearing, the escape or death of a person accused of committing a crime against the victim, release of a person convicted of a crime against the victim to a work release program, or any other type of postarrest release of a person convicted of a crime against the victim.¹⁴⁴

Indiana’s victims’ rights statute also imposes notice duties on law enforcement agencies who exercise custodial duties over defendants and convicted persons.¹⁴⁵ “The law enforcement agency having custody of a person accused of committing a crime against a victim shall notify the victim if the accused person escapes from . . . custody”¹⁴⁶ This notice must be given “before the person is released by the law enforcement agency, if possible; or as soon as practicable after the person escapes or has been released by the law enforcement agency.”¹⁴⁷

Courts have similar notice duties under the statute.¹⁴⁸ “Upon request of a victim, a criminal court shall notify the victim of any probation revocation disposition proceeding or proceeding in which the court is asked to terminate the probation of a person who is convicted of a crime against the victim.”¹⁴⁹ However, where a probation order against a defendant is modified, the court need only notify the victim if “the modification will substantially affect the person’s contact with or safety of the victim; or the modification affects the person’s restitution or confinement status.”¹⁵⁰ Similar notice must be given to the victim if the defendant is released, discharged or has escaped from a mental health treatment agency.¹⁵¹

While other states may not allocate the responsibility for victim notice rights in exactly the same manner as Indiana, they nonetheless require similar levels of

142. *See id.* § 35-40-6-7.

143. *Id.* § 35-40-6-10.

144. *Id.* § 35-40-7-2.

145. *See id.* §§ 35-40-7-1 to -3.

146. *Id.* § 35-40-7-1.

147. *Id.* § 35-40-7-3.

148. *See id.* §§ 35-40-8 to -9.

149. *Id.* § 35-40-8-1.

150. *Id.* § 35-40-8-2.

151. *See id.* § 35-40-9-1. Generally, if a victim has requested notice upon the release of a defendant from a mental health treatment agency, the agency must provide notice to the court, and then court must give the victim notice no later than ten days before the discharge or release of the defendant. *See id.*

notice to victims.¹⁵² However, despite the breadth or particularity of a given state's victim notice requirements, the violation of these rights (whether they be unintentional or otherwise) can directly impede upon a victim's other rights, compounding the difficult question of how to remedy such violations.

Some courts have displayed great flexibility in their attempts to find ways to redeem victim notice rights violations. For example, victims in Alabama have the "right to be notified by the Board of Pardons and Paroles and allowed to be present and heard at a hearing when parole or pardon is considered pursuant to"¹⁵³ Alabama's pardons and parole law. In a recent unreported case, the Alabama Board of Pardons and Paroles failed to notify a rape victim of a parole hearing for one of the two men convicted of raping her, and the man was released.¹⁵⁴ Judge Charles Price ruled that the Alabama Board of Pardons and Paroles violated state law when it did not notify the rape victim of the hearing, and ordered that the parole board rescind the defendant's parole and schedule a new hearing.¹⁵⁵ Similarly, in *State ex rel. Hance v. Arizona Board of Pardons and Paroles*,¹⁵⁶ the Arizona Court of Appeals ordered that the results of a parole hearing for a convicted rapist be set aside, as the victim of the crime was not informed of the hearing, nor of her right to even request notice of the hearing.¹⁵⁷ The court stated that the parole board

cannot use the victim's failure to request notice as a defense against the victim's right to appear at the release proceeding because the state failed to first fulfill its constitutional obligation to inform her of that right. The constitutional mandate is clear: victims must be informed of their rights. Armed with this knowledge, victims may choose to exercise these rights. Conversely, an uninformed victim may not exercise her rights because she is unaware of them, or unaware that the right to notice of a release hearing requires that she first file a request for such notice.¹⁵⁸

The court continued, noting that

152. See, e.g., ALASKA STAT. § 12.61.015(a)(2) (Michie 2000); CAL. PENAL CODE § 679.03 (West 1999); LA. REV. STAT. ANN. § 1844.A (West 1999 & Supp. 2001); S.C. CODE ANN. § 16-3-1530 (Law Co-op. Supp. 1999); TEX. CRIM. PROC. CODE ANN. § 56.08 (Vernon Supp. 2001); TEX. CRIM. PROC. CODE ANN. § 56.11 (Vernon Supp. 2001); TEX. CRIM. PROC. CODE ANN. § 56.12 (Vernon Supp. 2001); UTAH CODE ANN. § 64-13-14.7(2)-(4) (1999); UTAH CODE ANN. § 77-38-3 (1999).

153. ALA. CODE § 15-23-79(b) (2000).

154. See Bob Johnson, *Montgomery Judge Orders Paroles of Convicted Rapists to Be Null and Void*, A.P. NEWSWIREs, Aug. 11, 2000.

155. See *id.*

156. 875 P.2d 824 (Ariz. Ct. App. 1993).

157. See *id.* at 832. Under Arizona law, a victim has the right to be "informed of victims' constitutional rights." ARIZ. CONST. art. 2, § 2.1(A)12. The victim also has the right to "be heard at any proceeding when any post-conviction release from confinement is being considered." *Id.* § 2.1(A)9.

158. *Hance*, 875 P.2d at 830.

[t]he issue is whether the victim received that which the constitution guarantees: reasonable efforts by the state to notify her of her constitutional rights and, in particular, the right to participate in the post-conviction release process We decide today only that the constitution gives victims the right to be notified and that this victim's right to notification was violated.¹⁵⁹

However, not all states have addressed the enforcement of victims' notification rights in such a pro-victim manner. In a controversy raising similar notice issues as to those arising in *Newman*,¹⁶⁰ the State of Kansas brought an action on behalf of victims who were not given notice of a defendant's probation hearing.¹⁶¹ The State argued that the results of the probation hearing should be revoked because the victims were not provided with their right to notice and hence were not present at the probation hearing.¹⁶² The court rejected the State's claims, remarking that Kansas' victims' rights legislation was not mandatory, but rather directive, and lacked any enforcement mechanism.¹⁶³ The court further noted that while the victims' rights statute provided victims with the right to notice for public hearings, including preliminary hearings, trials, sentencings, and sentencing modifications, the right to notice did not extend to probation hearings.¹⁶⁴ The court also noted that while both parties had consistently referred to the "probation" hearing of the defendant, the legally correct term was "parole."¹⁶⁵ This definitional clarification gave further weight to the court's final conclusion.

There is nothing in our constitutional, statutory, or case law which requires a public hearing or holds that 'the accused or the convicted person has the right to appear and be heard' at the granting of a parole to a misdemeanor. The granting of a parole to a misdemeanor defendant who has served a portion of the jail sentence imposed is purely discretionary with the trial court as is the holding of any hearing in connection therewith.¹⁶⁶

Therefore, while the victims had an interest in knowing that the defendants were being considered for parole, the parole board was under no obligation to inform the victims of the hearing.

159. *Id.* at 831.

160. *Newman v. Ind. Dep't of Corr.*, No. 49D01-9910-CP-1431 (Marion Super. Ct., Ind. dismissed, Jan. 18, 2000).

161. *See State v. Holt*, 874 P.2d 1183 (Kan. 1994).

162. *See id.* at 1184. The State argued that victims had the right to be informed of the probation hearing and to be afforded the right to be heard. *See* KAN. CONST. art. 15, § 15; KAN. STAT. ANN. § 74-7333 (1992).

163. *See id.*

164. *See id.* at 1186.

165. *Id.*

166. *Id.* at 1187.

While the construction of the parties in *State v. Holt* differed somewhat from those in *Newman*, the underlying issue remained the same. In *Holt*, the particular question was whether the victims had a right to notice of the probation hearings.¹⁶⁷ In comparison, the *Newman* case queried whether a victim had a right to notice of an offender's transfer into the CTP.¹⁶⁸ In both cases, the courts determined that a victim's right to notice did not include either a probation hearing or alternative imprisonment programs; hence, there was no violation of the victim's rights.

An even more interesting comparison can be drawn from the *Holt* and *Newman* controversies. Both cases, regardless of their legal conclusions, highlighted their respective states' concern and commitment to victims' rights. Despite the *Holt* court's rejection of the plaintiff's claims, it did acknowledge the growing force and intent of the victims' rights movement stating that the

right of the public in general, and victims in particular, to open access to the courts is to be encouraged. We recommend that trial judges carefully consider holding a public hearing and notifying crime victims in cases where the court deems it advisable and when it can be accomplished without undue burden on the judicial system.¹⁶⁹

Moreover, in 1997, Kansas expanded the notification rights of victims so that probation hearings were included within the definition of a public hearing.¹⁷⁰ Similarly, one of the important effects of the *Newman* case was that the Indiana General Assembly amended the CTP to require victims be given direct notice of an offender's eligibility for the program, and the ability to submit a written statement to the sentencing court regarding the offender's eligibility.¹⁷¹

In California, a victim's right to notice has received varying treatment. For example, the result of *People v. Superior Court*¹⁷² exemplifies how a victim's attempt to enforce her notice rights were thwarted by the permissive nature of the state's victims' rights laws, coupled by her inability to intercede in the criminal trial. In this case, a battery victim was not given notice of the sentencing hearing for the defendant, and therefore sought to vacate the court's judgment and have the defendant's probation order set aside.¹⁷³ In rejecting the victim's prayer for relief, the California Court of Appeals noted that it did not have the authority to

167. *See id.* at 1184.

168. *See Newman v. Ind. Dep't of Corr.*, No. 49D01-9910-CP-1431, at 12-13 (Marion Super. Ct., Ind. *dismissed*, Jan. 18, 2000).

169. *Holt*, 874 P.2d at 1187-88.

170. *See* KAN. STAT. ANN. § 74-7335(b) (1992). Chapter 74, article 73 of the Kansas Code currently reads "the victim of a crime . . . shall be notified of the right to be present at any proceeding or hearing where probation or parole is considered or granted by a judge whether or not a public hearing is conducted or required." *Id.*

171. *See* IND. CODE §§ 11-10-11.5-4.5, 11-10-8-9, 35-38-1-24, 35-38-1-25, 35-50-1-7 (2000); *see also supra* note 62 and accompanying text.

172. 154 Cal. App. 3d 319 (1984).

173. *See id.* at 320.

grant the victim any relief, as the victims' rights amendment and supporting statutes were directory as opposed to mandatory.¹⁷⁴ Moreover, the court stated that "[t]he failure of the probation officer to comply with that officer's duty to notify the crime victim of the probation and sentencing hearing, and the resultant absence of the victim at such hearing, does not deprive the trial court of its jurisdiction to proceed."¹⁷⁵ However, the California judiciary adopted a different stance in *Melissa J. v. Superior Court*.¹⁷⁶ In *Melissa J.*, a defendant was initially ordered to pay restitution to a sexual assault victim for counseling services.¹⁷⁷ The trial court later terminated the restitution requirement of the defendant's sentence but did not inform the victim.¹⁷⁸ Distinguishing its holding from *People v. Superior Court*, the court reasoned that there was a difference between an initial sentencing hearing and a hearing concerning restitution rights.¹⁷⁹ "Proper determination of restitution rights cannot take place without notice and an opportunity for the victim to be heard. Thus, as to restitution, the notice and right to appear requirements are mandatory. If the requirements are not satisfied, the victim may challenge a ruling regarding restitution."¹⁸⁰ In a comparable manner to how the Arizona courts have addressed victim standing,¹⁸¹ these California cases highlight a trend in which the courts are more comfortable enforcing victim notice rights where the underlying concern is restitution, rather than where victim notice impacts other victim concerns.

4. *Victim's Right to Be Heard.*—Closely related to a victim's right to notice, is the right to be heard.¹⁸² Under Indiana law, victims have the right to be heard in any proceeding involving sentencing or post-conviction release decisions.¹⁸³

174. *See id.* at 321-22.

175. *Id.* at 322.

176. 190 Cal. App. 3d 476 (1987).

177. *See id.* at 476-77.

178. *See id.* at 477-78.

179. *See id.*

180. *Id.* at 478.

181. *See supra* notes 111-13 and accompanying text.

182. A victim's right to be heard at capital sentencing hearings was first accepted by the United States Supreme Court in *Payne v. Tennessee*, 501 U.S. 808 (1991), in which the Court held that the Eighth Amendment of the United States Constitution was not violated by the use of a victim-impact statement during the sentencing stage of a federal trial. The holding in *Payne* was later extended to state capital trials in *State v. Gentry*, 888 P.2d 1105 (Wash. 1995).

183. IND. CODE § 35-40-5-5 (2000). Similar statutory provisions exist in other states. *See, e.g.*, ALA. CODE § 15-23-74 (1995); ALASKA STAT. § 12.61.010(8) (Michie 2000); ARIZ. REV. STAT. § 13-4424 (2000); ARIZ. REV. STAT. § 13-4426 (2000); CAL. PENAL CODE § 679.02(a)(3) (West 1999); COLO. REV. STAT. § 24-4.1-302.5(d) (2000); FLA. STAT. ch. 960.001(1)(a)5 (2000); IDAHO CODE § 19-5306(1)(e) (Michie 1997); 725 ILL. COMP. STAT. 120/4(a)(4) (2001); LA. REV. STAT. ANN. § 1844.K (West 1999 & Supp. 2001); MASS. GEN. LAWS ch. 258B, § 3(p) (2000); MISS. CODE ANN. § 99-36-5(1)(e) (1999); MO. REV. STAT. § 595.209.1(4) (2001); N.J. STAT. ANN. § 52:4B-36n (West Supp. 2000); N.M. STAT. ANN. § 31-26-4.G (Michie Supp. 2000); OKLA. STAT. tit. 19, § 215.33.11 (2000); TEX. CRIM. PROC. CODE ANN. § 56.02(a)(5) (Vernon Supp. 2001);

However, except for the limited examination of this right provided in *Newman*,¹⁸⁴ this right has not been subjected to extensive judicial scrutiny, nor a full consideration as to the best method of enforcement.

When victims in other states have sought to enforce their right to be heard, the results have varied. For example, in *People v. Pfeiffer*,¹⁸⁵ victims were initially denied the opportunity to be present and address the court during the sentencing hearing for a defendant convicted of sexual misconduct.¹⁸⁶ In an effort to ensure that the victims were given an opportunity to be heard, the trial court conducted a second sentencing hearing. At this hearing, the victims addressed the court, and the defendant subsequently received a longer sentence.¹⁸⁷ On the defendant's appeal, the appellate court reinstated the original sentence, reasoning that while the victims had the right to be heard at sentencing, the trial court's initial failure to provide those rights did not permit the victims to seek to set aside the sentence.¹⁸⁸ The court noted that "the Crime Victims's Rights Act does not purport to confer general remedial rights on victims or prosecutors, and has therefore not provided the necessary legal exception to the rule that a court may not modify a valid sentence."¹⁸⁹ Hence, despite a clear violation of the victims' rights, the court flatly denied them any opportunity to redress this wrong.

Conversely, in *Sharpe v. State*,¹⁹⁰ a defendant's challenge to the appropriateness of a victim's statement at sentencing was struck down by the Missouri court.¹⁹¹ In *Sharpe*, a defendant pled guilty to involuntary manslaughter in a drunk driving accident in exchange for the prosecution's agreement, in part, to remain silent on the issue of punishment. At sentencing the prosecution remained silent, but the victim addressed the court, and requested that the defendant be "prosecuted to the fullest extent that the law will allow."¹⁹² The defendant argued that the victim's statement violated the plea agreement. The court disagreed, stating that when the victim requested that the defendant be

UTAH CODE ANN. § 77-27-9.5(4)(b) (1999); UTAH CODE ANN. § 77-38-4(1) (1999); VA. CODE ANN. § 19-2-11.01.A.4 (Michie 2000); WASH. REV. CODE § 7.69.030(13) (2001); WIS. STAT. § 950.04(m) (2000).

184. See *supra* Part II.B.

185. 523 N.W.2d 640 (Mich. Ct. App. 1994).

186. See *id.* at 641.

187. See *id.* at 642.

188. See *id.* at 642-43. The court determined that the language of chapter 780 of the Michigan Code which stated that "[t]he failure to provide a right, privilege, or notice to a victim under this article shall not be grounds for the defendant to seek to have the conviction or sentence set aside" was not "intended to address a victim's right to seek resentencing, or to create such a right where no such right previously existed." *Id.* at 643 (quoting MICH. COMP. LAWS § 780.774 (1998)).

189. *Id.*

190. 908 S.W.2d 752 (Mo. Ct. App. 1995).

191. See *id.* at 754.

192. *Id.* See also MO. CONST. art. I, § 32.1(2); MO. REV. STAT. § 595.209.1(4) (2001).

punished to the “fullest extent that the law will allow,”¹⁹³ she was not speaking as a party for the state, but rather on her own behalf.¹⁹⁴ In so holding, the *Sharpe* court implicitly acknowledged that the interests of a third party, the victim, had to be honored in the proceeding, representing at least one court’s contribution towards shifting the victims’ rights pendulum to a new more victim-friendly place.

The effectiveness and enforceability of Indiana’s victims’ rights laws have not yet been tested to the extent of similar laws in other states. However, the particularized result of *Newman*, coupled with an examination of victims’ attempts to enforce their rights in other states, indicates that while the extent of victims’ rights in Indiana is comparable to those in other states, an Indiana victim’s ability to seek a judicial remedy for the violation of those rights may be limited. The foregoing discussion, while by no means an exhaustive comparison of Indiana’s victims’ rights laws with those in other states, nonetheless highlights how the judicial enforcement of victims’ rights tends to be varied and circumstantial, with victims finding more success when their restitution interests are at stake than when other rights are being championed.

IV. ENFORCEMENT MECHANISMS FOR VICTIMS’ RIGHTS

In light of the projection that a victim will have only a varying ability to judicially enforce his or her constitutional and statutory rights, the Indiana legislature should take additional steps to ensure that a variety of enforcement mechanisms exist to protect victims’ rights. Several states have taken such steps by establishing a number of different methods for victims to enforce their rights.

A few states do allow victims to seek direct redress from a state actor for the violation of their rights. In Wisconsin, a “public official, employee or agency that intentionally fails to provide a right specified under [the bill of rights for victims and witnesses] to a victim of a crime may be subject to a forfeiture of not more than \$1,000.”¹⁹⁵ Arizona’s victims’ rights statute also includes a provision which reads 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 under the victims’ bill of rights, article II, § 2.1, Constitution of Arizona, any implementing legislation or court rules.”¹⁹⁶ Finally, in Illinois, while a victim cannot bring a civil action against a state employee who

193. *Sharpe*, 908 S.W.2d at 754.

194. *See id.* at 755-56.

195. WIS. STAT. § 950.11 (2000).

196. ARIZ. REV. STAT. § 13-4437.B (2000). Utah law contains a similar provision, reading [i]f a person acting under color of state law willfully or wantonly fails to perform duties so that the rights . . . [of crime victims] are not provided, an action for injunctive relief, including prospective injunctive relief, may be brought against the individual and the governmental entity that employs the individual.

UTAH CODE ANN. § 77-38-11(1) (1999).

fails to comply with the state's victims' rights laws,¹⁹⁷ the Illinois courts have nonetheless acknowledged that state actors have a measure of responsibility to enforce crime victims' rights.

In *Myers v. Daley*,¹⁹⁸ an Illinois victim attempted on several different occasions to obtain information from the state attorney as to whether the state was going to prosecute his case.¹⁹⁹ The victim finally filed an action to enforce his rights under the Illinois Bill of Rights for Victims and Witnesses of Violent Crime Act.²⁰⁰ In response to the victim's suit, the state attorney informed the victim of the status of the case, and asked that the victim voluntarily drop his complaint. The victim agreed, but only if the State would agree to pay his court costs of ninety-two dollars and thirty cents.²⁰¹ The state attorney refused to pay the costs. The victim, in response, filed a second action requesting an award of the court costs.²⁰² In reviewing this controversy, the Illinois Court of Appeals ordered the State to pay the victim's costs, noting that to direct otherwise would run counter to the purpose of the Illinois victims' rights act which required that "[u]pon specific request of the victim . . . [the victim should be] informed by law enforcement authorities investigating the case of the status of the investigation."²⁰³ It appeared to the court that "the purpose of the Act would be frustrated if a victim were forced to file suit to learn the status of his case, and were also burdened with the costs of that suit."²⁰⁴

In reflecting upon these scattered examples, it appears that while the victims were provided some room to enforce their rights, the scope of this enforcement power was quite limited. A thousand dollar fine,²⁰⁵ court costs of ninety three dollars and thirty two cents,²⁰⁶ or liability based only upon "intentional, knowing or grossly negligent"²⁰⁷ violations of a victims' rights hardly represent formidable sanctions to victims' rights violations.

A. Oversight Bodies

In an effort to consistently provide for and oversee the provision of victims' rights laws, several states have established oversight committees or ombudsmen

197. See 725 ILL. COMP. STAT. § 120/9 (2000).

198. 521 N.E.2d 98 (Ill. App. Ct. 1987).

199. See *id.* at 99.

200. See *id.* The Illinois Bill of Rights for Victims and Witnesses of Violent Crime Act was originally codified in chapter 38, paragraph 1404(1) of the Illinois Revised Statutes (current version at 725 ILL. COMP. STAT. § 120/4 (2000)).

201. See *Myers*, 521 N.E.2d at 99.

202. *Id.* at 100.

203. ILL. REV. STAT. 1985, Ch. 38, para. 1404(1) (current version at 725 ILL. COMP. STAT. ANN. § 120/4 (West 1999 & Supp. 2000)).

204. *Myers*, 521 N.E.2d at 100.

205. See WIS. STAT. § 950.11 (2000).

206. See *Myers*, 521 N.E.2d at 100.

207. ARIZ. REV. STAT. § 13-4437.B (2000).

to review the implementation and enforcement of victims' rights. Colorado has established an oversight committee, through which "[a]ny affected person [except the defendant] may enforce compliance with . . . [the Colorado crime victim compensation and victim and witness rights statute] by notifying the victims compensation and assistance coordinating committee . . . of any noncompliance with this article."²⁰⁸

The Colorado Governor's Victims' Compensation and Assistance Coordinating Committee (Coordinating Committee) is made up of seventeen members, including representatives from law enforcement and district attorney's offices, legislators, victims of crime, and other members of the community.²⁰⁹ The primary goal of the Coordinating Committee

is to provide an unbiased assessment of whether a victim has been afforded his rights under state law [and] 'act as an impartial fact finding and disseminating entity. The coordinating committee is committed to follow[ing] all complaints to resolution and to engage in a process that is accurate, thorough, and responsive to crime victims and to the citizens of Colorado.'²¹⁰

Under the auspices of the Coordinating Committee, a standards subcommittee exists which recommends to the Coordinating Committee the standards criminal justice agencies should be required to follow in providing victims rights.²¹¹

The Coordinating Committee is charged to "review any such report of noncompliance and if the committee determines that such report of noncompliance has a basis in fact, and cannot be resolved, the committee shall refer such report of noncompliance to the governor, who shall request that the attorney general file suit to enforce compliance with" Colorado's victims rights laws.²¹² Additionally, the Coordinating Committee has the "power to investigate . . . [victims' rights laws] violations, and [is] able to recommend action with which the agency must comply to rectify victims' complaints. The . . . committee also may monitor the implementation of those suggestions."²¹³ If, in the course of investigating a victim's complaint, the Coordinating Committee determines that a victims' rights violation has occurred, the committee "sets forth requirements of the agency in violation."²¹⁴ These requirements are "designed to improve . . . [the] current problem and alleviate similar concerns within the

208. COLO. REV. STAT. § 24-4.1-303(17) (2000).

209. See Office of the Governor-Press Office, *Owens Appoints Nine New Members to Victim's Compensation & Assistance Coordinating Committee* (Jan. 19, 2000), available at http://www.state.co.us/gov_dir/govnr_dir/1-19-00a.htm; Office for Victims' Programs, *The Process for Insuring Your Rights*, available at <http://www.cdsweb.state.co.us/ovp/vraVI.htm>.

210. NATIONAL CRIMINAL JUSTICE ASSOCIATION, VICTIMS' RIGHTS COMPLIANCE EFFORTS: EXPERIENCES IN THREE STATES 11 (citation omitted).

211. See *id.* at 7.

212. COLO. REV. STAT. § 24-4.1-303(17) (2000).

213. NATIONAL CRIMINAL JUSTICE ASSOCIATION, *supra* note 210, at 5.

214. Office for Victims' Programs, *supra* note 209.

system on behalf of future victims.”²¹⁵

For example, the Coordinating Committee was once presented with a case in which a victim did not believe she was receiving timely information from county officials about the status of assault case against her estranged husband.²¹⁶ After examining the victim's complaint, and conferring with the District Attorney's office, the Coordinating Committee determined that the victim's rights had been violated, and established four requirements with which the District Attorney's office had to comply before the victim's complaint could be dismissed.²¹⁷ Pursuant to the directives from the Coordinating Committee, the District Attorney was required to submit

the office's policies and procedures for ensuring that victims' rights are provided; a description of the procedures by which employees ensure that reasonable efforts are made to return victims' phone calls; a description of the policies in place to insure consultation with victims on charges; and the measures undertaken to assure that the victim's rights were being adhered to in the pending case.²¹⁸

After the District Attorney provided the Coordinating Committee with this information, the committee closed the case.²¹⁹

In comparison, Minnesota provides for an ombudsmen to oversee and enforce victims rights.²²⁰ As charged by statute, the Minnesota crime victims' ombudsman investigates “complaints concerning possible violation of the rights of crime victims . . . , the delivery of victim services by victim assistance programs, the administration of the crime victims reparations act, and other complaints of mistreatment by elements of the criminal justice system or victim assistance programs.”²²¹ Moreover, the ombudsman is commanded to “act as a

215. *Id.*

216. *See* NATIONAL CRIMINAL JUSTICE ASSOCIATION, *supra* note 210, at 13.

217. *See id.* at 14.

218. *Id.*

219. *See id.*

220. *See* MINN. STAT. § 611A.74 (2000). An ombudsman is an individual “acknowledged officially by the government to whom citizens may report mistreatment or grievances resulting from government action or inaction [They] have the power to investigate the allegations of wrongdoing and suggest systematic change to improve the implementation of government programs and delivery of services to citizens.” NATIONAL CRIMINAL JUSTICE ASSOCIATION, *supra* note 210, at 23. Minnesota also has a Crime Victim and Witness Advisory Council, which is charged, in part, to review . . . the treatment of victims by the criminal justice system, . . . advocate necessary changes and monitor victim-related legislation, . . . develop guidelines for the implementation of victim and witness assistance programs and aid in the creation and development of [those] programs, coordinate the development and implementation of policies and guidelines for the treatment of victims and witnesses, and the delivery of services to them

MINN. STAT. § 611A.71.5 (2000).

221. *Id.* § 611A.74.2.

liaison, when the ombudsman deems necessary, between agencies, either in the criminal justice system or in victim assistance programs, and victims and witnesses.”²²² Finally, the ombudsman “shall establish a procedure for referral to the crime victim crisis centers, the crime victims reparations board, and other victim assistance programs when services are requested by crime victims or deemed necessary by the ombudsman.”²²³ In carrying out these duties, the Minnesota crime victims ombudsman has the power to:

investigate, with or without a complaint, any action of an element of the criminal justice system or a victim assistance program . . . prescribe the methods by which complaints are . . . made, received, and acted upon; . . . determine the scope and manner of investigations to be made . . . [and] determine the form, frequency, and distribution of ombudsman conclusions, recommendations, and proposals.²²⁴

If the ombudsman determines that a victim’s complaint is pertinent and requires remedial action, the “ombudsman may recommend action to the appropriate authority.”²²⁵ That party, in turn, shall “within a reasonable time period, but not more than 30 days, inform the ombudsman about the action taken or the reasons for not complying with the recommendation.”²²⁶ Finally,

the ombudsman may publish conclusions and suggestions by transmitting them to the governor, the legislature or any of its committees, the press, and others who may be concerned. When publishing an opinion adverse to an administrative agency, the ombudsman shall include any statement the administrative agency may have made to the ombudsman by way of explaining its past difficulties or its present rejection of the ombudsman’s proposals.²²⁷

In reflecting upon the work of its office, the Minnesota ombudsman perceives the office as a “problem-solving entity”²²⁸ with the role of

advocating broadly for fairness—[but] not necessarily as an advocate either for the victim or for the criminal justice system. Rather, . . . [the Minnesota ombudsman’s mission is] to promote the highest attainable standards of competence, efficiency, and justice for crime victims and witnesses in the criminal justice system. The office exists to discourage mistreatment of crime victims and ensure compliance with statutory protection for crime victims and witnesses.²²⁹

222. *Id.*

223. *Id.*

224. *Id.* § 611A.74.3.

225. *Id.* § 611A.74.5(a).

226. *Id.* § 611A.74.5(b).

227. *Id.* § 611A.74.5(c).

228. NATIONAL CRIMINAL JUSTICE ASSOCIATION, *supra* note 210, at 27.

229. *Id.*

However, the power of the Minnesota ombudsman is limited in that it cannot reverse judicial decisions, nor does it have direct control over judicial or executive decision making.²³⁰ Hence, if authorities do not accept the recommendations of the ombudsman, the ombudsman does not have any power to enforce its recommendations or discipline any state actors. Rather, the ombudsman's principal means of remedial action is by making known to the public, via the legislature and the press, an agency's failure to comply with the state's victims' rights laws.²³¹ Nonetheless, some of the remedies that the ombudsman has been able to effectuate have included

acting as a liaison between citizens and agencies to facilitate communication and understanding between victims and criminal justice practitioners; requesting that an agency issue an apology; reviewing agency or department documentation concerning a specific case to determine whether the agency has treated the citizen appropriately; developing model policies and procedures to help agencies to correct systemic procedures that negatively impact victims; and recommending legislative changes to laws affecting victims of crime.²³²

In conclusion, the Colorado and Minnesota victims' rights enforcement bodies provide examples of entities which, although unable to exercise judicial power to remedy victims' rights violations, are nonetheless able to employ other effective methods to protect victims' rights.

B. Dual Enforcement Mechanisms: Oversight Bodies and Victim Mandate Actions

Building upon the enforcement body model as employed in Colorado and Minnesota,²³³ other states have fashioned dual enforcement mechanisms by coupling the powers of an oversight body with a victim's ability to bring some form of distinct legal action to enforce his or her rights.²³⁴

In Arizona, a "victim has standing to seek an order or to bring a special action mandating that the victim be afforded any right or to challenge an order denying any right guaranteed to victims under the victims' bill of rights, . . . any implementing legislation or court rules."²³⁵ Crime victims also have the "right to recover damages from a governmental entity responsible for the intentional,

230. *See id.* at 28 (citations omitted).

231. *See id.*

232. *Id.* at 28-29 (citations omitted).

233. *See supra* Part IV.A.

234. *See* S.C. CONST. art. I, § 24(B); UTAH CONST. art. I, § 28; S.C. CODE ANN. § 16-3-1620 (Law. Co-op. Supp. 1999); UTAH CODE ANN. § 77-38-11 (West 1999). *See also* NEV. CONST. art. I, § 8; LA. REV. STAT. ANN. § 46:1844.U (West 1999 & Supp. 2000); N.C. GEN. STAT. § 15A-840 (1999) (providing additional examples of state laws which allow victims to bring a writ of mandamus to enforce their rights).

235. ARIZ. REV. STAT. § 13-4437(A) (2000).

knowing or grossly negligent violation of the victim's rights" ²³⁶ under the amendment, legislature or court rules and in some instances, can seek to set aside post-conviction release orders.²³⁷ This latter right, while limited, nonetheless demonstrates a significant shift in the structure of Arizona's criminal justice system, in that it explicitly allows a victim to interject his or her rights or concerns into a criminal action. Consequently, the interests of a third party, the victim, must be considered in conjunction with the interests of the state and the defendant.

In addition to the enforcement rights afforded to Arizona victims by statute, the Arizona Attorney General's Office of Victim Services has established an audit procedure by which it monitors those agencies that implement and provide victims rights.²³⁸ The audit process includes a site visit of the given victim service agency, interviews with staff regarding their knowledge of victim's rights, and surveys of victims rating their satisfaction of services provided by the agency.²³⁹ After the conclusion of the site visit, the Attorney General's Office of Victim Services issues a final report, detailing the agency's views of its own performance, a description of agency procedures for carrying out statutory mandates, conclusions regarding compliance with victims rights statutes and funding program guidelines, and possible suggestions to remedy any problems.²⁴⁰

Teena Olszewski, director of the program, views the audit as a system wide and prospective method of enforcing victim's rights.²⁴¹ Olszewski notes that

[i]t may be a non-traditional mechanism, but it does enforce victims' rights. Our approach to enforcement is pro-active: by auditing complex operations and activities of government agencies, we ensure compliance with duties imposed under our laws. We uncover systemic problems that

236. *Id.* § 13-4437(B). However, the statute does limit the scope of a victims action by stating that "[n]othing in this section alters or abrogates any provision for immunity provided for under common law or statute." *Id.*

237. *See id.* § 13-4436(B). Under this statute, provided that a prisoner has not been discharged, the "the failure to use reasonable efforts to provide notice and a right to be present or be heard . . . is a ground for the victim to seek to set aside the post-conviction release until the victim is afforded the opportunity to be present or be heard." *Id.* If the victim seeks to have the post-conviction release set aside "the court, board of executive clemency or state department of corrections shall afford the victim a reexamination proceeding after the parties are given notice." *Id.* § 13-4436(C). The reexamination proceeding "shall commence not more than thirty days after the appropriate parties have been given notice that the victim is exercising his right to a reexamination proceeding . . . or to another proceeding based on the failure to perform a duty or provide a right." *Id.* § 13-4436(D).

238. *See Auditing for Compliance in Arizona*, VICTIM POLICY PIPELINE, Fall 2000, at 11. The program was established in 1998, with the hope that auditing victim services agencies would help ensure that rights afforded to victims by law would be carried out in practice. *See id.*

239. *See id.* at 12.

240. *See id.*

241. *See id.* at 13.

can lead to large-scale violations of rights. When we help solve those problems, we prevent further violations. Our program is essentially about accountability.²⁴²

Moreover, victim service agencies have responded positively to the audit process. As Olszeweski has commented,

This is probably because our goals are similar to the goals of the agencies we audit. No one wants to deny victims of crime their rights, and no one sets out to serve victims poorly. Also, agencies appreciate getting feedback from outside experts, whether we are identifying areas for improvement or acknowledging programs that are doing well.²⁴³

The benefits of the audit process are obvious, in that it has identified and corrected instances of agency oversight in providing victims their rights. For example, many victims were not receiving information about court date changes in a timely manner from prosecutors.²⁴⁴ Findings from the audit determined that the prosecutors themselves were not receiving the court date change information in a timely manner, which prevented them from relaying this information to victims.²⁴⁵ In remedying this problem, the prosecutor's offices, courts, and Attorney General's Office of Victim Services met to establish procedures to "improve notice to prosecutors so [the prosecutors] in turn could better notify victims."²⁴⁶ Similarly, the audit process revealed that victims of serious misdemeanors were not receiving post-conviction notification.²⁴⁷ "Prosecutors had interpreted that right to apply only to felony victims. The law in fact applies to victims of both felonies and misdemeanors. Once this was clarified, . . . prosecutors developed a form for victims to request post-conviction notification."²⁴⁸

Utah law provides a similar system of dual enforcement for victim's rights. First, victims may bring a variety of special actions to enforce their rights. Pursuant to section 77-38-11 of the Utah Code, "[i]f a person acting under color of state law willfully or wantonly fails to perform duties so that the rights [afforded to victims] are not provided, an action for injunctive relief, including prospective injunctive relief, may be brought against the individual and the government entity that employs the individual."²⁴⁹ Moreover,

[t]he victim of a crime or representative of a victim of a crime, including any Victims' Rights Committee . . . may: . . . bring an action for declaratory relief or for a writ of mandamus defining or enforcing the

242. *Id.*

243. *Id.*

244. *Id.*

245. *See id.*

246. *Id.*

247. *See id.*

248. *Id.*

249. UTAH CODE ANN. § 77-38-11(1) (2000).

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.²⁵⁰

Finally, the statute also permits a victim or the victim's representative to appeal an adverse ruling of an action brought under the statute.²⁵¹

Victims may also defer to the Victims' Rights Committee for enforcement of their rights.²⁵² As dictated by statute, the Victims' Rights Committee is required to meet "at least semiannually to review progress and problems related to" Utah's victims' rights amendment and laws.²⁵³ Victims can submit issues or matters of concern to the committee, which can in turn hold open meetings and publish its findings on any issue raised by a victim.²⁵⁴ Finally, the committee is required to "forward minutes of all meetings to the Commission on Criminal and Juvenile Justice and the Office of Crime Victims' Reparations for review and other appropriate action."²⁵⁵

South Carolina provides a comparable model for enforcing victims' rights. South Carolina law prohibits a victim from bringing a "civil cause of action against any public employee, public agency, the State or any agency responsible for the enforcement of rights and provision" of victim rights²⁵⁶ and similarly limits a victim's ability to invalidate a sentence as a result of the State's failure to comply with South Carolina's victims' rights laws.²⁵⁷ However, victims are entitled to bring a writ of mandamus to "require compliance by any public employee, public agency, the State, or any agency responsible for the enforcement of the rights and provisions of [South Carolina's victims rights laws]."²⁵⁸ Moreover, "willful failure to comply with a writ of mandamus is punishable as contempt."²⁵⁹

South Carolina has also created a Crime Victims' Ombudsman of the Office of the Governor.²⁶⁰ The South Carolina ombudsman extends multiple services to members of the victim's rights community. The ombudsman provides a forum for victims to raise compliance complaints while simultaneously serving as a clearinghouse that refers victims to proper sections of the criminal justice system.²⁶¹ Additionally, the office acts as a liaison between different elements

250. *Id.* § 77-38-11(2)(a).

251. *See id.* § 77-38-11(2)(b).

252. *See id.* § 77-37-5.

253. *Id.* § 77-37-5(2).

254. *See id.*

255. *Id.*

256. S.C. CONST. art. I, § 24(B); *see also* S.C. CODE ANN. § 16-3-1565(A) (Law Co-op. Supp. 1999).

257. *See* S.C. CODE ANN. § 16-3-1565(B) (Law. Co-op. Supp. 1999).

258. S.C. CONST., art I, § 24(B).

259. *Id.*

260. *See* S.C. CODE ANN. § 16-3-1620 (Law. Co-op Supp. 1999).

261. *See id.* §§ 16-3-1620(B)(1) and (3).

of the criminal justice system and victims.²⁶²

When acting as a forum for victim complaints, the ombudsman is required to forward copies of the a victim's complaint to the "person, program, and agency against whom . . . [the victim] makes allegations, and conduct an inquiry into the allegations stated in the complaint."²⁶³ In responding to the complaint, the ombudsman is authorized to

request and receive information and documents from the complainant, elements of the criminal and juvenile justice systems, and victim assistance programs that are pertinent to the inquiry. Following each inquiry, the ombudsman shall issue a report verbally or in writing to the complainant and the persons or agencies that are the object of the complaint and recommendations that in the ombudsman's opinion will assist all parties. The persons or agencies that are the subject of the complaint shall respond, within a reasonable time, to the ombudsman regarding actions taken, if any, as a result of the ombudsman's report and recommendations.²⁶⁴

However, in similar fashion to the limits placed on a victim's right to bring a writ of mandamus,²⁶⁵ "[a] victim's exercise of rights . . . [through the ombudsman] is not grounds for dismissing a criminal proceeding or setting aside a conviction or sentence."²⁶⁶

One cannot escape the reality that where the writ of mandamus is sanctioned by statute as an adversarial method to enforce victims' rights, its power is restricted by other limits on a victim's ability to reestablish herself in the criminal process. However, despite these acknowledged challenges, the formal statutory grant of action to a victim, coupled with the efforts of an oversight committee or victims' rights ombudsman, creates an environment in which a victim is far more likely to be successful in bringing a victims' rights claim.

V. INCREASING THE POWER OF INDIANA'S VICTIMS' RIGHTS LAWS

The State of Indiana should adopt a dual model of victims' rights enforcement, combining the forces of a victims' rights ombudsman with a writ of mandamus to insure that Indiana victims have a variety of mechanisms to enforce their rights.

A. *Creation of an Ombudsman*

The role of an ombudsman is not a foreign concept to Indiana lawmakers. Currently, the state has at least three ombudsmen charged with responding to and

262. *See id.* § 16-3-1620(B)(2).

263. *Id.* § 16-3-1630. The ombudsman must first receive a "written complaint that contains specific allegations and is signed by a victim" of crime in the state. *Id.*

264. *Id.*

265. *See supra*, notes 248-49, and accompanying text.

266. S.C. CODE ANN. § 16-3-1660 (Law. Co-op Supp. 1999).

investigating complaints regarding health and legal services to the elderly, disabled, and mentally ill.²⁶⁷

First and foremost, Indiana's ombudsmen help centralize the process by which the state responds, investigates, and resolves complaints registered by citizens who receive specialized state services. For example, the statewide waiver ombudsman is commanded to "[p]romote effective coordination among . . . [p]rograms that provide legal services for the developmentally disabled. . . , the division [of disabilities] . . . ; [p]roviders of waiver services to individuals with developmental disabilities; [and] providers of other necessary or appropriate services."²⁶⁸ The long term care ombudsman has similar coordination duties and is charged by statute to

[p]romote the effective coordination between the office and . . . (A) [p]rograms that provide legal services for the elderly . . . (B) [t]he adult protective services program . . . (C) [t]he attorney general's division of Medicaid fraud . . . (D) [t]he state department of health . . . [and] (E) Indiana protection and advocacy services.²⁶⁹

Following naturally from their role as oversight coordinators, Indiana's ombudsmen are also commanded by statute to investigate citizen complaints in regard to services provided by the state to the mentally ill, the aging, and those who are developmentally disabled.²⁷⁰ In investigating complaints, the mental health ombudsman must

[a]t the request of a mental health patient, or upon receiving a complaint or other information affording reasonable grounds to believe that the rights of a mental health patient who is not capable of requesting assistance have been adversely affected, gather information about, analyze, and review on behalf of the mental health patient, the actions of an agency, a facility, or a program.²⁷¹

Likewise, the long term care ombudsman

. . . shall receive, investigate, and attempt to resolve complaints and concerns that . . . are made by or on behalf of a patient, resident, or client of a long term care facility or a home care service . . . and involve the health, safety, welfare, or rights of a resident or client.²⁷²

267. See IND. CODE §§ 12-10-13-4 to -20 (2000) (long term care ombudsman program); § 12-11-13-1 to -16 (statewide waiver ombudsman); § 12-27-9-4 to -6 (mental health ombudsman program). To assist in receipt of complaints, each ombudsman is required to establish a toll free telephone number to which individuals can register complaints. See *id.* § 12-10-13-16.8(2); § 12-11-13-15; § 12-27-9-5.

268. *Id.* § 12-11-13-10.

269. *Id.* § 12-10-13-16.8(1).

270. See *id.* §§ 12-27-9-4(a)(4), 12-10-13-14, 12-13-13-6.

271. IND. CODE § 12-27-9-4(a)(4) (2000).

272. *Id.* § 12-10-13-14 (long term care ombudsman program). Similar investigation duties are

Additionally, in the course of investigating complaints, the ombudsmen keep complainants informed of investigation results,²⁷³ and make recommendations to the relevant agencies involved in the party's complaint. For example, "[i]f after (1) reviewing a complaint; (2) considering the response of an agency, a facility, or a program; and (3) considering any other pertinent material the mental health ombudsman determines that the complaint has merit, the ombudsman may make recommendations to that agency, facility, or program."²⁷⁴ Similarly, the mental health ombudsman can request that the "agency, facility or program shall . . . inform the ombudsman about the action taken on the ombudsman's recommendation . . . or the reasons for not complying with the ombudsman's recommendation."²⁷⁵ If the mental health ombudsman "believes that the agency, facility, or program has failed to comply with the ombudsman's recommendations, the ombudsman shall refer the matter to the division of mental health or the Indiana protection and advocacy services commission as appropriate."²⁷⁶ Finally, in similar fashion to the reporting requirements imposed on the long term care ombudsman and the state wide waiver ombudsman,²⁷⁷ the mental health ombudsman must "maintain records of all activities on behalf of consumers and report all findings to the division on a quarterly basis."²⁷⁸

Following its trend of creating health care and disabilities ombudsmen, the Indiana legislature should establish a victims' rights ombudsman with coordinating, investigatory, recommending, and reporting powers similar to the powers granted to Indiana's current ombudsmen. First, since Indiana victims are afforded specific rights by constitutional amendment²⁷⁹ and by statute,²⁸⁰ an ombudsman could help ensure that victims were aware of their rights, and had a forum in which they could seek to review and redress any alleged violations.²⁸¹

required of the Statewide Waiver Ombudsman. *See id.* § 12-11-13-6(a).

273. *See id.* § 12-10-13-14 (ombudsman shall report findings to complainant); § 12-10-13-16 (ombudsman must inform complainant when office decides not to investigate complaint); § 12-11-13-6(b) (ombudsman shall report findings to complainant); § 12-11-13-6(c) (ombudsman must inform complainant when office decides not to investigate complaint).

274. *Id.* § 12-27-9-5(b).

275. *Id.* § 12-27-9-5(c).

276. *Id.* § 12-27-9-6(a).

277. *See id.* §§ 12-10-13-19 (long term care ombudsman must issue annual report to governor, general assembly, division, federal Commissioner on Aging, area agencies on aging, and state department of health), 12-11-13-13 (statewide waiver ombudsman must issue annual report to governor, legislative counsel, division and members of Indiana commission on mental retardation and developmental disabilities).

278. *Id.* § 12-27-9-4(b).

279. *See* IND. CONST. art. I, § 13(b).

280. *See id.* § 35-40-1 to -13.

281. While established as an oversight committee rather than an ombudsman, the Colorado Governor's Victims' Compensation and Assistance Coordinating Committee notes that one of the important aspects of its work is to ensure that victims understand the scope of their rights, and what

Second, in investigating victim complaints and recommending possible remedial action, the victims' rights ombudsman could "provide an unbiased assessment of whether a victim has been afforded his rights under state law and . . . [and] 'act as an impartial fact finding and disseminating entity'"²⁸² while simultaneously "advocating broadly for fairness . . . prompt[ing] the highest attainable standards of competence, efficiency, and justice for crime victims and witnesses in the criminal justice system."²⁸³ Finally, the ombudsman could "act as a liaison . . . between agencies, either in the criminal justice system or in victim assistance programs, and victims and witnesses."²⁸⁴

In its capacity as a liaison or coordinator, the Indiana victims' rights ombudsman should also instigate some form of audit procedure, similar to the one practiced by the Arizona Attorney General's Office of Victim's services.²⁸⁵ Such an audit procedure would provide a proactive and preventative approach to enforcing and protecting victims' rights. "[B]y auditing complex operations and activities of government agencies, . . . [the ombudsman could] ensure compliance with duties imposed under . . . [Indiana] laws [The ombudsman could] uncover systemic problems that . . . [might] . . . lead to large-scale violations of rights."²⁸⁶ In solving those problems, the ombudsman would help prevent further violations of victims' rights.²⁸⁷

B. Actions for Mandate

The Indiana legislature should equally be encouraged to amend the current victims' rights legislation to specifically allow victims to bring actions for mandate to protect their rights. Under the present status of Indiana law, victims do have standing to enforce their rights,²⁸⁸ but the scope of that enforcement power is limited and undefined.²⁸⁹

Commonly termed "writ of mandamus," Indiana law dictates that

[c]auses of action previously remedied by writs of mandate may be remedied by means of complaint and summons in the name of the state on relation of the party in interest in the circuit, superior, and probate courts as other civil actions. Such actions are to be known as actions for mandate.²⁹⁰

results they should expect from any review procedure. See NATIONAL CRIMINAL JUSTICE ASSOCIATION, *supra* note 210, at 12.

282. *Id.* at 11.

283. *Id.* at 27.

284. MINN. STAT. § 611A.74.2 (1999).

285. See *supra* notes 238-48, and accompanying text.

286. *Auditing for Compliance in Arizona*, *supra* note 238, at 13.

287. See *id.*

288. See IND. CODE § 35-40-2-1 (2000).

289. See *supra* Part III.B.

290. IND. CODE § 34-27-1-1 (1999).

It is long established that an action for mandate is an “extraordinary remedy expressly provided for by statute”²⁹¹ which should be “issued *only* where the trial court [or other party] has an absolute duty to act or refrain from acting.”²⁹² Likewise, “[b]ecause they are extraordinary remedies, such writs will not be issued unless the . . . [party bringing the action] can show a clear and obvious emergency where the failure of . . . [the] [c]ourt to act will result in substantial injustice.”²⁹³ Finally, actions for mandate cannot be used as a substitute for appeal.²⁹⁴

In examining Indiana’s current use of actions for mandate, it is evident that such an action would contribute to victims’ efforts to enforce their rights. Section 34-27-3-1 of the Indiana Code states that “[a]n action for mandate may be prosecuted against any inferior tribunal, corporation, public or corporate officer, or person to compel the performance of any: (1) act that the law specifically requires; or (2) duty resulting from any office, trust, or station.”²⁹⁵ In rendering a judgment in an action for mandate, the court will either issue “a prohibition absolute, restraining the [lower] court and party from proceeding; or authorizing the court and party to proceed . . . in the matter in question.”²⁹⁶

When determining whether to grant an action for mandate, the Indiana courts have carefully examined whether the party charged has an “absolute duty to act or refrain from acting.”²⁹⁷ For example, in *Perry Township v. Hedrick*,²⁹⁸ commissioners determined that Hedrick was entitled to poor relief assistance in satisfying her utility payments, and subsequently ordered the Perry Township trustee to pay Hedrick’s overdue electric bill.²⁹⁹ When the trustee failed to comply with the commissioner’s order, Hedrick filed a petition for mandate, seeking the court to order the trustee to pay the electric bill.³⁰⁰ In challenging the trial court’s grant of Hedrick’s action for mandate, the trustee argued, in part, that it was not subject to a clear legal duty to pay Hedrick’s bill.³⁰¹ The Indiana Supreme Court concluded otherwise, finding the trustee’s mandatory duty to comply with the commissioner’s order in the language of Indiana Code section

291. *E.g.*, *Moore v. Smith*, 390 N.E.2d 1052, 1054 (Ind. Ct. App. 1979).

292. *City of New Haven v. Allen* Superior Court, 699 N.E.2d 1134, 1136 (Ind. 1998) (emphasis added). *See also* *State ex rel. W.A. v. Marion County Superior Court*, 704 N.E.2d 477, 478 (Ind. 1998); *State ex rel. Ind. State Bd. of Fin. v. Marion County Superior Court*, 396 N.E.2d 340, 343 (Ind. 1979); *State ex rel. Bicanic v. Lake Circuit Court*, 292 N.E.2d 596, 598 (Ind. 1973); *Perry Township v. Hedrick*, 429 N.E.2d 313, 316 (Ind. Ct. App. 1981).

293. *City of New Haven*, 699 N.E.2d at 1136.

294. *See id.* at 1135-36.

295. IND. CODE § 34-27-3-1 (2000).

296. *Id.* § 34-27-2-2.

297. *City of New Haven*, 699 N.E.2d at 1136.

298. 429 N.E.2d 313 (Ind. Ct. App. 1981).

299. *See id.* at 315.

300. *See id.*

301. *See id.* at 317.

12-2-1-18.³⁰² The court noted that pursuant to the code,

the trustee ‘shall’ carry out the decision of the Commissioners. The term ‘shall’ in a statute is ordinarily to be used in its mandatory sense. We do not think that the stated purpose of the act [to provide necessary and prompt financial relief to citizens of Indiana] would be furthered . . . by permitting the trustee to suspend his mandatory duty to comply with the Commissioners’ order³⁰³

Therefore, the court determined that the trustee did have a duty to comply with the commissioner’s order and pay Hedrick’s bill.

Conversely, in *State ex rel. Indiana State Board of Finance v. Marion County Superior Court, Civil Division*,³⁰⁴ the Indiana Supreme Court rejected a crime victim’s action for mandate seeking an order for the Indiana Rehabilitation Services Board to fund the administration of the Indiana Violent Crime Compensation Division.³⁰⁵ The court reasoned that “while the Violent Crime Compensation Division is set up under mandatory statutes, there is no provision for the mandatory funding of it”³⁰⁶ and hence the victim’s petition, and the lower court’s ruling ordering the State Finance Board or State Budget Agency to use their discretionary powers to fund the Division, was inappropriate.³⁰⁷

As these cases indicate, the command of statute is crucial in establishing whether a mandatory duty to compel a public officer, court, or other party to take action exists. Such commanding language is present in Indiana’s victims’ rights laws.

For example, “[t]he law enforcement agency having custody of a person accused of committing a crime against a victim *shall* notify the victim if the accused person escapes from the custody of the law enforcement agency.”³⁰⁸ Similarly, “a criminal court *shall* notify the victim of any probation revocation disposition proceeding or proceeding in which the court is asked to terminate the probation of a person who is convicted of a crime against the victim.”³⁰⁹ Courts must provide similar notice to the victim if the defendant is released, discharged or has escaped from a mental health treatment agency.³¹⁰ Finally, prosecutors are

302. See IND. CODE § 12-2-1-18 (repealed 1992).

303. *Perry Township v. Hedrick*, 429 N.E.2d 313, 317 (Ind. Ct. App. 1981) (citations omitted).

304. 396 N.E.2d 340 (Ind. 1979).

305. See *id.* at 342-43. The victim had filed a claim for compensation with the Violent Crime Compensation division, but was informed that the processing of his claim was delayed due to a lack of funding for the division. See *id.* at 342.

306. *Id.* at 343.

307. See *id.*

308. IND. CODE § 35-40-7-1 (2000) (emphasis added).

309. *Id.* § 35-40-8-1 (emphasis added).

310. See *id.* § 35-40-9-1 to -3. Generally, if the victim has requested notice of release of a defendant from a mental health treatment agency, the agency must provide notice to the court, and the court must give the victim notice no later than ten (10) days before the discharge or release of the defendant. See *id.* § 35-40-9-1.

charged with providing victims with a variety of information, including the time of all “hearings and proceedings that are scheduled for a criminal matter in which the victim was involved,”³¹¹ and if a defendant is convicted, and the victim has so requested, the prosecutor must notify the victim regarding his or rights during the sentencing phase of the trial, including the time, place, and date of the sentencing proceeding.³¹²

Based upon these clearly delineated statutory duties, it is manifestly appropriate that a victim should be able to bring an action for mandate to enforce his or her rights. Denying victims the opportunity to require prosecutors, the courts and other statutorily commanded bodies to comply with Indiana’s victims’ rights laws would result in an obvious and “substantial injustice.” Hence, it is exceedingly appropriate that victims be afforded this remedy under the current structure of Indiana’s victims’ rights laws.

Despite the additional power an action for mandate would provide to victims seeking to enforce their rights, one must nonetheless remain mindful of the limited force that such a writ will have. “For example, it would not apply to solicitors once a victim’s case is closed. Furthermore, the enforcement provision would fail to protect a victim if prison officials fail to notify the victim that the person charged or convicted for the crime has been released.”³¹³ Additionally, victims would most likely be barred from using the action to “challenge a charging decision or a conviction, obtain a stay of trial, or compel a new trial”³¹⁴ in light of an alleged victims rights violation. Hence, if a victim did not attend a sentencing hearing and exercise his right to be heard³¹⁵ because the prosecutor did not give the victim notice of the proceeding,³¹⁶ the victim would not be able to bring an action for mandate commanding the court to conduct a second sentencing hearing.

However, such limits should not dissuade the Indiana legislature from adding a provision to Indiana’s current victims’ rights laws allowing victims to bring actions of mandate to enforce their rights. In concert with creating a victims’ rights ombudsman, the legislature should pass a statute dictating that “[t]he victim of a crime or representative of a victim of a crime, including the [victims’ rights ombudsman] may: bring an action for. . . [mandate] enforcing the rights of victims and the obligations of government entities under [Indiana’s victims’ rights statute].”³¹⁷ By so doing, the legislature would provide an additional tool

311. *Id.* § 35-40-6-4.

312. *See id.* § 35-40-6-7; *see also supra* Part III.B.3.

313. Westbrook, *supra* note 9, at 585.

314. IND. CODE § 35-40-2-1(1).

315. *See id.* § 35-40-5-5.

316. *See id.* § 35-40-5-9.

317. UTAH CODE ANN. § 77-38-11(2)(a) (1999). Conversely, the Indiana legislature might chose to pattern its action for mandate language after South Carolina law which dictates that victims are entitled to bring a writ of mandamus to “require compliance by any public employee, public agency, the State, or any agency responsible for the enforcement of the rights and provisions of [South Carolina’s victims rights laws].” S.C. CONST. art. 1, § 2.4(B).

to aid Indiana victims in securing and enforcing their rights.

CONCLUSION

The pendulum charting the victim's place within American criminal law is moving. While victims were once peripheral actors in the prosecutorial process, they now hold a far less marginalized position within the boundaries of the criminal justice system. Laws granting victims such rights as notice, presence and being heard, have all helped in shifting the victims' rights pendulum to a new position. The state of Indiana has equally contributed to this process.

Indiana's own victims' rights amendment,³¹⁸ and supporting legislation,³¹⁹ exemplify and highlight the state's commitment to reintegrating the victim into the prosecutorial system. However, the ruling in *Newman*,³²⁰ coupled with the results of victims' rights enforcement actions in other states, illustrates the numerous challenges that still surround enforcing victims' rights. Several states have responded to this challenge by establishing victims' oversight committees or ombudsmen to coordinate and review victims' rights services. Similarly, some states have formally sanctioned the writ of mandamus as a direct, albeit limited, judicial remedy for the enforcement of victims' rights violations. While neither of these systems can ensure a state's complete, unfettered, and consistent compliance with victims' rights laws, they nonetheless represent a tangible and cogent way for victims' rights claims to be heard, addressed, and reviewed. Therefore, the Indiana state legislature should be strongly encouraged to adopt a dual enforcement model, combining the forces of a victim's right to use an action for mandate with a victims' rights ombudsman.

While the American criminal justice system may never be able to remedy the ultimate violation an individual experiences when they become a victim of crime, the slow, careful, and appropriate reentry of the victim into the fold of criminal justice provides all individuals with the opportunity to acknowledge that the harms committed against the victim were indeed committed against all of society. Therefore, providing for and enforcing the manner by which victims participate in the criminal justice process should be fiercely championed and protected.

318. See IND. CONST. art. I, § 13(b).

319. See IND. CODE ANN. § 35-40-1 to -13 (2000).

320. *Newman v. Ind. Dep't of Corr.*, No.49D01-9910-CP-1431 (Marion Super. Ct., Ind. dismissed, Jan. 18, 2000).