MONETARY REMEDIES FOR VICTIMS DURING ILLINOIS CRIMINAL CASES

Jeffrey A. Parness, Laura Lee, and Karen Blouin

I. INTRODUCTION

In 1992, Illinois voters overwhelmingly added a constitutional bill of rights for crime victims, joining several other American states with express constitutional protections. Most American state constitutional provisions have only been enacted recently, reflecting state public policies increasing respect for crime victims during criminal cases.

The tenth (and last) enumerated right in the Illinois Crime Victim's Rights Amendment is the "right to restitution." Restitution is but one form of monetary remedy available to crime victims. Other remedies include monies beyond restitution paid by criminal offenders and monies paid to crime victims by governments.

Express constitutional rights, such as this right to restitution, need not be accompanied by corresponding legislation. Implementing legislation is unnecessary where the constitutional right is self-executing. The Illinois crime victim provisions do not contain, however, rights enforceable without General Assembly action. Rather, crime victim rights are to be provided by law. Nevertheless, they are specially addressed in the constitution, denoting enhanced importance. The ten...
crime victims' rights, including restitution, should be glorified, not trivialized, by legislators.

While crime victim restitution is addressed legislatively, many Illinois crime victims receive few or no monetary remedies. This Article examines the deficiencies in current Illinois laws on monetary remedies for crime victims during criminal cases. These failures undermine the desires of the electorate in 1992. This Article suggests reforms after examining experiences in other American states. In particular, it urges that monetary remedies for Illinois crime victims should be addressed in a single statutory scheme. The current statutes, including provisions on restitution, a state-supported compensation fund, and remedies at sentencing, are poorly coordinated and incomplete in their implementation of the constitutional right to restitution.

II. THE GROWTH OF CRIME VICTIM RIGHTS

Early in United States history there was a very different criminal justice system. Based on the English system, early criminal justice typically involved struggles between individual citizens, with emphases on the restoration of the victims by the offenders. Thus, criminal justice was largely driven by crime victims acting as police, prosecutors, and punishers. As there was no public prosecution, private criminal prosecution was usually available only to those with resources. In early English common law, justice was achieved, if at all, through corporal punishment of the offender by the victim or through restitution to the victim from the offender. Early in United States history similar private

---


[R]estorative justice recognizes crime as being directed against individual people. It is grounded in the belief that those most affected by crime should have the opportunity to become actively involved in resolving the conflict . . . . In the years preceding [Henry I's] decree [securing jurisdiction over certain criminal offenses], crime had been viewed as conflict between individuals, and an emphasis upon repairing the damage by making amends to the victim was well established.

Id.


8 Id. at 650–52. Resources were expended for aiding assistance in arrest, investigation, and prosecution as well as for providing rewards for information on criminals. JAMES STARK & HOWARD W. GREEN, THE RIGHTS OF CRIME VICTIMS 20 (1985).

9 Caissie, supra note 7, at 649.
prosecutions occurred, with some victims hiring lawyers after initiating criminal charges.\textsuperscript{10}

Although the transition period is not entirely understood, a system of public prosecution developed\textsuperscript{11} in the late 1800s.\textsuperscript{12} As crime increasingly was viewed as an offense against the "community as a whole,"\textsuperscript{13} the victim was relegated to "alienated third party" status.\textsuperscript{14} The diminished role of the crime victim coincided with the increased recognition of the rights of the criminally accused.\textsuperscript{15}

The focus on the rights of the accused was perhaps most extensive in the 1960s.\textsuperscript{16} As the rights of alleged criminal offenders grew through federal constitutional precedents interpreting various explicit federal constitutional provisions,\textsuperscript{17} crime victims increasingly pressed their interests through grassroots organizations.\textsuperscript{18} Greater public recognition of crime victim rights slowly developed, starting in the 1960s.\textsuperscript{19} There was increasing study of victimology, including explorations into criminal/crime victim relationships.\textsuperscript{20} Some researchers found that

\textsuperscript{10} Douglas E. Beloof, \textit{Weighing Crime Victims' Interests in Judicially Crafted Criminal Procedure}, \textit{56} \textit{CATH. U. L. REV.} 1135, 1138 (2007) ("Even after identification and arrest, the victim carried the burden of prosecution. He retained an attorney and paid to have the indictment written and the offender prosecuted.") (quoting William F. McDonald, \textit{Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim}, \textit{13} \textit{AM. CRIM. L. REV.} 649, 652 (1976)).

\textsuperscript{11} Caissie, \textit{supra} note 7, at 652.

\textsuperscript{12} Beloof, \textit{supra} note 10, at 1146.


\textsuperscript{14} Caissie, \textit{supra} note 7, at 655.

\textsuperscript{15} \textit{Id.} (discussing the need to protect against vindictiveness). \textit{See also id.} at 652 (discussing the need to insulate those criminally charged from "irrational private prosecutions").

\textsuperscript{16} Henderson, \textit{supra} note 13, at 943.

From the post-World War II period to the mid-1960s, liberal theories were ascendant, with respect to both the social welfare approach to crime prevention and offenders and the classic liberal ideology of protecting the individual from the overreaching power of the state. Liberals emphasized the social origins of crime—poverty, alienation, lack of education, discrimination—and sought to remedy these perceived causes of crime. They advocated rehabilitation, rather than punishment, of convicted criminals. And they sought to protect the constitutional rights of the accused, finding a responsive majority in the United States Supreme Court.

\textit{Id.} (footnotes omitted).

\textsuperscript{17} Caissie, \textit{supra} note 7, at 655.

\textsuperscript{18} Henderson, \textit{supra} note 13, at 949-50.


\textsuperscript{20} \textit{Id.}
victims often chose not to report crimes because of their "disillusionment with the system."\textsuperscript{21}

As crime rates soared, a get-tough attitude on crime also gained momentum.\textsuperscript{22} There was some backlash to the judicial focus on the rights of the accused.\textsuperscript{23} The plight of crime victims became important to those supporting prosecutors in the criminal justice system.\textsuperscript{24}

In this setting, a movement to better compensate crime victims arose. In particular, increased opportunities for compensation were thought to facilitate greater cooperation by otherwise reticent witnesses. Most compensation programs were need-based.\textsuperscript{25} Over time, however, crime victim compensation schemes were increasingly based on "a justice orientation."\textsuperscript{26}

Crime victims' rights also gained support from the emerging women's movement.\textsuperscript{27} Proponents sought to change the way female crime victims were treated, especially in sexual assault and domestic abuse cases.\textsuperscript{28} In fact, two of the earliest crime victim assistance

\textsuperscript{21} Id.\textsuperscript{22} Henderson, \textit{supra} note 13, at 945–46.

The decline of support for liberal approaches and the inability of liberals to solve the apparent paradoxes created by their beliefs left the crime issue to the conservatives. Conservatives pointed to the failures of liberal programs and emphasized that crime was a matter of individual choice and wickedness. They adhered to the "crime control" model of criminal justice that emphasizes "efficiency" in the criminal process . . . . Central to the ideology of the crime control model are "the presumption of guilt" and the belief "that the criminal process is a positive guarantor of social freedom."\textsuperscript{23}

\textsuperscript{23} Id. (footnotes omitted).

Conservatives believed that bad actors were getting off on "legal technicalities" because of the exclusionary rule and \textit{Miranda} rights. Id. at 948.\textsuperscript{24}

\textsuperscript{24} Id. at 948–49.

\textsuperscript{25} Award of compensation was dependent upon victims' cooperation with police and prosecutors. \textit{YOUNG & STEIN, supra} note 19, at 2.\textsuperscript{26}

\textsuperscript{26} Id.\textsuperscript{27} Henderson, \textit{supra} note 13, at 949.

\textsuperscript{27} [B]y the middle of the 1970s different groups began to focus their attention on the victims of particular crimes. For example, the women's movement did much to emphasize the plight of rape victims in the legal process, while the more recently formed group, "Mothers Against Drunk Driving" . . . brought the victims of drunk drivers to public attention. The success of these groups concerned with particular crimes and crime victims served to highlight the general importance of "victims" as an effective political symbol.\textsuperscript{28}

\textsuperscript{28} \textit{YOUNG & STEIN, supra} note 19, at 2.
programs were "rape crisis centers." These programs demonstrated that victims were often mistreated by criminal justice professionals.

Crime victim activism was further boosted by organizations established by survivors of homicide victims, including Mothers Against Drunk Driving and Parents of Murdered Children. In 1975, the National Organization for Victim Assistance began to coordinate efforts on behalf of crime victims. In 1981, crime victims were aided when President Ronald Reagan instituted a National Victims' Rights Week.

Crime victim activism shifted to the states toward the latter part of the twentieth century. California enacted laws providing compensation for crime victims in 1965 and then "became the first state to establish state funding for victim assistance in 1980." In 1980, Wisconsin became the first state to approve a statutory crime victims' Bill of Rights. Efforts continued elsewhere to become more responsive to crime victims. By 1990, several American states had some form of a Bill of Rights provision for crime victims. A more recent tally found there were more than 32,000 statutes nationwide addressing crime victim rights. It was in this setting that certain crime victim rights were constitutionalized in Illinois in 1992.

III. THE ILLINOIS CONSTITUTIONAL RIGHT TO CRIME VICTIM RESTITUTION

In Illinois, a proposed constitutional Crime Victim's Rights amendment was placed on the ballot in November 1992, after approval by the House on a 117-0 vote and after overwhelming approval by the Senate. The change was suggested by then-Illinois Attorney General

---

29 Id. at 3.
30 Id. at 2.
31 Henderson, supra note 13, at 949-50.
32 YOUNG & STEIN, supra note 19, at 5.
33 Id. at 6.
34 Id. at 2, 5.
35 Id. at 5. See also Wisc. Const. art. I, § 9m (noting that effective in 1993, the State shall "ensure" varying "privileges and protections" for crime victims).
37 YOUNG & STEIN, supra note 19, at 8.
38 Id.
39 Tim Novak, Crime Victims' Bill of Rights is Supported by House 117-0, ST. LOUIS POST-DISPATCH, April 23, 1992 at 6A. The Senate vote was forty-nine yes, one no, and four voting present. State of Illinois, 87th General Assembly Regular Session, Senate Transcript, Apr. 30, 1992, at 18.
Roland Burris. When the amendment passed, over a dozen other American states had already spoken constitutionally on crime victims. The Illinois initiative was intended to elevate crime victims in order to partially level the playing field with criminal defendants and to give crime victims a more significant role in the criminal justice system. Opponents protested that the amendment was a waste of time, as there could always be statutory protections. The Illinois amendment passed with over three-fourths voter approval. Its provisions, now in Section 8.1 of Article I, say in part:

SECTION 8.1. CRIME VICTIM’S RIGHTS.
(a) Crime victims, as defined by law, shall have the following rights as provided by law:
   (1) The right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process.
   (2) The right to notification of court proceedings.
   (3) The right to communicate with the prosecution.
   (4) The right to make a statement to the court at sentencing.
   (5) The right to information about the conviction, sentence, imprisonment, and release of the accused.
   (6) The right to timely disposition of the case following the arrest of the accused.
   (7) The right to be reasonably protected from the accused throughout the criminal justice process.
   (8) The right to be present at the trial and all other court proceedings on the same basis as the accused, unless the victim is to testify and the court determines that the victim’s testimony would be materially affected if the victim hears other testimony at the trial.
   (9) The right to have present at all court proceedings, subject to the rules of evidence, an

41 Rights of Victims, supra note 1.
42 Illinimedia, supra note 40.
advocate or other support person of the victim’s choice.
(10) The right to restitution.44

Besides defining crime victims45 as well as the ten enumerated rights, the General Assembly is also expressly authorized to "provide by law for the enforcement" of the rights46 and to provide for their funding, including the imposition of assessments against criminal defendants.47 So, the Illinois constitutional right to restitution is quite dependent upon state legislators. But legislative discretion is not boundless given the strong support in the constitutional convention and with the voters.48

Illinois General Assembly responsibility for explicit constitutional rights is not limited to crime victims. Elsewhere, legislation plays a variety of roles in the development of constitutional law. Constitutional claims that can be pursued directly in court cases without legislative authorization involve self-executing rights. Article I, Section 17 of the Illinois Constitution has a self-execution clause, declaring that certain antidiscrimination rights “are enforceable without action by the General Assembly,” though legislation may establish reasonable exemptions and provide additional remedies.49 Enforcement by lawsuits, absent any enabling legislation, is thus contemplated.

When a constitutional right is accompanied by a self-execution clause, Illinois courts have entertained claims in the absence of enabling legislation. In Baker v. Miller,50 a claimant alleged sex discrimination in employment,51 relying on Section 17 of Article I which states:

All persons shall have the right to be free from discrimination on the basis of race, color, creed, national

---

44 ILL. CONST. art I, § 8.1(a).
45 See ALASKA CONST. art. I, § 24 ("crime victims, as defined by law"); CONN. CONST. art. I, § 8 ("a victim, as the general assembly may define by law"). Cf. ARIZ. CONST. art. II, §§ 2.1(C), 2.1(A)(8) (defining “victim” who has a right to receive "prompt restitution").
46 ILL. CONST. art I, § 8.1(b). See also CONN. CONST. art. I, § 8 (restitution enforceable as “provided by law”). Cf. CAL. CONST. art I, § 28(b)(13)(B) ("Restitution shall be ordered ... in every case... in which a crime victim suffers a loss.").
47 ILL. CONST. art I, § 8.1(c).
48 Compare CAL. CONST. art. I, § 28(b)(13), OR. CONST. art. I, § 42, and R.I. CONST. art. I, § 23 (constitutions silent on role of legislature in crime victim restitution), with S.C. CONST. art. I, §§ 24(A), 24(A)(9) ("[V]ictims of crime have the right to... receive prompt and full restitution."). and id. at § 24(C)(3) ("The General Assembly has the authority to enact substantive and procedural laws to define, implement, preserve, and protect [the right to restitution], including the authority to extend [the right] to juvenile proceedings.").
49 ILL. CONST. art. I, § 17.
50 636 N.E.2d 551 (Ill. 1994).
51 Id. at 552-53.
ancestry and sex in the hiring and promotion practices of any employer or in the sale or rental of property. These rights are enforceable without action by the General Assembly, but the General Assembly by law may establish reasonable exemptions relating to these rights and provide additional remedies for their violation.52

The court held that because of the self-execution clause, legislation was unnecessary for the claim to proceed.53 But the court also found that any monetary remedies were limited by the General Assembly’s “reasonable exemptions” found within the Illinois Human Rights Act.54 In Baker, the claimant was without a damage remedy for unconstitutional discrimination because her employer was exempted under the Act.55

Illinois constitutional rights involving discrimination, within Section 18 of Article I, were reviewed in Teverbaugh v. Moore.56 There, a seventh-grade student and her mother sued a school district for sex discrimination by two male students. Section 18 declares there shall be no sex discrimination by “units of local government and school districts.” Section 18 mentions neither self-execution nor General Assembly action. The appellate court held that any recovery must come under the Human Rights Act.57 It further found the Act contained no claim for discrimination occurring in primary or secondary schools.58 The court compared Section 18 to Section 17, focusing on the words used59 as they provide the best indication of drafter intent.60 Additional bases for interpretation can appear, of course, in legislative or constitutional convention debates, as well as in conduct surrounding the “first legislative action” following the adoption of a constitutional provision.61 While Section 17 states that “[a]ll persons shall have the

52 [I.L. Const. art. I, § 17.]
53 Baker, 636 N.E.2d at 553.
54 Id.
55 Id. at 554 (employer had fewer than fifteen employees).
57 Id. at 230 (“[I]t is incumbent upon the Illinois legislature to acknowledge a right of action under the Human Rights Act.”).
58 Id. (“[W]e are aware that the Human Rights Act does not expressly recognize a right of action for damages under the circumstances contemplated in this case.”).
59 Id. at 229.
60 Id. (“The comparative texts of ... section 17 ... and section 18, evidence that where the drafters intended to provide a right of action for damages for discrimination, they purposely included language to effect such a result in the absence of implementing legislation.”).
right to be free from discrimination” and that “[t]hese rights are enforceable without action by the General Assembly.”62 Section 18 only says “equal protection . . . shall not be denied.”63 In comparing Sections 17 and 18 and examining Baker, the Teverbaugh court found that the Section 18 drafters did not intend an automatic private right of action,64 concluding that where drafters use different language, they usually intend different results.65

Constitutional rights were also at play in AIDA v. Time Warner where a claimant sought declaratory relief because the defendant’s television show, The Sopranos, “breache[d]” the individual dignity clause.66 That clause says in full, in Article I, Section 20: “To promote individual dignity, communications that portray criminality, depravity or lack of virtue in, or that incite violence, hatred, abuse or hostility toward, a person or group of persons by reason of or by reference to religious, racial, ethnic, national or regional affiliation are condemned.”67 The AIDA court found Section 20 was completely “hortatory.”68 It relied on the earlier Irving v. Marsh case where the court looked to the legislative history, specifically a Bill of Rights Committee Report, which stated:

“[Again [Victor Arrigo, the provisions supervisor] want to reiterate, the individual dignity clause in no way qualifies or modifies the constitutional rights of free speech and press.]” The provision creates no private right or cause of action . . . . It is purely hortatory, “a constitutional sermon.” Like a preamble, such a provision is not an operative part of the Constitution. It is included to serve a teaching purpose, to state an ideal or principle to guide the conduct of government and individual citizens.69

So a constitutional condemnation of certain conduct can be “merely an expression of philosophy and not a mandate that a certain remedy be provided in any specific form.”70

62 ILL. CONST. art. I, § 17.
63 Id. § 18. “The equal protection of the laws shall not be denied or abridged on account of sex by the State or its units of local government and school districts.” Id.
64 Teverbaugh, 724 N.E.2d at 229.
65 Id.
68 AIDA, 772 N.E.2d at 961.
69 Id. (citing Irving v. Marsh, 360 N.E.2d 983, 984 (Ill. App. Ct. 1977)).
70 Id.
However, deference to the General Assembly on enumerated constitutional rights does not always follow the Teverbaugh approach. The right to remedy for all wrongs and the rights regarding eminent domain, within Article I, Sections 12 and 15, use the “as provided by law” language twice, while the same phrase appears four times in Section 8.1. Crime victim rights seemingly require a more foundational role for the General Assembly. The persons entitled to the rights in Sections 12 and 15 are “every person” and, impliedly, owners of property taken by eminent domain. Section 8.1, by contrast, references “crime victims, as defined by law.” As well, Sections 12 and 15 enunciate some very particular protected rights, and then allow these protections “as provided by law.” This suggests the chief legislative responsibility is enforcement of the provisions. Section 8.1 on crime victims differs, as it says “the following rights as provided by law,” indicating that the rights themselves as well as their enforcement can be defined legislatively.

Notwithstanding significant General Assembly authority, the Illinois constitutional crime victim restitution right could be judicially deemed to provide by itself opportunities for crime victim recoveries. In Rhode Island there is the constitutional declaration that a “victim of crime shall, as a matter of right . . . be entitled to receive from the perpetrator of the crime, financial compensation for any injury or loss caused by the perpetrator of the crime, and shall receive such other compensation as the state may provide.” In 1998, in Bandoni v. State,71 the Rhode Island Supreme Court heard a case where a crime victim sued the criminal for negligence, urging rights afforded both by legislation and the constitution.72 The court held that although the constitution had mandatory terms, the crime victim compensation right was not self-executing. As there was no language requiring the General Assembly to act, the court held that the lack of a statutory enforcement scheme meant the crime victim had no claim. The dissent in Bandoni concluded, however, that as a general proposition, specific constitutional rights should be “presumed to be judicially enforceable absent an express textual negation of such a presumption or a demonstrable textual commitment of this remedial function to another coordinate branch of government.”73 The dissent reasoned that if there was no judicial enforcement absent enabling legislation, criminals could harm victims with fewer repercussions.74

72 Id. at 583–84.
73 Id. at 602 (Flanders, J., dissenting).
74 Id. at 603.
effectively allowed a legislative veto of a strong constitutional right,75 opining that where drafters intend no lawsuits they directly say so.76

Illinois case precedent suggests that Illinois courts would not follow the Bandoni dissent on Section 8.1 restitution claims. The Illinois crime victim restitution right is not self-executing, as victims are "defined by law" and the enumerated rights are "as provided by law." Under Teverbaugh, the absence of self-executing language would mean no intent to recognize a claim independent of General Assembly action. The long history of statutory mechanisms for crime victim recoveries in Illinois, even if not comprehensive, further suggests that any new or expanded crime victim remedies require legislative action. Yet given that crime victim restitution is now a constitutional right, expressly enumerated, restitution should not be subject to absolute legislative whims. There should be minimally adequate remedies available. Restitution is not hortatory. Unlike the constitutional provision in AIDA, crime victim restitution is an enumerated right. It is not simply a ban on certain conduct. It is more than a "constitutional sermon" or a "teaching" tool.77

So, what do the Illinois statutes now say about monetary remedies for crime victims, including the constitutional restitution right? Do they sufficiently implement the intentions of the drafters and of the electorate to have at least some crime victim monetary remedies? How do the Illinois statutes compare to statutory crime victim remedies elsewhere in America? And, are there models that Illinois legislators could employ to secure better restitution, and perhaps other monetary remedies, for crime victims in line with the strong intentions to aid crime victims under Section 8.1?

IV. ILLINOIS STATUTES ON RESTITUTION, COMPENSATION, AND OTHER MONETARY REMEDIES FOR CRIME VICTIMS

Within the Illinois constitution, the only express crime victim monetary remedy is restitution. As noted, such restitution significantly depends on General Assembly action, but it was never intended to be the sole monetary remedy available to crime victims.78 Before and since 1992, the Illinois General Assembly has had, and has exercised, the authority over monetary remedies beyond crime victim restitution.

75 Id. at 604.
76 Id. at 616.
78 In fact many of the Section 8.1 constitutional rights had predecessors in statutes. Illinimedia, supra note 40. Yet, restitution had not been addressed by statute before Section 8.1 was adopted. ILL. STAT. ch. 38, § 1404 (1991) (current version at 725 ILL. COMP. STAT. 120/4 (2008)).
Today there are three distinct statutory schemes on monetary recoveries for crime victims.79

A. Restitution

In Illinois, the crime victim restitution right expressly recognized in the Illinois constitution invites significant General Assembly action. This right, together with the other new constitutional Crime Victim’s Rights of 1992, are now addressed in the Rights of Crime Victims and Witnesses Act (“Victims and Witnesses Act”).80 The 1984 predecessor to this Act, known as The Bill of Rights for Victims and Witnesses of Violent Crimes Act, did not include a right to restitution. The stated purpose of the 1984 law was “to ensure the fair and compassionate treatment of victims and witnesses of violent crime . . . who are essential to prosecution.”81 The 1984 version was later amended to address notice to victims upon request of any plea agreements, appeals, and post-conviction reviews sought by offenders.82 In 1989, the State’s Attorney was newly mandated, upon the request of victims, to forward victim impact statements to the Prisoner Review Board.83

Following adoption of Section 8.1, the carryover 1984 provisions were placed in the Victims and Witnesses Act.84 The purpose statement of the new legislation, enacted in 1994, included the goal “to implement, preserve and protect the rights guaranteed to crime victims by Article I, Section 8.1.”85 The ten rights listed in Section 8.1, including restitution, were expressly addressed in the new scheme.86 A new statutory section was added to include the procedures (formerly there were only the rights themselves) for implementation. In particular, Section 4.5(b) of the Act says: “The office of the State’s Attorney . . . shall request restitution

80 725 ILL. COMP. STAT. 120/1 (2008) (an earlier crime victim’s rights statute, effective 1984, was amended, effective 1994, to reflect new Illinois constitutional provisions on crime victims).
81 ILL. STAT. ch. 38, § 1402 (1985) (current version at 725 ILL. COMP. STAT. 120/2 (2008)).
82 ILL. STAT. ch. 38, §§ 1404(6), (8)–(9) (1987) (current version at 725 ILL. COMP. STAT. 120/4 (2008)).
83 ILL. STAT. ch. 38, § 1404(23) (1989) (current version at 725 ILL. COMP. STAT. 120/4 (2008)).
84 725 ILL. COMP. STAT. 120/1 (1994).
85 Id. at 120/2.
86 Id. at 120/4.
at sentencing and shall consider restitution in any plea negotiation, as provided by law."87

Sections 4.5 and 6 of the Act also address other rights within Section 8.1, with the exception of the "right to timely disposition of the case." Section 4.5 specifically includes provisions on notice to victims of court proceedings,88 the availability of "social services and financial assistance,"89 and the rights to have a "translator present,"90 "appropriate employer intercession services,"91 and assistance in the prompt return of stolen property.92 These had all been included in the rights section of the 1984 statute, as had the right to present a victim impact statement at sentencing.93 The 1994 Act added the right to have an advocate or support person present at all court proceedings (the ninth right in Section 8.1).94 It also made the victim's constitutional right to communicate with the prosecution more meaningful by requiring that, upon victim request, the State's Attorney shall "where practical, consult with the crime victim" prior to offering a plea or negotiating a plea agreement.95 As well, with the adoption of Section 8.1, there were new provisions on such matters as the use of a "[p]rivately operated crime victim and witness notification service,"96 a "[s]tatewide victim and witness notification system" established by the Attorney General,97 and the creation of a toll-free number for victims to provide input for parole hearings.98 The 1994 statute also added new processes for courts to consider victim impact statements on possible aggravation or mitigation relevant to plea proceedings.99 Other than adding the restitution right itself and mandating that the State's Attorney request it, the 1994 statute said nothing else about restitution.100

---

87 Id. at 120/4.5(b)(11).
88 725 ILL. COMP. STAT. 120/4.5(c) (2008) ("[a]t the written request of the crime victim").
89 Id. at 120/4.5(b)(3).
90 Id. at 120/4.5(b)(7).
91 Id. at 120/4.5(b)(5).
92 Id. at 120/4.5(b)(4).
95 Id. at 120/4.5(c)(4) (1994).
96 Id. at 120/8 (1999).
97 Id. at 120/8.5(a) (2000).
98 Id. at 120/4.5(f) (2003).
99 725 ILL. COMP. STAT. 120/6(b) (1994).
100 The Act now says that it does "not limit any rights... otherwise enjoyed by... victims... of violent crime, nor does it grant any person a cause of action for damages or attorneys fees." 725 ILL. COMP. STAT. 120/9 (2008).
While the new statutory language could have prompted more crime victim restitution, it did not. According to the website of the DuPage County State’s Attorney’s victims services unit, restitution is not guaranteed but is simply statutorily allowed.\textsuperscript{101} The DuPage County State’s Attorney victims services unit says to a victim that “[i]f a defendant is found not guilty, you may have to pursue restitution through civil litigation.”\textsuperscript{102} In addition, it says that if a defendant is ordered to pay restitution but refuses, or is unable to comply, the States Attorney’s Office will “attempt enforcement procedures against the defendant.”\textsuperscript{103} The website further notes that if a court orders restitution, it will be payable through the State’s Attorney’s Office or through the Department of Probation.\textsuperscript{104}

According to the website, restitution contemplates financial reimbursement to crime victims who have suffered out-of-pocket expenses resulting from a crime.\textsuperscript{105} Qualified out-of-pocket expenses include costs, losses, damages, and injuries. The injuries can be to a victim’s person or to a victim’s real or personal property. However, restitution does not encompass punitive damages nor does the DuPage County notice encompass all who are harmed by criminal acts, as it does not cover, for example, third parties.

Overall, the Victims and Witnesses Act provides for pre- and post-conviction involvement of the crime victim through notice and communication opportunities. The only monetary remedy in the Act, as well as in the constitution, is restitution. Section 8.1 seemingly prompted the General Assembly to add this remedy to its written laws and to mandate that the State’s Attorney request it. Unfortunately, difficulties persist in securing more complete crime victim recovery. Problems also arise when monetary remedies beyond restitution are sought or when remedies are sought by third parties.

B. Compensation

In addition to restitution, since 1973 the Illinois General Assembly has provided to victims of violent crimes opportunities for compensation under the Crime Victims Compensation Act (“Compensation Act”).\textsuperscript{106} Under the Act, crime victims who have inadequate insurance and no


\textsuperscript{102} Id.

\textsuperscript{103} Id. (emphasis added).

\textsuperscript{104} Id.

\textsuperscript{105} Id.

\textsuperscript{106} 740 ILL. COMP. STAT. 45/1 et seq. (2008).
Monetary Remedies for Victims

other funding source to cover their expenses are eligible for compensation for medical bills, counseling, lost wages, "loss of tuition," and "funeral, burial and travel" expenses up to $5000, as well as for "loss of support of the dependents of the victim," and for other expenses. Illinois can provide up to $27,000 to a qualified victim. Compensation under the Act differs from restitution as it is only "a secondary source." Awards or benefits from other sources, such as Worker's Compensation, related causes of action, and insurance, will reduce the monies available under the Compensation Act.

In order to qualify for compensation, the victim must have suffered injury or death as the result of a "crime of violence." The victim must also have reported the crime within seventy-two hours of its occurrence and submitted a completed application within two years. Additionally, the victim must have "cooperated with law enforcement officials in the apprehension and prosecution of the assailant." Clean hands are required so that the victim cannot be an accomplice. The injury must not have been "substantially attributable" to the victim's "wrongful act" or "substantially provoked by the victim."

Compensation under this Act differs from restitution where there usually can be a more complete remedy, and crime victim remedies under the Compensation Act come from the state instead of the offender. The jurisdiction of the Court of Claims is used to resolve claims, with funds derived from fines imposed on convicted offenders. The Attorney General is to "promulgate rules... investigate all claims... and represent the interests of the State of Illinois." Despite the required notice of the right to compensation that must be given to

---

107 Id. at 45/2(h). The compensation is reduced by the amount of health insurance benefits available or life insurance proceeds (with $25,000 exempted). Id. at 45/10.1(e). No showing of economic hardship is required. Id. at 45/10.1.
108 Id. at 45/10.1(f).
109 Id. at 45/10.1(g).
110 Id. at 45/10.1(e) (referring to Section 45/7.1(a)(7)).
111 Id. at 45/2(d) (recognizing that an attempted crime of violence also counts and that victims include people who "personally witnessed a violent crime").
112 740 ILL. COMP. STAT. 45/6.1(b) (2008).
113 Id. at 45/6.1(a).
114 Id. at 45/6.1(c). But neither conviction nor apprehension is required. Id. at 45/9.1.
115 Id. at 45/6.1(d).
116 Id. at 45/6.1(e).
117 Id.
119 Under the constitutional provision on crime victim's rights, the "General Assembly may provide for an assessment against convicted defendants to pay for crime victims' rights." ILL. CONST. art. I, § 8.1(c).
120 740 ILL. COMP. STAT. 45/4.1 (2008) (note the victim is not separately represented).
victims by hospitals and law enforcement agencies,\textsuperscript{121} the onus is on the victim to follow the statutory procedures in order to recover.\textsuperscript{122} Where the victim acts, however, there should be little delay in payment and no concern about enforcement. While there have been some minor changes made since 1973, including increases in the compensation available, the Compensation Act has not been significantly altered since the adoption of Section 8.1.

C. Monetary Remedies at Sentencing

In addition to the Victims and Witnesses Act and the Compensation Act, the Illinois Unified Code of Corrections ("Corrections Code")\textsuperscript{123} has permitted monetary remedies for crime victims at sentencing since 1977.\textsuperscript{124} The current Code states the criminal court "in all convictions for offenses in violation of the Criminal Code of 1961 . . . shall order restitution" where the victim sustained personal injury or property damage "as a result of the criminal act of the defendant."\textsuperscript{125} In other cases, the court at sentencing must "determine whether restitution is an appropriate sentence."\textsuperscript{126}

In its original version, the law simply noted certain procedures "[i]f restitution is part of the disposition."\textsuperscript{127} It also declared the defendant's ability to pay restitution as a factor in determining amount.\textsuperscript{128} Prior to the adoption of Section 8.1 in 1992, the Corrections Code was amended several times to increase the use of restitution at sentencing. In 1985, the Code was changed to require that the court decide at sentencing whether restitution is appropriate,\textsuperscript{129} with the defendant's ability to pay a factor in determining the method of payment,\textsuperscript{130} but not the amount.\textsuperscript{131} By 1988, the Code stated that the court "shall order restitution" for all convictions under the Criminal Code of 1961 involving victims sixty-five years or older. For other cases the court would decide on the appropriateness of

\textsuperscript{121} Id. at 45/5.1.
\textsuperscript{122} See id. at 45/6.1 (reporting and cooperation duties); id. at 45/7.1 (claim applications).
\textsuperscript{123} 730 ILL. COMP. STAT. 5/5-5-6 (2008).
\textsuperscript{124} The Code views victims as does the Victims and Witnesses Act, so that a parent of a mentally disabled victim is also a victim who can recover lost wages for attending the criminal trial. People v. Fouts, 745 N.E.2d 1284, 1286–87 (Ill. App. Ct. 2001).
\textsuperscript{125} 730 ILL. COMP. STAT. 5/5-5-6 (2008).
\textsuperscript{126} Id.
\textsuperscript{127} ILL. STAT. ch. 38, ¶ 1005-5-6 (1977) (current version at 730 ILL. COMP. STAT. 5/5-5-6 (2009)).
\textsuperscript{128} Id. at ¶ 1005-5-6(a).
\textsuperscript{129} ILL. STAT. ch. 38, ¶ 1005-5-6 (1985) (current version at 730 ILL. COMP. STAT. 5/5-5-6 (2009)).
\textsuperscript{130} Id. at ¶ 1005-5-6(f).
\textsuperscript{131} Id. at ¶ 1005-5-6(b).
Immediately following the adoption of Section 8.1, there were no significant amendments. But in 1996, the requirement that the victim be at least sixty-five for mandatory restitution was removed. The requirement that the court determine the appropriateness of restitution in other cases was deleted in 1996, but returned in 2000.

Enforcement mechanisms for restitution orders under the Corrections Code were initially meager. Excess cash bond could be applied to restitution, but this was not mandatory. The court was authorized to modify or enlarge any conditions of payment or to revoke the sentence. In 1987, language was added allowing a court to order the sheriff to seize and sell the offender’s property to satisfy restitution. In 1991, the court was expressly authorized to enter withholding orders. As well, in 1991 a restitution order was then explicitly made a judgment lien in favor of the victim, enforceable as any other lien. Since 1992 the Code has declared that restitution is not discharged upon completion of the sentence. Finally, modest changes were made in 1998 to the civil procedure laws on interest, making them applicable to restitution orders.

The current Corrections Code requires that if restitution is ordered, the loss to the victim must be compensated if “proximately caused by the conduct of the defendant.” Restitution can neither include pain and suffering nor exceed actual costs. Besides considering restitution,
the Code states "the court shall determine whether the property may be restored in kind . . . or whether the defendant is possessed of sufficient skill to repair" it. It continues: "the court shall allow credit" for such property in determining the remaining amount of restitution payable in cash. Restitution can also now be established in plea agreements, or even when criminal charges are dismissed. As an order of restitution is a judgment lien, "the court may enter an order directing the sheriff to seize" and sell a defendant's property. If the offender fails to make restitution, but there is no willful violation, the court may grant an extra two years (above an original five) for a defendant to pay. If failure to pay is willful, the court may revoke the restitution order utilizing the procedures employed when revoking probation.

The Code has been construed liberally at times. Thus, while the Code states that in "taking into consideration the ability of the defendant to pay . . . the court shall determine whether restitution shall be paid in a single payment or in installments," one Illinois appellate court has held that the consideration of the defendant's ability to pay is not required in setting the amount of restitution. The same court also noted the legislative intent "to make victims whole for any injury received . . . and to make criminals pay all of the costs which arise as a result of the injuries victims suffered." 

There was also a broad reading of the Code in 1992 by the Illinois Supreme Court in People v. Lowe. There, the court held that the statute included victims of nonviolent crime. It said the legislative purpose was "to make all victims whole" and to avoid the need for victims to pursue civil suits with "additional expense, stress and delay."
While some courts have construed the Code and the related crime victim statutes liberally, crime victims often still go without remedy. Advocates of constitutional crime victim restitution in Illinois had hoped for more. They believed that explicit constitutional recognition of crime victims restitution would prompt greater monetary remedies. Yet to date, the monetary remedies and their processes remain inadequate. Restitution remains elusive, with, at best, standardless discretion. Crime victims are often left to fruitless civil lawsuits after criminal cases have ended. How have other states handled monetary remedies for crime victims? Can their laws provide guidance for those looking to enhance the constitutionally-recognized restitution right and additional statutory provisions on crime victim recoveries?

V. SECURING BETTER MONETARY REMEDIES FOR ILLINOIS CRIME VICTIMS

Other states have strong and explicit constitutional and statutory rights to monetary recoveries for crime victims. Unfortunately, elsewhere as in Illinois there are many statutory and judicial failures to implement and enforce crime victim recovery rights. Yet, a few American laws do provide guidance on possible new laws, though no single state has a comprehensive scheme. The approach elsewhere, as in Illinois, typically embodies three separate avenues to crime victim recovery: restitution, victim compensation, and sentencing. By combining these avenues into a single scheme, and by borrowing select provisions from other states, the Illinois General Assembly could facilitate greater monetary recoveries for crime victims and meet the expectations of 1992.

162 Illinimedia, supra note 40.
163 Id.
164 We particularly like the California provision that recognizes the constitutional right of a crime victim, intended to “secure restitution” for “all persons who suffer losses as a result of criminal activity,” requiring an order “in every case . . . in which a crime victim suffers a loss,” where all monies “collected” from criminals ordered to pay restitution “shall be first applied to pay the amounts ordered as restitution.” CAL. CONST. art. I, § 28(b)(13).
165 See, e.g., Douglas E. Beloof, The Third Wave of Crime Victims’ Rights: Standing, Remedy, and Review, 2005 B.Y.U. L. REV. 255, 342 (in commenting upon victims’ rights generally, author concludes: “there is no way to proceed but to change victims’ illusory rights into real rights. . . . To become real, rights must be accompanied by victim standing, meaningful remedy, and review as a matter of right.”).
166 Federal initiatives on crime victim restitution during state criminal cases are unlikely. See, e.g., United States v. Morrison, 529 U.S. 598, 617–18 (2000). The Court notes: The Constitution requires a distinction between what is truly national and what is truly local . . . . The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been
Monetary remedies for crime victims would be enhanced by a single scheme organized by the stages in a criminal case. Thus, crime victim recovery laws could speak to: (1) when a crime is being investigated; (2) when a prosecutor is deciding to charge; (3) plea bargaining; (4) trial; (5) sentencing; and (6) post conviction.

At the investigatory stage, legislators should better ensure that victims become informed of their recovery rights. Law enforcement officers should be trained on the content, and on the need to explain at times, such rights. A victim advocate could be established, perhaps locally within every county. Pro bono attorneys could be solicited to aid certain crime victims.

Upon the filing of a criminal charge, prosecutors, if not victims, should be enabled at times to preserve or freeze more assets so as to...
facilitate later crime victim recovery. Of course, any ex parte orders should be subject to quick review and all orders upon hearings should meet minimum procedural due process safeguards.\footnote{A cogent argument for expanding federal judicial authority to block criminal defendants from transferring assets that could be used for later restitution is made in statement of Professor Paul G. Cassell on improving restitution in federal criminal cases. The U.S. House Judiciary Committee, Subcommittee on Crime, April 3, 2008 (source available with author).}

A victim's monetary losses should also possibly be considered during some decision-making on criminal prosecution. If the prosecutor does decide to charge, the indictment or information could include detailed information regarding the losses suffered by the victim. This would aid later attempts at monetary recoveries. Of course, a victim should not have much voice (and certainly no veto power) in decisions on whether and what to charge (or continue to charge).\footnote{See, e.g., Briede v. Orleans Parish Dist. Attorney's Office, 907 So. 2d 790, 792-93 (La. Ct. App. 2005). The court noted: the above cited laws give the district attorney broad discretionary power in both instituting and handling criminal prosecutions... Mrs. Briede's allegations do not state a cause of action against either the District Attorney of Orleans Parish, individually, or his office because the decision to take any action to prosecute or not prosecute is within the district attorney's constitutionally granted powers. Id.; State v. Sykes, 364 So. 2d 1293, 1297 (La. 1978) (entering of nolle prosequi rests entirely within discretion of the prosecutor who possessed absolute discretion to dismiss indictment). However, in Delaware, "[c]onsistent with the duty to represent the interests of the public as a whole, the prosecutor shall confer with a victim before amending or dismissing a charge..." DEL. CODE ANN. tit. 11, § 9405 (2007).}

During plea bargaining, repeated consultations by the prosecutor with a crime victim help ensure possible monetary remedies will be considered. In Mississippi, for example, by law a trial court may make restitution a condition of accepting a plea.\footnote{MISS. CODE ANN. § 99-15-26(2)(a)(i) (2007 & Supp. 2008) ("[r]easonable restitution").} In Montana, the court must impose restitution upon certain pleas of guilty.\footnote{MONT. CODE ANN. § 46-18-201(5) (2007) ("[S]entencing judge shall... require payment of full restitution to the victim.").} In Alabama, a court will not accept a plea agreement unless the prosecutor recounts the reasonable efforts made to confer with the victim.\footnote{ALA. CODE § 15-23-71(1) (1995).} Connecticut formerly permitted any victim to give an opinion before a court accepted
a plea. In Michigan, the prosecutor is to confer with the victim before finalizing the terms of a plea. In Delaware, "consistent with the duty to represent the interests of the public as a whole, the prosecutor shall confer with a victim before amending or dismissing a charge or agreeing to a negotiated plea or pretrial diversion." We support legal reforms that require criminal prosecutors to consult with crime victims specifically about potential monetary recoveries, as well as laws that prompt trial judges entertaining plea arrangements to inquire about such consultations.

Victims would also be aided in their pursuit of monetary remedies if a criminal defendant was required, at times, to make certain financial disclosures as components of guilty pleas. In California, in anticipation of a restitution order, a criminal defendant must make a financial disclosure. In Alaska, certain financial disclosures are now required of defendants upon conviction. In Illinois only certain victims of adjudicated crimes have statutory rights to depose the convicted criminals (or others with "reasonable grounds to know") about the assets of criminals.

At sentencing, after trial, a crime victim seeking recovery can participate in varying ways. There could be a victim impact statement or a required proof of loss claim. In Alaska, the prosecutor must inform a crime victim of the right to make a victim impact statement showing losses, the need for monetary relief, and recommendation as to the sentence. In Colorado, a prosecutor must present a victim impact statement.

---

177 CONN. GEN. STAT. ANN. § 54-91(c) (repealed 1976).
178 MICH. COMP. LAWS ANN. § 780.756(3) (West 2007).
179 DEL. CODE ANN. tit. 11, § 9405 (2007).
180 See also TEX. CODE CRIM. PROC. ANN. art. 56.13 (Vernon 2006) (mandating that mediation services for victims and offenders be provided by volunteers trained by Texas Department of Criminal Justice); VA. CODE ANN. § 19.2-11.4 (West 2008) (recognizing that a victim-offender reconciliation program can lead to submissions to sentencing courts on damages to victims under proposed restitution agreement). Delaware expressly allows for creation of victim-offender mediation as an alternative to the criminal justice process. DEL. CODE ANN. tit. 11, § 9501 (2007). Minnesota invites restorative justice programs. MINN. STAT. ANN. § 611A.775 (West 2009).
183 725 ILL. COMP. STAT. 145/2.3 (2008) (cases involving persons "killed or physically injured" in Illinois as a result of crimes "perpetrated or attempted against" those persons).
184 Id. at 145/3(a) (cases involving persons convicted, or found not guilty by reason of insanity or guilty but mentally ill, "of first degree murder, a Class X felony, or aggravated kidnapping"). See also id. at 145/3(b) ("[U]pon written request of the victim, The Department of Corrections shall notify the victim of any assets of the person convicted. . . .").
185 ALASKA STAT. § 12.61.015(b) (2008).
statement itemizing any economic loss, including losses after criminal charges were filed. Where a conviction in a criminal case necessarily entails a defendant's responsibility for certain pecuniary harm, such a determination should be deemed conclusive at sentencing (and elsewhere via issue preclusion) when monetary remedies are pursued.

After sentencing, new laws could ensure better recovery of monetary remedies secured by court orders. Courts should be prompted to monitor compliance. The Authors like the Georgia law, stating that court clerks or probation or parole officers are statutorily mandated to report regularly on the failures by offenders to pay restitution. Once certain sentencing order violations become known, crime victims should have statutory standing to seek relief so they need not rely on prosecutorial discretion. We also especially like the new California constitutional provision that not only recognizes a crime victim's right to restitution, but also requires a restitution order "in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss." This California provision further states: "[a]ll monetary payments, monies, and property collected from any person who has been ordered to make restitution shall be first applied to pay the amounts ordered as restitution to the victim." Seemingly, this somewhat limits government collections in forfeiture proceedings.
Illinois, a statute only speaks expressly to “attachment against the property” of the convicted criminal when the prosecution involved “first degree murder, a Class X felony, or aggravated kidnapping.” Finally, we support a new Illinois statute allowing crime victim awards to be enforced at any time.

VI. CONCLUSION

When Illinois voters added the Crime Victims’ Bill of Rights to the Illinois Constitution in 1992, they anticipated significant new benefits for crime victims, including increased opportunities for restitution. Although the amendment has spurred some new statutes, many crime victims in Illinois still have little chance for restitution or other monetary remedies during criminal cases. One could argue, perhaps, that the restitution right should be self-executing, thus allowing direct civil actions. For us, a better path to restitution, and to other monetary remedies, for crime victims would be for the Illinois General Assembly to establish a new comprehensive remedial scheme. Integrated approaches to monetary remedies for crime victims, speaking to the varying stages of the criminal process, would help better secure the goal of enhanced recoveries by crime victims established in 1992 by overwhelming majorities of both legislators and voters. The 1992 initiative should finally prompt changes in the Victims and Witnesses Act, the Compensation Act, and the Corrections Code so that more Illinois crime victims receive more monetary relief during Illinois criminal cases.


194 725 ILL. COMP. STAT. 145/3(c) (2008).

195 See 735 ILL. COMP. STAT. 5/12-108(a) (2008) ("Child support judgments . . . may be enforced at any time.").