

**VICTIMS AND WITNESSES:
CURRENT TRENDS IN THE AMERICAN CRIMINAL
COURTS**

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James Phillips
Deputy District Attorney
County of Nevada

THE VICTIMS RIGHTS MOVEMENT IN THE UNITED STATES

By the early 1800 the United States of had nearly completed its task of separating criminal legal proceedings from civil proceedings, and effectively minimizing the role of victims in participating (or at least controlling) criminal proceedings. As a body of case law continued to evolve for the next 150 years clarifying the rights of the accused in criminal proceedings, the role and influence of victims became even less significant.

Beginning in the 1960's however, American society began to turn a more sympathetic eye towards the rights and welfare of crime victims in a movement that continues to this day. In 1965 the first American state established a crime victim compensation program. By 1972, the first institutions to assist without cost victims of specific crimes developed in the cities of San Francisco, St. Louis, and Washington D.C. 1974 saw the not only the expansion of victim assistance centers but saw the development of the first centers run by law enforcement agencies in Indianapolis, Indiana and Fort Lauderdale, Florida. These early centers specialized in "crisis counseling", especially in the period immediately following the crime. In 1975 the National Organization of Victim Assistance was created and 1976 saw the first use of "victim impact statements" included in felony pre-sentencing reports (Fresno, California Superior Court). Also in 1976 Nebraska & Wisconsin abolished marital exceptions to rape statutes, partly in response to criticism from pro-victims groups.

In the period 1978-1979 victim rights groups expanded both in number and membership, and some of these groups were visibly engaged in legislative lobbying, including on the federal level. In 1980 Wisconsin became the first state to adopt a "Victims' Bill of Rights" and to this date about 25 other states have followed suit.

In 1982-President Reagan formed the "Presidential Task Force on Victims of Crime". This prominent commission ultimately released a report that included numerous recommendations. Many of these recommendations were implemented by Congress over the next two years including the Federal Victim of Crime Act (VOCA, 1984); Funding, or at least subsidies, for victim assistance centers nationwide; and the creation of a permanent Office of Victims of Crime housed within the Federal Department of Justice. The most

prominent recommendation however, has not yet been recommended, which called an amendment to the United States Constitution specifically to protect the rights of victims of crime.

In 1987 the Victims' Rights movement suffered a setback when the US Supreme Court ruled in a 5 to 4 decision (Booth v. Maryland, 482 US 496) that victim impact statements are unconstitutional in the penalty phase of death penalty trials. It later repeated this ruling by the same margin in South Carolina v Gathers (1989) 490 US 805. But in a surprising change of position in 1991 the Supreme Court reversed itself and upheld the use of such victim impact statements in Payne v. Tennessee, 501 US 808. Also in 1991 the United States Supreme Court ruled that statutes prohibiting convicted killers from profiting from their crime in contracts to write books (memoirs) as unconstitutional (Simon & Schuster v. NY Crime Victims Board, 502 US 105).

In 1995, subsequent to the bombing of the Alfred P. Murrah federal building in Oklahoma City, Oklahoma, Congress created a victim restitution program specifically for the families of those killed in criminal act.

In 2000, Congress adopted the Trafficked Victims Protection Act of 2000 which, among other steps, provided funding to local government to care for victims of human trafficking within the United States.

By 2005, all 50 US states have implemented crime victim compensation programs.

The specific rights provided to victims of crime originate in individual state constitutions, state statutes, and legal rulings from state and federal courts. They can vary substantially from jurisdiction to jurisdiction, but typically include

- ◆ a right to be notified of charges and court dates;
- ◆ a right to be heard at sentencing and other crucial dates such as parole hearings;
- ◆ A right to restitution if there is a conviction (usually defined as a right to a restitution order from the defendant rather than a guarantee of payment);
- ◆ A right to be free from contact by the defendant (enforced by court order);
- ◆ A right to notification of the defendant's release from custody;

Additionally, some jurisdictions provide greater rights such as a right to HIV/AIDS testing of defendant and being informed of those results in appropriate cases; the right of prompt return of the victim's property; the right to attend defendant's trial; the right to keep their address confidential; the right to have the court consider their needs in trial scheduling; the right to confer with the prosecutor. In California, some of these rights are limited to the most serious felonies; for example, for the most violent felonies the prosecutor has a duty to inform the victim in advance of any plea-bargain offers in their case, but the victim's approval of that offer is not required.

VICTIM RESTITUTION IN THE UNITED STATES

Although the concept of direct restitution has long existed in American Criminal courts, (i.e., a court ordering a convicted criminal to reimburse the victim for his losses) society as a whole realized this mechanism was inconsistent at best and a failure at worst. There arose a general concern in American society for ensuring that the basic needs of crime victims be met more reliably than the current restitution mechanisms were accomplishing. In 1965, the State of California established the first victim compensation program in the United States. By 1995 that program was generally regarded as the largest in the world, typically receiving 60,000 applications for assistance yearly and having disbursed in excess of \$125 million annually on those approved claims.

In 1984, with the passage of the VOCA by Congress, substantial changes began to emerge in victim compensation programs. The VOCA did not require states to do anything per se, but created a funding source for state's victim compensation programs and imposed certain requirements on states accepting the offered funds. Requirements include prohibiting states from denying claims to nonresident victims and requiring certain categories of crimes be covered, requiring that victims attempt to utilize other sources first, and subjecting the states who accepted the federal money to annual audit requirements.

Almost all states accept the federal funding and the federal fund itself, fed by fines imposed on cases in federal criminal courts, is substantial. The fund has reached \$1,267,000,000, and the US government disburses up to \$500,000,000 to state & local

programs annually. In 1996 the fund collected \$530 million in fines and the largest single contribution occurred that year when a \$340 million criminal fine was imposed on Daiwa Bank for fraud involving the sale of US Treasury Bonds

Despite substantial contributions from the federal government, sometimes must subsidize their programs, often with their own criminal fines and sometimes with general tax revenue. The State of California has in some years subsidized its victims compensation program in excess of \$30 million dollars of general tax revenue.

Even those states using federal funds in their victims' compensation programs have broad discretion in determining what crimes it will compensate and what limits will be imposed. Generally, States compensate medical bills, funeral/burial costs of murdered victims, and lost wages for injured victims or their dependent survivors. Many also provide some funding for psychological counseling or rehabilitation services. Most states allow a maximum benefit of \$40,000 to \$50,000, but some states have different limits for the type of loss; California limits burial costs to \$3500 and counseling to \$10,000 but may pay up to \$70,000 for other types of losses. Other states typically allow the most compensation for medical bills. In almost all cases, victims must provide actual documentation of financial loss before compensation is made.

The US Federal Government has also adopted programs to provide financial assistance to victims in certain circumstances. First was the establishment of a program for the US Virgin Islands modeled after similar state programs. Later was the creation of a program for other victims of crimes in federal jurisdiction, and Congress adoption of the Victim Assistance in Indian Country Act (VAIC); It should notes that while in most states the amount of area under exclusive federal control is very small, in some states with large Native American populations (Arizona and New Mexico) substantial areas of property exist under federal jurisdiction.

The US federal government has also created some unique programs for victim compensation based on single crimes; First was the bombing of the Alfred P. Murrah building in Oklahoma City, killing 168 people including many children at a government run daycare center. Later, in response to the terrorist attacks on September 11, 2001, which killed nearly 3,000 victims in the World Trade Towers (and additional victims on

four commercial aircraft and at the Pentagon), Congress created a special compensation program and funded it with approximately \$5.4 billion dollars.

THE RIGHTS OF DEFENDANT AND THE RIGHT TO PRIVACY

The United States Constitution guarantees all defendants in a criminal action the right to see and confront witnesses against them. This right has since been held applicable to all defendants, even in state court prosecutions. Occasionally, this constitutional right comes into direct conflict with a witness' right to privacy.

More problematic is the attempt by a defendant to obtain access to a witness's mental health records, medical records, or records contained within the witness' computer, all areas for which the courts which generally recognize a right to privacy on the part of the witness. More often than not these conflicts between a defendant's rights to discovery and the witness's rights to privacy are resolved in favor of the witness. Some jurisdictions provide a mechanism where the witness must provide the subpoenaed evidence to the court, but the magistrate is entitled to examine the evidence or records alone ("in camera") before deciding whether the exculpatory value of the evidence requires their discovery to the defendant.

Generally, a defendant in a criminal prosecution has a right to explore potential bias of a witness or other matters affecting their credibility. However, almost all jurisdictions have adopted "rape-shield" laws, which prohibit a defendant from questioning a victim during testimony about prior sexual conduct with any person except the defendant.

JUVENILE WITNESSES

Although rules regarding juvenile testimony vary among jurisdictions, many states have no minimum age requirement to qualify as a witness. The determination of competence is left to the individual trial judge. The basic requirements would be some ability to perceive, remember and communicate the relevant circumstances, and a demonstrable knowledge of right and wrong. Perceptible witnesses (i.e., eyewitnesses) as

young as 5 years old have been allowed to testify in some cases. This standard is essentially the same as for adult witnesses, with the exception that in virtually all jurisdictions an adult witness is presumed to be competent under this standard, whereas the same presumption may not be extended to juvenile witnesses.

Although a number of states adopted statutes allowing testimony in certain cases (testimony by child molestation victims) through closed circuit television or the use of partitions to separate the victim from the defendant, those statutes have generally been held unconstitutional as a violation of the defendant's rights to see and confront witnesses. (Maryland v. Craig (1990) 497 US 836).

Most jurisdictions allow a juvenile witness to have a "support person" of their choice accompany them during their testimony. The support person is sometimes allowed not just in the courtroom but allowed to sit near the witness box next to the juvenile witness. The right to a support person is typically recognized even in proceedings that are otherwise closed to the public (i.e., prosecutions of juvenile defendants). This right is sometimes also extended to adult witnesses, typically in the case of a sexual assault victim serving as witness.

EXPERT WITNESSES

Although the concept of expert testimony has existed for many years the role it plays in criminal prosecutions has been steadily increasing. Expert testimony routinely appears from medical professionals, chemists, fingerprint examiners, questioned document examiners, engineers, firearm specialists, and biochemists specializing in DNA evidence. However, among the criminal defense bar, no area of expert testimony has increased to the extent psychological experts have. Certain "experts" devote their entire time to soliciting work from the defense bar and testifying for often lucrative wages, rather than performing traditional work in their "expert" field.

The standard for qualification as an expert witness is fairly low, in most jurisdictions the proffered witness must have "special, knowledge, training, experience and education" in his field (California Evidence Code §801). The thoroughness of training or

experience is often left to the jury to assess in deciding how much weight to give the “expert” opinion.

To ensure flaws in an “expert’s” opinion the opposing party is normally entitled to, before trial, the identity of the expert, his resume if one exists, and any reports he prepared for the party who hired him. During his testimony he may also be examined about his compensation for his work on behalf of the party who hired him. Courts often allow further examination about the frequency of his business with the counsel who hired him, and how much income he obtains annually from expert testimony.

In cases of particularly dubious experts, it is not uncommon for prosecutors, even from different agencies, to share information and transcripts of testimony. Some Prosecutor Associations of a more fraternal nature have even begun maintaining “brief banks” of testimony of dubious “experts” they make available for impeachment purposes to other prosecutors.

PENTITI & ACCOMPLICE TESTIMONY

Although the term “Pentiti” hardly exists in the US Criminal Justice System, the concept does. For over 100 years the Prosecution has attempted to use the testimony of an accomplice against other defendants in exchange for some leniency in the witness’s punishment. American courts have consistently held that whatever special benefits the “accomplice witness” receives must be disclosed, not only disclosed to the defendant but also disclosed to the trier of fact (jury) if either party seeks its admission into evidence. This has been held to apply even if the reward the witness receives is not as apparent as a lenient sentence, but could also include such benefits as the promise of a more favorable prison, or conjugal visits for an incarcerated witness. Furthermore, if a witness, even one who is clearly not an accomplice, is testifying under a grant of immunity, the law requires disclosure of that grant of immunity to the defendant and disclosure to the jury if the defendant desires.

The use of accomplice testimony also triggers other legal requirements. Although the testimony of one eyewitness is normally legally sufficient to prove a crime, the law

generally requires that the testimony of an accomplice require some corroborating evidence, however slight. This “corroboration rule” requires not only some extra proof that a crime occurred, but proof that the defendant participated in the crime. Furthermore, most jurisdictions require the jury be instructed that accomplices are generally less trustworthy than other witnesses.

The concept of “pentiti” became more pronounced beginning in the late 1970’s with a series of Government cases against traditional organized crime families (Mafia) operating in the east coast of the United States. For the first time, Americans learned in mass learned about criminals being provided lenient sentences, new identities, and government support after their testimony.

On the most sensational cases was Salvatore “Sammy the Bull” Gravano whose testimony proved crucial in prosecutions of John Gotti and other leaders of the Gambino crime family. The American public learned how Gravano admitted to 19 murders in sworn testimony, but was sentenced to only 3 1/2 years in prison due to his cooperation. Gravano also bragged of being allowed to keep \$8 million in criminal proceeds as part of his agreement with the Federal government. By that time (1995) the Federal Witness Program had more than 6,000 clients and a budget over \$53 million.

Another sensational case involving “Pentiti” was the case of Robert Rozier, a former professional football player who joined a Florida-based cult. The cult, dominated by African-Americans, had a practice of kidnapping and “sacrificing” victims, ordinarily indigent and homeless people of white or Hispanic descent. Rozier testified against the cults leader and other members, and admitted under oath how he murdered 6 victims on instructions from the cult leader. (he also murdered one additional person of his own initiative, independent of the cult). The cult leader was convicted and sentenced to death in a Federal Court prosecution. Rozier served a modest prison sentence and was then given a new identity and secretly placed across the country in rural El Dorado County, California. Rozier (now under the identity of Robert Ramses) was arrested for tendering \$130 in fraudulent checks. When the local (State Court) Prosecutor discovered Ramses true identity and criminal past, he amended the indictment to charge the defendant under California’s career criminal law, and Rozier/Ramses was ultimately sentenced to life in prison.

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