

# JUDICIAL ASPECTS CONCERNING THE VICTIM IN THE AMERICAN JUSTICE SYSTEM

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**Abstract:** *A couple of decades ago, victims had few, if any, rights to be informed, present and heard within the American criminal justice system. Moreover, victim assistance programs were virtually non-existent. Yet, there have been taken steps in this respect and made tremendous strides in the granting of mandated participatory rights for victims of crime and delivery of services to crime victims. Victims' rights statutes have significantly influenced the manner in which victims are treated within the federal, state and local criminal justice systems.*

## **Overview**

Diachronically, the American criminal justice system was patterned primarily after the English judicial system. One significant difference has been the manner in which criminal prosecutions are viewed. Traditionally, criminal prosecutions in England were private actions brought by the victim or a representative of the victim. While this was also true during the American colonial period, the new United States of America soon moved to a tradition of public prosecution, undertaken by a public official – the prosecuting attorney. In the United States, a crime is considered to have been committed *against the state* – in other words, against society as a whole – rather than solely against a victim. One especially unfortunate result of this system is that victims have been treated as evidence against the accused, usually included only as a witness to the crime committed against them. Since the crime is considered to have been committed against the state, and it is the state's job to prosecute, victims are not even recognized as a party to the case. Thus, they have had little or no involvement in the process of bringing offenders to justice.

In recent years, the victims' movement has sought to re-establish a place for the victim in the American criminal justice process and to enhance the rights of crime victims. It is important to note that the thrust of the victims' movement has been to increase the rights of victims, *not* to eliminate or reduce the rights of criminal defendants.

During the last decades, all states have passed laws concerning crime victims' rights. Every state has a "victims' bill of rights" – a set of basic rights and protections for victims of crime. By the end of 1998, thirty-one American states have passed constitutional amendments ensuring victims' rights, including Alabama, Alaska, Arizona, California, Colorado, Connecticut, Florida, Idaho, Illinois, Indiana, Kansas, Louisiana, Maryland, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin. An amendment to Montana's state constitution, although not a victims' rights amendment, was also adopted in 1998, broadening the purposes of the criminal justice system to include restitution for crime victims.

## **Victims' Rights**

American expert statistics show that virtually anyone can become a victim of crime. In 1997, there were an estimated 35,000,000 crimes in the United States against persons aged twelve or older. Among those, nearly 9,000,000 involved some type of violent crime. Best estimates are that five out of six people will be victims of a completed or attempted violent crime at least once in their lives.

About two decades ago, those who served on the American President's Task Force on Victims of Crime sought to understand and articulate victims' needs, and provide recommendations for a legal framework to enforce basic victims' rights. Many of the legislative efforts made on behalf of victims during the past years were in response to the 68 recommendations issued in the Task Force's *Final Report*. Today, the rights of victims are becoming more clearly defined to take into consideration the unique concerns of distinct victim populations such as sexual assault victims, domestic violence victims, child abuse or neglect victims, elderly victims of abuse, victims with disabilities, victims of hate-motivated crimes, and even Good Samaritans. These groups have been granted rights and remedies to address their special needs, such as restraining orders for domestic violence victims,

videotaped testimony and testimonial aids for child victims, and protective services for elderly victims.

Though all American states have some provisions for the rights of crime victims, the scope and strength of these provisions can vary greatly from state to state. Victims' rights often include:

- The right to notification of the stages/ proceedings in the criminal process;
- The right to attend and/or participate in criminal justice proceedings;
- The right to notification of other legal remedies ;
- The right to protection from intimidation and harassment;
- The right to notice of the release or escape of the offender;
- The right to privacy, including confidentiality of records;
- The right to speedy trial provisions;
- The right to confer or discuss the case with the prosecutor;
- The right to prompt return of the victim's personal property seized as evidence from the offender;

### **Who May Exercise Victims' Rights**

Exactly who is a "victim" entitled to a particular right is defined by the statutory or constitutional law of each American state. In many cases, a victim's entitlement to a right depends on the seriousness of the crime. In some states, basic rights are afforded only to victims of felonies, while in other states, victims of any violent crime, felony or misdemeanor may enjoy such rights. In a number of states, rights have been extended to include victims of juvenile offenders.

In addition to the direct victims of applicable crimes, victims' rights may often be exercised by a family member of a homicide victim, or the parent, guardian, or other relative of a minor, disabled or incompetent victim. In some states, a victim's legal representative or another person designated by the victim may exercise rights on the victim's behalf.

### **Right to Notification about the Criminal Justice Process and Other Legal Remedies**

Most states give victims or their families the right to be notified of important, scheduled criminal proceedings and the outcomes of those proceedings. They also notify victims when hearings have been canceled and rescheduled. In addition, victims may also have the right to be informed of various rights, including the rights: to attend a proceeding and/or submit a victim impact statement, to sue the offender for money damages in the civil justice system, to have a court order that they be protected from the offender and/or the offender's family and associates, and to collect witness fees for their testimony, among others. The right to be informed is crucial, because without notice of their rights, victims cannot, as a practical matter, assert those rights, and without notice of court proceedings, victims may miss the opportunity to exercise the rights they have been afforded.

### **Right to Attend and Participate in Criminal Justice Proceedings**

Usually, the victim's right to attend proceedings includes the right to attend the trial, sentencing, and parole hearing of the offender. Also, victims generally have the right to make an oral or written statement, at sentencing or a parole hearing, concerning the impact that the crime has had on their lives. Victims are increasingly being given the right to attend and address the court at other critical proceedings in the criminal justice process, such as:

- Hearings on bail or pre-trial release of the offender
- Entry of plea agreements;
- Post-trial relief or release hearings;
- Probation hearings;
- Change of security status hearings (*i.e.*, transfer of the offender from maximum to minimum security facilities, home detention, or escape);
- Commutation or pardon hearings.

### **Protection from Intimidation and Harassment**

A crime victim often has the right to protection from intimidation and harassment by the offender or the offender's family or associates. This protection may, under certain circumstances, be extended to a victim's family members as well. Some examples of this protection include:

- Police escorts to and from court;

- Secure waiting areas separate from those of the accused and his/her family, witnesses and friends during court proceedings;
- Closed courtrooms to those who are not parties to a case;
- Residence relocation;
- Denial of bail or imposition of specific conditions of bail release for offenders found to present a danger to the community or to protect the safety of victims and/or witnesses.

In addition, some states have passed laws making threatening or intimidating conduct by or on behalf of an offender against a victim or witness a separately punishable crime.

### **Right to Notice of Release or Escape of Offender**

Having the right to be notified of an offender's release can help provide for victims' peace of mind. Advance notice that an offender will soon be back on the streets gives victims an opportunity to mentally and emotionally prepare for an offender's release, as well as to develop a safety plan, if necessary, for themselves and their families.

Generally, the term "notice of release" refers to post-conviction release, and includes notice of final release from incarceration and notice of parole release. It may also include notice of other conditional releases, such as work release or furlough, if specified in a particular state's statute. Some states' laws may also provide for notice of the pretrial release of an offender on bond, or of an offender's release from a mental facility.

In a vast majority of states, victims are entitled to notice if the offender escapes from confinement; however, less than half of those states require that the victim be informed when the offender is recaptured.

### **Victim Compensation and Restitution**

Every state has a victim compensation program, which is designed to provide financial assistance to victims and, in some cases, to family members and other eligible persons. Usually, a victim must have suffered actual physical harm or other tangible loss, and the financial loss caused by such harm or loss must exceed a minimum dollar amount. In most states, a victim must fully cooperate with law enforcement and prosecution efforts in order to qualify for compensation.

In addition to compensation, victims often have the right to restitution, or payment by the convicted offender for the harm caused by the crime. The court generally orders restitution at the time of sentencing.

As a rule, neither victim compensation nor restitution includes punitive damages for injury or loss suffered by the victim. A lawsuit in civil court is usually required to recover punitive damages -- damages imposed as punishment, rather than as payment for specific, actual losses.

### **Conclusion**

There is still much that needs to be done in the American justice system. A study conducted by the National Center for Victims of Crime, funded by the U.S. Department of Justice, National Institute of Justice, concerning the impact of legal protection on crime victims' rights indicated that merely providing statutory rights for victims, while extremely important, does not guarantee the enforcement of such rights. Even in states with relatively strong protection for victims' rights, many crime victims were denied their rights. Not surprisingly, victims in the states with weaker protection of victims' rights were even less likely to be afforded their rights, even when mandated by law.

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