

3-26-1985

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Recommended Citation

30 N.Y.L. Sch. L. Rev. 757 (1985)

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Texaco Circle
Harrison, New York
March 26, 1985
Noon

VICTIMS AND WITNESSES: NEW CONCERNS IN THE
CRIMINAL JUSTICE SYSTEM

I am grateful for the kind invitation to speak to you today. I must say that your Chairman seemed genuinely surprised when I accepted the invitation. Apparently, not too many Judges have occupied this platform in the past. It is an unfortunate fact that Judges do not speak in many places outside the Courtroom, except to groups of lawyers. I say that it is unfortunate because I long have held the belief that the Judiciary has an obligation, a duty, to communicate with the public about matters relating to the legal system and the administration of justice. In my opinion, Judges should report to the citizenry just like any other public officials. I believe that this accountability should be a special concern to those of us who hold life tenure as federal judges by appointment of the President of the United States. When people with positions of responsibility in a major corporation such as Texaco are willing to take time from their busy schedules to give their attention as a group to topics of general public interest, Judges should be prepared, insofar as

possible and proper, to address their agenda. And so, in the performance of what I call my communication responsibility, I am pleased to discuss with you some new concerns in the criminal justice system and to provide some time at the end of my remarks to answer any questions about this subject or any other within my competence.

It should be obvious to all that there is an increasing popular dissatisfaction with the criminal justice system. This dissatisfaction has been manifested in public criticism of the legal restrictions placed on police agencies in detecting crime and apprehending criminals; in proposals to eliminate trial delay and plea bargaining abuses in the prosecution process; and in widespread disapproval of sentences imposed to punish offenders. All branches of government have become sensitive to these criticisms and proposals and have begun to react to them. An important response by the federal government is found in the Comprehensive Crime Control Act of 1984, enacted by the 98th Congress and signed into law by President Reagan on October 12, 1984. This Act represents a massive overhaul in federal criminal law. Among other things, it establishes new rules for bail proceedings, narrows the insanity defense, strengthens forfeiture laws, expands the definition of violent crimes, extends the federal government's role in the prosecution of credit card and computer fraud, and amends previous laws dealing with foreign

currency transactions and "money laundering." Its provisions for reform in sentencing are among the most important changes made.

In accordance with the requirements of the new law, a sentencing commission will be established shortly to establish guidelines for determinate sentencing. The Federal Parole Commission will go out of business, and the sentence imposed by the Judge will be the sentence served by the offender. The Commission will establish a range of penalties for each offense, and Federal Judges will be expected to impose sentences within the guidelines. In this way, it is expected that disparity in sentencing will be eliminated. Judges may impose sentences outside the guidelines only in very limited circumstances, and provision is made for appeal of a sentence by the government as well as the defendant. The State of New York has also established a sentencing commission, which is in the process of establishing guidelines for determinate sentencing by state judges. Whether guideline sentencing will be successful will depend to a large extent on the guidelines ultimately established as well as on their consistent application by the Courts. At any rate, they are designed to establish certainty in sentencing, and an offender will not be subject to the vagaries of parole board determinations. The responsibility will fall upon the Judge instead of the parole board.

These new approaches to sentencing arise out of traditional concerns for the proper punishment of offenders. Other traditional concerns of the criminal justice system revolve around the detection, apprehension and prosecution of offenders. Thus, always has the system focused on the wrongdoer. In recent years, however, the focus has begun to shift to the interests of victims and witnesses. This change in emphasis has brought with it new concerns for the protection, assistance and compensation of these important participants in the system. These new concerns have been fostered by the increasing demands of witnesses and victims for recognition and fair treatment and by an expanding public awareness of their significance in the law enforcement process. Response to these new concerns has come in the form of specific legislation, administrative reform and heightened sensitivity on the part of law enforcement personnel.

At the beginning of my career as a District Attorney, I was appalled by the failure of victims and witnesses to come forward to aid the authorities in criminal investigations and to testify in court. I made speeches to civic groups decrying public apathy toward crime. I compared some of those who were terrorized and victimized by criminals to the jury foreman who delivered a verdict in these words: "Your Honor, we have decided not to get involved." I announced that the twenty witnesses who failed to come to the assistance of a rape victim in Queens some years ago

or to assist in the identification of the offender were just as guilty as the rapist himself. Experience has since taught me that reluctance to identify or testify is often prompted by fear of retaliation. Concerns for the protection of witnesses have led to the implementation of elaborate programs for their security. The Witness Security Reform Act of 1984 revises and supplements a program for the security of federal witnesses that has been in place since 1970. The Attorney General of the United States now has broad powers to ensure the protection and welfare of witnesses. He may take all such other measures as he deems necessary to protect a person from bodily danger. These measures may range from providing security for a brief period to relocation of the witness in a different part of the country with a new identity. A relocated person may be furnished transportation and housing, living expenses, new employment opportunities and suitable official documentation to establish a new identity. The benefits of relocation and protection may be extended to the immediate family of a witness and to any "person closely associated" with the witness.

Federal law now provides penalties of up to ten years and fines of up to \$250,000 for tampering with a victim, witness or informant by the use or attempted use of intimidation or physical force. The same penalties are provided for retaliating against a witness, informant or victim by causing injury to or damaging the

property of another person. The Government may apply to a United States District Court for a restraining or protective order prohibiting the harassment of a victim or witness in a federal criminal case. Most states have similar laws, but few have as comprehensive a program for witness protection as the federal government. They would do well to follow the federal model, for a victim or witness who fears retaliation against himself, his family, his close associates or his property makes a poor soldier in the war against crime.

Simple justice requires that offenders should make restitution to the victims of their crimes. It was not until the Victim and Witness Protection Act of 1982 was enacted by Congress, however, that federal judges were required to either order restitution or state on the record why restitution is not ordered. The same Act requires that pre-sentence reports include specific information enabling the Court to ascertain the restitution needs of every victim. The offender may be directed to return property or to pay an amount equal to its value; to compensate a victim for necessary medical expenses and loss of income; and, if the victim consents, to perform services in lieu of money payments. In making an order of restitution, the Court must consider the amount of the victim's loss, the resources and needs of the offender and his family, and such other factors as may be appropriate. Any restitution ordered must be a condition

of probation or parole, and failure to comply with the order results in a revocation of the parole or probation. In addition, the order may be enforced in the same manner as a judgment in a civil action. In my opinion, the law does not go far enough. I consider the order of restitution one of the most important tools in the sentencing process. Its importance lies not only in making victims whole but in punishing the offender. It seems to me that a failure to comply with the order should be a separate crime in itself. Where a defendant is unable financially to make restitution before the end of his probation or parole, the order cannot be enforced under current law, except by civil remedies. I think that this is insufficient.

The compensation of victims from public funds is another fairly recent development. New York State has been a leader in this area, having established a Crime Victim's Compensation Board in 1976. The Board is empowered to make awards for certain out-of-pocket expenses, loss of earnings and costs of rehabilitation as a matter of legislative grace. Certain losses sustained by persons injured while acting as good samaritans also are covered. A number of relevant factors must be taken into consideration by the Board in fixing an award, and the financial difficulties of the victim are to be closely examined. There is no limit on an award for medical expenses, but compensation for other expenses is limited to \$20,000. Awards generally are

limited to cases where the victim has sustained personal injury, but elderly victims may claim up to \$250 for loss or damage to certain property even where no personal injury is sustained. Many states now have programs similar to that of New York.

The Federal Victims of Crime Act of 1984, enacted as part of the Comprehensive Crime Control Act of 1984 previously mentioned, establishes a Crime Victim's Fund in the Treasury Department. The Fund is to be administered in the Attorney General's office, and deposits in the Fund are to come from fines and penalty assessments imposed in criminal cases, forfeited bail bonds and "literary profits" of convicted federal criminals. I shall discuss "literary profits" a little later. The Fund is to be used for grants to states for victim compensation programs and for various services to victims of crime. The Attorney General is authorized to disburse money from the Fund for services to victims of federal crimes. Services to victims of crime are defined in the 1984 Federal Act as crisis intervention services, emergency transportation to court, short-term child care service, temporary housing and security measures, assistance in participating in criminal justice proceedings and payment of costs of forensic medical examinations. To be eligible for federal funds for victim assistance, states must certify that priority will be given to providing assistance to victims of sexual assault, spousal abuse or child abuse. This is in

recognition of the significant efforts already undertaken by state and local governments to provide for the special needs of these types of victims for medical treatment, counseling and other services. It is my opinion that the primary source for providing funds to compensate and assist crime victims should be the offender, and that the public treasury should be reimbursed by the offender under penalty of incarceration for his failure to do so.

Earlier on, I made reference to "literary profits." This phrase refers to proceeds payable to an offender for the sale of literary and entertainment rights to the depiction of his crime or the expression of his thoughts, feelings or opinions regarding the crime. Federal and state laws now make provision for the forfeiture of these literary profits to Crime Victim Funds for the benefit of any victim of the offender's crimes. In New York, this forfeiture provision is sometimes known as the "Son of Sam" law, named for the New York murderer who sold the literary rights to his story. While federal law requires conviction before the forfeiture provisions become operative, New York law allows for the earlier collection of these proceeds, to be held subject to the conviction of the accused person. All the legislation relating to the confiscation of these collateral profits of crime includes detailed procedural steps designed to protect the rights

of victims and offenders as well as the rights of the public and of those who have contracted to publish the offender's story.

Victims and witnesses, in addition to all their other problems, often suffer enormous inconvenience as the mills of justice grind slowly against the offender. They must give statements to police agencies and investigators; they must testify at preliminary hearings and at grand jury sessions; and, finally, they must testify at trial. These proceedings often drag on over a period of many months. A State University Professor, who is making a study of the problem of court delay, recently told me that the average criminal case in the state courts in New York City is adjourned seventeen times. During these delays, victims and witnesses are losing time from work and having their lives disrupted in various ways. Frequently, cases are disposed of without any notification to the victim whatsoever. These deficiencies in the criminal justice system are beginning to be corrected, as those responsible for the operation of the system are sensitized to the rights of the victims and witnesses to understand and participate in the process. Various states have adopted laws requiring notice to victims that they may appear and participate in plea bargaining and in sentencing and parole hearings; witness fees have been increased in some jurisdictions; advance notification must be given in certain states when a hearing is to be adjourned; in California, victims

who request notice must be informed when offenders who have harmed them escape from custody; in New York, prosecutors, on request, must inform victims of the final disposition of a case. Some states have gone so far as to adopt a formal "Bill of Rights" for victims and witnesses.

The United States Attorney General has adopted a comprehensive set of guidelines to ensure that federal officials will deal fairly with crime victims and witnesses. The guidelines require law enforcement officers and government attorneys to ensure emergency social and medical services to victims; to inform victims about compensation and treatment programs; to notify victims and witnesses about the availability of protection; to advise victims and witnesses promptly about scheduling changes; to notify the victims of major serious crimes at each step of the judicial proceedings; to provide separate waiting areas for victims and witnesses; to return victims' property held for evidence as soon as possible; to notify employers of the need for victim and witness cooperation and to seek their assistance; and to provide general assistance in the form of transportation, parking and translator services. The 1982 Report of the President's Special Task Force on Victims of Crime provides a comprehensive review of the matters I have discussed today. Some of the suggestions made by the Task Force already have been adopted. All levels of government will benefit

from a close attention to the problems studied and the recommendations made in the Report.

The March 17th issue of Parade Magazine, the Sunday newspaper supplement, carried an article entitled "Victims Have Rights Too." The article describes the growing efforts of pressure groups to persuade state legislatures of the need for reform of criminal laws, heavier penalties for violent criminals and more sympathetic treatment of victims. The immense importance of addressing the concerns of victims is illustrated in a story told at the end of the article. The story is told by John H. Stein, Public Affairs Director of the National Organization for Victim Assistance. I quote from the article:

Stein points to the notorious Bernhard Goetz case as a startling example of what can happen when a crime victim's needs and concerns are ignored. Prior to the New York subway shooting incident, Goetz had been mugged and injured by three assailants. Two escaped, and the third --who later received only a light sentence-- was freed from custody before Goetz had even completed the police paperwork. Goetz felt he had been treated shabbily by the criminal justice system.

"Here was a crime victim who was not informed by the police about events in the case, who was not helped and whose complaints were virtually ignored," says Stein. "Because of this, his whole lifestyle and attitude changed, and he began carrying a gun. Had there been a solid network of victim assistance and support in his case, the whole thing might never have happened."

More than twenty-five years ago, I served a tour of duty in Japan as a legal officer in the United States Army. I vividly remember the case of an American soldier who struck a pedestrian while driving his private automobile at an excessive speed

through the streets of Tokyo. He identified himself and his unit to the police, gave his insurance information and departed after the pedestrian left in an ambulance. Much to our surprise, he later was summoned for prosecution by the Japanese authorities. In finding the soldier guilty of violating the traffic laws, the Japanese Judge commented on the barbarous conduct of an individual who did not visit his victim in the hospital, failed to express apology for the wrong he had done and never offered compensation or even a gift of flowers or candy. Ladies and gentlemen, the moral of that story for me was this: Perhaps the quality of a civilization can be measured by its concerns for its victims.

Thank you.