

VICTIMS' RIGHTS - HISTORICAL BACKGROUND

Prior to the time of the American Revolution, the practice of criminal justice system in the colonies followed the English legal tradition that emphasized private prosecution by the victims of crimes. There was little concern for the rights of victims because they actually had a hand in way justice was administered.

The persecution by the King of England of many American colonists and the denial of their rights to free speech, privacy, to legal counsel and fairness when accused of a crime became a major force behind the drive for independence. At the birth of America as an independent nation and at the time of the adoption of the Federal Bill of Rights, there was no reason to afford constitutional protection to the victims of crime because in the past they were often the prosecutors. There was a need, however, to give judicially recognizable rights to those accused of crime because there had been a substantial imbalance in the criminal process against the accused in favor of the accuser.

At the onset of the nineteenth century the American system of criminal justice, as we know it today began to develop, and the practice of private prosecution gave way to prosecution by public officials. No longer were crimes considered to be an offense against the person but were now deemed to be acts against the whole of society.

The role of the Attorney General substantially increased on the federal level and during these times, and eventually the scope of his authority extended to being the chief law enforcement officer responsible for apprehending and prosecuting the criminal offender. As this public process of criminal prosecution evolved, the victims of crime were gradually excluded from meaningful participation in the criminal justice system, and eventually their function was

reduced to simply being the reporters of the crimes committed on them and, where needed, serving as witnesses when the public prosecutor decided to bring the matter to trial.

The common law practice of utilizing a private prosecutor has survived and does exist in a few other states. This practice is not authorized by statute in New Jersey. Victims' rights advocates in this State have called for the use of private prosecutors, despite the fact that on many occasions, the interests of the prosecutor and those of the victim are not the same.

Over the past two hundred years our American system of criminal justice has developed into a substantial body of laws where the rights of the accused are oftentimes balanced against the rights of society, as a whole. The battles were forged in the courtrooms between the defendant on one side, armed with the protective shields of his Bill of Rights, and the prosecutor, on the other, charged with the task of catching and prosecuting criminals, within the rules and without infringing upon the defendant's constitutional protections.

The criminal justice system in our country is a truly adversarial system. It is prosecutor versus defendant, and irrespective of which side you are on, it is usually perceived from the perspective of good versus evil and the oppressor versus the oppressed. For over two centuries the victim was squeezed out of this adversarial contest. He had no constitutional rights; therefore, he could not rise to the level of the defendant. He could only impede the mechanical processing of criminal cases and therefore, except for being a witness, the victim was not needed by the prosecutor.

The authors of the United States Constitution and the State Constitutions took for granted that the documents would grow into themselves. For example, slavery was permissible when the United States Constitution was drafted; the Thirteenth Amendment abolished it. In 1920, it was

determined (by all male voters) that it was time for women to be allowed to vote; the Nineteenth Amendment granted it. In 1971, with the ratification of the Twenty-Sixth amendment, eighteen year olds became eligible to vote.

The authors of the United States and State Constitutions could not possibly have foreseen twentieth century America with its industrialization, urbanization, population explosion, and escalation of violent crime. They could not have imagined that by the 1980's, one in four American households would be victimized by serious crime every year.

If we view the history to the fourth, fifth, sixth and eighth amendments to the Federal Constitution and their state counterparts, can we imagine that the original framers envisioned interpretations of these provisions as we have seen over the past half century? If not, does that mean that the courts have been improperly extending rights of persons accused of crime far beyond that which was originally contemplated? Absolutely not. As our country has developed, our institutions and our values have changed. Our system of democracy has survived not because we suppressed human rights but because we recognized them and, on many occasions, has been required to balance competing rights.

Prior to 1965, the victims of crime had little place in the criminal justice system. The evolutionary process of the criminal justice system has reached the point where crime victims have been excluded and so routinely rejected that they have become alienated by the bureaucracy of the system and indifferent to the individuals employed by it.

Many crime victims found their experience in the criminal justice system to be traumatic causing an increase in incidents of non-reporting of crimes and refusal to cooperate with law enforcement. Who does the criminal justice system truly serve? Certainly not the innocent

individuals who have and will suffer the often irrevocable effects of crime.

In the 1970's, as the crime rate continued on a rise, the frustration and disenchantment on the part of crime victims with the criminal justice system increased. The most common results of the criminal justice process for victims included feelings of rejection on the part of victims, higher recidivism rates, and a disenchantment with the increased financial costs to society in supporting this system. People became more aware that the criminal justice system was not serving the individuals whom it was designed to protect, that it had lost a truly positive purpose in society and was deemed by many to be failing the taxpayers who supported it.

Throughout the 1970's various victims' groups began to form and the legislatures in other states responded to the needs of crime victims. In 1971 New Jersey enacted the Criminal Injuries Compensation Act, and established the Victims of Crime Compensation Board. As the rights of victims received more attention, the grass roots movement began to take hold.

In 1972 victim assistance programs were created in Missouri, California and Washington, D.C. and in 1974 victim assistance programs were established in Florida and Indiana. The first "Victims Rights Week" was formally recognized in 1975 and in the same year the National Organization for Victim Assistance (NOVA) was formed. In 1976, the first victim impact statement was created in the State of California and the National Organization for Women (NOW) established its first task force and national conference on battered women. Also in that year, Nebraska became the first state to abolish the marital rape exemption. The public began to become more aware of violence in the home and in 1976 Oregon became the first state to enact legislation mandating arrest in domestic violence cases.

In 1978 the Child Abuse and Treatment Act was passed by Congress and three Victims'

Organizations, which would later have a significant effort on the crime victims' movement were formed. The National Coalition Against Sexual Assault (NCASA), the National Coalition Against Domestic Violence (NCADV) and Parents of Murdered Children (POMC) were all founded in 1978.

In 1980 Mothers Against Drunk Driving (MADD) was formed and Congress passed the Missing Children Act. The first "Crime Victims Bill of Rights" was passed in Wisconsin and the attention to domestic violence continued as NCADV established the Domestic Violence Awareness Week and held its first national conference in Washington, D.C.

In 1981 President Reagan proclaimed the first annual National Victims of Crime Week in order to focus attention on victim problems. In April 1982 he established the President's Task Force on Victims of Crime and in December the President's Task Force presented its report with profound recommendations for changes at the federal, state, and local levels. After hearing the plight of thousands of crime victims throughout the country, the members of the Task Force were convinced that the criminal justice system is out of balance:

Victims have discovered that they are treated as appendages of a system appallingly out of balance. They have learned that somewhere along the way, the system has lost track of the simple truth that it is supposed to be fair and to protect those who obey the law while punishing those who break it. Somewhere along the way, the system began to serve lawyers and judges and defendants, treating the victim with institutionalized disinterest.

(P.iv, President's Task Force on Victims of Crime, December, 1982)

In recommending an amendment to the Federal Constitution, the Task Force reported:

In applying and interpreting the vital guarantees that protect all citizens, the criminal justice system has lost an essential balance. It should be clearly understood that this Task Force wishes in no way to vitiate the safeguards that shelter anyone accused of crime; but it must be urged with equal vigor that the system has deprived the innocent, the honest, and the helpless of its protection.

The guiding principle that provides the focus for constitutional liberties is that government must be restrained from trampling the rights of the individual citizen. The victims of crime have been transformed into a group oppressively burdened by a system designed to protect them. This oppression must be redressed. To that end it is the recommendation of this Task Force that the Sixth Amendment to the Constitution of the United State be augmented.

We propose that the Amendment be modified to read as follows:

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the Assistance of Counsel for his defense.

Likewise, the victim, in every criminal prosecution shall have the right to be present and to be heard at all critical states of judicial proceedings.

We do not make this recommendation lightly.

The Constitution is the foundation of national freedom, the source of national spirit. But the combined experience brought to this inquiry and everything learned during its progress affirm that an essential change must be undertaken; the fundamental rights of innocent citizens cannot adequately be preserved by any less decisive action. In this we follow Thomas Jefferson, who said: 'I am not an advocate for frequent changes in laws and constitutions, but laws and institutions must go hand in hand with the progress of the human mind. As that become more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times'.

As a result of the Task Force, the victims' rights movement was on its way nationally. The Omnibus Victim and Witness Protection Act became law in 1982 and permitted victim impact statements at sentencing in Federal criminal cases, greater protection of Federal victims and witnesses from intimidation by defendants or their associates, restitution by offenders to victims of Federal crimes, guidelines for fair treatment of victims and witnesses in Federal criminal cases, and more stringent bail laws. The Comprehensive Crime Control Act and the Victims of Crime Act of 1984 authorize Federal funds for State victim compensation and victim assistance programs. These funds are distributed by the Office of Justice Programs, through its Office for Victims of Crime and Bureau of Justice Assistance.

The Crime Victims' Movement in the State of New Jersey began to gain recognition in the latter part of the 1980's. The New Jersey Crime Victim Bill of Rights was enacted in 1985; however it had little effect on the treatment of crime victims primarily because there was no meaningful training for lawyers, judges, prosecutors and law enforcement personnel.

There had been several small crime victims' rights groups established in the State during the 1980's and in the latter part of the decade they came together and formed the New Jersey Crime Victims' Coalition. The Coalition became the beginning of the victims' rights grass roots movement. In April 1989, a Statewide Crime Victims' Candlelight Vigil was held at Kean College, Union, New Jersey. Crime victims from throughout the State came together to support each other. They heard of the plights of other victims in the justice system, the hopes of many for fair treatment for victims, and for the first time, many of them heard about something called the "constitutional amendment for victims' rights."

The Drive for the Amendment

In 1989 New Jersey State Assemblyman Alex DeCroce became very upset over the murder of a teenage boy whose parents he had known. As his friends began to suffer the indignities experienced by so many crime victims at the time, he felt the necessity to do whatever he could on behalf of the innocent victims of crime.

Assemblyman DeCroce, quietly and without any public discussion or fanfare researched the status of the law of crime victims in the United States. He read the results of President Reagan's Task Force. He concluded that the State of New Jersey needed an amendment to the State Constitution recognizing the Rights of Crime Victims and introduced into the State Assembly ACR 85, a concurrent resolution establishing the rights of crime victims, which provided:

"A victim of crime shall be entitled to due process of law, including the right to be informed of, to be present at, and to be heard at appropriate criminal justice proceedings, and the Legislature may further define the extent of these rights through legislation."

The Crime Victims' Coalition began a petition drive supporting the amendment and an aggressive program to obtain the support of individual legislators was also well on its way.

The New Jersey Constitution had not been amended to confer to increase the personal rights of its citizens in over a century. The legislative process was cumbersome and politically charged. The proposed amendment would not move one step forward to reality without the full support of the Governor, the Attorney General and the Legislative majority in both the Assembly and Senate. And at the time Assemblyman DeCroce introduced the amendment, it had none of these.

Governor James Florio publicly stated that an amendment was not necessary, as the rights of victims could be safeguarded under existing "due process" considerations. Attorney General

Robert J. Del Tufo had deep reservations about amending the Constitution, and felt that a more rigorous and effective enforcement of the existing crime victim statutes could accomplish the same purpose.

The members of the Coalition knew that the statutes had failed and would continue to fail; however, the Attorney General and many others felt that amending the Constitution was too drastic a measure. The examples of poor treatment of victims of crime had not as yet been sufficiently convincing enough to change the minds of the Governor, the Attorney General and members of the Legislature.

Apparently, they needed to witness, first hand, more concrete examples. In the next few months they would.

In the summer of 1990 Florence Hoffman sat in the back row of a courtroom in Newton, New Jersey. It was obvious that where she sat she was straining to hear any part of the testimony, for the court in placing her there, probably did not realize that she suffered from hearing loss.

Florence Hoffman had been the subject of considerable legal argument over the past three days as the result of the attempts by the defense attorneys to have her removed not only from the courtroom, but also the courthouse. At one point the suggestion was made that she even be banned from the entire town of Newton until the trial was over. Florence Hoffman did not wish to be in that courtroom. However, she had no choice.

Florence Hoffman was the bereaved mother of Amy Hoffman who was brutally murdered by the man who sat a table, separate and apart from his attorneys because he had allegedly threatened them with bodily harm. If for no other reason, Florence Hoffman had to be in that courtroom for her daughter to bear witness to the justice proceeding involving Amy's killer.

James Koedatich had already been found guilty of this murder and sentenced to death only to have the Supreme Court of New Jersey overturn the sentence. Now, eight years after the crime, the retrial on the death penalty was taking place.

The attorney for Koedatich argued for the removal of Mrs. Hoffman and gave the true reason defense attorneys don't want a victim or survivor in the courtroom. He did not want the jury reminded by Mrs. Hoffman's presence that there was once a living, breathing, young girl named Amy Hoffman, whose life had been taken for no apparent reason by the defendant. The defense attorney referred to Mrs. Hoffman "as a living, walking victim impact statement" and "so much emotional baggage."

Over the continuing protest of Koedatich's attorney Mrs. Hoffman was finally allowed to sit in the back row of the courtroom surrounded by people so as to hide the jurors' view of her.

In upholding the right of Mrs. Hoffman to be present, the Trial Judge, Donald G. Collester, Jr. stated in his ruling:

"This is a public courtroom which is open to members of the public, all members of the public. And our courts must be open to members of the public because history teaches that when things go on that are hidden from the public, people tend to think the worst, and history also teaches us that sometimes they are right."

Koedatich escaped the death penalty by one juror's vote. The next murder trial in the same courtroom involved the family whose harsh treatment by the Sussex County Prosecutor lead Assemblyman DeCroce to introduce the Victim's Rights Amendment. This disrespect by the prosecutor continued as the trial started. It reach such a level that the County Prosecutor from another county and his victim advocate Sandra McGowan came to the trial to support the victim's

family. The State Attorney General became aware of what was taking place in this small courthouse in Newton, and he sent the State Chief of Victim Witness Advocacy to demand that the rights of the victim's family be respected.

After reviewing a transcript of the defense attorney's argument in the Koedatich trial and the report of the State Victim-Witness Coordinator, Attorney General Del Tufo realized that the crime victims Bills of Rights was not effective and the only way the rights of crime victims would be advanced was through an amendment to the State Constitution.

So in the fall of 1990, everything changed. After much discussion and debate, the language of the proposed amendment ACR 85 was modified to state:

A victim of crime shall be treated with fairness, compassion and respect by the criminal justice system. A victim of a crime shall not be denied the right to be present at public judicial proceedings except when, prior to completing testimony as a witness; the victim is properly sequestered in accordance with law or the Rules Governing the Courts of the State of New Jersey. A victim of a crime shall be entitled to those rights and remedies as may be provided by the Legislature. For the purposes of this paragraph, "victim of a crime: means: a) a person who has suffered physical or psychological injury or has incurred loss of or damage to personal or real property as a result of a crime or an incident involving another person operating a motor vehicle while under the influence of drugs or alcohol, and b) the spouse, parent, legal guardian, grandparent, child or sibling of the decedent in the case of a criminal homicide.

On October 15, 1990 the Assembly Judiciary Committee heard the following testimony in support of the proposed amendment:

"There have lately been outrageous incidents in which crime victims and/or their families have been excluded from the courtroom on the ground that their presence would generate such undue sympathy in the minds of the jurors as to prevent a fair trial for the defendant. A public trial should mean just that. An those who have their lives forever maimed and changed by violent acts are not only part of the

public but also have a special standing to be present and to observe the system at work." Robert J. Del Tufo, Attorney General.

"For many people, it's important that we, as public servants, recognize that the criminal justice system as it exists today is failing. It's failing society because it has no positive purpose. It will have a positive purpose once this amendment becomes law because I think people will look at the criminal justice system in a different manner, and they will realize that what's all about crime is the victim of crime and not necessarily the criminal. There are times when people are accused of a crime and convicted and sentenced, and at some point in time that sentence is over and their incarceration is over. For victims of crimes the sentence is never over, and the incarceration is never over." Richard D. Pompelio – Victim Advocate.

Governor Florio held a press conference on the same day and showed a considerable change in position, stating:

"I know that the accused have rights. They should get a fair trial and every protection to which the law entitles them. But sometimes things go too far. And we have to do something." But more importantly, it's time we stopped treating the victims like the bad guys, and recognized them for what they truly are -- victims who have suffered."

"Changing the Constitution is not something that is done lightly. But if that's what it takes to put victims on an equal footing with the criminal, that's what we have to do."

The members of the Coalition would see the proposed amendment pass the Assembly by a vote of 72-0 on January 17, 1991. The battle, however, was far from being over. The Senate President strongly opposed an amendment to the Constitution and without his approval the matter would not be heard in the Judiciary Committee.

The status of the amendment at the time is clearly reflected in the following excerpts from the Memorandum of Senate Associate Counsel, Kenneth A. Raatz dated 12/16/90 to the

Minority Leader:

"The Constitutional Amendment approach is supported by the Attorney General, and according to the Crime Victims' Rights Coalition, also by the Governor. ACR-85Acs is expected to pass the Assembly without any difficulty. However, apparently the Senate President, Senator John Lynch, believes that a Constitutional Amendment is not necessary and that the same rights could be guaranteed to crime victims by statute.

James K. O'Brien, Chairman of the New Jersey Coalition of Crime Victims' Organizations and Richard D. Pompelio, Legal Counsel to the Coalition are going to meet with Senator Lynch after the first of the year in an attempt to persuade him of the necessity of a Constitutional amendment.

I have discussed the situation with Mr. O'Brien and Mr. Pompelio and it is our collective feeling that there may be reasons in addition to the question of whether or not a Constitutional Amendment is necessary involved. I am attempting to find out whether or not that may be the case from the Senate Democratic staff.

The Coalition has submitted a twenty-nine page brief to Senator Lynch that directly addresses the issue of why a Constitutional Amendment is necessary. In my opinion it does so in an eloquent and persuasive manner. However, at my suggestion a condensed version of the brief is going to be written for submission to Senator Lynch and the Senators on the Judiciary committee. I offered my services in that regard but Mr. O'Brien and Mr. Pompelio for obvious reasons wanted to write an abbreviated version of the Coalitions's brief themselves."

After considerable discussion, debate and oftentimes awkward attempts at lobbying on the part of Coalition members, Senator Lynch either changed his mind or simply succumbed to the pressure. By May 1, 1991 the proposed amendment was heard and approved by the Senate Judiciary Committee and soon had the blessing of the full Senate.

The public comments about the proposed constitutional amendment were numerous and varied; some reflecting a keen insight into the reasoning behind the amendment and others demonstrating a total lack of it. The following are a few examples:

"But we do not believe that amending the constitution to palliate the feelings of victims of crime is either necessary or proper. The public justification offered for the amendment is that it will do little or nothing not already accomplished by the two applicable statutes, but it will make victims feel better. We fear that it may do far more, and we suspect that some of its proponents intend just that. But the goal of our criminal process is not revenge, but justice. Law enforcement is too serious a matter to entrust to emotion, however understandable that emotion might be." Editorial, New Jersey Law Journal 10/25/90.

"The amendment would represent a fundamental change in our criminal justice process, and also something of a risk. But it appears at this state anyway to be a change for the better, and a risk worth taking." Editorial, Daily Record 10/12/90.

"People are going to push this as far as they can push it... who knows where it's going to lead." Professor Robert Williams, Rutgers Law School.

"The Amendment is "a demagogic proposal aimed squarely at the defense table ..." Alan Silber, Esq., Vice President, Association of Criminal Defense Lawyers.

"I suspect that this is a Constitutional Amendment that would fit with the tenor of the times." Richard Rober, Director, Program for N.J. Affairs, Woodrow Wilson School of Public and International Affairs, Princeton University.

"Law enforcement is firmly behind this amendment. It's time for the rights of victims to be recognized formally in the social compact that binds us all - our constitution." Robert Del Tufo, New Jersey Attorney General September 19, 1991.

On November 5, 1991, 84 percent of the voters (over 1.2 million people) became a part of history. In State v. Muhammad, 145 N.J. 23 (1996), Justice Marie Garibaldi, speaking for the New Jersey Supreme Court would say:

Unlike most interpretations of constitutional provisions, we need not surmise what the founders intended when they drafted the Victim's Rights Amendment. We know exactly what the founders of this constitutional amendment intended--fair treatment for victims. To hold the victim impact statute unconstitutional would require us to ignore the Victim's Rights Amendment and the will of the electorate that overwhelmingly approved the constitutional amendment. Over 1,200,000 citizens voted for the Victim's Rights Amendment while only 223,248 people voted against it. Manual of New Jersey, Two Hundred and Fourth Legislature (First Session) 1992, at 903. Beginning with the passage of the Criminal Injuries Compensation Act of 1971 (N.J.S.A. 52:4B-1 to -33), the people of New Jersey, speaking through the Legislature, have repeatedly expressed a very strong "public attitude" that victims should be provided with more rights. Id. at 42-43.

In 1991 the people of New Jersey gained a victory that we continue to celebrate each day because crime victims in New Jersey are now constitutionally entitled to receive, and many in fact do receive "fairness, compassion and respect" in the criminal justice system.

Richard D. Pompelio
February 12, 1992