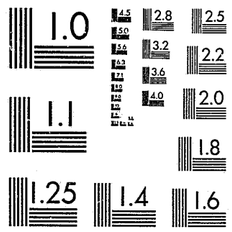

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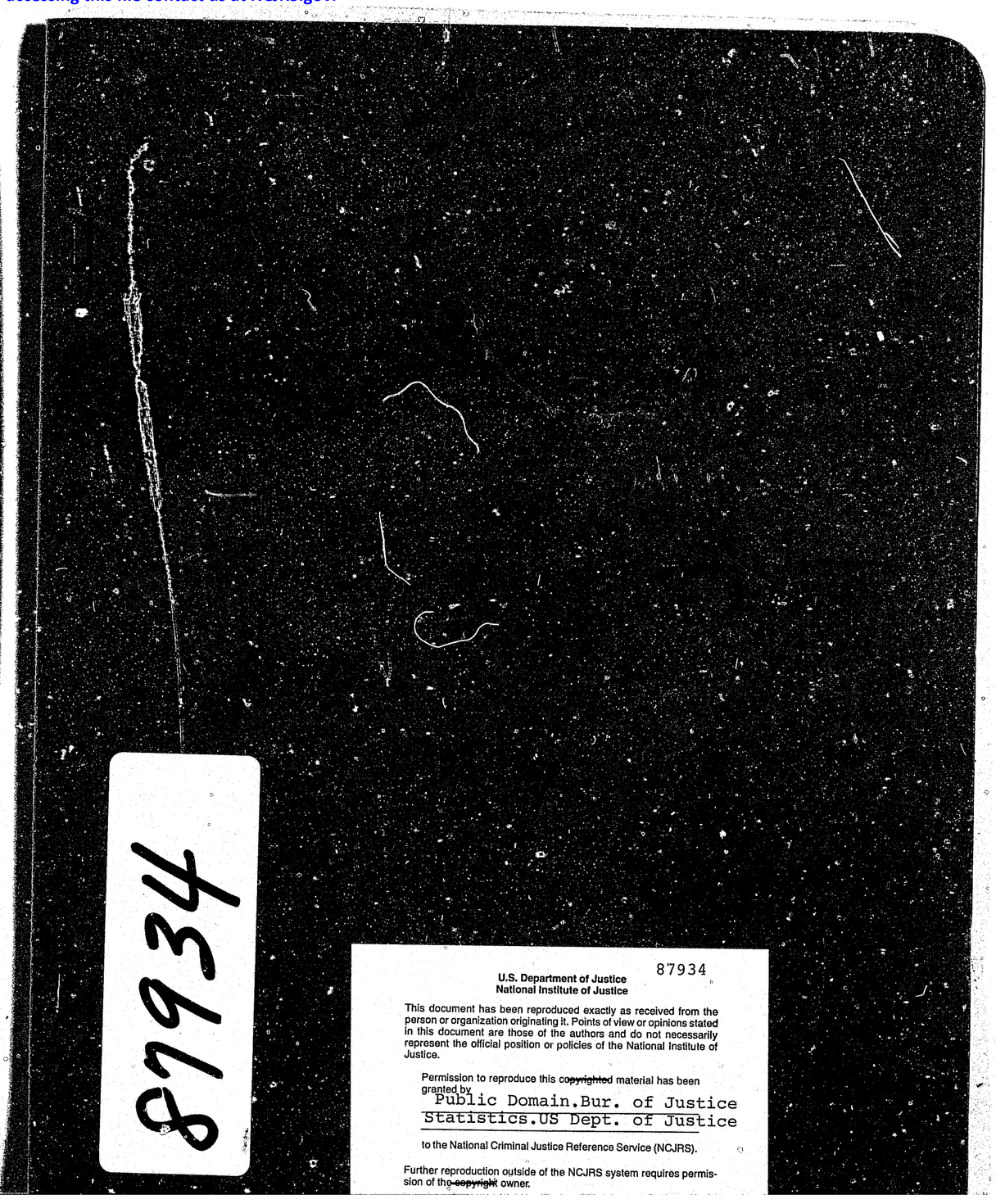

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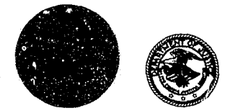

Bureau of Justice Statistics Bulletin

New State Laws and the System's Response

Victim and Witness Assistance

May 1983

The administration of American criminal justice has acquired a new focus: victim and witness assistance. In seeking the cooperation of victims and witnesses, criminal justice agencies are increasingly sensitive to the need of victims for information, notification, compensation, participation, and simple understanding. Concerns of victims, witnesses, and their extended families are here framed in the context of issues treated by the Bureau of Justice Statistics over the past decade—(1) developing computer-based information systems in support of operational law enforcement agencies, (2) acquiring statistical data for national purposes from such systems and from other administrative records, and (3) assuring the privacy and security of data present in such systems and records.

When the expectations of the victim assistance movement are reviewed—expectations best summarized in the December 1982 report of the President's Task Force on Victims of Crime—it is clear that a substantial alteration is expected in the practices of police, prosecutors, judges, probation and parole officials, members of the bar, and health and support agencies. Requirements for notifying victims of the status of their cases, for reflecting the views and experiences of victims, and for facilitating the participation of victims at each stage of the criminal proceeding will place new burdens on both law enforcement and social service agencies. Policymakers at all levels of government as well as the major participants in the criminal justice system—law enforcement, courts, and corrections—will need to ponder their responses to the expectations of the victim assistance movement.

On the next page is a statement by Lois Haight Herrington, Assistant Attorney General Designate.

Steven R. Schlesinger
Director

Traditionally, the criminal justice system in this country has been offender-oriented, focusing on the apprehension, prosecution, punishment and rehabilitation of wrong doers. Victims and witnesses have been considered only when they play a role in the identification and prosecution of offenders. The justice system cannot function without the assistance and cooperation of victims and witnesses, yet little if any recognition has been given to their rights and less has been done to assist them in overcoming the frustrations and economic sacrifices that involvement in criminal proceedings causes.

This attitude has begun to change in the last decade, particularly in the last few years. A strong national victim and witness assistance movement has had remarkable success in establishing programs to assist victims and witnesses and in increasing the public's awareness of their problems and rights. Hundreds of local assistance programs have been established throughout the country to respond to the special needs of crime victims and witnesses. Community organizations, church groups, bar associations, service groups and national lobbying groups have been active in the field. At the national level the President last year appointed a Task Force on Victims of Crime and the Congress enacted the Federal Victim and Witness Protection Act of 1982.

State legislatures have been active in responding to victim and witness needs. Legislatures in 38 states have enacted measures to provide compensation to victims of crime. Others have enacted specific authority for courts to order criminal offenders to make restitution to their victims. States have also enacted legislation to assist victims and witnesses in understanding and participating in the criminal justice process. A few states have enacted comprehensive legislation recognizing a "bill of rights" for crime victims and witnesses. Further efforts are necessary, however, to ensure that the broad scope of victim/witness concerns are met in a comprehensive and effective manner in all jurisdictions.

The implementation of new programs in this area will impose substantial operating demands upon all components of the criminal justice system. For this reason, it is critical that prompt recognition be given to the technical, administrative and policy changes which may be required in order to ensure that new programs meet the objectives established in current and future victim/witness legislation.

Specifically, the new programs will require rapid availability of information describing the criminal justice process and the individuals involved as victims and/or witnesses. To ensure program effectiveness, such data must be accurate, complete and timely.

There will also be an added demand for statistical information about criminal victimization and victim/witness programs for use in research and planning as well as in evaluating existing programs and services. Since the mission of the Bureau of Justice Statistics includes the collection and production of statistical data of this type, this agency is interested in the victim/witness movement and has monitored its progress.

Provision must be made also to ensure that policies regulating data disclosure are modified where necessary to best balance the data needs of victim/witness programs

We as a nation are faced with a dangerous and often deadly menace. It affects every one of us regardless of our age, race, gender or economic group. While some are more vulnerable than others, none of us is immune, no matter who we are or where we live. This threat is violent crime.

Every 23 minutes one of us is murdered. Every 6 minutes a woman is raped. While you read this, two Americans will be robbed and another two will be shot or stabbed or seriously beaten. Yet only 9% of the crimes reported to police in four major states resulted in a criminal going to jail or prison. These numbers capture our attention, but when we focus on the numbers, we forget the central fact that for every statistic there are victims whose personal tragedies should be the focus of our concern.

Untold hours and uncounted millions of dollars have been spent trying to understand and reform the criminal. Yet often little or nothing has been done to assist the innocent victim. When a child is brutalized, when an elderly person is robbed and knocked to the ground breaking a hip, when a woman is raped and tortured, their lives are forever changed. In a moment or an hour of terror honest people lose property; suffer injuries that may last a lifetime; sustain physical scars that may mar them forever; become incapacitated and unable to work; or, in the most tragic cases, leave behind a family to mourn, pay funeral expenses and wait years to see the killer tried and brought to justice. People are victimized in their homes or on the street and then the more insidious victimization begins when the criminal justice system starts to grind away at them.

This indifference to the suffering of the innocent must stop. We must restore a balance to a system that tries to be both responsive and fair but is often neither. We must bear in mind that when we take the justice out of the criminal justice system we leave behind a system that serves only the criminal.

Lois Haight Herrington
Chairman, President's Task Force on Victims of Crime; Assistant Attorney General Designate

and the privacy interests of individual victims and witnesses.

This Bulletin is intended to provide an overview of new legislative programs in the states which respond to the needs of victims and witnesses. It describes those programs that provide financial assistance to victims and witnesses as well as programs that recognize the rights of victims and witnesses and seek to protect them and help them to understand the criminal justice process and their role in it.

The Bulletin also discusses some of the informational ramifications of the new programs, both in terms of their immediate impact on law enforcement agencies, as well as their possible long-range influence on the development of criminal justice information systems. The final section of the brief discusses some of the security and privacy questions raised by the information impact of the new initiatives.

This Bulletin is not intended to, and does not, present a comprehensive or in-depth description or analysis. Rather, the Bulletin presents a brief summary of relevant law and policy and a brief analysis of relevant policy issues. Accordingly, the issues posed are not explored in great detail.

Overview of legislation to aid victims and witnesses

Financial assistance programs

The majority of the states have enacted legislation providing some form of financial assistance for crime victims who suffer economic loss--medical bills, loss of income or earning capacity or lost money or property. These legislative reforms have included principally crime victim compensation programs which establish state funds to compensate crime victims in specified circumstances, and restitution programs under which offenders are required to reimburse their victims. A few states have enacted legislation giving victims access to revenue realized by offenders because of publicity about their crimes. Other states have enacted a variety of legislative initiatives aimed at reducing the financial burden of court appearances by victims and witnesses. The following sections briefly describe these legislative reforms.

Victim compensation programs

At least 38 states have enacted legislation providing for compensation of victims of violent crimes under specified circumstances. Payments are made from state-administered funds upon application by eligible claimants. Payment does not depend upon the arrest and conviction of the offender and there is no need for the claimant to secure a civil judgment.

Coverage generally extends to both victims and dependents of victims, and the laws generally define both terms broadly. Most of the statutes condition eligibility on the victim's having reported the crime to the police and some also require that the victim have cooperated in the investigation and prosecution of the case. Commonly, the laws require the claimant to show financial hardship.

Compensation generally is provided for unreimbursed medical expenses, funeral expenses, loss of earnings and support of dependents of deceased victims. Property loss generally is not reimbursed. A few states provide compensation for such additional expenses as psychiatric services, occupational training and required household services. Most of the laws set a ceiling on the amount of recovery by an individual claimant, in a few states up to $50,000, but more commonly in the range of $10,000 to $15,000.

Most of the victim compensation programs are financed from general revenue funds, although some are financed in whole or in part from offender assessments. Some states have created new agencies to administer the programs, while others have incorporated the programs in existing administrative structures or designated existing agencies (such as the courts) to administer the programs.

Restitution

Restitution is a sanction imposed by the court upon an offender who has been apprehended and convicted. As a condition of probation or in addition to incarceration, the offender is ordered to compensate the victim for injury or loss caused by the offense.

Although judicial authority to order restitution has long been explicitly established by legislation in many states and is generally thought to be inherent in the sentencing power of criminal courts, it has been sparsely utilized as a sanction until recently. In the past few years, however, pressure from victims' rights groups and other factors have caused a marked increase in the utilization of court-ordered restitution. In the states without victim compensation programs, restitution may be the only practicable means by which a victim can obtain any financial assistance and, in virtually every state, it is the only means of recovering for property loss or damage without going to court and obtaining a civil judgment (since victim compensation laws do not cover property loss).

Most state laws authorizing restitution permit the court to impose restitution or not in its discretion. A few laws make restitution mandatory in certain cases, and others require the court to consider restitution as a condition to probation and in some cases to state the reasons for not ordering restitution.

A significant problem with the increased use of restitution is the additional expense to court systems, particularly the cost of administrative follow-up to insure that restitution orders are not ignored by offenders. A few states (including Wisconsin and Maryland) impose a surcharge on convicted offenders to support court administration of the restitution program.

Lien on offender profits

A number of states (including Georgia, Illinois, New York, Oklahoma, South Carolina and Tennessee) have enacted legislation granting victims access to income generated by offenders as a result of publicity about their crimes. The legislation generally provides that any profits made by an offender through books, articles, movies or other publications exploiting the criminal offense shall be paid into an escrow fund to cover successful civil judgments by victims of the crime. Victims are given periodic notice of the existence of the fund. Commonly, if no victim civil action is filed within a specified period, the funds are paid into the state's victim compensation fund.

Return of seized property

At least one state (Kansas) has enacted legislation to expedite the return to victims of recovered property. Commonly such property is retained as evidence until the prosecution of the case is concluded--a period of months in many cases. The Kansas law provides that the seized property may be photographed and then returned to the victim/owner. The photograph, with a description of the property endorsed on it, is authenticated under oath by the investigating police officer and is subsequently admissible in evidence.

Increased witness fees

In most states witness fees are so low as to be little more than symbolic--commonly $5 to $10 a day and in some states as low as 50 cents a day. These modest fees do not begin to compensate witnesses for the financial burden involved in being a witness in a criminal case, particularly if the case is lengthy and involves numerous appearances. To reduce this burden, several states (including Florida, Nebraska and Nevada) have enacted legislation to significantly increase witness fees and other states (including California and New York) have similar legislative proposals pending. The California proposal would increase witness fees to $35 per day and the New York proposal would set the fee at the prevailing minimum wage and would include parking expenses.

Employer obligations to victims and witnesses

Other states (including Hawaii, Illinois, New York and Wisconsin) have enacted or are considering legislation to protect the jobs of victims and witnesses while they are participating in criminal proceedings. The Hawaii proposal would prohibit an employer from dismissing or penalizing an employee absent from work in response to a subpoena in a criminal case and would require the employer to compensate the employee for time lost in court appearances. The Wisconsin statute protects the employee's job but does not require the employer to pay for time lost in court appearances unless the crime is work-related. The Illinois law specifically states that it does not require the employer to pay for lost time.

Recognition of the rights of victims and witnesses

In addition to providing financial assistance to victims and witnesses, most states have enacted bills that seek to assist such persons in their dealings with the criminal justice system. These reforms include victim and witness notification, protection of witnesses from intimidation, providing counsel or ombudsmen for victims, facilitating the participation and impact of victims in criminal proceedings and increased use of depositions in lieu of court appearances.

Most states have enacted one or more of these reforms and several (including California, Wisconsin, Washington, Oklahoma, New Jersey, New York, Massachusetts and Maryland) have enacted or are considering comprehensive legislation establishing a "bill of rights" for crime victims and witnesses. These omnibus measures commonly include all or most of the rights and protections discussed in this section.

Victim notification programs

This legislation is aimed at keeping the victim informed of the status of court proceedings against the offender. In some states the notice requirement applies to all major activities or decisions in the case; in others it applies only to specified events such as plea negotiations, sentencing or parole decisions. The New York proposal would require the police officer or prosecuting attorney to provide the victim with a victim notice form on which he may indicate which events and decisions he wishes to receive notice of. The California law provides that victims must receive notice of an offender's sentencing hearing and, upon request, may receive 30 days' notice of the offender's parole hearing. Ohio and Iowa have proposals pending that would require the prosecutor to notify a victim of his intention to recommend a plea bargain. Connecticut law provides for notices to victims of sentencing hearings in major felony cases.

Victim participation in criminal proceedings

Some states have enacted laws that go a step further than victim notification by ensuring that the victim may participate in specified decisions affecting the disposition of the case. Most of this legislation pertains to sentencing. It allows, or in some states requires, the court to consider the extent of the injury to the victim in imposing sentence. Some states (California, for example) permit the victim to make an oral presentation in court; in other states the presentence report is required to include a "victim impact statement" prepared by the victim or a probation officer. Indiana law permits the victim to offer his views on any recommended plea bargain. California permits victims to appear personally or by counsel at parole hearings and requires the parole board to consider the victim's statement in reaching a parole decision. South Carolina requires the victim's recommendations to be considered before an offender is admitted to a pretrial intervention program.

Protection of victims and witnesses from intimidation

Intimidation of victims and witnesses to prevent or discourage them from cooperating in the prosecution of criminal cases has long been a widespread problem. In 1980, the American Bar Association recommended a model statute to help prevent such intimidation. The model has provided the basis for anti-intimidation legislation in Pennsylvania, Rhode Island and California and at the federal level.

This legislation makes it a crime to attempt maliciously to prevent or discourage a witness from cooperating in a criminal prosecution. It also expressly authorizes criminal courts to issue protective orders forbidding defendants or other parties from communicating with or coming near witnesses and, in extreme cases, authorizes courts to order law enforcement agencies to protect threatened witnesses. The legislation is much broader and tighter than previous intimidation statutes and closes loopholes that previously existed.

Counsel for victims

Victims and witnesses are not officially parties to criminal cases and thus have no right to be represented by counsel even if their conduct is drawn into question during the proceedings. To alleviate this situation, California has enacted and New York is considering legislation to allow the victim to retain counsel (at his expense) if his conduct is alleged to be improper in the course of a criminal proceeding. The New York law would permit the victim to be represented by counsel at any stage of a prosecution where evidence is offered concerning the victim's sexual conduct or where any other improper, culpable or illegal conduct by the victim is alleged. Under both laws, the victim's counsel would be permitted to appear and offer legal arguments but would not be allowed to call or cross-examine witnesses.

Use of depositions

At least four states (Connecticut, Florida, Missouri and New York) have

recently enacted legislation to encourage the use of depositions in lieu of courtroom appearances for certain victims and witnesses. The Florida law applies to children who have been sexually abused or battered. Other laws apply to mentally disturbed or seriously injured witnesses. In some cases, the deposition may be videotaped. The purpose of the laws is to spare unstable or traumatized victims or witnesses the emotional strain of a public courtroom appearance. The deposition is sworn and is subject to cross-examination and the use of videotaping permits the judge and jury to observe the deponent's demeanor and appearance.

Ombudsman for victims

As noted above, numerous states have provided financial assistance and other forms of protection and assistance to victims and witnesses, and other states have sought to help victims understand and participate in criminal proceedings by providing notice of the status of proceedings and allowing them to participate in certain actions such as plea bargaining and sentencing. Oklahoma has gone a step further by providing for the appointment of victim/witness advocates to advise victims and witnesses of their rights in relation to the criminal justice process and to coordinate the operation of existing victim and witness programs. The Oklahoma law allows each district attorney to appoint a victim/witness coordinator to oversee implementation of the Oklahoma Victims' Bill of Rights. These rights include notification, participation, protection and information regarding financial assistance and other social services available to victims or witnesses.

Legislation pending in Ohio would allow designated advocacy groups to hire attorneys to assist crime victims by advising them of their rights and available services and keeping them informed of the status of their cases.

The aim of this type of legislation is to facilitate more extensive recognition of victims' rights and greater utilization of programs to aid victims and witnesses, as well as to improve their understanding of the criminal justice system.

Special-victim legislation

In addition to enacting legislation aimed at victims and witnesses as a class, many states have recently enacted some form of legislation to protect or benefit certain classes of individuals felt to be especially vulnerable to crime. These "special victims" include the elderly, spouses, children, victims of sexual assaults, the handicapped or even police. Legislation to aid these special victims has taken numerous forms, such as creating new crimes (child abuse or abuse of the elderly), instituting special procedures (protective orders for domestic violence situations) or setting up programs to meet the needs of special victims (such as rape victims or child abuse victims).

Some of the more common types of "special victim" legislation include the following:

The elderly

The elderly are more vulnerable to crime and generally less able to recover from injuries or recoup financial losses. State legislatures have sought to assist elderly victims by establishing victim assistance programs to respond to the particular needs of the elderly. They have also sought to protect elderly persons against criminal conduct by stiffening criminal laws and procedures relating to crimes against the elderly. For example, a few states (including Nevada, Rhode Island and Wisconsin) have enacted laws that require or permit the imposition of an additional penalty of up to five years for an offense against an elderly person. Other states (California and New York) have prohibited plea bargaining for offenders charged with crimes against the elderly. Still other states have created a new criminal offense--to abuse, neglect or exploit the elderly. Nevada and Vermont go even further by subjecting to criminal fines any persons who have knowledge of abuse or neglect of the elderly by others and fail to report it to authorities.

Domestic violence

State legislatures have sought to deal with the pervasive problem of domestic violence in a variety of ways, including principally authorizing the issuance of protective orders, funding programs to provide domestic violence services and requiring better recordkeeping about the incidence of domestic violence.

Numerous states (including Alaska, Arizona, California, Connecticut, Georgia, Iowa, Maryland, Massachusetts, Minnesota, North Carolina, New Jersey, Pennsylvania and Wisconsin) have laws that explicitly authorize courts to issue protective orders in domestic violence cases to prevent further incidents. Most of the statutes allow any family or household member to petition for a protective order and commonly the order not only enjoins violent conduct but may also prohibit one party from coming near the other or award exclusive possession of a family residence to one party. Violation of a protective injunction can result in punishment as a contempt of court and in several states (including North Carolina and Minnesota) can result in immediate arrest on a misdemeanor charge.

Other states (including Florida, Indiana, Kansas, Michigan, Nevada, Ohio, Oklahoma, Texas, Washington and Wisconsin) have enacted legislation establishing and funding domestic violence services, such as shelter facilities, counseling and hotlines. Some of the programs are funded from general revenues, but some are funded from such sources as marriage license surcharges, divorce surcharges, or assessments against offenders convicted of domestic abuse offenses.

Several states (including Connecticut, Illinois, Kentucky, Michigan, New York, Ohio and Washington) have enacted legislation to require more complete recordkeeping of domestic violence cases. Although domestic violence is known to be a serious problem, the extent of the problem has not been very well documented. This is due principally to the fact that most domestic violence situations are resolved informally without arrest and are not recorded by police agencies. The new laws require law enforcement agencies to maintain written records of all incidents of domestic violence encountered or reported to them. In some states (New York and Washington) the courts are given responsibility for collecting data on the incidence of domestic violence. The aim of the legislation is to encourage police to treat domestic violence cases more seriously, to increase public awareness of the problem of domestic violence and to document more accurately the magnitude and nature of the problem.

Sexual assault

A number of state legislatures have enacted measures providing increased services and assistance for victims of sexual assault. New Mexico has enacted a law which requires the development of a statewide comprehensive plan to deal with the prosecution of sexual crimes and the treatment of victims. The legislation provides for free medical and psychological treatment for victims of sexual assaults. A victim need not pursue criminal prosecution of a suspect in order to qualify for treatment and the law covers all treatment needed, not just the initial examination. Florida, Maryland, North Carolina and Oklahoma also have enacted legislation to provide medical services for victims of sex crimes, although these laws are aimed more at assisting law enforcement agencies in gathering evidence for prosecution than at providing treatment for victims.

California and Pennsylvania have enacted legislation providing that communications between the victim of a sexual assault and a counselor are privileged and may not be disclosed or admitted as evidence in court. The privilege covers information concerning the victim's prior sexual experiences and personal beliefs and feelings, but does not cover information about the alleged offense.

Federal actions

The Federal Victim and Witness Protection Act of 1982

On October 12, 1982, Congress enacted an omnibus measure to protect and assist victims and witnesses of federal offenses. The legislation expressly states that the Federal Government should exercise a leadership role in the victim/witness movement and one of the stated purposes of the law is to provide a model for legislation for state and local governments.

The federal law: (1) provides for inclusion of a victim impact statement in presentence reports; (2) makes it a felony offense to threaten, intimidate or otherwise tamper with a victim, witness or informant; (3) makes it a felony offense to retaliate against a victim, witness or informant for giving information about an offense or testifying in a criminal proceeding; (4) imposes a mandatory condition on the release of defendants prior to trial or pending sentencing or appeal that the defendant refrain from committing victim harassment offenses; (5) authorizes federal courts to issue protective orders to prevent harassment of victims or witnesses; and (6) provides explicit authority for federal trial courts to order offenders to make restitution to victims and requires courts to state on the record the reasons for not ordering restitution.

The legislation also requires the Attorney General to (1) report to Congress regarding any necessary law to prohibit offenders from deriving profits from publicity about their offenses, and (2) issue comprehensive federal guidelines for fair treatment of crime victims and witnesses.

The President's Task Force on Victims of Crime

On April 23, 1982, the President appointed a special Task Force on Victims of Crime. During 1982 the Task Force held hearings in Washington and in 5 cities across the country, receiving the testimony of almost 200 witnesses, including federal, state and local officials, professionals engaged in all aspects of victim and witness assistance and private organizations and individuals interested in the rights of victims and witnesses. Most important, the Task Force heard from some 60 victims of crime.

In December 1982, the Task Force issued its final report setting out comprehensive and detailed recommendations for action at the federal, state, local and private levels to assist victims of crime and witnesses. The recommendations are far-ranging, including proposed actions by state and federal legislatures, criminal justice agencies and other agencies and groups such as hospitals, schools, bar associations, mental health facilities, the ministry and the private sector. The majority of the recommendations deal specifically with the recognition of the rights of victims and witnesses and the establishment and funding of the types of assistance and services discussed above. Additional recommendations address issues which are of primary concern to victims since they relate to the victim's perception of the functioning of the criminal justice system.

For example, the Task Force recommends the abolition of the controversial "exclusionary rule," which now operates to render relevant evidence inadmissible in criminal trials if it was gathered as a result of improper police conduct. Other recommendations would toughen bail laws, in part by allowing courts to deny bail to persons considered dangerous to the community. The Task Force also recommends the enactment of legislation to abolish parole and limit judicial discretion in sentencing, with the result that offenders would serve the full sentence imposed for their crimes reduced only by good time credits actually earned.

The recommendations of the Task Force are the most complete yet issued on the subject of victim and witness assistance. Since they bear the authority and prestige of the President, they should add significant impetus to the victim/witness movement.

Information impact of victim and witness programs

As evidenced by the above discussion of legislative activity, the victim/witness assistance movement has achieved remarkable momentum and is likely to grow. As also indicated, however, the implementation of the programs defined in existing new legislation imposes substantial new responsibilities upon the criminal justice system particularly as respects the timely production of data necessary to support program objectives.

Specifically, many of the new laws require police agencies, prosecutors or probation officials to give notice to victims and witnesses concerning the status of criminal cases and scheduled court appearances. Other laws require that notice be given to victims of particular actions or decisions, such as plea bargains, sentence hearings or parole or probation hearings. Still other laws require law enforcement agencies to maintain records of all domestic incidents, even those resolved without arrest or other formal proceedings.

To meet these notice and recordkeeping responsibilities law enforcement agencies in many jurisdictions are now required to collect more accurate and complete personal information about victims and witnesses and to maintain it in a more systematic manner. They also must maintain information about victim compensation programs in order to give required notice of the programs to claimants. Even where the responsibility for the administration of victim compensation programs is vested in other agencies, law enforcement agencies must provide or confirm information concerning the nature and circumstances of the offense and the cooperation of the victim to enable the administering agency to make eligibility decisions. Law enforcement agencies in some jurisdictions are required to advise victims of available services and they must acquire and maintain this information. Finally, pursuant to some new laws, courts and parole officials must collect and use information from victims at sentencing hearings and parole hearings. They also must bear the added burden of the increased use of restitution orders and provide the administrative machinery and information necessary to follow up restitution orders to ensure that they are complied with.

In addition to these added operational information requirements, law enforcement agencies will most likely bear a large share of the responsibility for collecting and perhaps collating and analyzing statistical data about crime victims necessary for such purposes as predicting and assessing the seriousness of crime from the victim's perspective, developing victim profiles for identifying potentially vulnerable victims, and developing and implementing new response programs, including educational programs to enable police officers to diagnose and treat crisis symptoms in victims.

Some information of this type for some crimes is now collected by the Bureau of Justice Statistics as part of the National Crime Survey. These annual surveys include interviews with about 132,000 individuals in a probability sample of 60,000 households designed to collect comprehensive information about the circumstances and consequences of criminal victimization nationally. Information collected includes data about the crime as well as the victim's age, race, sex, marital status, education, employment and relationship to the offender. The survey also collects information about the consequences of the crime, including data about injuries, cost of medical attention, property loss and time lost from work. In addition, law enforcement agencies in some jurisdictions now routinely collect some limited statistical information about victims, such as age, sex and race. It seems certain that other agencies will need to collect such data and that other data elements will need to be collected, such as previous victimization experience, economic status, the relationship between the victim and the offender, and other data elements now included in the National Crime Survey.

In the long run, the information needs of the victim/witness rights movement will have a significant influence on the development and structure of criminal justice information systems. Certainly, the notice requirements of the new laws will give added impetus to the implementation of automated systems that track the status of criminal cases through the justice system. They may also result in significantly restructured information systems that are indexed by victim and witness identity as well as by offender identity, particularly since some of the new laws require the maintenance of information about victims of offenses for which no offender has been identified or apprehended. Finally, the need for more statistical information about victims may necessitate the redesign of existing criminal justice statistical systems to facilitate the collection of data of the kind discussed above.

Security and privacy considerations

Just as the criminal justice system has historically been offender-oriented, criminal justice information systems also have been offender-oriented. So too have state laws dealing with criminal records. These laws apply principally, and in most states exclusively, to criminal history records--to alphabetically indexed records that identify individuals charged with criminal conduct and contain information about the progress of these offenders through the criminal justice system.

Victim/witness programs require a different type of data--data concerning the identity and personal characteristics of victims and witnesses. Since these individuals have not been charged with criminal offenses, information about them is not covered by most state criminal record laws. A few states have laws governing intelligence and investigative data that might apply to victim and witness information and a few have public record laws that would apply to such information. However, in most states, questions concerning disclosure, use and security of victim and witness data are not clearly answered by existing law. State legislatures may need to deal with these issues by enacting new measures or amending existing criminal record laws. In the meantime, criminal justice agencies may be called upon to resolve some new security and privacy issues without statutory guidance.

The primary issue centers on the authority to disclose victim and witness information, and perhaps criminal record information about offenders, to victims and to organizations and individuals providing services and assistance to victims and witnesses. Timely availability of victim and witness identification data is critical to implementation of assistance and support programs. Similarly, disclosure of offender record data may be necessary to facilitate meaningful victim input to bail and parole proceedings. Where victim/witness services are provided by public agencies pursuant to legislative authority, the issue of authority to disclose may be easily resolved. Most of the state laws establishing victim compensation programs (including the laws of California, Kansas, Maryland, New York and Virginia) expressly authorize and direct criminal justice agencies to provide requested information to the agency administering the program. Where such authority is not expressly stated, it may be considered to be implied. Similarly, the laws providing for various kinds of notification to victims and witnesses of the progress of criminal proceedings against an alleged offender constitute adequate authority for the disclosure of such necessary information. The same should be true of laws providing for the appointment of counsel and ombudsmen to assist victims and witnesses in applying for services and assistance and in dealing with the criminal justice process. Since these persons are discharging statutory duties, criminal justice agencies should run little risk in releasing to them any requested information reasonably necessary in connection with their duties. In the absence of an express law to the contrary, this probably could include the offender's criminal history record where the counsel or ombudsman needs this information to assist a victim or witness in petitioning for a protective order or in resisting release of the offender on bail, probation or parole, in states that permit victims or witnesses to participate in this way in the criminal process.

A more difficult question arises when the requestor is a private organization performing victim/witness services or assistance without statutory authorization. Literally hundreds of such organizations have sprung up around the country in recent years. Typically, they provide specialized services or assistance to particular classes of victims (and, to a more limited extent, to witnesses), including rape victims, the elderly or children who have been abused. Sometimes these organizations are sought out by victims or witnesses who can themselves provide some of the data to the organizations and can give their consent to the release of additional data. More typically, however, the service organizations seek out the victims and witnesses; and in order to do this they apply to criminal justice agencies, principally to police agencies, for victim and witness identifying data and addresses to enable them to contact persons who may need their services.

Assuming that the state criminal record law does not cover such a disclosure request, other state laws may provide the answer or guidance. As noted, some states have public record laws that make many criminal record files available to the public. Other states have laws expressly providing that the names and addresses of certain victims and/or witnesses shall be made public. For example, California has a law making the names and addresses of all crime victims publicly available, with the exception of the addresses of victims of sexual assaults. On the other hand, some state laws expressly forbid the public release of certain types of victim information, typically personal information about rape or sexual assault victims. Other states have exemptions to their public record laws that authorize the withholding of certain types of information, such as police investigative information, if release of the data would cause enumerated types of harm, such as an unwarranted invasion of privacy. The U. S. Department of Justice has interpreted the federal Freedom of Information Act[1] and the federal Privacy Act[2] to permit federal agencies to make selected disclosures of victim identification data. Agencies are instructed to balance the requestor's need for the data against the potential harm caused to the individual by the release.

In the absence of statutory guidance, disclosure of victim and witness information will depend upon local agency policy and agency officials may need to follow a similar balancing-of-interests procedure. To date, there is little case law to guide them. No court has yet squarely resolved the question of whether a victim or witness has a privacy interest in personal identifying data that outweighs the public's interest in seeing the data or the state's public safety interest in supporting victim/witness programs. The Supreme Court has said that a rape victim does have a constitutional privacy interest in maintaining confidentiality and has suggested that a state law forbidding any disclosure of information concerning the identify of such victims would be constitutional.[3] Other state and federal courts have upheld state statutes making certain other types of criminal justice data non-public, including cumulative criminal histories,[4] non-contemporaneous arrest data,[5] and intelligence and investigative data.[6] On the other hand, the Supreme Court's decision in Paul v. Davis[7] has been widely interpreted to mean that there are no constitutional privacy interests that forbid the disclosure by criminal justice agencies of information about individuals arrested for criminal offenses.

The import of these decisions seems to be that there is no constitutional interest that dictates agency policy with respect to disclosure of victim and witness information. The public (including victims and victim/witness support organizations) has a constitutionally based right to be informed about the operation of the criminal justice process. However, statutory or policy standards that limit the disclosure of particular types of records normally are permissible. It is likely that a reasoned policy forbidding or limiting the disclosure of victim or witness information based upon potential harm caused by disclosure would not be viewed by the courts as an unconstitutional impingement on the public's right to obtain information about the functioning of the criminal process. On the other hand, a soundly based policy of disclosing such information also probably would be viewed by the courts as constitutionally permissible.

Victim and witness assistance organizations should be able to make strong policy arguments in favor of obtaining necessary information from criminal justice agencies. Although victims and witnesses arguably do have a privacy interest in maintaining the confidentiality of information about them, this interest may not be particularly compelling since for most crimes (sexual assaults and child abuse offenses are exceptions) identification as a victim or witness does not result in stigma, embarrassment or loss of opportunities. In addition, the degree of potential harm caused by disclosure of victim or witness identification data to service organizations is slight, particularly if the organizations have procedures to protect the confidentiality of the information. Indeed, disclosure may serve the interests of the data subjects since the purpose of the organizations is to assist them and provide services to them. For these reasons, victim and witness organizations can argue persuasively that their identity and purpose entitle them to greater access rights than the public generally, and criminal justice agencies can defend policies that permit disclosure to such agencies of information that is not available to the public, including the news media.

The Report of the President's Task Force on Victims of Crime did not deal directly with the issue of confidentiality of criminal justice agency data on victims, although it is clear that the Task Force expected data to be made available where necessary. The report did, however, include two recommendations raising security and privacy considerations of interest to criminal justice policymakers. In its recommendations for legislative action, the task force proposed that state criminal record laws be amended, if necessary, to make available to employers the sexual assault, child molestation or pornography arrest records of prospective and present employees whose work will bring them into regular contact with children. And in its recommendation for federal action, the task force recommended that a study be commissioned at the federal level to evaluate the juvenile justice system from the perspective of the victim, and urged specifically that reconsideration be given to policies supporting the sealing of juvenile records. In its commentary, the task force stated that the juvenile records of serious juvenile offenders should be available in adult criminal proceedings if the offender continues to commit crimes as an adult. This recommendation is consistent with research data now becoming available that indicates that juvenile misbehavior is a predictor of adult criminal conduct.

Conclusions

The victim/witness movement has achieved considerable success in the state legislatures in recent years. Little attention has been paid however, to the operational implications inherent in such programs or to the substantial financial and administrative responsibilities which programs impose on both the overall criminal justice system and those components having primary responsibility for the collection and analysis of information.

In order to ensure the successful development of nationwide victim/witness programs therefore, it is critical that attention be directed at this time to the operational and policy implications new programs will have on existing criminal justice information systems and capabilities.

In particular, it would seem advisable for state legislatures and criminal justice record system administrators to give some consideration to the impact of the new programs on criminal justice record systems. These officials might also consider whether presently structured information systems and practices are adequate to collect and make available the kind of information necessary to support victim/witness programs and research. As in the case of all major program initiatives, major system changes may be necessary in order that the criminal justice system can effectively respond to the newly identified data requirements of expanded victim/witness programs.

Other publications

Victim/Witness Legislation: Considerations for Policymakers, American Bar Association, Section on Criminal Justice, 1800 M St., N.W., Washington, D.C. 20036. Sept. 1981. (The descriptions of state legislative programs set out in this issue brief are based largely on this publication. The publication contains the text of sample laws and an extensive bibliography.)

Restitution to Victims of Personal and Household Crimes, Bureau of Justice Statistics, U.S. Department of Justice. 1980.

Crime Victim Compensation: Program Models, National Institute of Justice, U.S. Department of Justice. 1980.

Final Report of the President's Task Force on Victims of Crime, December 1980.

Bureau of Justice Statistics Bulletins are prepared principally by the staff of the Bureau. Carol B. Kalish, chief of policy analysis, edits the bulletins. Marilyn Marbrook, publications unit chief, administers their publication, assisted by Julie A. Ferguson and Lorraine Poston. This bulletin was prepared by Paul Woodard and Gary Cooper of SEARCH Group, Inc., under the direction of Carol G. Kaplan of BJS.

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[1] The Freedom of Information Act, 5 U.S.C. §552.

[2] The Privacy Act of 1974, 5 U.S.C. §552a.

[3] Cox Broadcasting Corporation v. Cohn, 420 U.S. 469 (1975).

[4] Houston Chronicle Publishing Co. v. City of Houston, 531 S.W. 2d 177 (Tex. Ct. App. 1975).

[5] Menard v. Mitchell, 430 F.2d 486 (D.C. Cir. 1970).

[6] Houston Chronicle case and Congressional News Syndicate v. Department of Justice, 438 F.Supp. 538 (D.D.C. 1977).

[7] 424 U.S. 693 (1976).

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