

## CHAPTER 4

# The Judiciary

Many victims and their families feel that they are the stepchildren of the criminal justice system, that their rights and concerns are misunderstood or ignored. In communities across the nation, victims are denied a voice in decisions to release defendants on bail despite having legitimate safety concerns, and they are not notified when defendants are released. Too many victims also are not notified when the court changes its schedule even though they have taken time off from work, arranged for child care, and paid for transportation.

While plea agreements offer an efficient means for court systems to manage overwhelming case loads, they are routinely finalized without input from, consultation with, or notification of victims, denying millions of victims their rights to be informed about and have input into the justice process. Many victims are still not informed of sentencing hearings or of their right to submit a statement about the financial, physical, and emotional impact of the crime despite the enactment of victim impact statement laws in every state.<sup>2</sup> Moreover, the costs of crime can be devastating, but judges too often overlook victims' financial hardship by failing to order restitution or provide appropriate conditions for its collection.

Judges play a crucial role in the day-to-day implementation of victims' rights. Judges, after all, control the courtroom and make rulings that will affect the court's observance of victims' rights to be present, notified, and heard. At the same time, judges have an obligation to ensure that the criminal justice process is impartial and fair, and many judges feel constrained about giving what they consider to be "special treatment" to crime victims.

Addressing these concerns requires a fundamental shift in viewpoint to allow judges and other court personnel to see the protection of victims' rights and services under law not as "special," but as appropriate and just. The practices and recommendations discussed in this section attempt to do this while holding true the balance judges must keep among the competing and often contradictory interests of vigorous prosecution and defense.

## Progress Since the President's Task Force

The *Final Report* of the President's Task Force on Victims recognized the important role of judges in ensuring the rights of

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*The courtroom is the focal point of the entire criminal justice system. . . The judge who presides over a court becomes not only the final arbiter of each evidentiary and procedural issue, but also establishes the tone, the pace, and the very nature of the proceedings. Particularly for the victim, the judge is the personification of justice.<sup>1</sup>*

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Lois Haight,  
California Juvenile  
Court Judge and Chair of  
the 1982 President's Task  
Force on Victims of Crime

victims as well as defendants. The principal Task Force recommendations for the judiciary included:

- Developing and participating in training programs on the needs and interests of crime victims.
- Implementing procedures and court processes with sensitivity to the needs of crime victims, including ensuring that separate waiting areas are provided for prosecution and defense witnesses and permitting victims and witnesses to be on call for court proceedings.
- Giving the same weight to the interests of victims and witnesses as that given to the interests of defendants when ruling on requests for continuances.
- Facilitating the victim's efforts to be present and, where relevant, heard during essential phases of the proceedings.
- Understanding the impact of crime on victims and ensuring sensitivity to their needs in the handling of cases.

Many of these recommendations have been addressed by legislative changes at the state and federal level, as well as by victims' rights constitutional amendments in 29 states. However, it is difficult to measure how well courts are implementing this legislation and recommendations calling for judges to "recognize" and "give weight to" the needs of victims at appropriate junctures of the justice process.

Almost immediately after the Task Force issued its recommendations, the U.S. Department of Justice, the National Conference of Special Court Judges of the American Bar Association, and the National Judicial College cosponsored the 1983 National Conference of the Judiciary on the Rights of Victims of Crime. The participants of the conference represented courts of general and special jurisdiction in all 50 states, the District of Columbia, and Puerto Rico. The conference adopted a *Statement of Recommended Judicial Practices* which further articulated and provided specific direction for implementing the recommendations in the Task Force's *Final Report*.<sup>3</sup> In addition, in 1984, the Attorney General's Task Force on Family Violence issued recommendations for the judiciary for dealing specifically with victims of family violence.<sup>4</sup>

Since these events, some judicial training programs and conferences such as those held by the State Justice Institute, the National Judicial College, and the National Council of Juvenile and Family Court Judges have made a practice of offering participants educational programs on victim issues. Recently, the California Judicial College made training on victims' rights mandatory for new judges.

## Judicial Concerns About Implementing Victims' Rights

Before discussing ways in which judges can help victims have a greater voice in the justice process, it is important to acknowledge the traditional concerns of judges about taking a more active role for victims. In 1997, a focus group of a dozen judges and judicial administrators from diverse regions of the country identified why many in the judiciary have not viewed the enforcement of victims' rights as part of their courtroom duties.<sup>5</sup>

According to the focus group, many judges find it difficult to view victims as having a legitimate role in the justice process because they are not official parties to the criminal proceedings.<sup>6</sup> Judges are also sometimes unaware of the laws setting forth victims' rights and the specific services to which victims are entitled.<sup>7</sup> Moreover, judges often worry that paying "special" attention to victims other than as witnesses for the prosecution impinges on the impartiality of the court and creates the appearance of impropriety.<sup>8</sup>

Judges typically have little or no training on the impact of violent crime on victims and their families, how victims feel or experience the criminal justice system, their grieving or healing processes, and appropriate judicial conduct toward victims. The judge's control of the courtroom and the rules of evidence are designed to avoid surprises, control all participants including witnesses and spectators, and minimize emotional outbursts. Victims' expressions of emotional trauma, fear, anger, confusion, and psychological scarring in the courtroom can be an unsettling prospect and a threat to courtroom control.

Moreover, traditional court organization and administration do not encourage problem solving approaches in cases. Limited resources, crowded dockets, and statutory requirements to process cases within certain time limits often cause even well-intentioned judges concern about opening up the process to victim input. Finally, the focus group noted that many judges believe that victims increase media and public attention on the court proceeding, often casting judges in an unfavorable light.

## Encouraging Judicial Leadership

Judges are uniquely situated to bring together institutions in the community, including schools, hospitals, and social service agencies, that can solve the wide range of problems that bring offenders and the people they victimize to the justice system. By forging public-private partnerships, these institutions make maximum use of limited resources.

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*In a civilized society, members of the judiciary serve as the collective guidon of the banner representing fairness and impartiality, both for the criminally accused as well as the intended victim.*

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Chief Justice Richard Barajas,  
Texas Court of Appeals,  
El Paso, Texas

As community leaders, judges can and should be catalysts for coordinating the delivery of services to both victims and offenders. When judges take a problem-solving approach to administering justice, the result is greater outreach to the community and greater community access to the justice system.

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*Judicial leadership is the single most important factor in the criminal justice system for supporting victims' rights. Judges have a unique role in implementing existing law and creating new, innovative solutions to old problems.*

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Hon. Mary C. Morgan (ret.),  
Municipal Court of the City  
and County of San Francisco,  
California

- The Municipal Court of Tucson, Arizona, was one of several partners including the police, victim advocates, prosecutors, and health care professionals in establishing a Community Domestic Violence Awareness Center. The center's victim advocates provide information on domestic violence and assist victims in obtaining protection orders, either through an interactive video system or by personally taking the victim to the city court. During evening hours, weekends, and holidays, a judge is on duty at the center, where victims can appear and seek assistance.
- In Santa Clara County, California, and a growing number of other local jurisdictions, the judiciary has taken the initiative in establishing local family violence councils to provide "a comprehensive response to domestic violence which addresses prevention, public education, intervention, and corrections including treatment and rehabilitation."<sup>9</sup> Mandated by the Violence Against Women Act of 1994 as a requirement for communities to qualify for funding, localities across the nation are now organizing such councils.<sup>10</sup> The councils have led to the creation of new community partnerships and adjudication alternatives for batterers and enhanced victim assistance and referral networks.
- In New York, the state has begun an initiative through its Permanent Judicial Commission on Justice for Children to provide assistance to children in the courts, particularly children under 5. The Commission's efforts have focused on promoting early intervention for at risk children by establishing child care centers in courts across the state that give children whose parents are in court a safe haven. The child care centers allow the courts to conduct business more efficiently, but more important, they provide children sorely needed educational, nutritional, and social services. The New York State Office of Court Administration has been instrumental in raising and sustaining support for maintenance and expansion of the centers. In June 1994, a Court Rule was issued in the state requiring all new construction or renovation in court facilities to set aside space for child care.

Judges also have an affirmative obligation to explain to the public what courts do. One example is Navajo Justice Day, in which the Navajo Tribal Court sponsors an open house for the community and the media to learn about all aspects of the judicial system. Another innovative approach is the Wisconsin Supreme Court's court-community collaboration, which emphasizes outreach to citizens to inform them about the work of the courts and public input into how to make the justice system more responsive.<sup>11</sup>

## Restructuring Courts to Solve Problems

The court's traditional emphasis on procedural rights has led judges in many instances to neglect other aspects of their mandate to do justice. Many people, including victims, bring problems to the system that need attention. In some jurisdictions, judges are addressing the needs of offenders *and* victims with a new focus on restorative community justice that involves the community, holds the offender accountable through punishment and supervision, and helps the victim to heal.

A good example of judicial leadership to help victims through problem solving is the pioneering use of neighborhood or community impact statements in cases involving drug crimes. Traditionally, drug crimes have been considered "victimless" and courts rarely heard from people affected by those who sell drugs in their neighborhood. In some jurisdictions, judges now receive information about how drug trafficking has affected the community's quality of life. Neighbors are given the opportunity to provide information anonymously, and their statements are incorporated into an overall impact statement for the case. Judges consult these statements when ordering convicted drug dealers to pay restitution to community groups in the neighborhood where the offense was committed. Community members are informed of their right to submit statements through public education and crime prevention programs as well as flyers distributed in neighborhoods following a drug arrest.<sup>12</sup>

For certain kinds of crimes and victims, problem solving may be most effective in specialized courts. Current examples are drug courts, domestic violence courts, community courts that handle "quality of life" misdemeanor crimes, unified family courts that handle all problems relating to the family including criminal, civil, and juvenile matters, and courts designed specifically for child victims. The value of specialized courts for victims and offenders is that delivery of resources such as counseling, treatment, and job training can be coordinated in one location, allowing the judge to solve multiple problems in what traditionally were considered separate court jurisdictions.

- In New York City, the Midtown Community Court focuses on petty offenses such as prostitution, shoplifting, subway fare skipping, graffiti, minor drug possession, and illegal peddling that victimize the community. In sentencing defendants who plead guilty in these cases, the court and community organizations work together to make justice constructive for offenders as well as restorative to the community. Offenders pay restitution to the community through community service, but they also receive help for their problems through substance abuse treatment, health care, education, and other social services. The court is developing a process to help facilitate statements from community members on the impact of these crimes.

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*A family violence council can accomplish a great deal through its operation. At the very least, if the principal persons in the legal system are present, communication and coordination should be improved within it.*

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Leonard P. Edwards,  
Superior Court Judge,  
Santa Clara County, California, in *Juvenile and Family  
Court Journal*, 1992

- In August 1995, following the enactment of state legislation establishing family violence cases as a priority for the criminal justice system, 11 county criminal court judges in Dallas County, Texas, created the first unified family violence court in the state. The court docket is limited to cases involving family violence offenses, and the prosecuting attorney's office expanded its family violence division to prosecute these cases exclusively. Among the many benefits for victims has been a streamlined application process for protective orders. Because the family and criminal courts are now together, victims attend all proceedings at one court. Unifying the courts has also led to more efficient dispositions and an increase in the expertise of judges and court personnel on the complicated issue of family violence.<sup>13</sup>
- In Los Angeles County, the Edmund D. Edelman Children's Court was established in 1992 as the nation's first dependency court designed specifically to meet the needs of children going through the court process. The building's small courtrooms are less intimidating to children than traditional courtrooms. Each courtroom's semicircular counsel table is shaped like a smile, and there are specially designated play areas for children to help reduce stress and trauma. The court's public areas have special eating facilities, television sets tuned to the Disney Channel, and separate diaper changing areas, and a shelter area offers a secure space for children in out-of-home placement. Safe, friendly, and private play areas, family visiting rooms, exercise areas, and conference rooms for children to meet with their attorneys, social workers, or other care providers are also available. Special initiatives of the court include counseling services for children and their families, training and internship programs, and a child-parent art program. The court is supported by a public and private sector partnership, the Child Victims in Court Foundation, which has raised over \$1 million since the court began operation.<sup>14</sup>

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*If court spaces are designed around children, then adults never forget why they are there.<sup>15</sup>*

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The rich American Indian traditions of this country's tribal justice systems provide strong models for judicial leadership. In tribal courts, the goal is to solve problems created by wrongful acts, which are seen as harming not only the victim, but the offender, the victim and offender's families, and the entire community as well. In the Navajo Nation, for example, justice is administered through a peacemaking system in addition to a western legal process. In this system, victims, offenders, and their families are brought together to solve all kinds of problems ranging from nonpayment of child support to theft. But such "judicially sanctioned" problem solving need not be limited to small or culturally homogeneous communities. Peacemaking techniques have been adopted in an Albuquerque family court where participants are often of different cultures and do not necessarily share the same values.

A number of Canadian courts use the concept of the Aboriginal sentencing circle in which the judge, prosecutor, defense attorney, victim, offender, community members, and service agencies all come together to determine remedies, sanctions, and treatment programs that are appropriate for the victim, offender, and community. Moreover, family group conferencing based on Maori tradition is used throughout the New Zealand juvenile justice system, and community reparation boards are used in Vermont to craft appropriate sentences.

All of these restorative justice mechanisms originated in very different cultures but share common goals: solving problems through a collaborative process that emphasizes addressing the harm done to the victim; holding the offender accountable for the harm done; and restoring community relationships by bringing the victim and offender back into community life. Significant strides have been made in laying a legislative framework that provides for greater and more meaningful victim participation in the criminal justice process. At the same time, judges are hampered by a lack of experience with and training in the legal rights and legitimate needs of victims. To overcome the concerns of judges about the full implementation of victims' rights and the victim's role in the judicial process, education and training are critical. Those jurisdictions that have begun to reexamine the basic way in which justice is administered by giving greater recognition to the role of the community and the victim in the criminal justice process should serve as models of how the competing concerns of those affected by criminal conduct can be justly met.

## Recommendations from the Field for the Judiciary

These recommendations address the judiciary's role in implementing victims' rights laws, and apply equally to judges in civil and criminal courts. Judges in civil courts, particularly family courts, interact with numerous crime victims and are often the most important arbiters of justice for these victims. Indeed, throughout all judicial systems, judges, court administrators, and court personnel must implement the spirit as well as the letter of laws protecting victims' rights that have been enacted on the state and federal levels. Judges must enforce victims' rights in the day-to-day operations of the court, particularly by ensuring that victims have an opportunity for input prior to plea proceedings, during the trial, and at sentencing. While a lack of adequate funding is sometimes the problem, more often full implementation is prevented by the lack of judicial education in victims' rights and services, a narrow vision in the judiciary of the role of the justice system, and the failure of the system to make victims' rights a priority.

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*These new ways of doing business have been given many names—community justice, tribal courts, specialized courts, restorative justice—but at their heart they all share a commitment to problem-solving and partnership with community groups, non-profit and government service providers outside of the justice system. These new movements hold promise for victims.*

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John Feinblatt,  
Midtown Community Court,  
New York, New York

**JUDICIARY RECOMMENDATION FROM THE FIELD #1**

**The voices and concerns of crime victims should be recognized and institutionalized within the justice system. Judges should advise victims of their rights as routinely as they advise defendants of their rights.**

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*I sit before you today as a parent of a murdered child. Unfortunately, I am only one of many. My associates and I have survived the most devastating chapter in any parent's life, the senseless loss of a child. The agony is not easily retold. In fact, you couldn't possibly fathom the sensation unless you have survived it.*

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Ralph H. Hubbard,  
Outreach Coordinator,  
Parents of Murdered Children  
of New York State,  
Public Forum on  
New Directions, 1995

All jurisdictions have statutory provisions spelling out the rights of victims, and 29 states have underscored these rights with the passage of state victims' rights constitutional amendments. The judiciary has a major responsibility for ensuring that victims are acknowledged, informed, heard, and treated fairly and with dignity. The first step is to recognize that the interests and needs of prosecutors and victims are not always identical. It would be educational for all participants in the courtroom to hear judges acknowledge victims and inform them of their rights. Oral advisement and videotaped and written materials can be used to explain the justice system and the proper role of victims in it. Judges must also ensure that victims are aware of rights for which prosecutors and probation officers have implementation responsibility, such as notification of hearing dates, case disposition, victim impact statements, and offender release.

Every court's administrative staff should have a victim coordinator, even in jurisdictions in which the prosecutor or probation office operates a victim/witness program. Victims and their advocates, including court-appointed special advocates and guardians ad litem for children, should have a formal voice in the court planning process. Special attention should be given to ensuring that multicultural and multilingual individuals serve in the courts to enhance the court's responsiveness to and understanding of the needs of the various ethnic and language groups in the community.

**JUDICIARY RECOMMENDATION FROM THE FIELD #2**

**Judges and all court personnel at all levels of the court system must receive initial and continuing education on the law concerning victims' rights, the impact of crime on victims and their families, and how the judiciary can implement the spirit as well as the letter of these rights. This education must include training on the special needs of some victim populations such as victims with disabilities and non-English speaking individuals.**



The importance of educating judges and court personnel about the proper role of victims in the justice system cannot be overemphasized. Just as doctors need training in interacting appropriately with patients and their families, judges and court personnel need training in understanding the impact of crime on victims and their families and the role of the justice system in their grieving and healing process. Training can help judges and court personnel appreciate the potential of the justice system to exacerbate victims' emotional injuries by failing to accord them respect, provide them with information, or allow them to participate.

Judicial education about victims should articulate why victim participation is a difficult subject for the judiciary. There must be thoughtful dialogue about issues relating to impartiality and opportunities for judges to not only learn the law but also reexamine basic notions about how justice is administered in our society.

Education of the judiciary about victim participation must be reinforced with interaction with victims themselves. Judges and court personnel need to hear from victims and their families. They should be encouraged to think about the role of victims in the larger judicial process in addition to their role in each case. Open dialogue among judges about victim participation should be encouraged institutionally, and this discussion must also occur between judges and court personnel, other members of the criminal justice system, the bar, the public at large, and crime victims. Education about these issues should begin as soon as possible in a judge's career, preferably in law school, and continue throughout the judge's service. Education on crime victims' issues must be provided to civil court judges, particularly those in family or dependency courts, as these judges regularly interact with hundreds of crime victims.

A model curriculum should be developed for the judiciary that links information about the rights and needs of victims to standard programs about trial management, criminal procedure, juvenile justice, and family law. When judges learn, for example, about their discretion in excluding witnesses from the courtroom they should also learn about the importance to victims and their families of being present for hearings and trials. When judges learn about setting bail and issuing restraining orders, they should also be apprised of research indicating when domestic violence is most lethal. Programs about child victims and victims of family violence, sexual assault, and hate crimes are good vehicles to educate the judiciary about victim issues. Judges should assume responsibility for obtaining current information about victim-related laws and any subsequent amendment of those laws.

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*By their attitude and the attitude of their staff, judges can set examples in the treatment of witnesses and victims. We urge that our fellow judges exercise their leadership role in improving the treatment of victims and witnesses. Victims of crime should not be victims of the criminal justice system.*

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Statement of Recommended Judicial Practices adopted by the National Conference of the Judiciary on The Rights of Victims of Crime at the National Judicial College, Reno, Nevada, 1983

In addition to general training, judges assigned to criminal courts, and particularly to specialized courts such as domestic violence courts, should receive intensive training in the impact of such crimes on victims, the dynamics between victims and offenders, and issues when judging the credibility of victims such as child victims and victims of domestic violence and sexual assault. Interdisciplinary training is essential. To truly act as problem solvers, judges must be aware of medical, psychological, and child development issues. Innovative ways need to be explored to allow judges with expertise in these areas to share that expertise with their colleagues through mentoring, partnering of courts, and use of experts who ride the circuit. All training curriculums must address the needs of multicultural and multiethnic groups, and all training initiatives—not just that on multicultural issues—should use the skills of racially, ethnically, and culturally diverse trainers.

Court administrators must ensure that judges are provided ongoing, comprehensive training on victims issues, and that the specialized training described above is incorporated into training plans and budgets.

**JUDICIARY RECOMMENDATION FROM THE FIELD #3**

**Judges should facilitate the rights of crime victims and their families to be present at court proceedings unless the defendant proves that their presence would interfere with the defendant's right to a fair trial.**

Thirty-four states have given victims the right to attend either the defendant's trial specifically or the criminal proceedings generally.<sup>16</sup> Furthermore, nearly half of the states guarantee it in their constitutions. In most cases, this right is limited by the requirement that it apply only to proceedings in which the defendant is also present. In addition, the majority of the states that allow for the victim's right to attend the trial also give judges wide discretion in excluding a victim from the courtroom in order to preserve the defendant's right to a fair trial or based on the victim's dual status as a witness.

Practical considerations also prevent victims from attending legal proceedings. In high-profile or multiple-party cases, there are often not enough seats in the courtroom reserved for the victims and members of their immediate family. Judges must make a point of setting aside adequate space in their courtrooms for crime victims and make better use of technology to expand victims' access to proceedings. The power of technology to aid victims was shown recently when closed-circuit

television allowed hundreds of victims and survivors of the bombing of the Alfred P. Murrah Federal Building in Oklahoma City to observe the trial in Denver, Colorado, from an auditorium in Oklahoma City.

**JUDICIARY RECOMMENDATION FROM THE FIELD #4**

**Judges should consider victim and community safety in any prerelease or postrelease decision. As part of any pretrial release order, including bail, bond, or personal recognizance, judges should include a “no-contact” provision stating that the accused or defendant shall not harass, intimidate, threaten, or commit physical violence against the victim or victim's family.**

Judges should invite victim input, whenever possible, regarding the release of the accused. When bail is allowed, when appropriate it should be conditioned on the defendant's restricted access to victims or prosecution witnesses. If judges find probable cause that the defendant has harassed, intimidated, threatened, or committed physical violence against the victim or the victim's immediate family, judges should revoke the defendant's bond or personal recognizance and order that he or she be taken into custody.

**JUDICIARY RECOMMENDATION FROM THE FIELD #5**

**Before imposing a sentence, judges should permit the victim, the victim's representative, or, when appropriate, representatives of the community to present a victim impact statement.**

Today, all states, the District of Columbia, and the federal government have enacted victim impact statement laws to allow judges to weigh the financial, physical, and emotional impact of a crime on its victim in establishing appropriate sentencing for the defendant. The U.S. Supreme Court has upheld the constitutionality of victim impact statements at sentencing, even in the most difficult decisions, capital offenses. Victim impact statements are an important source of information for judges in ordering restitution to the victim. In addition to statements from individual victims, community impact statements have been used in drug-related crimes to provide the courts with information on the impact of the crime for those living in drug-ridden neighborhoods.

Judges should require the inclusion of victim impact statements, including community impact statements where appropriate, in all dispositional hearings, especially plea agreements and sentencing. Judges should allow for the submission of victim impact evidence both orally and in writing. Additionally, judges should allow victims to submit victim impact evidence via audiotape, videotape, or other electronic means, especially when the victim is a child, elderly, or disabled, or where travel to the court would be burdensome. To facilitate input from victims who face communication barriers, judges should make every attempt to locate foreign or sign language interpreters. Finally, judges should require prosecutors to describe on the record their efforts to contact and seek input from victims.

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*I personally feel that it is a miscarriage of justice to sentence a defendant who has been convicted of committing a crime against another person without first hearing from the victim and taking into account the effects the crime had on the victim's life.*

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Judge Reggie Walton,  
The President's Task Force  
on Victims of Crime, 1982

**JUDICIARY RECOMMENDATION FROM THE FIELD #6**

**Judges should facilitate the input of crime victims into plea agreements and resulting sentences, and they should request that prosecuting attorneys demonstrate that reasonable efforts were made to confer with the victim.**

Requiring offenders to acknowledge guilt and take responsibility for their actions is important to the victim's healing process and the offender's rehabilitation. It is significant for victims' healing that the judge acknowledge at the time of sentencing that victims have been injured, solicit specific information from victims on the crime's impact on their lives, and explain the terms of the offender's sentence.

Judges' decisions will be better informed if victims are given an opportunity to provide comments about the plea agreement. In general, judges should require that reasonable efforts be made to confer with the victim, notify the victim of the time and date of the plea hearing, and inform the victim of his or her right to be present and heard. Whenever possible, the court should be informed of the victim's opinion concerning plea agreements. With the vast majority of cases disposed of through plea agreements, the debate on victims rights needs to be refocused on this critical juncture of the criminal justice system.<sup>17</sup> Exceptions to this practice should only be made under extraordinary circumstances such as in cases involving many victims or confidential informants.

Victim input into the plea process is critical because the rapid growth in caseloads over the past two decades has forced courts to use more efficient means of concluding cases. Resolving criminal cases through plea agreements, which are quicker than formal trials, has

become standard practice in courts today. In 1994, 64 percent of felony cases in state courts nationwide were disposed of through guilty pleas, while only 7 percent were disposed of by trial. The remaining cases were resolved by a decision by the prosecutor not to continue or by the court to drop all charges.<sup>18</sup>

With criminal caseloads expected to increase even more in the decade ahead, the pressure on the judiciary, prosecution, and defense to dispose of cases through plea agreements will likely also increase. The great irony for victims is that this is an area of the criminal justice process in which victims are given fewest opportunities for participation. Nationwide, victims are often not notified about plea negotiations nor asked to provide input into the plea agreement.

A number of state constitutional amendments and statutes mandate victim input into the plea bargaining process. Arizona law, for example, requires that the court not accept a plea agreement unless:

- The prosecuting attorney advises the court that before requesting the negotiated plea reasonable efforts were made to confer with the victim;
- Reasonable efforts are made to give the victim notice of the plea proceedings and to inform the victim that the victim has the right to be present and, if present, to be heard; and
- The prosecuting attorney advises the court that to the best of the prosecutor's knowledge notice requirements were complied with and the court was informed of the victim's position, if known, regarding the negotiated plea.<sup>19</sup>

For the benefit of both offenders and victims, consideration should be given to not accepting no contest pleas.

#### JUDICIARY RECOMMENDATION FROM THE FIELD #7

**As leaders within the justice system, judges must ensure that victims' rights legislation is fully implemented.**

Judges should work closely with the bar to encourage dialogue with lawyers and the community about the problems of victims within the justice system. Judges should foster education and an understanding that solving victims' problems does not mean denying rights to offenders. Being leaders within the community means that judges have a responsibility to hear the public's views about the criminal justice system, understand community needs, and encourage

public involvement in the criminal justice system. The philosophy of community involvement underlying community courts should be incorporated into all courts.

The chief justice of each state should personally take responsibility for encouraging dialogue on these subjects. The implementation of victims' rights should be placed on the agendas of the Conference of Chief Justices and the Conference of State Court Administrators. The Model Code of Judicial Conduct and state codes of judicial conduct should be examined to ensure that judges are encouraged to treat victims fairly. The Conference of Chief Justices and the Conference of State Court Administrators should hold educational panels on victim issues at their annual meetings. Each chief justice should ensure that the judicial recommendations contained in this report are disseminated to every judicial officer within his or her state and that appropriate and continuing educational programs on victim issues are undertaken.

Victim issues are important for federal as well as state court judges. Victims of crime appear in federal courts in cases involving white collar crime, terrorist bombings, civil rights crimes, interstate child support and domestic violence offenses, and crimes committed in Indian Country, on military reservations, and in other federal enclaves. Victims also appear in civil cases involving civil rights, sexual harassment, and employment discrimination. Victim issues should be on the agenda of the Judicial Conference of the United States, the Federal Judicial Center, and the Administrative Office of the United States Courts. All judicial agencies should develop continuing training programs for judges and *all* court personnel on victims' rights and services.

The presiding judge in each court is particularly important as a leader and inspiration among his or her peers, a spokesperson for the justice system within the community, and a liaison and collaborator with other branches of government. Judges and courts should see themselves and be seen by the community as peacemakers and problem solvers. This message should be taken to law schools, the bar, and to the community at large. Special steps should be taken to ensure that this outreach involves all sectors of the community including culturally or linguistically distinct groups.

Victims and victim advocates should be informed of available recourse to judicial oversight groups such as judicial disciplinary committees should they believe a judge has denied a victim's rights in court. The California Commission on Judicial Performance has demonstrated the efficacy of this remedy and has twice brought public censure on judges who failed to honor crime victims' statutory rights. Disciplinary committee members should receive ongoing training in victims' issues and in substantive victims' rights.

**JUDICIARY RECOMMENDATION FROM THE FIELD #8**

**Judges should play a leadership role in ensuring that police, prosecutors, defense counsel, judges, and court administrators receive joint training so that all have a comprehensive picture of what happens to a victim as he or she navigates through the criminal justice system.**

Judges should give special consideration to how defense attorneys and the bar at large can best be educated about crime victims and how courts can be reoriented to be problem solvers for both offenders and victims. Appropriate postadjudication victim-offender mediation programs should be encouraged, but only with adequate safeguards for the physical and emotional well-being of victims and their families, and only if requested by the victims. The defense bar and public defenders as well as prosecutors should be fully involved in the planning and implementation of specialized courts. Multicultural issues should be incorporated into all trainings.

**JUDICIARY RECOMMENDATION FROM THE FIELD #9**

**Judges have a responsibility to manage their cases and calendars to make victim involvement as feasible as possible. Modern technology should be used to give victims greater access to the justice system and should include multilingual services at no cost to victims.**

Many victim reforms such as reducing delay, allowing input into the process at points other than sentencing, and controlling the examination of witnesses are dependent on active case and courtroom management by the judge. The need for “efficiency” should not be used as an excuse not to inform and involve victims. Victim involvement does require time, but a properly managed court and calendar can accommodate reasonable victim participation. Judges set expectations for attorneys and other participants in the justice system. The local legal culture will respect and comply with victim involvement if it is expected and validated by the judiciary.

With appropriate safeguards for statutorily required confidentiality, modern technology should be used to bring more information about crime victims and offenders in particular cases to judges. Technology

should be used to link all agencies within the criminal justice system to ensure that court orders issued to the same family do not conflict. Teleconferencing and closed-circuit television should be used to minimize inconvenience and trauma to victims. Information kiosks, educational videos, and other educational tools should be used to educate victims about the justice system and the process and procedure they should expect. Judges should coordinate with other criminal justice agencies in the development of a centralized case tracking system that will provide victims with notice at every stage of the criminal justice process.

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*Victims' rights laws affect even America's northernmost court. The trial court in Barrow, Alaska, serves a community of 4,000 and an area half the size of California. With the vast distances involved in some of these cases, we can use technology to serve victims even in the most remote locations.*

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Superior Court Judge  
Michael I. Jeffery,  
Alaska Court System,  
Barrow, Alaska

The availability of interpreters and accessibility to the justice system are important issues for the public, and for victims and their families in particular. Judges should never assume that disabled crime victims and their family members would prefer not to or cannot attend court proceedings. Courts should provide victims with interpreters for all proceedings whenever needed and possible, and at least one courtroom in each courthouse should have the capability for real-time transcription for hearing-impaired victims.

#### JUDICIARY RECOMMENDATION FROM THE FIELD #10

**Judges should order restitution from offenders to help compensate victims for the harm they have suffered. If extraordinary and compelling reasons make restitution impractical or inappropriate, judges should explain in writing and on the record why they did not order it.**

Judges should order restitution regardless of whether the defendant was adjudicated through a plea agreement or trial, and regardless of whether the offender is incarcerated or placed on probation. Courts should make every attempt to ensure the enforcement of restitution orders. Judges should also explain to crime victims the purpose of ordering restitution as part of a sentence, how it is collected and disbursed, and the avenues available to hold offenders accountable for payment. Victims should be advised not to have unrealistic expectations about receiving restitution payments from indigent offenders.

In addition, judges should ensure that restitution orders become automatic liens against the defendant by ordering restitution as a civil judgment where permitted by law. The judgment can then be enforced by the government or by the victim or the victim's beneficiary in the same manner as a civil action. In cases in which more than one defendant is convicted of the criminal offense, the defendants should



be held jointly and severally liable for the judgment. There is a growing trend to enforce restitution orders as civil liens. Currently, a majority of states have laws that permit the courts to enforce restitution orders as civil judgments, either at the time of the order or at the end of an offender's probationary period. In some states, the laws also allow the authorities to seize an offender's property and financial assets through the use of garnishment or attachment orders when the offender has failed to satisfy the court's order.<sup>20</sup>

**JUDICIARY RECOMMENDATION FROM THE FIELD #11**

**Judges should play a leadership role in ensuring that separate and secure waiting areas are available in all courthouses for prosecution and defense witnesses to minimize the contact of victims with defendants, their relatives, and friends before, during, and immediately after court proceedings.**

The 1982 President's Task Force recommended that judges or their court administrators establish separate waiting rooms for prosecution and defense witnesses to reduce victim intimidation.<sup>21</sup> However, the practical reality of too many overcrowded courthouses across the country has prevented the full implementation of this important recommendation. As new courthouses are designed, the safety of victims must be taken into consideration.

**JUDICIARY RECOMMENDATION FROM THE FIELD #12**

**Codes of Judicial Conduct should be amended to reflect the fact that crime victims play a pivotal role in the criminal justice system.**

Judges throughout this country are guided by their respective Codes of Judicial Conduct. These codes are not intended to be exhaustive guides for the conduct of judges. They are intended instead as guidelines to assist judges in establishing and maintaining the highest standards of judicial conduct. The Code of Conduct for United States Judges applies to all federal judges and serves as a model for state Codes of Judicial Conduct.

The following specific recommendations, highlighted in bold, are offered as amendments to the Code of Conduct for United States Judges:<sup>22</sup>

Canon 3(A)(3)<sup>23</sup> should be amended to provide that:

A judge shall be patient, dignified and courteous to litigants, jurors, **victims of crime**, witnesses, lawyers and others with whom the judge deals in an official capacity, and should require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.

Canon 3(A)(4)<sup>24</sup> should be amended to provide that:

A judge shall accord to every person who has a legal interest in a proceeding, including **victims of crime**, or that person's lawyer, the right to be heard according to law.

Other jurisdictions should modify their respective codes of conduct accordingly.

**JUDICIARY RECOMMENDATION FROM THE FIELD #13**

**Judicial assignments to specialized courts or family law or juvenile courts should be based on experience and interest, not on lack of seniority or punishment.**

There is a perception among some members of the judiciary that the work of family or juvenile courts is of less distinction or merit than that of other courts. As a result, assignments or appointments to these courts typically do carry the same stature in judicial circles and are less well paid. Judges in other courts may have little understanding of the nature and complexity of the issues involved in juvenile or family court cases, limiting their ability to recognize and address these issues when they arise in their own court.

To the extent that there is a goal of exposing all judges to all assignments, adequate education and mentoring should accompany rotational assignments. Rotations should be long enough to allow the new judge to become thoroughly familiar with the assignment and the law. Judicial salaries should be equalized. In particular, lower salaries should not be paid to judges sitting in juvenile or family law courts.

**JUDICIARY RECOMMENDATION FROM THE FIELD #14**

**Judges must take a leadership role in conceptualizing and advocating that the justice system encompass not only traditional adjudication and punishment**

**but also holistic problem solving and treatment for victims as well as offenders. Principles of restorative community justice and therapeutic jurisprudence should be incorporated into court systems with due regard for differing cultures and ethnic groups.**

Courts must reexamine the ways in which they do business and consider innovative means of achieving justice through the involvement of the community and victims. A reorientation toward problem solving, as opposed to only adjudication, requires a much broader allocation of jurisdiction among judges. In family violence cases, for example, such a reorientation may require a single court to exercise criminal, civil, as well as juvenile jurisdiction to address all of a family's problems. This expanded jurisdiction gives the court the authority to hold the batterer accountable through treatment as well as punishment and protect and treat both adult and child victims of violence.

Reorienting courts toward problem solving expands the system's definition of victim in the context of a particular set of issues. Again using family court as a model, victims would now include children who witness violence in their family as well as those who are themselves battered and sexually assaulted. Moreover, judicial problem solving expands our definition of restitution. The new objective is to help the victim achieve healing as well as to hold the offender accountable. In addition to full monetary restitution, courts must make counseling, social services, drug and alcohol treatment, and job training available, when appropriate, to victims and offenders.

The recommendations in this chapter were based upon input from participants at public hearings and reaction and working groups, as well as papers submitted by experts in the field, identified in Appendix A. The recommendations do not necessarily reflect all of the views of the contributors, nor do they necessarily represent the official views of the Department of Justice.

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*One of the important, if not the most important aspects of justice is healing victims, healing wounded people. One thinks of justice in the context of deterrents, of retribution. But too infrequently is justice looked at as a form of healing, a form of therapy for victims who cannot really begin their healing process until there has been some public acknowledgement of what has befallen them.*

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Justice Richard J. Goldstone,  
Constitutional Court,  
South Africa, and former Chief  
Prosecutor, International  
Criminal Tribunals for  
the former Yugoslavia  
and Rwanda; speech  
given at the United States  
Holocaust Museum,  
January 27, 1997

## **The Judicial System Today**

State courts serve as the primary institution for adjudicating criminal and civil disputes in the United States. There are 16,400 state trial courts operating in the 50 states, District of Columbia, and Puerto Rico.<sup>25</sup> Of these courts, 13,874 are limited jurisdiction courts and 2,513 are general jurisdiction courts. In 1994, 27,194 trial judges served in state courts.<sup>26</sup>

In the federal judicial system, 94 district courts and 12 regional courts of appeals adjudicate approximately 310,000 criminal and civil cases each year.<sup>27</sup> Approximately 1,991 judges comprise the federal judiciary<sup>28</sup> and there are approximately 325 tribal courts in the nation's tribal justice system.<sup>29</sup>

## **Pressures on the Court System**

One of the greatest challenges facing the nation's judiciary over the past decade has been the huge growth in the number of serious cases before the courts.<sup>30</sup>

- In 1995, 86 million new cases were filed in state courts, including approximately 20 million civil and domestic relations cases, 13 million criminal cases, 2 million juvenile cases; and 51 million traffic and ordinance violations.
- Between 1984 and 1995, criminal caseloads rose 38 percent, juvenile caseloads rose 55 percent, and domestic relations caseloads rose 70 percent. In contrast, the U.S. population increased roughly 10 percent over the same period.
- Felony filings in general jurisdiction courts increased 70 percent between 1984 and 1994.
- Total criminal case filings in the United States reached an all-time high in 1995 of more than 13 million cases—a 38 percent increase since 1984.
- The most rapid growth in domestic relations cases occurred in the area of domestic violence, with filings in 1995 increasing over 99 percent since 1989.
- On the federal level, U.S. District Courts faced a significant increase of criminal cases filings from 1980 to 1994, rising from 27,968 to 45,774.<sup>31</sup>

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## Endnotes

- 1 President's Task Force on Victims of Crime, *Final Report*, Washington, D.C.: U.S. Government Printing Office, December 1982:72.
- 2 National Victim Center, *1996 Victims' Rights Sourcebook: A Compilation and Comparison of Victims Rights Laws*, Arlington, VA: National Victim Center, 1997: §9.
- 3 National Conference of the Judiciary on the Rights of Victims of Crime, *Statement of Recommended Judicial Practices*, Washington, D.C.: U.S. Department of Justice, National Institute of Justice, 1985.
- 4 Attorney General's Task Force on Family Violence, *Final Report*, Washington, D.C.: September 1984: 33-34.
- 5 *The Judicial Focus Group on Victims' Issues*, which met in Washington D.C. on January 27-28, 1997, consisted of prominent members of the judiciary and judicial administrators. They included the Honorable Mary C. Morgan (ret.), the Honorable Richard Andrias, the Honorable A. Franklin Burgess, Jr., John Feinblatt Esq., the Honorable Lois Haight, the Honorable Suzanne W. Knauf, the Honorable Cindy Lederman, the Honorable Rosalyn Richter, Lynn Hecht Schafran Esq., the Honorable Bill Schma, the Honorable Bill Thorne, and the Honorable Irene Toledo.
- 6 Office for Victims of Crime, *Report from the Judicial Focus Group on Victims' Issues*, Washington, D.C.: 1997.
- 7 *Id.*
- 8 *Id.* at 4. Judges report that they often feel caught in the crossfire among prosecutors who resent interference in their cases, victim advocates who perceive judges as having more power and discretion than they do, and defense counsel who often paint victims as persons interested only in revenge.
- 9 Edwards, Hon. Leonard P., "Reducing Family Violence: The Role of the Family Violence Council," *Juvenile and Family Court Journal*, 2, 1992:43.
- 10 Violence Against Women Act, Tit. IV of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322 (September 13, 1994), codified at 42 U.S.C. 13701.
- 11 Abrahamson, Hon. Shirley S., *A True Partnership for Justice*, JUDICATURE, Vol. 80, No.6 (1996).
- 12 American Prosecutors Research Institute, *Community Prosecution: A Guide for Prosecutors*, Washington, D.C.:1995: 32 (National District Attorneys Association prepared under agreement with the U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance, 1995). This unique concept for victim participation was first initiated by the Milwaukee District Attorney's Office, and is now routinely used by the U.S. Attorney's Office for the Eastern District of Wisconsin.
- 13 Bush, G. W. and K. J. Greene, *The Governor's Criminal Justice Plan for Texas: Protecting Our Future*, Austin, Texas: Criminal Justice Division, Office of the Governor, fiscal year 1998:58.
- 14 The Edmund D. Edelman Children's Court, *The Children's Court Design Committee Report*, Los Angeles, California: Juvenile Court Administrative Office, 1995.
- 15 *Id.*
- 16 National Victim Center, *1996 Victims' Rights Sourcebook*, 257.
- 17 Ostrom, B. J. and N. B. Kauder, *Examining the Work of State Courts, 1994: A National Perspective from the Court Statistics Project*, Williamsburg, VA: National Center for State Courts, 1996:66.

- 18 *Id.*
- 19 ARIZ. REV. STAT. § 13-4423 (1996).
- 20 National Victim Center, *1996 Victims' Rights Sourcebook*, 275-276.
- 21 President's Task Force on Victims of Crime, *Final Report*, 72.
- 22 *Code of Conduct for United States Judges, Guide to Judiciary Policies and Procedures*, Washington, D.C.: Judicial Conference of the United States, 1997: vol ii, ch.1.
- 23 *Id.* at 5.
- 24 *Id.* at 6.
- 25 Ostrom, *Examining the Work of State Courts*, 1994, 17, 14.
- 26 *Id.* at 14.
- 27 Administrative Office of the U.S. Courts, *Statistical Report for the Justices and Judges of the United States*, Washington, D.C.: April, 1997:1.
- 28 *Id.*
- 29 Telephone interview between Cathy Sanders (OVC) and the National American Indian Court Judges Association (April 24, 1997).
- 30 Ostrom, *Examining the Work of State Courts*, 1994, 8-9.
- 31 Committee on Long Range Planning, *Proposed Long Range Plan for the Federal Courts*, Washington, D.C.: Judicial Conference of the United States, November 1994:11.