

STATEMENT TO THE TASK FORCE ON VICTIM PRIVACY AND THE PUBLIC'S RIGHT TO KNOW

TRANSPARENCY AND VICTIM PRIVACY IN THE CRIMINAL JUSTICE SYSTEM

By Mitchell W. Pearlman
Lecturer in Law and Journalism, University of Connecticut

Subsection (b) of Article XXIX of the Amendments to the Constitution of the State of Connecticut is the constitutional predicate for the rights of victims in criminal proceedings.¹ Nowhere in that provision is there mention of "victim privacy." There is a very good reason for this omission.

The amendment does require that victims be accorded "fairness and respect throughout the criminal justice process." Thus, government officials should be sensitive to the feelings of victims. But nowhere in the constitution, either explicitly or implicitly, do victim rights override the fundamentals of all criminal law. Those fundamentals include:

1. Criminal prosecutions are brought by the government on behalf of society as a whole;
2. The justice system is accountable to the people, as is the rest of government in a democracy; and
3. Because of the extraordinary powers conferred by the people on the police, prosecutors and courts, fairness for the accused and transparency to society are essential prerequisites to the credibility of the criminal justice system.

That criminal prosecutions are brought by government on behalf of society as a whole is an ancient concept. The Greek dramatist Aeschylus wrote of the destructive consequences of victim-centric justice about 2,500 years ago in his trilogy, *The Oresteia*. At that time, the established means for redressing criminal behavior was vendetta, in which the victim's family members would take revenge against the alleged perpetrator, leading to a never-ending cycle of vengeance and retribution. Some scholars say that changing personal vendetta to a system of state-imposed litigation represents the emergence of civilization from barbarism.

¹ "In all criminal prosecutions, a victim, as the general assembly may define by law, shall have the following rights: (1) the right to be treated with fairness and respect throughout the criminal justice process; (2) the right to timely disposition of the case following arrest of the accused, provided no right of the accused is abridged; (3) the right to be reasonably protected from the accused throughout the criminal justice process; (4) the right to notification of court proceedings; (5) the right to attend the trial and all other court proceedings the accused has the right to attend, unless such person is to testify and the court determines that such person's testimony would be materially affected if such person hears other testimony; (6) the right to communicate with the prosecution; (7) the right to object to or support any plea agreement entered into by the accused and the prosecution and to make a statement to the court prior to the acceptance by the court of the plea of guilty or nolo contendere by the accused; (8) the right to make a statement to the court at sentencing; (9) the right to restitution which shall be enforceable in the same manner as any other cause of action or as otherwise provided by law; and (10) the right to information about the arrest, conviction, sentence, imprisonment and release of the accused. The general assembly shall provide by law for the enforcement of this subsection. Nothing in this subsection or in any law enacted pursuant to this subsection shall be construed as creating a basis for vacating a conviction or ground for appellate relief in any criminal case."

So the idea behind our criminal law is to substitute society, through its government, for the victim. That is why criminal prosecutions are denominated as the “*State*” or “*The People*” versus Defendant A. They are not denominated, for example, as “*Victim A*” versus Defendant A. That is also why the rights of victims do not control over the interests of the state or of the people.

One of the principal interests of the people is in government accountability. Such accountability can only be achieved if there is transparency throughout the entire criminal justice process. Of course, efficient law enforcement requires some confidentiality – at least for a period of time.² But secrecy in the justice system must be kept to an absolute minimum given the extraordinary powers delegated by society to its law enforcement agencies. Without transparency, there is simply too much room to cover up mistakes, misconduct, and even wrongful arrests, prosecutions and convictions. Unfortunately, there have been too many examples of this in recent years as greater transparency has shed greater light on our justice system.

Today, perhaps more than ever before, the credibility of government officials has been called into question – in part because of government’s predisposition toward secrecy. Many people today simply don’t believe or trust their government. Thus, to withhold information from the public in the name of victim privacy is simply to invite less trust and more conspiracy theories, further undermining government’s credibility with respect to the fairness of the justice system.

This was a lesson that should have been learned from the Watergate scandals of the 1970s, when the President of the United States publicly asserted that there was no criminal conspiracy in his office and his Attorney General refused to investigate. Intrepid reporters, however, found evidence proving otherwise. Only then were the President’s private recordings made public, and criminal and impeachment proceedings instituted.

Although victim rights have – and should continue to have – a place in our criminal justice process, it must be limited for the reasons stated above. On the other hand, civil litigation always remains available to victims for redress. In part, that is what such litigation is designed to do in a civilized society. And victims, of course, may even sue for invasion of their privacy³ or intentional infliction of emotional distress under existing tort laws.

In the wake of the grievous tragedy that was Sandy Hook, it is understandable that government officials looked for quick fixes, especially those they thought might relieve some of the victims’ anguish. But emotion-charged quick fixes and knee-jerk responses often bring devastating unintended consequences.

On serious reflection, the members of this task force need to put aside emotional appeals and the special interests of particular groups. They need to put the interests of this state and all its people first – something that too often does not occur in public life today. If you do this, then you will find that the arguments favoring more transparency and less secrecy are indeed in the greater public interest of society as a whole, and that therefore victim privacy should give way to that greater interest.

² It is important to note that there does not seem to be any likelihood of a criminal prosecution in the Sandy Hook massacre, although full disclosure may show that mistakes might have been made by certain government authorities.

³ For example, one may sue for invasion of privacy for: intrusion into a person’s seclusion, solitude or private affairs; publicity that places a person in a false light; or the publication of embarrassing personal facts.