

# Victim Rights In Indian Country

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## Who Is A Victim?

- Example 1: Marvin pistol whips his wife Shirley in front of their 2 children and her elderly mother



- Example 2: A large corporation criminally dumps toxic waste that infiltrates the drinking system of an entire town.



## Historically, in the Anglo Justice System...



- Victims were treated as witnesses
- Criminal cases captioned “State v. Joe” or “United States of America v. Joe”
- United States Constitution contains rights for **defendants**
- Focus on defendant’s rights (because of the potential loss of liberty)
- Victims did not have specific “rights”
- Assumed prosecutors knew what was best

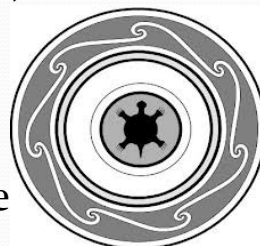
## Anglo Courts Historically, cont’d



- Victims weren’t provided copies of police reports, sentencing recommendations, notified of hearings, notified of a defendant’s release, etc.
- Victims were **not** routinely consulted by prosecutors or the courts on conditions of release, plea agreements, or sentencing.
- Input into restitution was often the best victims could hope for.

## Victims' Rights Tribally

- Focus on making the victims whole, fixing the wrong, changing defendant's future behavior
- "Victims" were not just the individual directly harmed, but the affected family/clan/community/balance
- The victim or their representative normally had input into the consequences that the perpetrator would face



## New Trend: Victims' Rights

### Movement

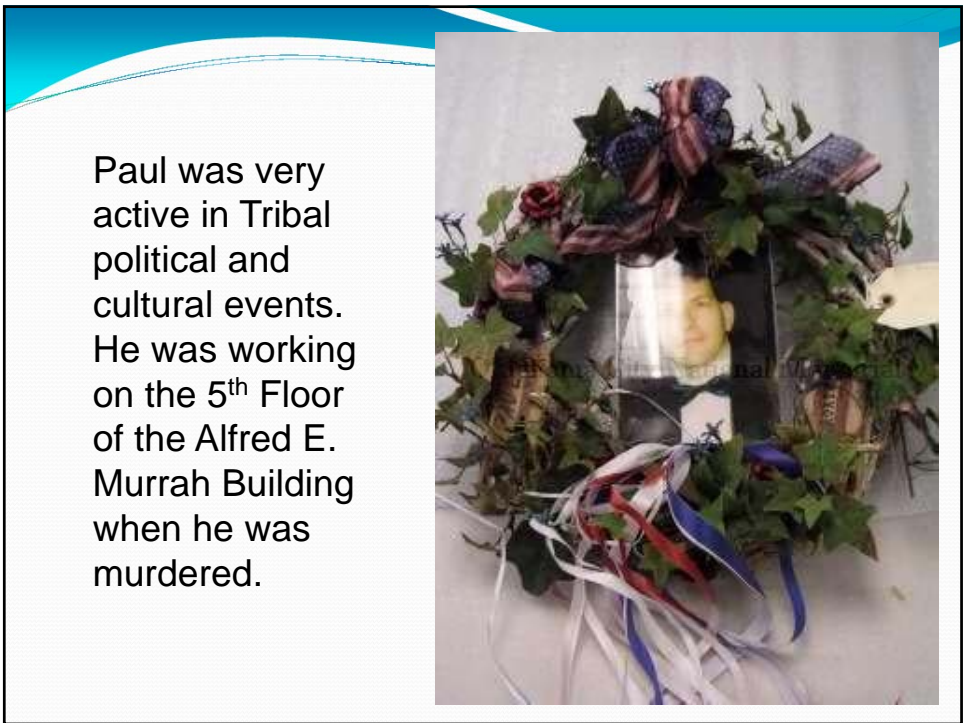
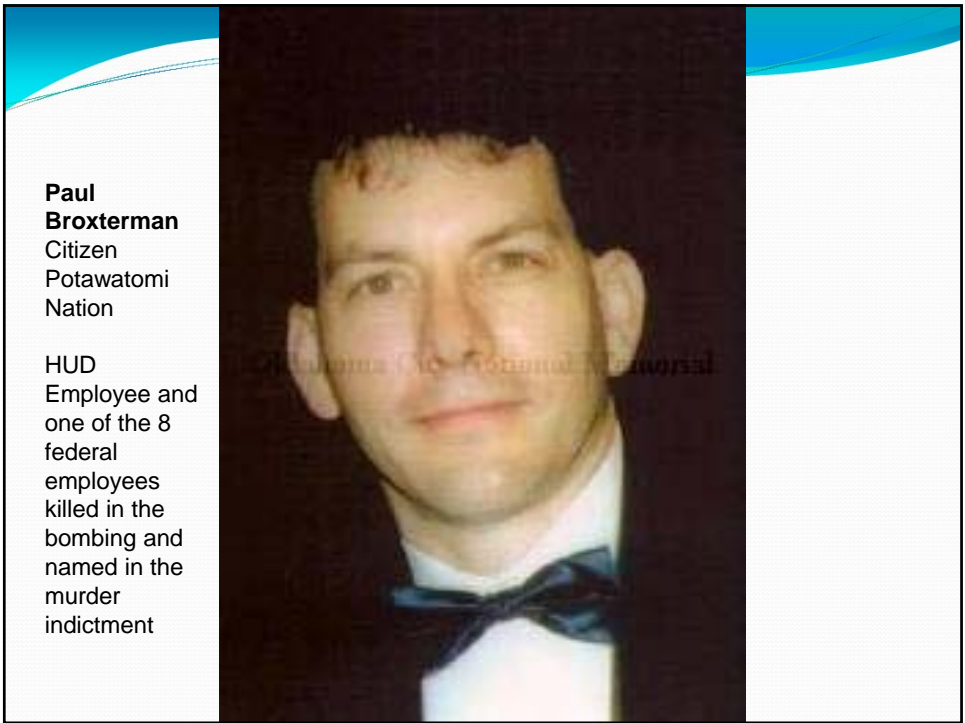
- Recognized prosecutor represents the govt. & may have different interests than victims
- States, Feds, & some tribes codifying victim rights
- **Victims can have their own legal counsel**
- **Victims allowed input into release conditions, plea agreements, victim impact statements at sentencing**
- **Protection from discovery abuses**
- Victim impact panels

**Peggy Broxterman**

Citizen  
Potawatomi  
Nation



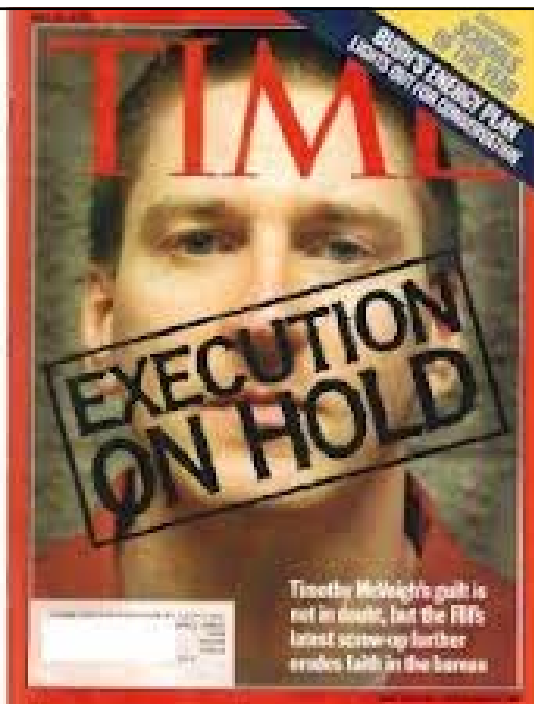




Peggy was elected **spokesperson** by the victims of the **Oklahoma City bombing**. She was active at all stages of the criminal proceedings and testified at McVeigh's sentencing hearing (reading a poem she wrote).



Peggy lobbied for greater respect and increased rights for victims of federal crimes. She appeared on numerous news programs (including the Larry King show). Peggy, as the spokesperson for the OKC bombing victims, attended McVeigh's execution in Terra Haute, Indiana.



**1996:** As a result of the demands by the OKC bombing victims:

- President Clinton signs the *Antiterrorism and Effective Death Penalty Act*, making **restitution mandatory in violent crime cases**, and expanding the compensation and assistance services for victims of terrorism both at home and abroad.



*The Mandatory Victims' Restitution Act, enacted as Title II of the Antiterrorism and Effective Death Penalty Act*

- **allows federal courts to award "public harm" restitution** directly to state VOCA victim assistance programs allowing judges to require federal offenders in certain drug offense cases to pay "community restitution."



Crime Victims' Rights Act of  
2004



There is HELP for  
**VICTIMS**  
OF  
**CRIME**



### CVRA 18 U.S.C. § 3771

#### “Victim” Definition

- **Victim** = a person directly and proximately harmed
  - But a victim who is:
    - **under 18** years of age or
    - **incompetent, incapacitated, or deceased**
- = is the legal guardian(s) of the crime victim or representatives of the crime victim's estate or family members or any other persons appointed as suitable by the court

## Federal Crime Victims' Rights Act:

### A Victim Has the Right to:

- be reasonably **protected** from the accused
- reasonable, accurate, and **timely notice** of any **public court proceeding**, or any **parole proceeding**, involving the crime or of any **release or escape** of the accused.
- **not to be excluded** from any such public court proceeding, **unless** the court, after receiving **clear and convincing evidence**, determines that **testimony** by the victim **would be materially altered if the victim heard other testimony** at that proceeding.

- **be reasonably heard** at any public proceeding in the district court **involving release, plea, sentencing, or any parole proceeding.**
- **confer** with the **attorney** for the Government in the case (prosecutor).
- full and timely **restitution** as provided in law.
- The right to **proceedings free from unreasonable delay.**
- **be treated with fairness and with respect for the victim's dignity and privacy**



### CVRA cont'd

- Crime victims must be ensured their **rights are fully afforded**
- make every effort to **permit the fullest attendance possible by the victim** and **shall consider** reasonable **alternatives** to the exclusion of the victim, before **excluding** a victim from criminal proceedings (“invoking the rule”)
- **Rights may be enforced by the crime victim or the crime victim’s lawful representative**

### Crime Victims’ Rights Act Continued

- The Rights given to victims under 18 U.S.C. § 3771 **only apply in the federal system after charges** have been filed.
- If a crime victim in a Federal case believes a USDOJ law enforcement agent, prosecutor, or victim-witness professional has violated their 3771 rights, the victim may file a complaint with the **USDOJ Victims of Crime Ombudsman**.

## State Victim Rights

- **Every state has some version of crime victims' rights legislation.**

## Tribal Victim's Rights

- Check the tribal code & rules of procedure to see if they afford victims any particular rights.
- Most tribes do NOT have victims rights legislation. (But you can argue custom and tradition)
- Some tribes have modeled victims' rights after the federal and/or state statutes (especially notification and a right to be heard during the sentencing phase).

## Representing Victims In Tribal Court

- Many Tribes allow non-law school trained persons to practice law in their tribal courts (many judges and prosecutors are non-law school trained)
- Victim advocates may be allowed to practice law in tribal court and to represent victims in criminal victim rights matters.
- Clerk of the court can provide admission information, direct you to rules of court, tribal codes, etc.

## Representing Victims: Tribal Court

- **Formal representation as victim's legal counsel** in tribal court

**versus**

**Assisting victim as an advocate**  
throughout the process

- How do you make that decision?
- What are the differences between these roles?

## If permitted to serve as legal counsel in tribal court you can:

- File a notice of appearance as the victim's counsel
- Request & receive copies of all motions, filings, etc.
- File your own motions with the court
- Make arguments on behalf of the victim as to conditions of release, sentencing, restitution, any motions to continue a trial, plea agreements, etc.

## What tools will you need?

- Rules of court
- Tribal code
- Sample copy of motions filed in tribal court so that you can utilize the same format, if possible.
- **Remember: you may be the trailblazer!**

## Normally the 1<sup>st</sup> Victim's Right: Conditions of Release

- Generally the Court MUST set conditions of release unless there are very unusual circumstances that pose a significant risk to the community (terrorism, etc.).
- Options for the Court include:

Bail/Bond

3<sup>rd</sup> party release

Court supervision

Own Recognizance

Supervision

Probation

Parole

## Purpose of Conditions of Release

- Ensure Defendant's Appearance At Trial
- Can not be punitive – innocent until proven guilty
- Defendant's prior criminal history and whether previously released and appeared taken into account.
- Additional concerns: Safety measures for victim and the community

## Bail/Bond

- Usually statutes address “non-bailable or non-bondable crimes”
- “Bail can not be excessive” – US Constitution and ICRA
- Bail usually set proportionate to the crime
- Takes into account defendant’s ties to the community when setting bail/bond
- Remember: Can not be punitive – must ensure appearance of defendant at trial
- Can include bail PLUS other safety conditions

## Making Bail

- Can pay full amount to the court or can get a bail bondsman to take 10% cash plus collateral for remainder to post a bond
- Families often help post bail
- Bond can be forfeited for non-appearance or compliance
- How common are bailbondsmen in tribal courts?



## 3<sup>rd</sup> Party Supervision

- Defendant can be released to the custody of reputable 3<sup>rd</sup> party who agrees to ensure defendant's appearance at trial and to comply with all court orders.
- Common 3<sup>rd</sup> party supervision: family, clergy, Drug and Alcohol Treatment facilities, mental health facilities
- 3<sup>rd</sup> party has obligation to notify court if defendant absconds or violates conditions of release.

## "Pre-Trial Release Supervision"

- Some tribal courts have pre-trial release supervision by the court via a probation officer or other release supervisor
- Defendant has to keep court notified of whereabouts (home, work address, schedule) and keep to an agreed schedule
- Access/search to defendant's home
- Commonly: drug and alcohol testing, random spot checks of defendant's whereabouts, defendant must keep employment, defendant must report weekly to court, etc.

## Own Recognizance

- Defendant is deemed reliable enough (and not an extreme safety risk) to ensure his own appearance at trial.
- Usually for employed, long standing member of the community with ties to the community and a clean record
- Additional conditions of release can also be set for an O/R release

## When are conditions set?

- Initially set at the initial court appearance, but **can be reviewed multiple times** during the course of litigation.
- They can be **revisited** by the court by motion of any party or if there's a change of circumstances.
  - Example: bond is set at 1 million and defense asks for a hearing to lower it.
- They can be **revoked** by the court:
  - Example: defendant released on own recognizance and is arrested for DUI while on release.

## Who has input into the tribal court's decision?

- **Prosecutor**
- **Defendant/defense counsel**
- **Pre-trial services worker (if any)**
- **Victim**
  - **By providing input to the prosecutor (and/or pre-trial services worker) about what conditions & terms they'd recommend & why**
  - **Directly to the court: orally, written (letter), or by an authorized representative**

## Holds

- **Even if the defendant makes bail/bond or the court orders the defendant released 3<sup>rd</sup> party or O/R, there can still be "holds" on the defendant and he must remain in custody pending transfer to another jurisdiction.**
  - **Undocumented aliens with immigration holds**
  - **Defendants on parole, probation, release, or with arrest warrant.**

## Other Conditions of Release

- VAWA allows a pre-trial criminal release order to qualify as a protection order.
- Many of the same provisions contained in a protection order can also be contained in a pre-trial release order.
- What conditions would be appropriate for a court to include in a release order in a case involving stranger rape?
- Any other conditions you'd ask for if the perpetrator is a former intimate partner?

## Discovery

- In some jurisdictions, the victim has the right to refuse defense interviews
- Victim's legal counsel can protect victim from discovery abuses such as:
  - subpoena of her mental health records, etc.
  - Can file *motion in limine* re. victim's past sexual history if prosecutor fails to do so
- Other issues: victims subpoenaed and criminally charged for failure to appear

## Assisting With Victim Impact Statements

- A Victim Impact Statement is a document that ...
  - describes how a crime has affected the victim and loved ones.
  - provides an opportunity for the victim's voice to be heard by the justice system.
  - Provides input on how the court can best hold the offender accountable for his/her actions.

## Who can write a Victim impact statement?

- Any victim of a violent crime has the right to draft and present a victim impact statement in federal court, most state courts, and most tribal courts.
- This is a **RIGHT** that is purely **VOLUNTARY**. Victim's are **NOT OBLIGATED** to draft or present a victim impact statement.

## A Victim Impact Statement

### Should Be Written To:

- Describe the crime & its physical, emotional, & financial effects on them and their loved ones.
- Discuss any concerns they may have about their safety and security.
- Address any changes in their life they may have experienced since the crime occurred.
- Offer suggestions for a resolution that is fair, and provide information that will give the offender the opportunity to take responsibility for actions that caused them harm and loss.

## Why write a victim impact statement ...

- It may be difficult for victims to share their experience and feelings with the court, but it allows victims to have a voice in the criminal justice system.
- Victim input is vital to determining a fair sentence and holding the offender accountable for the crime he/she has committed.

## Writing a Victim impact statement ...

- Writing a Victim Impact Statement can be emotionally taxing, but procedurally it is a simple process.
- Begin by having the victim write down EVERYTHING about their experiences as a victim. (“Brainstorm”)
- May not have time to share all with the court, but it’ll ensure that the victim gives the most influential statement they can.

## Tips

- **write simply and descriptively**
- Example:1: Every morning when I wake up, I think about my daughter.

### Versus

- Example 2: Every morning when I wake up, I remember that (name of daughter) will not be in her chair at the breakfast table and that I no longer will need to buy Fruit Loops, her favorite cereal. My heart skips a beat every time I pass the Fruit Loops in the grocery store and I say a quick prayer that she doesn’t miss me as much as I miss her.

## Tips cont'd

- write in short sentences and short paragraphs
- check the draft for spelling and grammar before writing the final statement.

Source: <http://www.madd.org/docs/Victim%20Impact%20Statement%20Workbook.pdf>

## Don't:

- vent your anger toward the court or the offender
- describe what you want to happen to the offender while in prison
- ask for a confession from the offender
- write anything that is not true

SOURCE: <http://www.madd.org/docs/Victim%20Impact%20Statement%20Workbook.pdf>



## Address the **Emotional Impact of the Crime**. Consider:

- How this crime has affected the victim's lifestyle or those close to her?
- How the victim's feelings about herself or her life have changed since the crime?
- How the victim's ability to relate to others has changed?
- Any counseling or other support the victim obtained to help her cope.

Source: <http://www.crimevictimservicecenter.org/VictimImpactStatement.asp>

## **Physical Impact of the Crime**

- The specific physical injuries the victim or members of her family suffered.
- How long the injuries lasted or how long they are expected to last.
- Any medical treatment the victim received or expects to receive in the future.
- How physical injuries have affected lifestyle, i.e. ability to work, enjoy recreational pursuits, etc.

Source: <http://www.crimevictimservicecenter.org/VictimImpactStatement.asp>

## To write or not to write ...

### Consider:

- ◉ **The offender may retaliate:**
  - ◉ The Victim Impact Statement is part of the official court record (oral and written) and is public information.
  - ◉ Many people have access to it (judge, prosecutor, defense attorney, prison officials, probation officers, parole officers.)
  - ◉ If Victims are concerned about the offender's ability to retaliate, listen to their fears.

Source: <http://www.madd.org/docs/Victim%20Impact%20Statement%20Workbook.pdf>

## Does a victim impact statement make a difference?

- Surprise: Judges and juries are actual people with real emotions!
- Often a judge or jury member can relate more to the victim than to the offender and is interested in hearing the impact of the crime on the victim's life.
- Every state and the federal courts now afford victims the right to present a written or oral statement to the court ...

SOURCE: <http://www.madd.org/docs/Victim%20Impact%20Statement%20Workbook.pdf>

## Several options for presenting the victim impact statement ...

- The Victim can read the statement or speak from the heart at sentencing themselves.
- Have the prosecutor or advocate or legal counsel read the statement at sentencing.
- Send the written statement to the prosecutor or Pre-Trial Services Investigator **well in advance of the sentencing hearing**

## Videotaped Statements

- Shown at the time of sentencing (but DO submit a written statement in advance as well)
- Provides the emotional impact of the live, heartfelt statement without the pressure on the victim to deliver it in public in front of the perpetrator
- Make sure well in advance of the hearing that the appropriate equipment is available in court (LCD projector, speakers, screen, etc.)
- Local community colleges and universities may be able to assist (or a tech savvy relative or friend)

## Sentencing in General

- Defendant can be sentenced to incarceration for up to 1 year per crime, and up to \$5000 per crime in tribal court.
- Max and Stack
- Court can also sentence defendant to:
  - “time served”
  - period of probation
  - Probation + incarceration
  - Incarceration + with or without parole
  - Incarceration can be weekends, evenings, etc.

## Restitution

- Provide documentation
- Think expansively and creatively:
  - Hunt meat or fish or provide other labor or tools or equipment
  - Livestock in lieu of monetary restitution
  - Others?

## Other Tribal Creative Sentencing Provisions

- Banishment – Exclusion: are there different considerations when the perpetrator is a tribal member vs. a member of another tribe?
- Loss of licensure
- Others?

## General Terms for Probation

- Do not associate with convicted felons
- Cannot be present at any establishment that serves alcohol or reside in home where alcohol is present
- No alcohol or substance use
- Community service
- No contact provisions
- Supervised/unsupervised
- Intensive vs. regular probation

## SAFETY

- Victims can request:
  - detailed no contact language
  - 52 week Batterer Intervention Program
  - appearance before **Victim Impact Panels**
  - **No possession of firearms, weapons or ammunition**
  - other safety provisions?

## Probation Monitoring

- Electronic monitoring
- House arrest
- Probation officer must have access to defendant's home and work place
- Drug and alcohol testing
- Compliance with counseling, classes, treatment, etc.
- Violation = Revocation (or more intense level of supervision)

## Victims Can Report Violations To

- Law Enforcement
- Prosecutor
- Court
- Violations may also result in **new criminal charges with enhanced penalties** for being committed “while on release.”

## PAROLE

- In Indian Country, sometimes referred to as “probation” when the release is from tribal jail.
- Basically: a defendant is released early from a term of incarceration and is followed by a parole officer with conditions of parole.
- Violation = re-incarcerated.
- Completion of incarceration or of parole= no continuing criminal jurisdiction of the court or orders in the case.

## Rights of the Victim at State and Federal Parole Hearings

- Notice of the parole hearing
- Opportunity to be heard
- Notification of the results of the hearing (sex offenses- notified of the defendant's release)

## Considerations for Parole

- The parole board usually takes into consideration:
  - The number of felony or prior convictions
  - The type of crimes previously committed
  - Inmates behavior while incarcerated (GED, etc.)
  - Whether inmate has obtained suitable employment (either at time of release or short time after release)
  - Whether the inmate has obtained suitable residence (either at time of release or within short time after release)
  - Statement of victim(s)



## Usual Conditions for Parole

- Maintain employment
- Keep current address & allow access to residence
- Drug and alcohol testing
- Electronic monitoring
- Pursue education
- Payment of Restitution
- Community Service
- Stay away from victim, certain locations & people

## Violations of Parole

- Violations of Parole Conditions can result in immediate revocation of parole and reincarceration.

## THANK YOU!

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