

# Victim Rights and New Remedies

## Finally Getting Victims Their Due

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In the last two decades, state legislatures have greatly expanded the legal rights of crime victims. Victims have some rights under the law in all states, ranging from the right to be notified of court and parole hearings, the right to be present and express opinions at sentencing hearings, the right to be consulted about plea agreements, the right to compensation and restitution, and the right to a speedy trial. But researchers and audits have shown that many victims are not given the chance to exercise their rights. This article describes the history of victim rights legislation and then discusses recent efforts, including compliance programs and victim law clinics designed to increase compliance of criminal justice agencies charged with aiding victims in the exercise of their rights.

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During the last two decades, federal and state governments have dramatically expanded the rights of crime victims. Many forces have spurred this change, including activism by crime victims as well as national crime victimization surveys documenting surprisingly high rates of crime, yet low levels of crime reporting by victims (Tobolowsky, 1997; Young, 1999). In the early 1980s, President Reagan convened a Presidential Task Force on Victims of Crime to investigate crime trends and the treatment of victims by the criminal justice system. The Task Force's 1982 final report defined an agenda for restoring a balance between the rights of defendants and victims. It called for increased participation by victims throughout criminal justice proceedings and restitution in all cases in which victims suffer financial loss.

Even before the Task Force issued its report, however, Congress anticipated many of its recommendations in the 1982 Victim Witness Protection Act. This act authorized victim restitution and the use of victim impact statements at sentencing in federal cases. It also required the attorney general to issue guidelines for the development of further policies regarding victims and witnesses of crimes. Soon after, the 1984 Victims of Crime Act (VOCA) implemented more of the Task Force's recommendations on victim compensation. This second act by Congress redistributed monies levied from federal offenders to states, funding local aid to victims (Smith & Hillenbrand, 1999).

Recommendations by the Reagan Task Force regarding procedural rights for crime victims were at least as influential as those regarding restitution. First, Congress revised the Federal Rules of Criminal Procedure to require pre-sentence reports to include “any harm done to or loss suffered by any victim of the offense” along with “any other information that may aid the court in sentencing.”<sup>1</sup> Then, in the 1990 Victim Rights and Restitution Act, Congress gave crime victims in federal cases the right to notification of court proceedings and the right to attend them, the right to notice of changes in a defendant’s detention status, the right to consult with prosecutors, and the right to protection against offender aggression. Under President Clinton, the 1994 omnibus Violent Crime Control and Law Enforcement Act gave victims in federal cases the right to speak at sentencing hearings, made restitution mandatory in sexual assault cases, and expanded funding for local victim services (Kelly & Erez, 1999; Kilpatrick, Beatty, & Howley, 1998).

In 2004, the Crime Victim Rights Act, which provides for crime victims’ rights in federal courts, was signed into law. As part of the 2004 act, victims of crime were given significantly expanded rights, including the right to be present and heard at public court proceedings involving release, plea, sentencing, or parole. The act also placed on the federal courts a duty to ensure that victims are afforded those rights. Previous federal law did not provide any means of enforcement and only recognized the right to be heard in federal district court for victims of violent crimes or sexual abuse.

## **The Rights of Victims Under State Laws**

During the past 30 years, victims who previously had no rights to be notified or to participate in the criminal justice process have acquired statutory basic rights and protections in every state, the first of which was passed in Wisconsin in 1979. Although every state has some form of victim rights legislation, the states differ in their definitions of who is eligible for rights, with some limiting rights only to victims of violent felonies or other subcategories of victims. About 40% of states extend rights to all classes of victims of crime (Howley & Dorris, 2007). States also differ in the types of rights provided. A study by researchers at the Vera Institute analyzed victim rights legislation from every state and then coded it using a standardized evaluation form (Deess, 1999). The study showed that rights to compensation, notification of court appearances, and submission of a victim impact statement before sentencing were provided in all states (at least for some victims). A majority of states also gave victims the right to restitution, to attend sentencing hearings, and the right to consult with officials before offers of pleas or release of defendants from custody. States vary widely in their eligibility requirements and organizational responsibility for the implementation of these rights (Goddu, 1993).

## Notification

The right to notification is perhaps the most basic. Victims unaware of their rights and available services, or of the proceedings themselves, will be unable to exercise any rights they may have (Kilpatrick et al., 1998). Victims themselves place a great deal of weight on the notification of events in their case. Kilpatrick and his colleagues (1998) asked more than 1,300 victims to rank, in order of importance, 13 different rights. Three rights to notification ranked among the five most important, with the right to notification of a suspect's arrest seen as "very important" by more than 97% of the victims interviewed—the highest rating overall. The researchers also categorized states as either strong-protection states or weak-protection states on the basis of the specificity, strength, and comprehensiveness of their victim rights to notification, participation, and restitution. They found that victims from strong-protection states were more likely to receive notification throughout criminal justice proceedings, including notice of arrests, trials, and parole hearings. Nonetheless, stronger legislation did not guarantee notification. Even in strong-protection states, 25% to 35% of victims did not receive required notifications (Kilpatrick et al., 1998).

## Participation and Consultation

The best-known form of participation by victims is the submission of a victim impact statement at the time of sentencing. Most states also authorize submission of a victim statement of opinion, a more subjective assessment by victims of the appropriate sentence. By 1997, 40 states had mandated that criminal justice officials consult victims before making decisions on bond, plea, sentencing, or parole (Kelly & Erez, 1999).

According to the Kilpatrick et al.'s (1998) study, victim impact statements are the most frequent form of victim participation, submitted by more than 90% of people informed of their right to do so. In strong-protection states, the survey found that participation frequently went beyond these statements, with victims significantly more likely than those within weak-protection states to have input during bond hearings, provide testimony in court, and submit victim impact statements at parole hearings (Kilpatrick et al., 1998).

One fear voiced by opponents of expanded victim rights has been that more participation by victims would lead to harsher sentencing by judges. Injecting personal statements into the sentencing decision would reduce uniformity in sentencing, introduce a greater degree of arbitrariness, and result in harsher treatment of convicted offenders across the board (Abramovsky, 1986; Talbert, 1988). There is little research on this question, and the few studies that have examined it have produced inconsistent results (Erez & Tontodonato, 1990; Davis & Smith, 1994). This inconsistency may be the product of weak commitment to the use of these statements and other input from victims. For example, the study by Davis and Smith (1994) found

that although prosecutors and judges endorsed victim impact statements in theory, many resisted integrating them into their established routines.

## **Compensation and Restitution**

Crime victims can incur medical costs associated with physical or emotional trauma, repair, and replacement costs associated with property crime, and opportunity costs of time they lose, measured in lost income. In theory, victims can recover these costs either from offenders required to pay restitution or through public compensation. Nearly all states authorize corrections officials to require restitution from offenders as a condition of parole. In addition, officials in a majority of states have the authority to order offenders to pay restitution as part of a suspended sentence or work release (Smith & Hillenbrand, 1999).

Likewise, public victim compensation programs in the large majority of states are funded by fees or charges paid by the offender. Since 1984, the federal VOCA legislation has encouraged states to institute victim compensation programs, and in 1988, VOCA was amended to ensure that victims of domestic violence and drunk driving were not excluded from compensation. States whose programs meet VOCA requirements can draw on federal subsidies that cover up to 40% of their payments to victims. All states limit eligibility to victims who report crime to the police and help prosecute offenders (Smith & Hillenbrand, 1999).

In practice, a minority of victims appear to receive compensation or restitution. A 1991 study found that less than a third of victims of violent crime were encouraged by a criminal justice official to file for compensation (McCormack, 1991). Kilpatrick et al.'s (1998) survey found that fewer than 20% of people eligible for restitution received it. Moreover, contrary to expectations, judges in states with stronger victim protections were significantly less likely to order victim restitution for economic losses than were judges from states with weaker victim rights protections.

## **Right to Protection**

Criminal justice officials are increasingly concerned with the safety of victims and witnesses, especially in cases involving intimate partner violence or gang crimes. A majority of states provide victims with some right to protection including information about measures to take in the event of intimidation by the defendant, no contact orders, and separate and secure waiting facilities in court buildings. An increasing number of states are protecting victims from possible intimidation by limiting disclosure of victim information in law enforcement or court records or by not requiring that they provide their address of place of employment in testimony given in open court (Howley & Dorris, 2007).

## Right to a Speedy Trial

Approximately half of states provide victims the right to a speedy disposition or trial. Generally, such legislation requires the court to consider the interests of victims in ruling on motions for continuance (Howley & Dorris, 2007). In some states, the law also provides for accelerated dispositions in cases involving victims who are elderly, disabled, or minor children.

## The Challenge of Implementing Victim Rights Legislation

One of the most frequent conclusions from empirical research on victim rights is that despite the scope of federal and state legislation, criminal justice systems do not honor these rights.

Consequently, some states began to develop state-level victim services offices that serve as both oversight agencies monitoring compliance and centers for referrals and linkages to victim services organizations. In the early 1990s, policy makers in Wisconsin created the Wisconsin Victim Resource Center, a body that functions to enforce the new victims' rights laws (Office for Victims of Crime, 1998). Still, as Kilpatrick and his colleagues observed after their 1998 survey, even within states with strong victim rights legislation, many victims are not notified about key hearings and proceedings, many are not given the opportunity to be heard, and few receive restitution. Although victims in these states generally fared better than those in states with weak victim rights legislation, as many as one third of victims in strong-protection states were not afforded the opportunity to exercise certain rights.

Kilpatrick et al.'s (1998) findings have been echoed in other recent studies. A study of Texas law enforcement officers revealed that only 25% fulfilled their statutory obligation to notify victims of the state compensation program (Fritsch, Caeti, Tobolowsky, & Taylor, 2004). An audit conducted in Florida found that between one quarter and one half of victims did not receive information on victim rights from first responders and that agencies were not consistently documenting compliance with victim notification requirements (Auditor General, 2001). Similarly, a survey of Oregon crime victims found that 30% to 60% were denied rights to be notified of court dates, parole hearing dates, and restitution (Regional Research Institute for Human Services, 2002).

Officials in criminal justice agencies responsible for victims argue that state legislatures often do not provide funding to implement victim rights statutes. Criminal justice officials surveyed by the American Bar Association in 1989 were quite happy with their state's victim rights legislation, believing that it increased victims' satisfaction with officials and the criminal justice system, increased victims' willingness to cooperate, increased information for making case decisions, and improved their job

satisfaction. But a major source of dissatisfaction was with the lack of resources provided to implement the legislation (Smith & Hillenbrand, 1999). These complaints were echoed in the Kilpatrick et al. (1998) study; in which, state and local officials indicated that inadequate funding, training, and enforcement of rights still present problems. According to this study, only 39% of local officials from strong-protection states and 27% of those from weak-protection states felt that funding for victim rights implementation was sufficient. A more recent study by the Vera Institute found that a majority of prosecutors believed that victim rights laws had imposed significant costs on their offices and other criminal justice agencies, requiring them to hire new staff and spend more money to contact victims by mail and by phone (Davis, Henderson, & Rabbitt, 2002).

Few states provided some form of remedy in their original victim rights legislation for victims whose rights were not honored by criminal justice officials. In fact, at one point, more than 15 states banned legal challenges to case resolutions or other redress for denial of victim rights by including clauses stating that the violation of a right did not create a civil cause of action against any government agency or official and that the failure to provide a right to a victim could not be used as a ground for appeal (Tobolowsky, 1997).

Those concerned with the rights of victims have come to realize that it is not enough to grant rights to victims: These rights must be backed up with ways to ensure that the agencies and officials responsible for informing victims of rights actually provide that information to victims. Beloof (2005) argues that there are three obstacles to full ability of victims to exercise their rights: government discretion to deny rights, lack of a way to enforce rights, and appellate court discretion to deny review. He further argues that victims will achieve real rights when they get legal standing to defend their rights, when appellate courts can void court decisions made in violation of victim rights, and when review of violations is a matter of right. These remedies have been the focus of new legal and programmatic efforts on behalf of victims.

## **Constitutional Amendments**

In 1982, California was the first state to pass a constitutional amendment enumerating crime victims' rights that included the right to public safety. The Reagan Task Force helped to spur the adoption of constitutional amendments by other states with its recommendation for a federal constitutional amendment to ensure victim rights. As a step toward building support for a federal constitutional amendment, members of the Task Force helped launch a 1986 National Victims' Constitutional Amendment Network of crime victim advocacy groups pursuing state-level victim rights and state constitutional amendments (Young, 1999). Today, 32 states have adopted constitutional amendments regarding victim rights (Howley & Dorris, 2007).<sup>2</sup>

Constitutional amendments provide greater assurance that victim rights will actually be observed. Because amending a state constitution is more difficult than passing a statute, this approach gives victim rights a greater degree of permanence. Also constitutional amendments take precedence over conflicting statutory provisions: Courts have generally honored rights contained in constitutional amendments as indicative of the public will (Howley & Dorris, 2005). Finally, constitutional protection for victim rights makes enforcement potentially more likely. Court decisions in some states have held that victim rights amendments give victims legal standing to pursue their rights.

However, Beloof (2005) argues that constitutional amendments alone are inadequate because most state constitutional rights of victims are silent about available review and remedies. Moreover, government discretion typically curtails victim standing to enforce constitutional rights. Contrary to the intent of constitutional amendments, Beloof cites cases in some states in which state court judges have declared victim constitutional rights to be advisory rather than mandatory.

## Compliance Programs

Victim rights compliance programs are responsible for educating criminal justice agencies and often the public about victims' rights. Crime victim compliance programs currently exist in 13 states.<sup>3</sup> In most of the states where compliance programs exist, the programs were established as part of the enabling legislation that accompanied the state constitutional amendments. However, there is a great deal of variety in the autonomy and authority among the programs. Most of the compliance programs are located in either the governor's office or in the state's Department of Justice. At least a couple of states (e.g., Alaska and Connecticut) created independent "watchdog" agencies to oversee the enforcement of victims' rights. Most states rely on legislative appropriations and or VOCA funds to support their victim rights compliance programs.

Many programs conduct trainings, either on their own or in conjunction with other mandatory training programs. The programs also field calls from victims and the general public and provide information about victim rights and referrals to other victim services, including compensation. All the crime victim compliance programs receive complaints from victims when an individual feels that his or her rights have been violated. Most of the programs have a formal compliant process, whereby the victim files a complaint and the compliance officer (also known as compliance coordinator or ombudsman) communicates the complaint to the individual or agency against whom the complaint was directed. Usually, the complaint is investigated by the compliance officer or a compliance board, and the officer or board determines if the complaint constitutes a violation of the victim's rights. Beyond this point, the compliance programs differ in how violations are handled. In most states, the compliance officer communicates the violation to the agency against whom the complaint

was made and attempts to educate the agency about victims' rights. Some states file annual reports to the legislature or other commissions or boards in which the offending agencies are named, whereas others are not permitted to name specific agencies (e.g., South Carolina). Mandated training (e.g., Maryland) and corrective action plans (e.g., Colorado) are available to some compliance programs. Alaska is the only state that has the authority to set fines or apply for criminal misdemeanor charges for serious infractions. Connecticut has used press conferences and public release of infractions as mechanisms to gain compliance.

Several victims' rights compliance programs provide an arbitration role and do not consider themselves to be either victim advocates or agency advocates, whereas others consider themselves to be victim advocates (Edwards, Myrus, & Felix, 2006). In only a couple of states (e.g., Connecticut and Alaska), are the compliance programs given the authority to appear in court on behalf of victims.

### **Victim Rights Clinics**

In an effort to promote the enforcement of victims' rights, as well as awareness and education in the area of crime victim rights, the National Crime Victim Law Institute (NCVLI) was established in 2000. In 2002, to help address the enforcement of victims' rights through direct pro bono representation of victims in the court process, the Office for Victims of Crime within the U.S. Department of Justice entered into a co-operative agreement with NCVLI to establish legal clinics in several jurisdictions. The clinic demonstration project was created to advocate for the expansion of the enforcement of victims' rights in the criminal justice system and to educate legal professionals about victim rights law. Then in 2006, Congress appropriated monies to support NCVLI in its efforts to enforce crime victims' rights in federal jurisdictions through federal clinics.

The first state clinic was funded in Arizona, followed by clinics in California, Maryland, New Mexico, and South Carolina the following year. In 2005, four additional clinics were added, including state clinics in Idaho, New Jersey, and Utah and a federal clinic in Arizona. Two additional federal clinics, one in South Carolina and one in Maryland, were added in 2007. NCVLI continues to expand and provide funding to the existing clinics.<sup>4</sup> NCVLI serves as an umbrella organization and, in addition to funding the clinics, provides them with training and technical assistance, including programmatic and financial monitoring, and legal support and research.

The eight state clinics all have the same basic mission and goals but operate through a variety of models. Two of the clinics, California and Idaho, are operated as law school clinics, with supervision of law students by the clinic director. Several clinics were developed within existing victim service organizations and employ staff attorneys to represent victims (e.g., Maryland, South Carolina, and Arizona). Two other clinics developed within nonprofit organizations that serve targeted victim

populations (e.g., Utah's clinic was initially located within the Salt Lake Rape Recovery Center and New Mexico's clinic is located within the DWI Resource Center). New Jersey is the only clinic that was developed independently, specifically to enforce the rights of crime victims. The various models offer different strengths and weaknesses (Small, Roman, Owens, & Shollenberger, 2006). For example, the clinics that are operated through law schools have better access to law students, so are better able to fulfill the goal of educating future lawyers in victim rights law. However, it is more difficult for these clinics to access client populations in need of representation in victim rights law cases. On the other hand, a state clinic that is located in a reputable victim service organization, such as Maryland that has well-established relationships with victims and other victim serving organizations, has ready access to victims but less interaction with law students.

One of the goals of the clinics is to represent victims in cases that have the best chance of making a significant impact to future victims. Some of the clinics have embraced this goal more fully than others (Small et al., 2006). Some of the clinic directors find it difficult to turn away any victims in need of representation, whereas other clinics would like to be more selective, but do not have a large enough case load to justify turning cases away. NCVLI provides training and assistance to the clinics in selecting the most significant cases. The issues involved in the selection of significant cases are jurisdiction specific, but include such things as rights to be present, be heard, receive notice, and rights to privacy.

The NCVLI organization also hosts an annual conference on crime victim rights law, a cluster meeting of the clinic directors, and a membership organization, the National Alliance of Victims' Rights Attorneys (NAVRA). As indicated on NCVLI's Web site, NAVRA is an "alliance of attorneys committed to the protection, enforcement, and advancement of crime victims' rights nationwide." NAVRA membership allows attorneys to use the listserv, receive conference call training on crime victim rights issues, and receive case updates. A federally funded evaluation of NCVLI and the state clinics began in January 2008.<sup>5</sup>

## Conclusion

The process of securing rights for crime victims has been a long and uneven one. Federal and state government efforts to pass legislation providing rights to crime victims helped to give victims greater involvement in criminal cases. However, legislation was not enough to guarantee victims rights in the process. It soon became clear that those charged with assisting victims to exercise their rights were not always complying with statutes and that there was little recourse when they did not.

To try to ensure that victims received rights in practice, new approaches were adopted. Constitutional amendments were efforts to make victim rights fundamental and more enforceable. Compliance programs and victim rights clinics are more

recent initiatives designed to improve compliance with victim rights statutes. These programs attempt to ensure that more victims are able to exercise their rights through training of criminal justice officials, representation of victims in individual cases, and filing complaints against agencies or individuals who deny victims their rights. A current evaluation will examine the extent to which the clinics are making the exercise of victim rights more universally accepted.

## Notes

1. Ct §3, 96 Stat. at 1249, amending Fed. R. Crim. P. 32.
2. Alabama, Alaska, Arizona, California, Colorado, Connecticut, Florida, Idaho, Illinois, Indiana, Kansas, Maryland, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin all have provisions for crime victims' rights in their constitutional amendments.
3. Alabama, Alaska, Arizona, Colorado, Connecticut, Maryland, Minnesota, New Mexico, Oregon, South Carolina, Texas, Utah, and Wisconsin are the states that have compliance projects.
4. All the clinics currently receive funding from NCVLI, with the exception of the California clinic. An additional state clinic will be added in 2008.
5. The evaluation is funded by a grant from the National Institute of Justice to the RAND Corporation (Grant #2007-VF-GX-0004).

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