

A Call for Judicial Leadership in the Victims' Rights Movement*

Over the past thirty years, the Victims' Rights Movement has experienced tremendous success as a social movement as it sought to advance justice in the criminal justice system. It has not, however, had perfect success. There are competing theories regarding how rights-based social justice movements advance.¹ Amidst these competing theories, there is general consensus that the following core elements are necessary to advance victims' rights: a mobilized grassroots effort; existence of constitutional or statutory rights; support structures for legal mobilization to assert and enforce the rights; and judicial leadership in reviewing and affording the rights.² If this is an accurate roadmap of how to advance a rights-based social justice movement, the Victims' Rights Movement must critically analyze whether it has put each of these core pieces into place.

As detailed in the Spring/Summer 2005 edition of *NCVLI News*, the Crime Victims' Rights Movement has a well-established mobilized grassroots effort.³ This grassroots effort has led more than thirty states to amend their respective state constitutions to provide crime victims with rights and protections in criminal justice proceedings, and the remaining states and Congress to pass statutes recognizing and affording crime victims' rights in the criminal justice system.⁴ The current membership in the National Alliance of Victims' Rights Attorneys, which as of December 2006 boasts 331 members from 41 states (including the District of Columbia), and the generous support of the Office for Victims of Crime in funding the *pro bono* legal clinics of the State & Federal Clinics and System Demonstration Project and the Victims' Rights Enforcement Project, demonstrates an ever-growing support for legal mobilization related to these rights. This leaves only judicial leadership – has there been judicial leadership in the Victims' Rights Movement? Focusing on the federal judiciary, the answer is that while there has been some recent leadership, far more is needed if the movement is to achieve social justice.⁵

The CVRA's Explicit Call for Judicial Leadership

The federal Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, provides crime victims individually enforceable participatory rights in the criminal justice system. Equally important to this provision of clear rights and remedies is the CVRA's call to the federal judiciary to exercise leadership with regard to the rights. The CVRA provides: "In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a)." *Id.* at (b). This call for judicial leadership is not a call to ensure that crime victims "win" in every case. Instead, it is a call upon the judiciary to recognize victims' rights as rights. It is a call upon the judiciary to engage in the legal analysis of balancing victims' rights against any competing rights at play in a particular case. Judicial leadership requires courts to disregard the antiquated notion that crime victims are interlopers in the criminal justice system, and to recognize that rights, even new legal rights such as those afforded by the CVRA, are properly a part of every judicial determination in a criminal case. A few courts have heeded Congress' call for leadership; unfortunately, others

have failed to do so. Outlined below are four cases in which the CVRA's call for judicial leadership has been answered, and one example of where it was ignored.

The Courts' Responses

In *United States v. Heaton*, ___ F. Supp. 2d ___ 2006 WL 3072573 (D. Utah. Oct. 24, 2006), defendant was charged with using a means of interstate commerce to entice an individual under the age of 18 to engage in unlawful sexual activity. The United States filed a one sentence motion for leave to dismiss the charge without prejudice, averring that the dismissal was "in the interest of justice." *Id.* at *1. The court noted that under the CVRA victims have the right "to be treated with fairness and with respect for dignity and privacy" and, citing Black's Dictionary, stated that to be treated with fairness means "treating them 'justly' and 'equitably.'" *Id.* at *2. Finding that the victim's right to be treated with fairness extended to courts' decisions regarding dismissal of indictment, the court stated that "[i]t is hard to understand how a victim would be treated with fairness if the court acted precipitously to approve dismissal of a case without even troubling to consider the victim's views." *Id.* Thus, the court went on, "[w]hen the government files a motion to dismiss criminal charges that involve a specific victim, the only way to protect the victim's right to be treated fairly and with respect for her dignity is to consider the victim's views on the dismissal." *Id.* The court then directed the government to the provision in the CVRA that guarantees victims the right to confer with the attorney for the government, and required that in its re-filing the government recount both that the victim had been consulted regarding the dismissal and the victim's views on the matter. *Id.*

Second, in *United States v. Wood*, CR. No. 05-00072DAE, slip op. at 2 (D. Haw. July 17, 2006), Defendant was found guilty of one count of fraud and sentencing was scheduled. The government moved to continue sentencing because the individual victims were scheduled to be out of the country on the scheduled date. *Id.* Defendant objected, arguing that the corporation, not the individuals, was the victim. *Id.* The court found that the individuals, as well as the corporation were victims of defendant's action. *Id.* at 3. Citing the CVRA, the court noted that crime victims have the right to be reasonably heard and that the "CVRA was enacted to make crime victims full participants in the criminal justice system." *Id.* Noting "the importance of victim allocution as embodied by the CVRA," the court granted the government's motion. *Id.* at 4.

Third, in *Kenna v. United States District Court for the Central District of California*, 435 F.3d 1011 (9th Cir. 2006), Moshe and Zvi Leichner, father and son, defrauded numerous victims out of nearly \$100 million. After each defendant pleaded guilty, more than sixty victims submitted written impact statements, and at Moshe's sentencing, several victims, including Mr. Kenna, delivered an oral impact statement. *Id.* at 1013. At Zvi's sentencing, which was three months later, Mr. Kenna was present again to verbally allocute, but the district court denied him the opportunity, stating that after reviewing all the victims' written statements and listening to the victims at the prior sentencing, "I don't think there's anything that any victim could say that would have any impact whatsoever." *Id.* Mr. Kenna filed a petition for writ of mandamus with the Ninth Circuit. Noting that the CVRA sought to change the criminal justice system's assumption "that crime victims should behave like good Victorian children – seen but not heard," the court framed the issue presented as the proper scope of the right to be reasonably heard. *Id.* Turning to the legislative history of the CVRA, the court determined that the law disclosed "a clear congressional intent to give crime victims the right to speak at proceedings covered by the CVRA." *Id.* at 1016. The court then concluded that under the CVRA, "[v]ictims now have an indefeasible right to speak, similar to that of the defendant," and found that Mr. Kenna's statutory right was violated when the district court denied him the right to speak at Zvi's sentencing. *Id.*

Finally, in *United States v. Degenhardt*, 405 F. Supp. 2d 1341 (D. Utah 2005), defendant pleaded guilty to committing fraudulent interstate transactions, and the defendant and government agreed to a sentence of six months of home confinement, payment of at least \$2.4 million in restitution, and such additional amounts of payment as the court might determine. Prior to the sentencing hearing, the government advised the court that several victims would be present and wanted to allocute. *Id.* at 1342. The court initially noted that “[p]erhaps [it] could duck the question [of the scope of this allocution] because . . . [a] strong argument can be made that courts have discretion to hear at sentencing from any person who might provide useful information.” *Id.* at 1343. Importantly, however, the court stated that “treating victim allocution as a mere discretionary matter for the courts would leave questions open for debate in future cases,” and that “victims deserve to know” the scope of their right. *Id.* Thus, heeding Congress’ call, the court concluded that the CVRA gives the right to be heard to all crime victims. The court then held that the right to be heard is the mandatory right of the victim to personally address the court and make an in-court statement, and that this right is not subject to the court’s discretion. *Id.* at 1349.

In contrast to the four cases discussed above stands *United States v. Holland*, 380 F. Supp. 2d 1264 (N.D. Ala. 2005). In *Holland*, the Government moved to dismiss a petition filed by *pro se* petitioner, and subsequently amended by court appointed counsel, which attacked the restitution portion of a sentence entered pursuant to the Victim Witness Protection Act. The court held that it retained jurisdiction to alter the restitution obligation nine years after sentencing. In its conclusion, the court stated that if the victim “believes that . . . the new, mushy, ‘feel good’ statute with the grand title ‘Crime Victims’ Rights”, abrogated [prior case law] by including among victims’ ‘rights’, ‘the right to full and timely restitution as provided by law, the [victim] may, of course, mount an appeal from the order.” *Id.* at 1278. The court’s curt dismissal of victims’ rights led the court to fail to actively balance all of the participants’ competing rights that were legitimately at issue in the case. When a court fails to adequately take into account all participants’ legal rights and interests in a case, whether those rights attach to the defendant or to the victim, the outcome is a skewed legal analysis. Such failure represents a fundamental rejection of the call for judicial leadership.

The Time is Right for Federal Judicial Leadership

Victims’ rights today, be they codified in the CVRA or in state constitutional or statutory provisions, firmly establish that crime victims are legitimate participants in the criminal justice system. This is a fundamental shift in the way the system works.⁶ The Crime Victims’ Rights Movement has put in place many of the elements necessary for significant social change – grassroots support, constitutional and statutory law, support structures for litigation. Now it is time to call upon our judiciary to furnish the missing piece – judicial leadership. This call for judicial leadership is not about victims winning. It is about courts working to effectuate the fundamental purpose of the CVRA – rights-based participatory status of crime victims in the criminal justice system. It is about balancing the victims’ rights against competing participants’ rights so that the outcome is one which recognizes that all participants’ rights – victims and defendants – are critical. This leadership is legally proper and absolutely necessary to advance social justice. As a movement we must demand that our courts heed the call.

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1 See, e.g., Charles R. Epp, *THE RIGHTS REVOLUTION* (1998); Gerald N. Rosenberg, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991); Mark V. Tushnet, *THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950*, (1987).

2 *Id.*

3 See *The Grassroots Beginnings of the Victims' Rights Movement*, NCVLI News, Spring/Summer 2005, at 6.

4 See, e.g., Ala. Const. Amend. No. 557; Alaska Const. art. I, § 24; Ariz. Const. art. 2, § 2.1; Cal. Const. art. I, § 28; Colo. Const. art. II, § 16a; Conn. Const. art. 1, § 8; Fla. Const. art. I, § 16(b); Ill. Const. art. I, § 8.1; Idaho Const. art. I, § 22; Ind. Const. art. I, § 13(b); Kan. Const. art. 15, § 15; La. Const. art. I, § 13; Md. Const. Decl. of Rights, art. 47; Mich. Const. art. I, § 24; Miss. Const. art. 3, § 26A; Mo. Const. art. I, § 32; Neb. Const. art. I, § 28; Nev. Const. art. 1, § 8; N.J. Const. art. I, ¶ 22; N.M. Const. art. II, § 24; Ohio Const. art. I, § 10A; Okla. Const. art. II, § 34; Or. Const. art. I, § 42; R.I. Const. art. 1, § 23; S.C. Const. art. I, § 24(B); Tenn. Const. art. 1, § 35; Tex. Const. art. I, § 30; Utah Const. art. I, § 28; Va. Const. art. I, § 8-A; Wash. Const. art. 1, § 25; Wis. Const. art. I, § 9m. See also 18 U.S.C. § 3771.

5 The United States Supreme Court has, in *dicta*, recognized the legitimacy of victims' interests in the criminal justice system in a variety of cases. See, e.g., *Calderon v. Thompson*, 523 U.S. 538, 555 (1998) (acknowledging that both the state and victim share an interest in finality, moral judgment, and the punishment of the guilty); *Morris v. Slappy*, 461 U.S. 1, 14 (1983) (noting crime victims' interests in criminal cases and admonishing the lower court for "wholly fail[ing] to take into account the interest of the victim of these crimes" when it interpreted the Sixth Amendment.); *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 428 (1979) (discussing the educational value of public trials and noting "the victim of the crime, the family of the victim, others who have suffered similarly, . . . have an interest in observing the course of a prosecution."); *Snyder v. Massachusetts*, 291 U.S. 97, 120 (1934) (stating, "But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true. . . ."). Importantly, however, in none of these cases did the outcome of the issue presented to the court turn on a victim's constitutional or statutory right.

6 The transformation that the CVRA works on the federal criminal justice system has been recognized by courts and commentators alike. See, e.g., *Kenna*, 435 F.3d at 1013 (noting that the rights provided in the CVRA are designed to change the criminal justice system which functions "on the assumption that crime victims should behave like good Victorian children—seen but not heard"; Paul Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act*, 2005 B.Y.U.L. REV. 835, 893 (2005) (noting, "The CVRA transforms crime victims into participants in the criminal justice process These new rights will reshape the federal criminal justice system").