

# Crime Victims' Rights: From Illusion to Reality

BY MARY L. BOLAND AND RUSSELL BUTLER

Attorneys have an obligation to their clients, to their profession, and to justice itself. They are obligated to use their expertise to guarantee that the system does not stray from the principle that lies at the heart of the law: justice for all who seek it.

—Final Report, President's Task Force on Victims of Crime (1982)

**A**lthough she had read and heard much about Santa, her friends told her that Santa didn't exist, and she had never actually seen Santa, so eight-year-old Virginia O'Hanlon asked the now-famous question to the editor of the *New York Sun* more than 100 years ago, "Is there a Santa Claus?" Some victim advocates have wondered the same thing about victims' rights: Are they just "mushy, 'feel good'" platitudes, as one court put it? (*See United States v. Holland*, 380 F. Supp. 2d 1264, 1279 (N.D. Ala. 2005). After all, each state and the federal government have passed literally thousands of statutes that say victims have rights, and 33 states have passed constitutional amendments protecting the rights of victims in the criminal and juvenile justice systems. Yet when victims have tried to assert these "rights," they have often been turned away from the courts. So, do these rights really exist?

Well, just as the editor reassured young Virginia, victim advocates may be assured that a significant and dramatic shift is occurring in the criminal and juvenile justice systems. With the recent sweeping changes in the federal landscape for victims' rights under the Crime Victims' Rights Act (CVRA), victims have been given the teeth of standing to enforce their rights. (18 U.S.C. § 3771). Already, the states are beginning to follow suit. In 2008, Oregon gave victims standing under its constitution. (Or. CONST. art. I, §§ 42 & 43.) In the November 2008 elections, the platform of change that swept through the nation brought to California the strongest constitutional

amendment for victims in the country. (*Victims' Bill of Rights Act of 2008*, WEST'S ANN. CAL. CONST. art. 1, § 28, adding standing).

So yes, victims' rights do, indeed, exist. This article examines the current state of victims' rights, the evolution of enforcement mechanisms seeking to implement those rights, and the criminal justice practitioner's emerging roles with respect to those rights.

## Reemergence of the Victim's Voice

In colonial America, crime victims prosecuted their own criminal cases, in keeping with the common law in which there was no public prosecutor. But this form of justice was available only to those with resources, and was replaced as early as 1704 with local public prosecutors. In 1789, the first federal code provided for public prosecutors to prosecute federal crimes, and by the end of the 1800s private prosecutions were entirely eliminated. Victims were basically relegated to witness status.

As an outgrowth of the civil rights work of the 1960s and 1970s, there was an increased attention to crime and its aftermath. The first National Crime Survey in 1972 (now renamed the National Crime Victimization Survey) identified crime rates much higher than those reported to law enforcement in the FBI's Uniform Crime Reports. The tremendous toll of crime on its victims emerged into social consciousness. Public support for crime victims was immediate and overwhelming. Indeed, the crime victims' rights movement has been termed "one of the most successful civil liberties movements of recent times." (John W. Gillis and Douglas E. Beloof, *The Next Step for a Maturing Victim Rights Movement: Enforcing Crime Victim Rights in the Courts*, 33 MCGEORGE L. REV. 689, 691 (Summer 2002).)

By 1981, President Reagan established a National Victims' Rights Week. Programs sprang up to help victims navigate the complexities of the criminal justice process. Grassroots efforts in sexual assault and domestic violence led to early reforms for the treatment of these victims.

Perhaps one of the most influential efforts to improve the treatment of crime victims occurred as a result of publication of a report of President Reagan's Task Force on Victims of Crime in 1982. That report detailed the truly sorry state of treatment of crime victims in the criminal justice system. The task force found that victims "pleas for justice have gone unheeded, and their wounds—personal, emotional, and financial—have gone unattended." The report concluded that "sustained

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**MARY L. BOLAND** is an assistant state's attorney in Cook County, Illinois. She is a member of the ABA's Criminal Justice Section Council and a former chair of its Victims Committee. Contact the author at [mboland@cookcountygov.com](mailto:mboland@cookcountygov.com). **RUSSELL BUTLER** is executive director of the Maryland Crime Victim Resource Center and cochair of the Victims' Committee of the Criminal Justice Section. Contact the author at [rbutler@mdcrimevictims.org](mailto:rbutler@mdcrimevictims.org). Points of view in this article are those of the authors and do not necessarily represent the official positions of the United States Department of Justice or the National Crime Victim Law Institute.

efforts of federal, state and local governments, combined with the resources of the private sector" were necessary to "restore balance to the criminal justice system." (Final Report of the President's Task Force on Victims of Crime (Dec.1982) *available at* <http://www.ojp.gov/ovc/publications/presdntstskforcrprt>).

One of the 68 recommendations of that landmark report was the establishment of a governmental focus and a funding source for victims. The following year, the Department of Justice established the Office for Victims of Crime (OVC). Among its duties was to administer the newly passed Crime Victims Fund, part of the Victims of Crime Act, which established a source of funds for victim assistance and compensation from federal fines, penalties, and bond forfeitures. With a permanent funding source, treatment and assistance for victims improved, and victim advocates began to focus on legal reform.

### **Legal Reform**

The U.S. Supreme Court noted the strength of the emerging victims' rights movement in *Payne v. Tennessee*, when it reversed a previous decision excluding victim impact

the same court allowed a 14-minute video with 118 pictures of the elderly couple who had been murdered by the defendant. (People v. Zamudio, 43 Cal. 4th 327, 366 (Cal. 2008) (however, trial court excluded the music and required narrative to be "objective").) In each case, the Supreme Court of California recognized the need to balance such evidence against the potential for impermissible prejudice.

Despite concerns of the defense bar, having a "voice" in the criminal proceedings does not mean that victims have party status. (See Amy Baron-Evans, National Federal Defender Sentencing Resource Counsel, *Crime Victims Rights Act* (Oct.12, 2008) *available at* <http://www.fd.org>). Victims "are not accorded formal party status, nor are they even intervenors" in the traditional sense. (See United States v. Rubin, 558 F. Supp. 2d 411, 417 (E.D.N.Y. 2008).) Still, crime victims are to be treated as "participants in the process." (See United States v. Hunter, 2008 U.S. Dist. LEXIS 443 at \*5 (D. Utah, Jan. 3, 2008).)

But what are "participant" rights? Unlike the clearly-identified constitutional standards for defendants, there

## ***The permissible scope of victim impact statements in capital cases continues to be an issue in the courts.***

statements in a capital case at sentencing as wrongly decided. (See *Payne*, 501 U.S. 808, 834 (1991) (overruling *Booth v. Maryland*, 482 U.S. 496 (1987).) In *Payne*, the Court recognized a murder victim's "uniqueness as an individual human being" in permitting victim impact statements at sentencing. Indeed, Justice Scalia opined that *Booth* "conflicts with a public sense of justice keen enough that it has found voice in a nationwide 'victims' rights' movement." (See *Payne*, 501 U.S. at 834 (Scalia, J., concurring).)

The permissible scope of victim impact statements in capital cases continues to be an issue in the courts. In November 2008, the U.S. Supreme Court refused to hear two cases in which technology-enhanced victim impact statements were allowed at sentencing in capital cases. (See *Kelly v. California*, 129 S. Ct. 564 (2008).) In the *Kelly* case, the California Supreme Court allowed a 20-minute video of the life of a murder victim as part of a victim impact statement as within the trial court's discretion to permit relevant and factual information. (People v. Kelly, 42 Cal. 4th 763, 799 (Cal. 2007) (allowing soft music in the background).) In the *Zamudio* case,

were no uniform standards to guide the early development of "Bill of Rights" laws for victims. Each jurisdiction was free to conceptualize what "due process" meant in the context of "victims' rights." This has produced considerable differences in language, scope, and level of specificity for the "rights" of victims across the country. Generally, though, victims' rights laws included the right to information; the right to be present at criminal justice proceedings; the right to notice and to be heard (at least at the victim impact stage); the right to restitution and/or compensation; the right to protection; and the right to privacy. (See National Conference of State Legislatures, *Victims Rights Laws in the States*, *available at* <http://www.ncsl.org/programs/cj/victimsrights.htm>).

Professor Doug Beloof, who has written extensively on crime victim rights, conceptualizes the legal evolution as a series of waves. The first wave involved statutory rights. Strong public support literally led to the passage of thousands of statutes. These laws do have benefits for victims. The laws are proof that governmental public policy envisioned some level of participation for victims in the criminal process; and the government cannot de-

privé victims of their rights. No longer would a victim be considered merely a witness. Governmental officials in the justice system (usually judges, prosecutors, and corrections officials) who were tasked with various duties of notice and information made good faith efforts to follow the law. But what happened when the system did not make a “good effort” or simply failed to follow the law? Compliance efforts focused on improving the system, but did little for individual victims. Although efforts by the Justice Department and federal judiciary to improve compliance with the CVRA included the establishment of an administrative authority in the Victims’ Rights Ombudsman Office, a federal study found that many victims are not aware of complaint procedures and that there is a lack of independence in the process, impeding impartial consideration of complaints made. (U.S. Gov’t Accountability Office, *Crime Victims’ Rights Act: Increasing Awareness, Modifying the Complaint Process, and Enhancing Compliance Monitoring Will Improve Implementation of the [CVR] Act* (Dec. 2008).) Victims, who sought to enforce their rights, found that they had no power to do so.

For example, the Maryland Court of Appeals refused to order a new sentencing hearing despite a victim’s statutory right to be heard in a victim impact statement, where the trial court indicated:

There’s nothing those fine people [the petitioners] could tell me that hadn’t already been said in whatever letters I’ve received. While I respect their right to be heard, we’re already running, I think, a half hour late. I really don’t think it would be beneficial to take the time to hear from them.

(*See Cianos v. State*, 659 A.2d 291, 292 (Md. App. 1995).)

Advocates turned to the second wave of legal reform that, again with overwhelming public support, resulted in the passage of 33 state constitutional provisions. But still these two waves of legal reform did not prove consistently successful in achieving remedies for victims. For example, the Illinois Supreme Court found the presence of a “freshly minted” constitutional amendment guaranteeing the victim a right to restitution was “irrelevant” and simply had no effect on prior case law that permitted a criminal judgment (on which the restitution order depended) to be vacated at the death of the convicted offender. (*See People v. Robinson*, 719 N.E.2d 662, 663 (Ill. 1999).)

Similarly, despite the fact that two judges found “deeply prejudicial error” to have occurred in a case that failed to consider restitution for a victim, and the Maryland Court of Appeals indicated that the “rights, provided by the Maryland Legislature and the Mary-

land Constitution, are to be followed and respected,” the court nonetheless would not remand for a restitution hearing on the victim’s right to restitution. (*See Lopez-Sanchez v. State*, 879 A.2d 695 (Md. 2005) (finding victims’ rights to be “largely illusory”)). Although the legislature attempted to correct the legal deficiency identified in *Lopez-Sanchez*, (*see* <http://mlis.state.md.us/2006rs/billfile/sb0508.htm>, last accessed Dec. 01, 2008), the reform proved short-lived. Shortly after passage of the new Maryland law in 2006, a defendant, without notice to the victim, sought to reduce his 15-year sentence for assault in the first degree to probation. Through counsel, the victim moved to vacate the sentence reduction. The trial court granted the victim’s motion, but on the defendant’s appeal, the court of appeals reversed, holding that [t]he victims’ rights provisions in Maryland law still lack adult teeth” and therefore, there was no remedy for the constitutional, statutory, and rule violations of the crime victim. (*See Hoile v. State*, 948 A.2d 30, 52 (Md. 2008)). A few courts, however, gave victims a remedy for violations of their state rights. (*See, e.g.*, *Melissa J. v. Superior Court*, 237 Cal. Rptr. 5, 6 (Cal. Ct. App. 1987) (voiding sentencing where victim’s restitution rights were not considered).)

Victims of federal crimes fared little better. As one federal court put it, the criminal justice system had “long functioned on the assumption that crime victims should behave like good Victorian children—seen but not heard.” (*Kenna v. U.S. Dist. Court for C.D. Cal.*, 435 F.3d 1011, 1013 (9th Cir. 2006).) In the 1980s and 1990s, Congress passed several laws designed to assist victims, principal among them was the Victims’ Rights and Restitution Act of 1990, 42 U.S.C. § 10606 (later repealed by the CVRA), which provided federal victims with a “Bill of Rights” and ordered federal officials to “make their best efforts to see that victims of crime are accorded the rights described” in the Act. But, as the Oklahoma bombing trial of Timothy McVeigh would show, when victims appealed, after they were barred from attending trial on the basis that they were scheduled to provide impact statements, the court of appeals found that the victims did not have standing to enforce their “right” to attend trial. (*See United States v. McVeigh*, 106 F.3d 325, 335 (10th Cir. 1997).) Congress responded to public outcry with another statute—the Victim Rights Clarification Act in 1997 (18 U.S.C. § 3510)—which permitted victim impact witnesses to attend trial.

Professor Laurence Tribe noted that the problem with the statutory rights for victims is that they “provide too little real protection whenever they come into conflict with bureaucratic habit, traditional indifference, sheer inertia, or any mention of an accused’s rights regardless of whether those rights are genuinely threatened.” (*See*

Proposals for a Constitutional Amendment to Provide Rights for Victims of Crime: Hearings on H.R.J. Res. 173 and H.R.J. Res. 174 Before the House Comm. on the Judiciary, 104th Cong. 242 (1996) (statement of Laurence H. Tribe, Professor, Harvard Law School.) With the support of Presidents Clinton and Bush, victim advocates lobbied for a federal constitutional amendment. But there was also strong opposition to amending the federal Constitution that ran “the gamut, from the structural (the Amendment will change ‘basic principles that have been followed throughout American history’), to the pragmatic (‘it will lay waste to the criminal justice system’), to the aesthetic (it will ‘trivialize’ the Constitution).” (See Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims’ Rights Amendment*, 1999 UTAH L. REV. 479, 480, nn.6-8, citing sources of opposition.)

Although the amendment stalled, the resulting attention to the problem of a lack of enforcement resulted in strong congressional support for modification of the law. In 1973, the U.S. Supreme Court had found that there was no legal standing for crime victims, but noted that Congress could enact laws that would create standing. (See Linda R.S. v. Richard D., 410 U.S. 614 (1973).) Victim advocates decided to seek to put those missing “teeth” into the federal statutory laws.

### **Standing**

This was the key goal of the sweeping changes in the 2004 Crime Victims’ Rights Act (CVRA), which became the “cutting edge of the third wave of victims’ rights.” (See Douglas E. Beloof, *The Third Wave of Crime Victims’ Rights: Standing, Remedy, and Review*, 2005 B.Y.U. L. REV. 255, 343).

Section 3771(a) of the CVRA provides eight basic rights to crime victims:

- (1) The right to be reasonably protected from the accused.
- (2) The right to 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.
- (3) The right 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.
- (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
- (5) The reasonable right to confer with the attorney for the Government in the case.

- (6) The right to full and timely restitution as provided in law.
- (7) The right to proceedings free from unreasonable delay.
- (8) The right to be treated with fairness and with respect for the victim’s dignity and privacy.

(18 U.S.C. § 3771.)

The CVRA also expands the victims’ right to be present at public proceedings, to be heard at certain proceedings, such as plea proceedings, and to independently enforce their rights. The CVRA provides standing to victims at both the trial and appellate levels. As Senator Diane Feinstein explained during the debate on the CVRA:

This provision allows a crime victim to enter the criminal trial court during proceedings involving the crime against the victim, to stand with other counsel in the well of the court, and assert the rights provided by this bill. This provision ensures that crime victims have standing to be heard in trial courts so that they are heard at the very moment when their rights are at stake and this, in turn, forces the criminal justice system to be responsive to a victim’s rights in a timely way.

(150 Cong. Rec. 24261 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).)

The CVRA provides that victims may choose to have their own attorney and seek to assert their rights to be present and participate in the criminal proceeding. In the district court, a victim may make a motion for relief, including a motion to reopen a plea agreement. (18 U.S.C. § 3771 (d)(5).) If the district court denies a victim’s motion, the CVRA provides for an expedited appellate review process. (Maryland also allows the victim to be represented by an attorney before the appellate courts. (See Md. R. 1-326, as amended Dec. 4, 2007, eff. Jan. 1, 2008).) A crime victim may petition for a writ of mandamus, and the court of appeals must decide the petition within 72 hours. The CVRA “contemplates active review of orders denying crime victims’ rights claims even in routine cases.” (See *Kenna v. United States Dist. Ct. for C.D. Cal.*, 435 F.3d 1011, 1017 (9th Cir. 2006).)

In one of the first cases decided under the CVRA, the court held that Congress intended to allow victims to speak at sentencing hearings, and, if that right was denied, a victim had the right to have the sentence vacated and a new sentencing hearing held. (*Id.*) *Kenna* involved a father and son who defrauded dozens of victims out of close to \$100 million. The defendants pled guilty and more than 60 victims submitted victim impact state-

ments. At the father's sentencing, victims spoke, but at the son's sentencing, the judge denied victims the right to speak. The appeals court held that the victims were entitled to speak at the new sentencing hearing.

In just over four short years since the enactment of the CVRA, there have been more than 50 district and appellate decisions that have considered a wide range of victims' issues: the definition of who is a "victim"; rights to information and notice; rights to confer, be present, and be heard; right to restitution; and the rights to fairness, respect, dignity, and privacy. There are times when the interests of the

victims and the prosecutor diverge and some of the appellate cases have arisen out of the mandamus procedures afforded victims under the CVRA; in some cases, defendants have also raised the CVRA as an issue on appeal. (*See, e.g.*, United States v. Edwards, 526 F.3d 747 (11th Cir. 2008) (rejecting defendant's argument that his constitutional rights to a fair trial and confrontation were abridged where the district court refused to sequester the victim, since a defendant has no right to exclude witnesses from a courtroom).) Each decision under the CVRA assists in shaping the balance between the rights of defendant and government, on behalf of the public, and the victim's emerging role as a participant in the criminal process.

## REVISIONS TO RULES OF CRIMINAL PROCEDURES

On December 1, 2008, several revisions to the Federal Rules of Criminal Procedure became effective to implement the CVRA:

- **Criminal Rule 1.** (Scope; Definitions) (incorporates definition of "crime victim" from the Crime Victims' Rights Act and specifies legal representatives who may act on behalf of victims under 18, incompetent, or deceased. Also clarifies that a person accused of an offense cannot be a "victim" under the rules);
- **Criminal Rule 12.1.** (Notice of Alibi Defense) (provides that a victim's address and telephone number should not automatically be provided to the defense when an alibi defense is raised);
- **Criminal Rule 17.** (Subpoena) (requires court approval when defendant subpoenas third party to provide personal or confidential information about a victim. Also requires notice of subpoena to victim and opportunity to quash or modify it);
- **Criminal Rule 18.** (Place of Trial) (requires court to consider convenience of victims as well as defendants and witnesses when setting place for trial within the district);
- **Criminal Rule 32.** (Sentencing and Judgment) (several amendments implementing the Crime Victims' Rights Act); and Criminal Rule 60. (Victim's Rights) (consolidates in one rule new provisions implementing the Crime Victims' Rights Act, including notice to victims of judicial proceedings, victim attendance at these proceedings, victim's right to be heard, and enforcement of victims' rights. Also incorporates statutory provisions limiting relief and states that failure to provide relief under the rule is not a basis for a new trial).

## The Role of Practitioners

Judges, prosecutors, criminal defense attorneys, and those attorneys who seek to provide independent representation for a crime victim must consider the CVRA and its emerging body of case law as well as respective state law that affects their cases. Certainly all attorneys have a duty to know the law. But it is also an ethical responsibility of all criminal justice practitioners to treat participants fairly under the law.

The 1982 landmark task force report on crime victims included recommendations for criminal justice practitioners: (1) judges were urged to consider the needs and legal interests of victims in a series of recommendations; (2) attorneys, as officers of the court, were urged to ensure that the criminal justice system dealt "fairly" with all participants and prosecutors were especially urged to recognize the interests of victims; and (3) bar associations were requested to consider victims' issues in their criminal justice-related committees.

## Judges

In the CVRA, Congress has clarified the federal judicial obligation to crime victims. The statute 18 U.S.C. § 3771(b) provides that "the court shall ensure that the crime victim is afforded the rights described in subsection (a)" of 3771. Under the CVRA, judges shall also make every effort to permit the fullest attendance by the victim and consider reasonable alternatives to exclusion. The judge must promptly consider the victim's motion for relief. (18 U.S.C. § 3771(d)(3)(a).) The reasons for denying a victim's right to relief shall be clearly stated on the record. (18 U.S.C. § 3771(b).) One U.S. district court has found that under the CVRA, a court has "an affirmative obligation to 'ensure' that those rights are 'afforded.'" (*See United States v. Turner*, 367 F. Supp. 2d 319 (E.D.N.Y. 2005).)

In cases where the law does not specifically identify judicial duties, ethical rules should nonetheless guide judges to consider victims' interests. For example, Canon 3 of the judicial canons require judges to "[a]ccord a person who

## READING AND RESOURCES

- L.C. Newmark, *Crime Victims' Needs and VOCA-Funded Services: Findings and Recommendations from Two National Studies*, National Institute of Justice (March 2004).
- For the history of witness as prosecutors, go to <http://law.jrank.org/pages/1858-1860/Prosecution-History-Public-Prosecutor-British-colonial-origins.html> (last accessed Dec. 1, 2008).
- Douglas E. Beloof and Paul G. Cassell, Symposium, *The Crime Victim's Right to Attend the Trial: The Reascendant National Consensus*, 9 LEWIS & CLARK L. REV. 481 (Fall 2005).
- Steven Derene, Steve Walker, and John Stein, "History of the Crime Victims' Movement in the United States," Nat'l Victim Assistance Academy (May 2008).
- Douglas E. Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289.
- Russell Butler, *Reemergence of Crime Victims as Participants in the Criminal Justice System*, MARYLAND BAR J., Nov./Dec. pp. 36-41 (2004).
- Nat'l Criminal Justice Assoc., *Victims' Rights Compliance Efforts: Experiences in Three States*, DOJ: Office for Victims of Crime (2004), noted that "states have made extraordinary progress in establishing fundamental rights for crime victims."
- Paul G. Cassell, *Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Crimi-*

*nal Procedure*, 2007 UTAH L. REV. 861, 865-68 for a thorough discussion of the history of the consideration of the constitutional amendment measures.

### Cases

- In *United States v. Holland*, 380 F. Supp. 2d 1264, 1279 (N.D. Ala. 2005), the court referred to federal victims' rights law a "new, mushy 'feel good' statute."
- In *Lopez-Sanchez v. State*, 388 Md. 214, 230-31 (2005), the court noted that, without a mechanism to enforce these rights, the laws remain "largely illusory."

### Web Sites

- American Bar Association, Victims Committee; [www.abanet.org/crimjust/home.html](http://www.abanet.org/crimjust/home.html) (click on "Committees" on the left-hand navigation bar)
- Department of Justice, Office for Victims of Crime; [www.ojp.usdoj.gov/ovc/](http://www.ojp.usdoj.gov/ovc/)
- Maryland Crime Victims Resource Center; [www.mdcrimevictims.org/](http://www.mdcrimevictims.org/)
- National Crime Victim Law Institute; [www.ncvli.org](http://www.ncvli.org)
- National Alliance of Victims Rights Attorneys; [www.ncvli.org/navra.html](http://www.ncvli.org/navra.html)
- National Center for Victims of Crime; [www.ncvc.org](http://www.ncvc.org)
- National Crime Victim Bar Association; [www.ncvc.org/vb/Main.aspx](http://www.ncvc.org/vb/Main.aspx)

has a legal interest in the proceeding or the person's lawyer the right to be heard according to law." (See Code of Conduct for United States Judges, Canon 3(a)(4); ABA Model Code of Judicial Conduct, Canon 3 (b)(7).)

### Attorneys

Attorneys must operate within the legislative mandates as well as the confines of ethical rules imposed on them by the jurisdiction in which they practice.

Because they represent the government, prosecutors have a special duty as "ministers of justice." Citing the ABA Model Rule of Professional Conduct 3.8 ("Special Responsibilities of a Prosecutor"), it has been suggested that prosecutors, in fulfilling their special duty, "must make efforts to assure that an unrepresented criminal defendant is aware of the right to counsel and has opportunities to obtain counsel." (See Bruce A. Green, *Why Should Prosecutors Seek Justice?* 26 FORDHAM URB. L.J. 607, 616 (1999).) This is because, since "the public interest is never served by conviction of the innocent," a prosecutor must seek to ensure that justice is done in the process. (*Id.* at 616). But what

does "doing justice" mean in the context of victims' rights? At the very least, it can be said that "doing justice" must include adherence to victims' rights laws.

Prosecutors have long been subject to mandates to provide information and notice under victims' rights laws. Accordingly, they have developed victim assistance programs and extensive training materials to ensure compliance with victims' rights laws. (See, e.g., *Attorney General Guidelines for Victims and Witness Assistance*, U.S. Dep't of Justice: Office for Victims of Crime (May 2005).) But participatory rights under the CVRA and newer state provisions require additional measures by prosecutors. The CVRA explicitly requires Department of Justice personnel to make their best efforts to see that crime victims are accorded their rights. (18 U.S.C. § 3771(c)(1).)

Under the CVRA a prosecutor must inform a victim of his or her right of independent representation. (18 U.S.C. § 3771(c)(1), (2).) This becomes especially important when a prosecutor's and victim's interests conflict. For example, victims have a right to attend a 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." (See *United States v. Edwards*, 526 F.3d 747, 758 (11th Cir. 2008).) Yet, in a given case, a prosecutor may wish to avoid the appearance that the victim's testimony was influenced by other witnesses and seek exclusion of the victim. Or, the prosecutor may wish to offer sentencing concessions to a cooperating defendant against the interests of the cooperating defendant's victim(s). (See *Melanie D. Wilson, Prosecutors "Doing Justice" Through Osmosis—Reminders to Encourage a Culture of Cooperation*, 45 AM. CRIM. L. REV. 67, 95 (Winter 2008).) The CVRA envisions that these interests can be heard to fully inform a court on the issue of whether to exclude or limit notice of certain proceedings.

The emergence of the growing body of case law under the CVRA has also drawn the attention of the defense bar. As one federal defense attorney recently remarked at the fall 2008 ABA Criminal Justice Section training on federal sentencing: "We [defense attorneys] ignore victims' rights at our peril."

For example, under Federal Rule of Appellate Procedure 21, a defendant becomes a respondent in any mandamus proceeding under the CVRA. (See *In re Mikhel*, 453 F.3d 1137 (9th Cir. 2006).) This gives the defendant a right to respond to the victim's petition so that a reviewing court will have the benefit of a complete record. Because of the expediency of the mandamus action, defense practitioners also advise participating fully in the consideration of a victim's motion at the trial level, "so that your arguments are already developed before the 72-hour mandamus timetable begins." (See *Amy Baron-Evans, National Federal Defender Sentencing Resource Counsel, Defending Against the Crime Victims Rights Act* (May 5, 2007) at 32; available at <http://www.fd.org>).

### **Bar Associations**

Bar associations play an important role in providing a forum for an exchange of ideas and for continuing legal education programs. Bar policies often serve as guidance for ethical practices of attorneys.

The ABA established a Victims Committee as part of its Criminal Justice Section in 1976 to identify victim concerns and to make recommendations on victim interests; some state and local bar associations followed suit. In 1983, the ABA adopted Fair Treatment Guidelines for crime victims. (See <http://meetings.abanet.org/webupload/commupload/CR300000/newsletterpubs/guidelinesforfairtreatmentofcrimevictims.pdf>, last accessed Dec. 1, 2008). Since that time, the ABA has adopted a number of resolutions calling for improved treatment of crime victims, and has published materials

designed to guide practitioners on victims' issues. (See, e.g., ABA Criminal Justice Section, *Victims Committee, Restitution for Crime Victims: A National Strategy* (2004) and ABA Criminal Justice Section, *The Child Witness in Legal Cases* (2002).) In addition, the ABA regularly includes victim issues in its annual publication of contemporary issues in *The State of Criminal Justice*. But a recent, comprehensive review by the National Crime Victims Law Institute at the request of the Criminal Justice Section's Victims Committee found the fair treatment guidelines have long been surpassed by the enactment of state constitutional provisions, and federal and state statutes. (See National Crime Victims Law Institute, "A Review of the American Bar Association's Guidelines for Fair Treatment of Crime Victims and Witnesses" (2006) available at <http://meetings.abanet.org/webupload/commpupload/CR300000/newsletterpubs/victimsguidelinereview.pdf>, last accessed Dec. 1, 2008). Revisions are long overdue and the ABA's Victims Committee is currently working to revise the guidelines in light of the major legal reforms over the last 25 years.

More recently, the National Crime Victims Bar Association, sponsored by the National Center for Victims of Crime, has focused on providing representation to victims in civil cases, and the National Alliance of Victims' Rights Attorneys, an association of the National Crime Victim Law Institute (NCVLI), has promoted victims' rights by providing, through a group of legal clinics, pro bono representation to victims in criminal cases. The NCVLI also provides technical assistance to legal practitioners representing crime victims.

### **Conclusion**

Crime victims have rights. For federal victims, the CVRA has made these rights real, by making them enforceable; some states have begun to follow this trend. The practice of criminal law is, and will be, different with victims as participants in the criminal justice system. (See, e.g., *State v. Korsen*, 141 Idaho 445, 450 (Idaho 2005) (noting that by virtue of the substantial changes brought about by the constitutional and statutory enactments, particularly the victims' rights provisions, the justice system has changed).) Practitioners need to know these laws, how they work, and how the criminal process has changed as a result. Additionally, each state and local bar association should measure its victims' rights laws against those in the CVRA and more recent amendments in Oregon and California to answer the question of whether victims' "rights" are indeed "real" and enforceable. The ABA's Rule of Law Initiative has urged governments around the world to adopt the rule of law. Victims, in the United States, are likewise entitled to the same rule of law. ■