

Testimony of Professor Douglas E. Beloof
Before the Oregon Senate Judiciary Committee
HJR's 49 & 50
Wednesday, May 23, 2007

Thank you for the opportunity to appear before you today. My name is Douglas E. Beloof. I am Professor of Law at Lewis & Clark College and Director of the National Crime Victim Law Institute. I have been cited by the United States Senate Judiciary Committee as a leading authority on crime victim law. I have authored the only book in the field entitled VICTIMS IN CRIMINAL PROCEDURE (CAROLINA ACADEMIC PRESS 2D ED., 2006). I have written numerous scholarly articles published in law reviews on the subject of crime victim law. I consult with legislators nationwide. I consulted with Congress on the drafting of the 2004 Federal Crime Victims' Rights Act which provided meaningful rights for crime victims and standing to seek appellate court review of rights violations. I have argued victim law issues in state supreme courts at the request of State Attorney Generals' and crime victim lawyers. The National Crime Victim Law Institute, which I direct, submits amicus curiae brief to federal and state appellate courts, including the United State Supreme Court. I have received an award for Professional Innovation in Victims Services from the United States Attorney General for the Institute's work establishing pro bono clinics around the country to enforce victims' laws of participation privacy and protection. I was named by Oregon Business Magazine in 2006 as one of 50 leaders and 10 pioneering leaders.

Crime Victims' Rights in Oregon are presently unenforceable, thus the present version of Oregon's Constitutional Victims' Rights are illusory rights. Real rights are rights which can be enforced in, and defined by, appellate courts. Other rights in the Oregon Bill of Rights, such as criminal defendants' rights, have this characteristic.

From a national perspective, Oregon lags behind the federal government and the majority of states because in Oregon victims' cannot enforce their rights. Federal law gives victims standing to enforce their rights. The vast majority of the 34 states with constitutional rights explicitly or implicitly allow victims to defend rights violations. Oregon is in a small minority of states with constitutional victims' rights that do not allow the rights to be defended in court by victims. There are only two state constitutions that have eliminated both any ability to obtain a stay to obtain review of a constitutional rights violation and any opportunity to change a court ruling, even when that ruling is a gross violation of the victims' right. Oregon is one of those states.

The central reason for such a constrained set of rights was an over-abundance of caution, particularly on the part of county prosecutors, that victims' rights not clog up the efficient functioning of the criminal process. In the intervening years there has been substantial experience in the federal and other state jurisdictions where victims have standing to enforce their rights, and the prosecutors now support enforcement of these rights. This experience has provided significant comfort that, first, enforceable rights will not negatively impact the criminal process, second, that it does not present the danger of a significant cost to the parties or the courts. Contrary to the dire predictions of nay sayers, enforceable victims' rights did not cause the sky to fall. Similarly, the standing provided for enforcement bill will not cause the sky to fall.

The primary reason for providing standing to victims is to accord victims meaningful, rather than illusory, rights. There are other important reasons to provide victims with standing to enforce their rights in the courts. These other reasons have a lot to do with keeping constitutional structure and judicial order in place.

First, the lack of victim standing makes trial courts, rather than appellate courts the ultimate arbiters of rights, this is upside down. In this upside down process, trial courts are the ultimate arbiters of victims' constitutional rights. Each trial court can arrive at its own unique conclusion about the meaning of a given right. Moreover, trial courts can apply their disparate interpretations without fear of reversal. The result can be different rights for different victims based on which trial judge is selected to preside over the case.

Second, presently providing victims standing to enforce evidentiary privileges, which are statutory protections, but denying enforcement for rights of constitutional stature, make little sense. In Oregon, a victim cannot seek review of a denial of constitutional rights but might, for example, seek review of a denied spousal privilege.

Third, denying victims' standing prevents the adversity that is critical to the adequate litigation of rights. Our legal system is founded on the idea that adverse sides to an issue will adequately frame the issue for an appellate court. Without victim standing, victims' rights can only be contested on review by parties that have no personal stake in the right. The federal Fourth Circuit court of Appeals summed this up best when it allowed rape victims to bring an interlocutory appeal of an adverse rape shield ruling: "No other party in the evidentiary proceeding shares these interests to the extent that they might be viewed as a champion of the victims' rights."

Fourth, when prosecutors possess exclusive control over victims' rights such a structure provides fertile grounds for conflicts of interest. Prosecutors represent the public interest, not victims' interests. Moreover, when prosecutors violate victims' rights they cannot, nor should they, be reasonably expected to seek review and reversal of their own actions.

Finally, victims' rights without standing are destructive to the traditional model of civil rights. Standing accompanying legal rights is a tradition as old as the constitution itself. *Marbury v Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). The great weight of constitutional tradition and judicial structure are behind these bills.

The question remains whether there are substantial reasons in opposition that outweigh these foundational values. There are none. First, it might be argued that giving victims standing to enforce standing is inefficient as it may clog up the courts. This argument is not supported by the experience of other states which have granted victims standing for years. In looking at a random sample of five states that expressly allow victims standing on review, here are the average number of appellate opinions substantively dealing with victims Constitutional rights per year: The greatest number of cases are in Arizona since 1991, one opinion every three years;

Nevada, since 1996, no opinions in 10 years; South Carolina since 1996, one opinion every five years; Texas since 1989, one opinion every eight years; and Utah since 1999, one opinion every eight years. Experience plainly reveals that the courts will not suffer any great burden or expense.

It is important to note that even though the opinions are few, they nevertheless serve two important purposes. First, even one opinion can clarify the scope and meaning of victims rights for literally hundreds, even thousands of cases. Second, the potential of reconsideration or review provides incentive to government actors to be scrupulous in honoring the rights.

Finally, it might be asked whether victim standing to defend their constitutional rights might be accomplished without amending the constitution? The answer is clearly, “No!” The present language in the constitution implicitly precludes victim enforcement of these rights in two critical ways. First, under the present language there can be no delay of a case in order to determine whether rights have been violated. Second, no ruling of a trial court can be reconsidered and changed and no appellate court can overturn the ruling of any trial court. These provisions so dramatically eliminate a victims ability to enforce their constitutional rights that statutes alone cannot “fix” it.

In conclusion, an amendment to the Constitution is needed to provide victims meaningful rights, to bring the rights in conformance with constitutional norms for civil liberties and to bring them within conventional judicial structure. For all these reasons, I urge you to send the bill to the Senate floor with a “do pass” recommendation.

