

Victim Rights Comes of Age

Oregon leads the way — but only to a point

By Janine Robben

From a quiet, tree-lined bower at Lewis & Clark Law School, Oregon has been quietly leading a revolution. It's a revolution on behalf of victims of crime, who are seeing their rights come of age around the country, in part because of the leadership provided by the law school-based National Crime Victim Law Institute.

"Nationally, we've arrived," says the institute's director, Doug Beloof, who helped secure the passage of a federal "Justice for All" act in 2004 and whose program, established in 2000, oversees pro bono victims' rights legal clinics in eight states.

But none of those clinics are in Oregon, where the national institute is based. The reason? Oregon is not a good place in which to devote the institute's limited resources, says Beloof.

This is because the state's constitution — while appearing to give victims strong rights — also contains language that means the rights aren't worth the paper they're written on if "the system" doesn't want to enforce them.

"The Oregon constitutional amendments adopted in 1999 were sort of a 'first phase' of victims' rights," says Beloof, a former Multnomah County prosecutor and current member of the Oregon State Bar who is also an associate professor of law at Lewis & Clark. "Now what we're finding is that there are significant dysfunctions with rights that don't have remedies attached."

That 'dysfunction' is felt by crime victims, a significant percentage of whom said that their rights were not enforced in their cases, according to a 2002 statewide Crime Victims Needs Assessment conducted by Portland State University.

But, while this 'dysfunction' is causing the National Crime Victim Law Institute to concentrate its efforts in other states and at the federal level, other programs are devoted to helping crime victims in Oregon.

These include a pilot project through the Oregon Department of Justice, whose multi-disciplinary committees are working on getting voluntary compliance with victims' rights that aren't enforceable by law, and a restitution project — also through DOJ — that is promoting tougher attitudes towards collection of restitution for crime victims.

Carol Schrader, director of DOJ's Crime Victims' Rights Compliance Implementation Project, concedes that getting compliance via carrots when Oregon law doesn't provide any sticks is "a creative challenge.

"(But) I'm encouraged at the end of the first year," says Schrader, for whose project Oregon Attorney General Hardy Myers obtained federal grant funding through April 2008. "There are significant challenges ahead, but people are doing a fabulous job."

History of victims' rights

Doug Beloof has been involved in victims' rights issues for almost 25 years, ever since, as a young prosecutor, he "saw how victims were treated by the system.

"They were treated poorly," he says.

Beloof came into the criminal justice system in the 1980s, just as victims' rights first were being added to state constitutions elsewhere in the country.

Beloof, who says he took his "passion for victims' rights and wrote the only case book in the field, *Victims and Criminal Procedure*, divides the history of victims' rights law into three independently developed movements.

These include a general victims' rights movement, largely made up of victims, or families of victims, of homicides and violent crimes other than crimes against women. In Oregon, this movement included Crime Victims United of Oregon, which was founded by members of the support group Parents of Murdered Children in 1983.

The other two movements are what Beloof calls two "very different" constituencies of the women's rights' movement — victims of sexual assault and victims of domestic violence — and what he describes as a general "crime-control, tough on crime" lobby.

According to Beloof, "These groups have operated — often not communicating well with each other — to enact legislation that impacts their unique constituencies."

In 1999, the general victims' rights movement, via Crime Victims United of Oregon and prosecutors working on their own time, led an effort that resulted in a sweeping array of victims' rights being adopted – by popular vote – as an amendment to the Oregon Constitution.¹

The list of rights now guaranteed to Oregonians by this constitutional amendment and by multiple statutes as well, is astonishing: As prepared in list form by the Crime Victims' Rights Compliance Implementation Project, it fills six, single-spaced pages.

These rights include everything from the right to "reasonably express" the victims' views at sentencing to the right to "prompt restitution."

But what the left hand giveth, the right hand taketh away.

That's because every one of the constitutional articles that ensure these rights contains the following language: "Nothing in this section creates any cause of action for compensation or damages nor may this section be used to invalidate an accusatory instrument, ruling of a court, conviction or adjudication or otherwise suspend or terminate any criminal or juvenile delinquency proceedings at any point after the case is commenced or on appeal."

Beloof, who says this language was the result of "political compromise," says that Oregon is one of only two states (the other is Virginia) with constitutional victims' rights that have other constitutional language that, "as a practical matter, keeps those rights from being enforced."

According to Beloof, "The Oregon constitutional amendments adopted in 1999 are sort of a first phase of victims' rights. They were implemented over-cautiously. Now what we're finding is that there are significant dysfunctions with rights that don't have remedies attached."

Beloof says that Oregon's Constitution makes it unique among other Western states.

"In Idaho and Nevada, victims' constitutional rights are enforceable," says Beloof. "In Washington, they probably are; we don't have case law yet. The governor of California is looking at making California's rights both more comprehensive and enforceable. I expect that at some point Oregon will tag along."

In the meantime, says Beloof, none of the eight state victims' rights legal clinics that the National Crime Victim Law Institute manages are in Oregon.

"Given the limited funding available," says Beloof, "it's not a good investment."

Federal law a model for the states

In addition to the eight state clinics, the institute also manages one pro bono clinic at the federal level.

In 2004, Congress passed a Crime Victims' Rights Act, 18 USC Sec. 3771, which amended the federal criminal code to give crime victims the right to confer with prosecutors, to have timely notice of hearings, to be heard on issues of release, plea and sentencing and to receive "full and timely" restitution.

"The (act) provides real, enforceable rights," says Beloof. "It provides a model for the states."

In January, the United States Court of Appeals for the Ninth Circuit ruled² that the act's right to be "reasonably heard" at sentencing means the right to speak in open court.

The ruling came in a California case involving father-and-son defendants who had swindled more than 60 victims out of almost \$100 million.

The son, who was sentenced first, received 20 years in prison.

Three months later, the same judge refused to let victim W. Patrick Kenna, who had spoken at the son's sentencing, speak again at the father's.

"I listened to the victims last time," the judge explained. "...quite frankly, I don't think there's anything that any victim could say that would have any impact whatsoever. ...what can you say when people have lost their life savings...? There just isn't anything else that could possibly be said."

But the Ninth Circuit disagreed, granting Kenna's petition for mandamus and sending the case back to the district court.

"The criminal justice system has long functioned on the assumption that crime victims should behave like good Victorian children – seen but not heard," the Court wrote.

"The Crime Victims' Rights Act sought to change this by making victims independent participants in the criminal justice process...Victims now have an indefeasible right to speak, similar to that of the defendant..."

"...Moreover, the (act) gives victims the right to confront every defendant who has wronged them; speaking at a co-defendant's sentencing does not vindicate the right of the victims to look *this* defendant in the eye and let him know the suffering his misconduct has caused."

The Ninth Circuit's decision in this case was one of at least 15 occasions when federal circuit courts around the country either were asked to interpret and apply the act, or did so *sua sponte*, in the year after it became effective in October 2005.

"Certainly not all aspects of these court decisions are favorable to crime victims," Meg Garvin, a staff attorney for the National Crime Victim Law Institute, wrote in the institute's Fall/Winter 2005 newsletter. "One federal court referred, in *dicta*, to the CVRA as 'the new, mushy, 'feel good' statute..."

A reluctance to make rights enforceable

According to Beloof, while "there have been some preliminary conversations about modernizing" the victims' rights language in Oregon's constitution to bring it into line with federal law and the constitutions of many other states, nothing has yet been presented to the Oregon legislature.

In Beloof's view, the reluctance to make victims' rights enforceable comes out of what he calls "an exaggerated fear" that victims' rights laws will "infringe on judicial and prosecutorial discretion.

"The short answer," he says, "is that none of them do. There's no victims' right law in the country that results in victims having control over the process that judges and prosecutors have always had."

Where problems have arisen, he acknowledges, is where what the victim wants, and what the prosecutor – or the defendant – wants are at odds.

"Here is this interested person (the victim) who now gets to say what he thinks and ask for what he thinks is right and just," Beloof says. "That voice may contradict the voice of the defendant or prosecutors. This becomes most acute where there is an agreement on a plea and the victim is unhappy with that."

According to Beloof, "There have been reported cases around the country where courts have refused to accept a plea because of the victim's objection. That's perfectly lawful and appropriate. >From the judge's perspective, the victim just gives them more information. More information usually is better than less information.

In Beloof's view, "We are emerging from system where – from a legal perspective – only the state is harmed by crime. We're now in a world where victim harm is a legitimate basis for participation rights. This is a paradigm shift, a big cultural change, in criminal prosecution."

Diverse group working for victim rights

The Department of Justice's Crime Victims' Rights Compliance Project is not waiting passively for that paradigm shift to take place. Instead, it intends to be a major force in making it happen.

Carol Schrader had been a Legal Aid attorney in Portland, representing survivors of domestic violence. She had also directed an Oregon non-profit that worked with child abuse and domestic violence before joining DOJ last year to direct the compliance project.

In her former positions, Schrader says, she didn't think of the issues she saw every day from the perspective of victims' *rights*.

"That was not something that was at the forefront of my practice," says Schrader, who is now an inactive member of the OSB. "It wasn't part of my law school curriculum, the bar exam or CLEs."

Now, Schrader is coordinating six multidisciplinary committees, made up of what she calls "an incredibly diverse group of people who are working for victims' rights."

One year into the project, the committees already have accomplished such goals as putting together a six-page, single-spaced comprehensive list of victims' rights in Oregon.

"District attorneys' offices in counties across Oregon provide victims with a list of their rights," says Schrader. "Until we got this list together, it may have been that no two lists of those rights were the same.

Schrader says this list "has been making quite an impression within the criminal justice system."

"We hear, 'How nice it will be to have a standard list to distribute,' and 'There are rights on this list that we did not realize we need to be paying attention to.'"

Over the past year, Schrader says the committees have identified several obstacles to full compliance with the rights laid out in Oregon's statutes and its constitution. These include: lack of financial resources (effective last December, DOJ's Crime Victims' Compensation Program had to reduce certain benefits for budgetary reasons); the lack of a legal mechanism for enforcing victims' rights and what Schrader diplomatically describes as "different levels of commitment to compliance with victims' rights in different counties.

"We want to make sure victims' rights are complied with in *all* counties," says Schrader. "We're approaching it from making sure they have information and training."

While the compliance project is working on victims' rights in general, another grant-funded DOJ project has been focusing on restitution.

In 2003, the Oregon legislature amended ORS Chapter 147 to require judges to order defendants to pay the full amount of restitution owed to a crime victim.

Prior to that, says Connie Gallagher, director of DOJ's Crime Victims' Assistance section, "the judge could reduce the amount ordered based on the defendant's ability to pay.

"Add to that what was happening in practice – how judges were ordering restitution and how fragmented the collection of restitution is – and it was a recipe for disaster," she says. "You could see why victims were not getting restitution."

Gallagher points out that the amendments to Chapter 147 didn't modify anybody's authority to set restitution payments. "We're simply saying there has to be a *judgment* for the full amount," she says.

But, she says, the project is working towards what she calls a "more realistic and fluid system that adjusts to a person's ability to pay over time."

In the past, Gallagher says, "Payment schedules seemed to be carved in stone. But somebody's ability to pay could *change*."

"The more you look into their (convicted defendants') assets, the more you find," she says. "We're living in an electronic age, a credit-card age. Many of them (convicted defendants) are coming into inheritances.

"What has been proven, in Clackamas and Multnomah counties is that if you have somebody who is willing to make it (collection of restitution) a priority, you can get it done," Gallagher says. "Clackamas County has developed a tight system using existing resources. Probation officer Penny Barnes works a great deal with convicted defendants. She knows their lives, knows their assets. 'You want me out of your life, don't you? Do you smoke? You're not going to smoke 'til you're done (paying restitution).'"

The bottom line, says Gallagher, is "This (restitution) is not a fine. It's not a fee. It's not punitive. This is something the offender *owes*."

Despite the changes that still have to be made to bring victims' rights in Oregon into line with federal and state law in much of the rest of the country, Gallagher says that when she looks at "now versus 10 years ago, 'improving' is the word that comes to mind.

"We have a long way to go, but there's the commitment of an awful lot of people," she says. "Do I think victims' rights are coming of age? I do. Not only are victims becoming more assertive about saying, 'I was the injured party,' but they're saying, 'I have a right to be involved in this process.

"I think the system also is beginning to recognize this by having victims play a larger role," Gallagher says. "The system is more just. Oregon is in a different position because our victims don't have standing, but across the nation, things are changing because of efforts like Beloof's and the National Crime Victim Law Institute."

Gallagher cites the federal Crime Victims' Rights Act and the Ninth Circuit's ruling that said crime victims, unlike Victorian children, now have the right to be seen *and* heard.

"I think that really reflects changing sentiment within the country," she says.

The National Crime Victim Law Institute's Fifth Annual Conference will be held June 16-17 in Portland. Additional information is available on its website, www.lclark.edu/org/ncvli.

Endnotes

1. Or Const Art 1 Sections 42-45.
2. *Kenna v. United States Dist. Court*, 435 F3d 1011 (9th Cir 2006).

ABOUT THE AUTHOR

Janine Robben is a frequent contributor to the Bulletin. She has been a member of the Oregon Bar since 1980.

© 2006 Janine Robben