

1-1-2006

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Publication Information

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Repository Citation

O'Hear, Michael M., "Punishment, Democracy and Victims" (2006). *Faculty Publications*. Paper 116.
<http://scholarship.law.marquette.edu/facpub/116>

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Punishment, Democracy, and Victims

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Through its passage of the Crime Victims' Rights Act in 2004, Congress has responded once again to longstanding demands that the federal criminal justice system be made more attentive to the interests of victims, as Congress has done with some regularity since the early 1980s.¹ Although many questions remain as to how precisely it will be interpreted and implemented, the new statute is likely to strengthen long-term trends towards a more robust role for victims in American criminal procedure. Victims first emerged as a potent, organized political force in the 1970s.² Between 1982 and 2004, Congress adopted at least seven significant pieces of victims' rights legislation.³ Many states acted even more quickly and aggressively in embracing victims' rights.⁴ Boosting these trends, the Supreme Court upheld the constitutionality of victim impact evidence for capital sentencing purposes in 1991.⁵ As the public was recently reminded during the sentencing of Zacarias Moussaoui, "VIE" has since become an emotionally charged focal point of the penalty phase in many capital cases.

Victims' rights groups have already won a notable victory in their efforts to build on their success in securing passage of the CVRA. Earlier this year, the Ninth Circuit ruled in *Kenna v. District Court* that the CVRA gives victims a right to speak at sentencing, mirroring the defendant's right to allocute.⁶ Also in the works are victim-related amendments to the Federal Sentencing Guidelines,⁷ the Federal Rules of Criminal Procedure,⁸ and the American Bar Association's Fair Treatment Guidelines for Crime Victims and Witnesses.⁹ Looming over all of these initiatives is the promise—or threat, depending on your perspective—of victims' rights proponents to renew their earlier efforts to amend the Constitution should the CVRA prove insufficiently protective of victim interests.¹⁰

In light of these recent and pending developments, *FSR* is devoting two consecutive issues to the role of victims in sentencing. The present issue focuses on VIE, the CVRA, and *Kenna*. The next issue looks beyond the CVRA and considers future directions for the victims' rights movement. In these Editor's Observations, I identify and comment on some of the leading concerns raised by the articles in this issue. I suggest that enhanced victim participation may be viewed as both a product and an embodiment of the "democratization" of sentencing. Injecting victims' voices and concerns into the sentencing process is capable of promoting a constructive new dialogue about the future of federal sentencing, but skeptics will have to be convinced that victims' rights laws should be regarded as anything more than symbolic legislative gestures.

Punishment and Democracy

For the past thirty years, the culture of American punishment has shifted from one of public deference to experts and criminal justice professionals to one of more intensive democratic engagement. Professors Zimring, Hawkins, and Kamin offer an incisive account of this phenomenon in *Punishment and Democracy*, their influential assessment of the "Three Strikes" ballot initiative in California.¹¹ They associate the rise of democratic control over sentencing with a mistrust of government actors and a rejection of the rehabilitation-based parole model. Although our political culture tends to equate "democratization" with "progress," Zimring and his colleagues identify a number of areas of concern with the democratization of punishment. One problem, for instance, is the tendency to make general policy decisions on the basis of stereotyped, worst-case scenarios, thereby blurring important distinctions between categories of crimes and criminals.¹² Another, related problem is the tendency for punishment decisions to become swept up in the symbolic politics surrounding criminals and victims. "The essential element of the way in which

Federal Sentencing Reporter, Vol. 19, No. 1, pp. 1–4, ISSN 1053-9867 electronic ISSN 1533-8363
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public opinion applies to questions of penal policy is that citizens tend to express not a preference for specific penalties but an attitude toward criminals. . . . In choosing between more and less severe punishments, the citizens will usually choose the former, simply as a way of expressing hostility toward those who commit a crime.”¹³ Thus, in the sphere of democratic control, “virtually all issues of punishment policy can be reduced to a zero-sum competition,” in which the voter is asked to decide “by choosing between offenders and their victims.”¹⁴ And “[o]nce every policy question becomes a status competition [between offenders and victims], the appropriate result is a foregone conclusion.”¹⁵

Like other victims’ rights legislation, the CVRA is readily situated within the democratization story. Passage of the CVRA by overwhelming majorities in both the House and the Senate doubtlessly reflects the popular tendencies to view criminal justice policy as a zero-sum competition between criminals and victims, in which acceding to the wishes of victims can be seen as a way of expressing hostility towards criminals. Indeed, the legislative history of the CVRA, significant portions of which are reprinted in this issue, is replete with calls to restore greater “balance” in a criminal justice system that is said to favor defendant rights at the expense of victims.¹⁶ Whatever its operational objectives—and in some respects, these do not appear especially well thought out¹⁷—the CVRA’s passage likely has as much to do with the “status competition” between victims and offenders as it does with anything else. What else are we to make of a statute that purportedly imposes on courts an enforceable duty to show “respect for the victim’s dignity”?¹⁸

The democratization phenomenon is apparent not only in the CVRA’s passage, but also in its content. The statute imposes on judges and prosecutors a host of nondiscretionary duties, some of which can only be characterized as micromanagement, such as the requirement that courts of appeals respond to victims’ mandamus petitions within seventy-two hours after filing.¹⁹ The statute thus embodies a mistrust of government officials—perhaps, most notably, of prosecutors, who have traditionally been regarded as the protectors of victim interests. In opposition to a system dominated by government officials and criminal justice experts—judges, lawyers, and probation officers—the CVRA envisions a more open, deprofessionalized system in which lay victims—who might or might not be represented by counsel—play an active and important role.

None of this is to say that the CVRA is, on the whole, a bad (or, for that matter, a good) piece of legislation. These observations do, however, suggest a number of questions and concerns as to how the CVRA will be implemented in the sentencing context.

The Victims May Speak, But What Will They Say and How Will They Say It?

The articles in this issue cover three topics: VIE, the CVRA generally, and the *Kenna* right to allocute specifically. On VIE, Wayne Logan offers a thorough and penetrating survey of the use of victim statements in federal capital cases.²⁰ He finds that VIE has become a routine part of such cases since 1991, and that courts have imposed few restrictions on its use. He closes with a discussion of the fascinating question of what to do when a close relative of a deceased victim wishes to make known his or her *opposition* to the death penalty. Such cases not only demonstrate the oversimplified nature of the “zero-sum” paradigm on which much victims’ rights rhetoric rests, but also raise in an especially poignant way the question of how far we should go toward recognizing victims as independent and legitimately interested parties at sentencing, as opposed to mere fact witnesses. According to the black-letter law, as Logan observes, “opinion evidence” as to penalty is impermissible. He nonetheless identifies some erosion of the principle in state courts and predicts that federal courts will themselves come under increasing pressure to clarify the precise boundaries of the black-letter rule.

The opinion ban assumes that the capital sentencing process should be a logic-driven exercise of finding facts and applying general legal principles to those facts. On this view, the sentencer should not be in the business of accommodating or expressing extralegal preferences, which would move the sentencing process from the realm of law to the realm of politics. One of the standard criticisms of VIE, however, is that, even in the absence of express opinions, the emotional power of victim statements is such that jurors will lose sight of their law-applying task and instead be drawn into the political game of expressing symbolic contempt for crime and criminals.

In their contribution to this issue, Bryan Myers, Emalee Weidemann, and Gregory Pearce tell us that the VIE story is actually a bit more subtle and uncertain.²¹ Based on a comprehensive review of the social scientific literature, Myers and his colleagues conclude that different types of emotional response affect decision-making processes differently, and that some types of emotions may actually *enhance* the care with which jurors consider the evidence. Thus, the knee-jerk, zero-sum paradigm may not be automatically triggered simply by exposing the jury to emotion-packed VIE. On the other hand, regardless of the complexity of the emotional mechanism, numerous studies do suggest that the presence and content of VIE are capable of affecting sentencing judgments—a suggestion that will trouble those who

believe punishment should turn on the defendant's culpability and/or dangerousness, not the happenstance of which individuals are harmed by the crime and how they describe the harm in court.

Moving from VIE to the CVRA, Russell Butler offers a thorough account of how the new statute may affect the sentencing process in federal courts.²² Even though the CVRA may draw much of its political strength from symbolic anticrime politics, that fact does not necessarily mean the statute will lack meaningful consequences in practice. As Zimring, Hawkins, and Kamin put it, in light of the limited attention and technical expertise of most voters and legislators, there is apt to be only a "loose coupling" between the symbolic message and the operational results of a law.²³ And Butler makes a strong case that the CVRA is one statute that ought not to be read merely as a pro-victim gesture, but rather as the dawn of a "new era in federal criminal justice." Perhaps most provocatively, Butler argues that the CVRA implicitly authorizes—perhaps even requires in some cases—court appointment of counsel to represent victims. The argument serves as a reminder of another way that the reality of victim rights diverges from the zero-sum, victim-versus-defendant rhetoric: a criminal justice system that is truly devoted to the interests of victims will have to dedicate a substantial portion of its limited resources to the cause. (Other examples of circumstances in which victims' rights may bump into resource constraints include the identification of and communication with hundreds or thousands of victims in mass fraud or terrorism cases, and the management of competing restitution, fine, and forfeiture claims against defendants with limited assets.)

Finally, a set of four articles in this issue provides differing perspectives on *Kenna*. Steven Twist and Douglas Beloof are unabashed fans of the Ninth Circuit's decision.²⁴ They share Butler's "new era in federal criminal justice" view of the CVRA and regard *Kenna* as an important step toward the realization of that vision. At the same time, they also recognize that not all judges share their understanding of the CVRA as a statute with profound operational, and not just largely symbolic, significance. Twist (who, as the lawyer of the victim, *Kenna*, offers a unique "inside story" of the case) notes with evident concern a very recent follow-up decision in which the Ninth Circuit held that *Kenna* had no right to obtain the presentence report in the case.²⁵ For his part, Beloof focuses his criticism on two cases: a district court decision rejecting the victims' right to speak²⁶ and a Second Circuit decision suggesting that lower courts' compliance with the CVRA might be reviewed under the deferential abuse-of-discretion standard.²⁷ Beloof forcefully argues that such decisions threaten to subvert the operational agenda of the CVRA and notes that judicial recalcitrance might reinvigorate the movement for a victims' rights amendment to the Constitution.

Richard Bierschbach offers a more equivocal assessment of *Kenna*.²⁸ As a matter of formal legal analysis, he is less persuaded than Twist and Beloof that the Ninth Circuit interpreted the CVRA correctly. However, Bierschbach's ultimate concern is less with the interpretive question than it is with the deeper question of what purposes are really served by victim allocution. Thoughtfully surveying potential purposes, he shows that some provide much stronger support for victim allocution than others. Bierschbach concludes with a call for greater clarity on the part of policy makers in identifying the objectives of victim participation, noting that clearer thinking on this front might help us to deal more coherently with the pervasive real-world complexities of cases lacking stereotypical victims and offenders locked in zero-sum combat.

Finally, Amy Baron-Evans provides a more skeptical perspective on the "new era" thesis.²⁹ She cautions against expansive readings of the CVRA that threaten defendants' constitutional rights and privacy interests. While not necessarily quarreling with the result in *Kenna*, she regrets some of the court's language, such as the reference to an "indefeasible" right to be heard. She then offers a helpful survey—in some ways a mirror image to Butler's—of the ways in which victims' rights advocates might attempt to use the CVRA and *Kenna* to the detriment of defendants. She reminds us that, while victims' rights may not always conform with the zero-sum paradigm, the interests of victims and defendants may indeed conflict in a host of subtle ways that go well beyond sentence severity.

What's Next?

Quite apart from the possibility of a constitutional amendment, the CVRA plainly does not mark the end of efforts by victims' rights advocates to reform criminal justice laws. The next issue of *FSR* will cover proposals to modify the Federal Rules of Criminal Procedure, the Federal Sentencing Guidelines, and other sentencing-related laws. The next issue will also contain articles reflecting in greater depth on the tension between the rhetoric of victims' rights, which often rests on the stereotype of good victims and bad defendants engaged in zero-sum competition, and the difficult realities of victims who are not blameless, victims who do not seek to maximize punishment, and defendants who are themselves victims.

As a political movement, victims' rights has been tremendously successful. This success should come as no surprise, given the movement's ability to draw on popular anti-government, anti-lawyer, anti-criminal

sentiments. What is less clear is the extent to which the movement can translate its political support into real reform of the criminal justice system at an operational level. The challenge, I think, is only partially a matter of recalcitrant judges and other system insiders. There is also a need, as Bierschbach demonstrates, for policy makers to articulate more clearly the objectives of victims' rights and to develop a policy agenda that embodies these objectives in a coherent way, even if that agenda leads to places where the conventional zero-sum paradigm falls apart. This may mean, for instance, difficult reallocations of limited criminal justice resources, the imposition of constraints on prosecutorial discretion, a rethinking of rule-based approaches to sentencing, and the development of a more robust set of non-custodial sanctions. Without an agenda that forthrightly rejects the equation of victims' rights with longer sentences, the movement will have a hard time persuading many system insiders that its legislative victories represent anything fundamentally different from the many other symbolic anticrime enactments that have become routine in recent years.³⁰

Notes

- * I am grateful for diligent research assistance from Sonya Bice, and comments on an earlier draft from Richard Bierschbach, Nora Demleitner, Wayne Logan, and Dan Markel.
- ¹ The first federal victims' rights legislation was the Victim and Witness Protection Act of 1982. UNITED STATES DEPARTMENT OF JUSTICE OFFICE FOR VICTIMS OF CRIME, ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE 7 (2005) [hereinafter *AG Guidelines*].
 - ² See AM. BAR ASS'N, CRIMINAL JUSTICE SECTION, VICTIMS COMMITTEE, THE VICTIM IN THE CRIMINAL JUSTICE SYSTEM 2 (2006) (discussing history of victims' rights movement) [hereinafter *ABA Report*].
 - ³ These were contained in the Victim and Witness Protection Act of 1982, the Victims of Crime Act of 1984, the Victims' Rights and Restitution Act of 1990, the Violent Crime Control and Law Enforcement Act of 1994, the Antiterrorism and Effective Death Penalty Act of 1996, the Victim Rights Clarification Act of 1997, and the CVRA. *AG Guidelines*, *supra* note 1, at 7.
 - ⁴ See *ABA Report*, *supra* note 2, at 2 ("Today, thirty-three states have incorporated victim rights into their constitutions, and legislatures have enacted over 27,000 statutes pertaining to victims.").
 - ⁵ 501 U.S. 808 (1991).
 - ⁶ 435 F.3d 1011 (9th Cir. 2006).
 - ⁷ See Statement of Paul G. Cassell Before the United States Sentencing Commission on Protecting Crime Victims' Rights in the Sentencing Process (March 15, 2006), available at http://www.uscc.gov/hearings/03_15_06/cassell-testimony.pdf (making proposal to Sentencing Commission).
 - ⁸ See Paul G. 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 (describing proposed amendments).
 - ⁹ See *ABA Report*, *supra* note 2, at 3 ("The Victims Committee of the Criminal Justice Section is currently engaged in a comprehensive review of the ABA's fair treatment guidelines.").
 - ¹⁰ See Douglas E. Beloof, *Judicial Leadership at Sentencing Under the Crime Victims' Rights Act: Judge Kozinski in Kenna and Judge Cassell in Degehardt*, 19 FED. SENT'ING RPTR. 36, 42 (2006) ("If, however, federal courts whittle away these [CVRA] rights . . . Congress will get back on track to send to the states for ratification an amendment granting victims federal constitutional rights.").
 - ¹¹ FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 210-15 (2001).
 - ¹² *Id.* at 194-95.
 - ¹³ *Id.* at 201.
 - ¹⁴ *Id.* at 223.
 - ¹⁵ *Id.*
 - ¹⁶ See, e.g., 150 CONG. REC. S4260-1 (daily ed. April 22, 2004) (statements of Sen. Feinstein and Kyl).
 - ¹⁷ Consider, for instance, the ambiguity with which *Kenna* wrestled: whether victims have a right to speak at sentencing.
 - ¹⁸ See 18 U.S.C. § 3771(1)(8).
 - ¹⁹ 18 U.S.C. § 3771(d)(3).
 - ²⁰ Wayne A. Logan, *Victim Impact Evidence in Federal Capital Trials*, 19 FED. SENT'ING RPTR. 5 (2006).
 - ²¹ Bryan Myers et al., *Psychology Weighs in on the Debate Surrounding Victim Impact Statements: Are Emotional Jurors Really Irrational?*, 19 FED. SENT'ING RPTR. 13 (2006).
 - ²² Russell P. Butler, *What Practitioners and Judges Need to Know Regarding Crime Victims' Participatory Rights in Federal Sentencing Proceedings*, 19 FED. SENT'ING RPTR. 21 (2006).
 - ²³ ZIMRING ET AL., *supra* note 11, at 225.
 - ²⁴ Steven J. Twist, *Kenna v. District Court*, 19 FED. SENT'ING RPTR. 30 (2006); Beloof, *supra* note 10.
 - ²⁵ See 453 F.3d 1136 (9th Cir. 2006).
 - ²⁶ *United States v. Marcello*, 370 F. Supp. 2d 745 (N.D. Ill. 2005).
 - ²⁷ *In re W.R. Huff Asset Management Company*, 409 F.3d 555 (2d Cir. 2005).
 - ²⁸ Richard A. Bierschbach, *Allocution and the Purposes of Victim Participation under the CVRA*, 19 FED. SENT'ING RPTR. 44 (2006).
 - ²⁹ Amy Baron-Evans, *Traps for the Unwary under the Crime Victims' Rights Act*, 19 FED. SENT'ING RPTR. 49 (2006).
 - ³⁰ As an example of a symbolic anticrime measure with little operational bite, Zimring, Hawkins, and Kamin point to the federal Three Strikes law. ZIMRING ET AL., *supra* note 11, at 224-26.