

Judicial Leadership at Sentencing under the Crime Victims' Rights Act: Judge Kozinski in *Kenna* and Judge Cassell in *Degenhardt*

This article reviews significant federal caselaw addressing a crime victim's right under the Crime Victims' Rights Act to personally allocute at sentencing. Reviewing the background of the CVRA, it identifies that victims are participants in criminal, not civil, procedure at sentencing. As criminal procedure participants, crime victims have the right to personally be heard at sentencing, when they are present in the court. Analyzing the *Kenna* and *Degenhardt* opinions, which recognized the right to allocute personally, while critiquing the *Marcello* opinion, which did not, the article concludes that *Kenna* and *Degenhardt* got it right.

I. The CVRA

The federal Crime Victims' Rights Act (CVRA) replaced illusory victims' rights with enforceable rights. Enacted in 2004, the CVRA is a congressional effort to determine if statutory victims' rights, rather than constitutional rights, will be adequately enforced by courts.¹ The former illusory "rights" provided for discretionary, and therefore unenforceable, victims' rights.² The problematic nature of those rights came to a head in the effort of the Oklahoma City bombing victims to attend Timothy McVeigh's trial. In *United States v. McVeigh*, the Tenth Circuit informed the victims that they had no standing to enforce their right to attend the trial because neither the pre-CVRA Victims' Rights Act nor its legislative history contemplated a cause of action.³ The message of the *McVeigh* opinion is that if victims were to have standing Congress would have to explicitly provide it. With the CVRA, Congress has explicitly provided victims' rights accompanied by standing. As the CVRA legislative history provides, "This legislation is intended . . . to avoid federal appeals courts from determining, as the Tenth Circuit Court of Appeals did, that victims had no standing to seek review of their right to attend the trial under the former victims' law this bill replaces."⁴

To be sure, enforceable victims' rights represent a change in federal legal culture. Yet, in the modern American legal era, the idea that victim harm is legitimately recognized is neither novel nor exclusively legislative. In the states, victims' rights have been mainstream for some time. In the federal jurisdiction, Congress and the

Supreme Court have, respectively, recognized that victim harm and minimizing secondary harm are legitimate bases of both legislation and judicial opinions. In 1998, for example, the Supreme Court acknowledged the interests of victims in the timely execution of a sentence. In *Calderon v. Thompson*, the Court observed that to unsettle expectations in the execution of moral judgment "is to inflict a profound injury to the powerful and legitimate interests in punishing the guilty, *an interest shared by the State and victims of crime alike.*"⁵ The Court's language is an express recognition that the state's interest in timely punishment is not exclusive, but is shared with victims. Moreover, the Court's recognition is implicitly rooted in an understanding that victims' interests are "profound[ly] injured" when execution of a sentence is significantly delayed. Because no codified victims' right is cited in *Calderon*, the victim's interest is *judicially* acknowledged as "legitimate."⁶

The CVRA reveals that the Court's respect for victims' interests in *Calderon* was in accord with Congressional values. The *Calderon* language is in harmony with the CVRA victims' "right to proceedings free from unreasonable delay," as well as the rights to "fairness" and "dignity."⁷ Echoing *Calderon*, Senator Kyl, a principal drafter of the CVRA, observed: "Whatever peace of mind a victim might achieve after a crime is too often inexcusably postponed by unreasonable delays in the criminal case,"⁸ and "crime victims share an interest with the government in seeing that justice is done in a criminal case."⁹ Thus, the Court and Congress have arrived at the same truth—crime victims' interests matter.

The *Calderon* opinion came as no surprise. In *Payne v. Tennessee*, the Court recognized crime victims as unique individual human beings whose particularized harm could be the legitimate subject of victim impact statements.¹⁰ Moreover, three concurring Justices—Scalia, O'Connor, and Kennedy—acknowledged the ascendance of crime victims' interests in America:

Justice Marshall has also explained that "[t]he jurist concerned with public confidence in, and acceptance of the judicial system might well consider that, however admirable its resolute adherence to the law as it was, a



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decision contrary to the public sense of justice as it is, operates, so far as it is known, to diminish respect for the courts and for the law itself." . . . [T]hat a crime victim's unanticipated consequences must be deemed "irrelevant" to the sentence, . . . , conflicts with a public sense of justice keen enough that it has found voice in a nationwide victims' rights movement.¹¹

Fifteen years later, the Justices' concurrence in *Payne* understates the public sense of justice in favor of crime victims' rights. Over thirty state constitutions and all fifty state statutory schemes recognize victims' rights.¹² A review of electoral passage rates of state victims' rights constitutional amendments reveals that it is not unusual for them to pass by overwhelming margins.¹³ In 2004 the Senate moved the initial CVRA bill to the House.¹⁴ The Senate vote was 96 to 1 in favor of the bill.¹⁵ The House modified the bill slightly and voted passage 393 to 14.¹⁶ Then the CVRA passed the Senate by unanimous consent. If popular and Congressional votes are any measure, victims' rights are as American as apple pie.

The general public debate over whether victims' rights are a good idea is won. Now the issues are more specifically drawn. As Professor Tobolowsky accurately observed: "The relevant inquiry is no longer whether victims have participatory rights in the criminal justice process. . . . The relevant current focus [is] to ensure that these victim participatory rights are appropriate and meaningful in the context of the varied societal interests involved in criminal prosecutions."¹⁷

II. The Judicial Response to the CVRA Right to Be Heard

Given the culture shift in federal criminal procedure envisioned in the CVRA, it is not surprising to find a variety of federal judicial reactions. A few unfortunate federal opinions fumble the CVRA. The most arrogant language to date is that of the district court in *United States v. Holland*.¹⁸ In *Holland*, an offender filed a petition objecting to the restitution portion of the sentence. Relying on the Eleventh Circuit's decision in *United States v. Johnson*,¹⁹ 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 *Johnson*, by including among the victims' "rights," "the right to full and timely restitution as provided by law," the [victim] may, of course, mount an appeal from the order.²⁰

The victim's treatment in the callous language of *Holland* demonstrates why crime victims' rights against government are so popular.

Another opinion is ominous. In *In Re W. R. Huff Asset Management Company*²¹ (*Huff*), the Second Circuit declared in dicta that because most victims' rights have a "reasonable" requirement the judicial review standard of the CVRA is "abuse of discretion."²² Such a standard of

review is in direct contravention of Congressional intent; as Senator Kyl observed, "It is not the intent of this bill [the CVRA] that its significance be whittled down or marginalized by the courts."²³ As a practical matter, *Huff*'s abuse of discretion standard goes a long way toward turning the CVRA into the same kind of unenforceable rights scheme faced by the Oklahoma City bombing victims.

A. *Kenna* and *Degenhardt*

In contrast, two judges, Judge Kozinski, in *Kenna v. United States District Court*,²⁴ and Judge Cassell, in *United States v. Degenhardt*,²⁵ show a comprehensive understanding of crime victims' interests underlying the CVRA and, in particular, make an effort to parse the meaning of the term "reasonable." These judges properly interpret victims' rights "to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole hearing."²⁶ *United States v. Marcello*²⁷ is yet a third opinion on the right to be heard. In contrast, the *Marcello* opinion is a Midas-like effort to hold back the tide of the CVRA. The *Kenna* and *Degenhardt* opinions both view victims under the CVRA as participants. *Marcello* views victims as mere witnesses. Most likely as a result of this fundamental difference, the *Marcello* opinion turns to civil procedure case law. On the other hand, the *Kenna* and *Degenhardt* opinions see the participation of victims as a matter of criminal procedure. Given these dramatically different perspectives, it is not surprising that *Marcello* advocates the pre-victims' rights view that prosecutors alone are sufficient representatives of victims' interests, while *Kenna* and *Degenhardt* acknowledge that victims' are participants exercising rights under the CVRA independently of the parties. *Marcello* holds that district courts have discretion to receive victim input in writing, instead of orally, at a release hearing. *Kenna* and *Degenhardt* hold that victims have a right to personally speak at sentencing under the CVRA, when victims come to the sentencing hearing.

Kenna and *Degenhardt* are important not just because they correctly choose to access the legislative history (more about that later) but also because Judges Kozinski and Cassell "get it"—that federal law embraces the legitimate interests of crime victims. The rhetoric of the *Kenna* opinion fits the CVRA like a glove:

The criminal justice system has long functioned on the assumption that crime victims should behave like good Victorian children—seen but not heard. The Crime Victim's Rights Act sought to change this by making victims independent participants in the criminal justice system.²⁸

In two sentences, Judge Kozinski captured the essence of the change in legal culture mandated by Congress in the CVRA. The "long functioning assumption" of the federal criminal justice system is indeed undone by the CVRA, as victims are made independent participants. While victims as participants at sentencing (and other

hearings) represent a shift in the federal criminal process,²⁹ the shift comes as no surprise to those familiar with crime victim law in the states. In 2003, shortly before the enactment of the CVRA, my *Cornell Law Review* article surveyed all fifty states, revealing that all had laws allowing victim allocution at sentencing³⁰ and that crime victims being heard at sentencing “are no longer witnesses . . . but are participants.”³¹ In giving victims independent participant status, the CVRA has followed the states’ lead.

Judges typically write opinions exclusively for other judges and lawyers. However, portions of Judge Kozinski’s opinion in *Kenna*, and Judge Cassell’s opinion in *Degenhardt*, addressed the victim. The CVRA has short time limitations for judicial review for victims’ rights violations by mandamus. The Ninth Circuit went substantially beyond those time limits in *Kenna*. Judge Kozinski expressed regret:

We acknowledge our regrettable failure to consider the petition within the time limits of the statute, and apologize to the petitioner [victim] for this inexcusable delay. It may serve as a small comfort for petitioner to know that, largely because of this case, we are in the process of promulgating procedures for expeditious handling of CVRA mandamus petitions to ensure that we comply with the statutes’ strict time limits in future cases.³²

Judge Kozinski’s *Kenna* opinion displayed a dignified judicial grace toward the crime victim. This direct communication to the victim embodied the essence of another CVRA victims’ right, to be “treated with fairness and respect for their dignity . . . throughout the criminal process.” Judge Kozinski drafted *Kenna* in a manner that implicitly acknowledged that judicial *opinions* are also part of that criminal process in which “victims are to be treated with fairness and respect for their dignity.”

Judge Cassell’s *Degenhardt* opinion, written before and cited heavily in *Kenna*, also respected the dignity of crime victims. Judge Cassell noted that he could “[p]erhaps . . . duck the question [of victim oral allocution] because . . . [a] strong argument can be made that courts have discretion to hear at sentencing from any person who might provide useful information.”³³ Despite the availability of this discretion, Judge Cassell gave his reasons for proceeding to analyze the CVRA and hold that it gives victims the right of personal allocution:

But treating victim allocution as a mere discretionary matter for the courts would leave questions open for debate in future cases. . . . Crime victims deserve to know whether, like criminal defendants, they can always address the court at sentencing. The court will, therefore, give a firm answer to the question. The CVRA also suggests it is desirable to reach this question. The CVRA instructs that the court “shall ensure” that crime victims are afforded their rights under the act. It is therefore appropriate for this court to announce, as part of its efforts to ensure that victims

receive their rights, that the victims in this case must be allowed to address the court at sentencing.³⁴

Judge Cassell’s willingness to tackle the issue in *Degenhardt* was driven by his respect for crime victims, as required by the CVRA.³⁵ More specifically, he showed respect to victims by informing them of the extent of their rights at the sentencing hearing. Like the majority opinion in *Payne* that equated defendants and victims as individual human beings, Judge Cassell equated the victim’s interest in understanding the meaning of his right with defendants’ similar interests. Moreover, Judge Cassell’s opinion reflected an appreciation of his statutorily mandated judicial role under the CVRA. The CVRA charges federal judges with “ensur[ing] that the crime victim is afforded the rights” recognized by the statute.³⁶ The respect for the dignity of the crime victim demonstrated by Judges Kozinski and Cassell in the *Kenna* and *Degenhardt* opinions reflects the ultimate intent of the CVRA—“without the ability to enforce the rights in the criminal trial and appellate courts of this country any rights afforded are, at best, rhetoric. We are far past the point where lip service to victims’ rights is acceptable.”³⁷

The *Kenna* and *Degenhardt* opinions looked to the legislative history of the CVRA and concluded that victims’ right to reasonably be heard is a right to in-person allocution. *Marcello* did not rely on the legislative history and concluded just the opposite—that judicial discretion can prohibit personal allocution under the CVRA. Instead, *Marcello* allowed the district court, in its discretion, to restrict the victims’ right to be heard to a written statement. Access to the legislative history clears up any doubt that personal allocution was intended. The uncontradicted legislative history of the CVRA makes abundantly clear that:

It is not the intent of the phrase “to be reasonably heard” to provide any excuse for denying a victim the right to appear in person and directly address the court. Indeed the purpose of this section is to allow the victim to appear in person and directly address the court. This section would fail in its intent if courts determined that written, rather than oral, communication could generally satisfy this right. On the other hand the term “reasonably” is meant to allow for alternative methods of communicating a victim’s views to the court when the victim is unable to attend the proceeding.³⁸

As the judges in *Kenna*, *Degenhardt*, and *Marcello* framed the issue, a pivotal inquiry is whether there is sufficient ambiguity in the CVRA “right to be heard” to justify reference to this legislative history. Without elaboration, Judge Cassell concluded that because the right can “be read in various ways, courts appropriately may refer to a statute’s legislative history to resolve statutory ambiguity.”³⁹

Judge Kozinski examined the ambiguity in a bit more detail. First, he reviewed First Circuit precedent cited by the respondent District Court Judge as providing that “where the parties have a ‘fair opportunity to present rele-

vant facts and argument to the court,' a matter may be heard on the papers alone."⁴⁰ Furthermore, unlike the existing Federal Rule of Criminal Procedure 32, which gives victims the right "to speak," the CVRA used the term "heard." Arguably, the selection involved a shift toward written statements. For Judge Kozinski, contradicting this interpretation is the full language of the CVRA relative to the right to be heard:

However, the term "heard" does not appear in isolation in the CVRA. The full phrase we are construing is "[t]he right to be reasonably heard at any public proceeding in the district court involving . . . sentencing." . . . When Congress used the term "public" in this portion of the CVRA, however, it most likely meant to refer to proceedings in open court—much as the word is used in the phrase "public hearing." So read, the right to be "heard" at a public proceeding becomes synonymous with "speak" and we can draw no negative inference from the congressional choice of one term over another.⁴¹

Finding neither interpretation dispositively supported by the statutory text, the *Kenna* opinion referenced the legislative history, with predictable results: as demonstrated above, the legislative history does provide that victims have a right to personal allocution under their right to be heard.

Access to legislative history to determine the meaning of the CVRA is also appropriate for several reasons not clearly articulated in *Kenna* or *Degenhardt*. These reasons are discussed in the next Section.

B. *Marcello*

In *Marcello*, a case preceding both *Degenhardt* and *Kenna*, the victim sought to personally allocute at a pretrial release hearing involving organized crime figures.⁴² The statutory language is identical for the victims' right to be heard at sentencing, which was at issue in the *Kenna* and *Degenhardt* opinions, as it is for release hearings.⁴³ In *Marcello*, District Judge Zagel held that legislative history need not be referenced as the "plain language of the statute does not mandate oral presentation of the victim's statement"⁴⁴; while "the word 'heard' does imply oral presentation in ordinary English, it does not have that meaning in courts where it is a term of art."⁴⁵

The *Marcello* opinion relied centrally on *Aoude v. Mobil Oil Corp*⁴⁶ for the notion that "to be heard" is a legal term of art. *Aoude* was a civil case decided under the Federal Rules of Civil Procedure on cross motions for preliminary injunction in a service station operator's action against a franchisor.⁴⁷ The relevant portion of *Aoude* stated:

Because a final resolution of factual conflicts is reserved to time of trial . . . the judge must be accorded some leeway in truncating the proceedings. For these reasons we think in certain settings a matter can adequately be heard on the papers. . . . The test should be substantive: given the nature and circumstances of the

case, did the parties have a fair opportunity to present relevant facts and arguments of the court, and to counter the opponent's submissions? If the question is close and time permits, then doubt should be resolved in favor of taking evidence.⁴⁸

With its reliance on *Aoude*, the *Marcello* opinion becomes a fish out of water. The fundamental problem with *Marcello*'s reliance on *Aoude* is that *Aoude* is based on civil rules of procedure,⁴⁹ when victims exercising rights in their capacity as participants are actually engaged in criminal procedure. Judge Cassell, who is one of the nation's foremost scholars on crime victim law, highlights the criminal procedure nature of victims' rights in his recent law review article, which seeks to integrate the CVRA into the Federal Rules of Criminal Procedure.⁵⁰ Furthermore, in *Degenhardt*, Judge Cassell analogized the defendant's and state's right to speak at sentencing with the victims' right to be heard. Judge Kozinski also views victim participation as part of the criminal process. He opined in *Kenna*, "Our interpretation advances the purposes of the CVRA. The statute was enacted to make crime victims participants in the criminal justice system. Prosecutors and defendants already have the right to speak at sentencing. . . . our interpretation puts crime victims on the same footing."⁵¹ The same footing is in criminal, not civil, procedure. Moreover, existing rights of victim allocution are in Federal Rule of Criminal Procedure 32, not the Civil Rules. Finally, at Congress's direction, the CVRA is found at 18 U.S.C. § 3771, part and parcel of criminal codifications. For all these reasons, the reliance on civil procedure precedent in *Marcello* is misplaced. Turning back to the propriety of looking to legislative history, at a minimum, the quandary about the applicability of the civil rules to victims' rights creates sufficient ambiguity to justify reference to the legislative history of the CVRA.

Even if one could credibly rationalize the applicability of the civil rules, *Aoude* is inapposite. *Aoude* is inapposite because it is all about the presentation of relevant facts, in particular, whether a formal hearing is always needed for the presentation of those facts. Relying on this aspect of *Aoude*, Judge Zagel reasoned that the victim need not be heard in person because he has nothing relevant to say.⁵² However, the victim as participant is not a testifying witness presenting facts. Like the state and the defendant, as an independent participant, the victim similarly expresses his or her views about the proper release decision, plea, or sentence. Of course, these views are usually based on evidence, but the victim as participant is not presenting evidence or testifying as a witness. This was the position of the government in the *Marcello* case.⁵³ Judge Zagel dismissed it as "an extraordinary argument."⁵⁴ Nevertheless, the government was right. In exercising the CVRA right to be heard, whether or not the victim has relevant facts to present does not matter.

Because relevance, in this sense, is not required in the CVRA, the relevance rationale in *Aoude*, *Marcello*, and the district court in *Kenna* is undone. At the very least, ques-

tions about the relevance issue leave sufficient ambiguity to require reference to the legislative history. Moreover, deconstructing *Marcello* in this way leaves untrammelled the point in *Marcello* that “to be heard” in the English language implies to be orally heard. Thus, even if legislative history is not referenced, and assuming civil procedure is abandoned in favor of criminal procedure, the right result is that the phrase “to be heard” grants victims the right to personally allocute.

Federal victims’ rights did not come out of thin air. States were the experimental laboratories for victims’ rights long before the CVRA was enacted. If federal civil procedure case law such as *Aoude* is to be referenced, it is at least as appropriate to ascribe to the Congress awareness of these state victim laws. Tellingly, of the fifty state provisions concerning victims speaking at sentencing,⁵⁵ only two contain the requirement that the victims’ allocution be “relevant.”⁵⁶ However, the CVRA and the forty-eight other states have no such relevancy limitation.⁵⁷ If anything, the lack of an express relevancy limitation in the CVRA points to the inappropriateness of *Marcello*’s reliance on relevance as the gatekeeper of victims’ personal allocution. At the very least, the parallels between the CVRA and state law raise ambiguity that supports reference to legislative history.

In the states, written victim statements are often designed for particular contexts in which it is difficult for victims to attend. For example, in Utah, a statute provides that if the “victim of crime is a person in custody . . . the right to be heard shall be exercised by submitting a written statement to the court.”⁵⁸ Clearly, Utah’s “to be heard” language normally means oral allocution. The “reasonably be heard” language of the CVRA can readily be interpreted to have a similar function, that is, to provide for written statements only where the victim cannot practically be orally heard by the court. Again, sufficient ambiguity is created to reference legislative history. Unsurprisingly, when this history is referenced, as in *Degenhardt*, “the term ‘reasonably’ is interpreted to allow for alternative methods of communicating a victim’s views to the court when the victim is unable to attend the proceedings.”⁵⁹

Judge Zagel in *Marcello* clung to the pre-CVRA vision of the victim’s role as that of a fact witness whose presentation is controlled by the parties:

Most prosecutors believe they represent the viewpoint of the victim to the Court. Implicit in the recent legislative judgment of Congress [in the CVRA] is a suggestion that the federal prosecutors are not able to do this without giving the victim a personal right to speak. I hope that Congress did not conclude that the professional attorneys of the Department of Justice are unable to communicate the real plight of the victim using their own considerable skills as well as the power to call the victim to the stand—a power they have had and used for decades.⁶⁰

Judge Zagel’s “hope” was intentionally dashed by Congress on the rock of the CVRA. On the one hand, Congress

meant no disrespect to the Department of Justice and the fine lawyers who work there. On the other hand, the CVRA takes into account the reality that the government represents the people, not the individual victim. Victims are often under the illusion that prosecutors represent them, and are surprised when they find out it is not so. To be sure, where the government’s and victims’ interests are identical, fewer problems may exist. But where there is a conflict, it would be unethical for these government attorneys to put the individual victims’ interests above the interests of the people. Absent their own due process rights of notice and the ability to speak, victims can be left out in the cold.

Victim independence is not just a legislated value. Well before the CVRA, victim standing independent of government prosecutors has been defended by federal judges. The Fourth Circuit, in the analogous context of granting a rape victim standing to bring an interlocutory appeal of an adverse rape shield ruling, opined, “[N]o other party [than the victim] shares these interests to the extent that they might be viewed as a champion of the victim’s rights.”⁶¹ Moreover, the Congressional move from discretionary rights to enforceable rights eliminated the dysfunctions that accompany rights without remedies. These dysfunctions have been identified at length elsewhere,⁶² but in sum include the following: (1) no victim standing turns judicial hierarchy upside down by making trial courts, rather than appellate courts, the ultimate arbiters of rights; (2) no victim standing to enforce corrupts adversity by making the public prosecutor the only potential advocate for victims’ rights; (3) when only the state is allowed to defend victims’ rights, state and victim interests are improperly conflated; (4) where the state is the rights violator, it makes no sense for it to be the defender of rights; and (5) the state cannot be consistently relied upon to define victims’ rights given its conflicted priorities.

Moreover, Judge Zagel’s “hope” revealed a misunderstanding of the fundamental sources from which congressionally recognized victims’ interests spring. An awareness of victims’ rights begins with understanding that victims, as well as the state, are harmed by crime.⁶³ It is this harm, like harm to the state, that provides victims’ independent rights. Another important concept is that exiling victims from the criminal process inflicts a secondary victimization. Victims’ rights are founded on the idea that government processes should minimize secondary harm to victims from those processes. For example, under the CVRA and in many states, victims have the right to attend the trial and other public proceedings.⁶⁴ These rights exist because excluding victims from the trial regarding their victimization inflicts a secondary harm upon them. As Senator Kyl stated in the legislative history to the CVRA, “[C]rime victims share an interest in seeing that justice is done in a criminal case and this interests supports the idea that victims should not be excluded from public criminal proceedings.”⁶⁵

It is contrary to an understanding of secondary harm to interpret into the phrase “to be reasonably heard” the judi-

cial discretion to deny victims personal allocation. The most universal of victims' rights is the right "to speak" or "be heard."⁶⁶ The right itself has underlying rationales that urge an interpretation of the right to be heard that encompasses personal allocation. Judge Cassell in *Degenhardt* recognized the importance of this when he wrote that to offer "no more than an opportunity to be heard in writing . . . disregard[s] the rationales underlying victim allocation."⁶⁷

Judges Kozinski and Cassell had the right idea when they equated the victim's personal allocation with that of the government and the defendant. The right to be heard is completely independent of the government's and the defendant's statutory and constitutional rights to address the court at sentencing. This makes the crime victim an independent participant at sentencing, requiring no permission from the court and no request from the parties. Such a substantial change in legal culture, representing perhaps the single most significant innovation in criminal procedure in the last thirty years, should not be ignored when interpreting victims' rights. It stands to reason that victims, like the government and defendant, should be able to personally allocute at sentencing. After all, no one seriously thinks the government or the defendant should only submit sentencing statements in writing.

Moreover, as Judge Cassell urged,⁶⁸ the CVRA version of victims' rights replaced the discretionary rights that so disserved victims in the Oklahoma City bombing case. Comparing these discretionary rights with the CVRA rights that replaced them demonstrates that Congress disfavored discretionary judicial interference. This is further supported by the review mechanism of mandamus that is provided for rights violations.⁶⁹ The replacement of discretionary rights, as well as the availability of mandamus, at least provides sufficient ambiguity to require reference to legislative history.

As Judge Cassell mentioned in *Degenhardt*,⁷⁰ even before victims' rights, judges had discretion to allow a victim to be heard in whatever fashion the court deemed proper. To codify this discretion in the CVRA is unnecessary and also raises an ambiguity that reference to legislative history resolves.

If any ambiguity about the impropriety of judicial discretion under the CVRA remained after abandonment of the earlier discretionary rights scheme, the ambiguity should be resolved by reference to legislative history, which provides: "It is not the intent of this bill that its significance be whittled down or marginalized by the courts."⁷¹ For all these reasons, Judges Kozinski and Cassell were right to reference the legislative history to clarify Congressional intent underlying the CVRA.

III. Mandamus

The CVRA provides for review of rights violations by nondiscretionary mandamus.⁷² Judge Kozinski in *Kenna* appropriately fashioned mandamus relief under the CVRA. Detractors might say that the only proper method

of review from sentencing is appeal. Parties appeal sentences, the logic goes, so victims should, too. However, victims' rights are typically enforced by writ.⁷³ Where specific review is provided in the states, it is by writ review.⁷⁴ Where state courts have vacated sentencing provisions, they have done so by writ.⁷⁵ Writs are a conventional procedure for victim participants.

Moreover, there are practical reasons to elect a mandatory mandamus over an appeal. Foremost among these is efficiency. By electing mandamus, the victims' rights violation can be reviewed by a single circuit court of appeals judge, rather than a panel of three. The parties' interests and the victims' interests are satisfied in the quick turnaround such a procedure provides. Additional burdens to appellate courts are minimized. Moreover, mandamus procedure keeps the substantive limits of a victim's objection properly cabined. Victims can object to violations of their rights to be heard but cannot obtain review of an otherwise lawfully imposed sentence through appeal.

Admittedly, mandamus creates a problem. Mandamus is a civil remedy and, when brought against a judge for violating a victim's right to be heard at sentencing, does not traditionally include the defendant or the state. However, as long as a defendant's constitutional rights can also be accommodated, the efficiencies mandamus provides are greater than the problem created. In *Kenna*, Judge Kozinski wrote:

The problem [with the Appeals Court vacating the sentence] is that the CVRA gives district courts the authority to decide a motion to re-open in the first instance. Moreover, defendant . . . is not a party to this mandamus action, and re-opening his sentence in a proceeding where he did not participate may well violate his right to due process. It would be imprudent and perhaps unconstitutional for us to vacate [the] sentence without giving him an opportunity to respond. . . . In ruling on the motion, the district court must avoid upsetting constitutionally protected rights, but it must also be cognizant that the only way to give effect to *Kenna's* right to speak as guaranteed to him by the CVRA is to vacate the sentence and hold a new sentencing hearing.⁷⁶

Judge Kozinski's solution is fitting and proper. The issued writ of mandamus is fashioned to accommodate the criminal defendant's constitutional right to due process participation at the trial court level. This is in keeping with the maxim that a statute should be interpreted, wherever possible, to comport with constitutional requirements. Moreover, the writ to the district court allows that court to comply with the constitutional requirement to hear from the defendant.

IV. Conclusion

Enforceable victims' rights have come of age in the federal criminal justice system. Victims' rights exist for the same central reason individual rights are always needed—with-

out them, government will create processes blithely indifferent to the individual. This bygone era has been eclipsed by the leadership of Senators Kyl and Feinstein, resulting in Congress's CVRA, and the judicial interpretations of the CVRA by Judges Kozinski and Cassell.

With judicial leaders like Judges Cassell and Kozinski enforcing the Congressional intent of the CVRA, the CVRA becomes much, much more than either the "mushy, feel good statute" dismissively described in *Holland* or the "abuse of discretion" statute described in dicta in *Huff*. Given more judicial leadership, the illusory rights that so miserably failed the Oklahoma City bombing victims can be eclipsed. In the mold of *Marbury v. Madison*,⁷⁷ crime victims will have rights with remedies, and for them, too, this will be a government of laws, not of men. If, however, federal courts whittle away these rights, by introducing discretion or standards of review that effectively preclude enforcement, Congress will get back on track to send to the states for ratification an amendment granting victims' federal constitutional rights.

Notes

- ¹ 18 U.S.C. § 3771. The statute and constitutional amendment effort are discussed in Douglas E. Beloof, *The Third Wave of Victims' Rights: Standing Remedy and Review*, 2005 B.Y.U. L. REV. 255, 350-54 (2005).
- ² *Id.* at 274-311 (examining illusory rights and defining them as rights without standing, review, or remedy).
- ³ 106 F.3d 325, 328 (10th Cir. 1997).
- ⁴ Statement of Senator Kyl, 150 Cong. Rec. S10, 910-13 (daily ed. Oct. 9, 2004), *reprinted in*, Beloof, *supra* note 1, App. II, at 369).
- ⁵ 523 U.S. 538, 556 (1998) (quoting *Herrera v. Collins*, 506 U.S. 390, 421 (1993) (O'Connor, J. concurring)) (italics added).
- ⁶ State courts are increasingly referring to victims' interests independent of specific legislation. See Douglas E. Beloof, *Judicial Interpretation of Crime Victims' Interests* (forthcoming).
- ⁷ 18 U.S.C. § 3771(7)&(8).
- ⁸ Kyl, *supra* note 4; Beloof, *supra* note 1, at 366.
- ⁹ *Id.*
- ¹⁰ 501 U.S. 808, 809 (1991).
- ¹¹ *Id.* at 833 (brackets in the original). For more information on the ascendancy of victims' interests, see Douglas E. Beloof & Paul G. Cassell, *The Crime Victims' Right to Attend the Trial: The Re-emergent National Consensus*, 9 LEWIS & CLARK L. REV. 481 (2005).
- ¹² Douglas E. Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289, 328-29 App. A. (collecting rights from state jurisdictions).
- ¹³ Beloof, *supra* note 1, at 341 n.421 (collecting popular vote passage rates of state constitutional victims' rights amendments).
- ¹⁴ S. 2329, 108th Cong. (2d. Sess. 2004).
- ¹⁵ *Id.*
- ¹⁶ Justice for All Act of 2004, Pub. L. No. 108-405 (codified as amended in scattered sections of 42 U.S.C.). Perhaps, not all constituencies are as comfortable with victims' rights as the public and its representatives. In a noble effort to improve the academic dialogue, Professor Erin O'Hara has written, "Given that virtually all law professors were trained in criminal law classes that ignored victim involvement in the

criminal process, it is perhaps not surprising that it is considered heretical to suggest that direct [victim] participation might be warranted." Erin Ann O'Hara, *Victim Participation in the Criminal Process*, 8 BROOK. J.L. & POL'Y, 229-203 (2005). We academic heretics are in interesting company, ranging from the liberal Professor Laurence Tribe to the conservative Professor Paul Cassell. Collaborating in an op-ed piece, Judge Cassell and Tribe wrote: "These are the very kinds of rights with which our Constitution is typically and properly concerned—rights of individuals to participate in all those government processes that strongly affect their lives." Laurence H. Tribe & Paul G. Cassell, *Embed the Rights of Victims in the Constitution*, L.A. TIMES, July 6, 1998, *reprinted in*, DOUGLAS E. BELOOF ET AL., VICTIMS IN CRIMINAL PROCEDURE 776-8 (2d ed. 2005).

- ¹⁷ Peggy Tobolowsky, *Victim Participation in the Criminal Justice Process: Fifteen Years after the President's Task Force on Victims of Crime*, 25 NEW ENGLAND J. ON CRIM. & CIV. CONFINEMENT 21, 103 (1999) (brackets added).
- ¹⁸ 380 F. Supp. 2d 1264 (N.D. Ala. 2005).
- ¹⁹ 983 F.2d 216 (11th Cir. 1993).
- ²⁰ *Id.* at 1278.
- ²¹ 409 F.3d 555 (2d Cir. 2005).
- ²² *Id.* at 564.
- ²³ Kyl, *supra* note 4; Beloof, *supra* note 1, at 368-69.
- ²⁴ *Kenna v. United States Dist. Ct.*, 435 F.3d 1011 (9th Cir. 2006).
- ²⁵ *United States v. Degenhardt*, 405 F. Supp. 2d 1341 (D. Utah 2005).
- ²⁶ 18 U.S.C. § 3771(4).
- ²⁷ *United States v. Marcello*, 370 F. Supp. 2d 745 (N.D. Ill. 2005).
- ²⁸ *Kenna*, 435 F.3d at 1013.
- ²⁹ Beloof, *supra* note 12, at 328-29.
- ³⁰ Douglas E. Beloof, *Constitutional Implications of Crime Victims as Participants*, 88 CORNELL L. REV. 282, 299 (2003) (collecting in appendix victim allocution at sentencing laws from the fifty states).
- ³¹ *Id.* at 285.
- ³² *Kenna*, 435 F.3d at 1018.
- ³³ *Degenhardt*, 405 F. Supp. 2d at 1343.
- ³⁴ *Id.*
- ³⁵ This willingness also reflects his expertise in this area of law. Judge Cassell, in his prior professional life, represented some victims of the Oklahoma City bombing in the *McVeigh* case. He is also one of a handful of legal experts in the nation on the subject of crime victim law, having authored several articles on the subject and coauthored the law school casebook *Victims in Criminal Procedure*. DOUGLAS E. BELOOF ET AL., VICTIMS IN CRIMINAL PROCEDURE (2d ed. 2006) (I am a coauthor of this text). He is a valuable potential resource for other district court judges faced with victim law issues, whether under the CVRA or not.
- ³⁶ 18 U.S.C. § 3771(b) (brackets added).
- ³⁷ Kyl, *supra* note 4; Beloof, *supra* note 1, at 370.
- ³⁸ Kyl, *supra* note 4; Beloof, *supra* note 1, at 366-67.
- ³⁹ *Degenhardt*, 405 F. Supp. 2d at 1346 (citing *Patterson v. Schumante*, 504 U.S. 753, 761 (1992)).
- ⁴⁰ *Kenna*, 435 F.3d at 1014 (quoting *Fernandez v. Leonard*, 963 F.2d 459, 463 (1st Cir. 1992) (quoting *Aoude v. Mobil Oil Corp.*, 862 F.2d 890, 894 (1st Cir. 1988))).
- ⁴¹ *Id.* at 1014-15.
- ⁴² 370 F. Supp. 2d 745, 745 (N.D. Ill. 2005).
- ⁴³ *Supra* note 26 and accompanying text.
- ⁴⁴ 370 F. Supp. 2d at 748.
- ⁴⁵ *Id.* at 748.
- ⁴⁶ 862 F.2d 890 (1st Cir. 1988).
- ⁴⁷ *Id.* at 890-91.
- ⁴⁸ *Id.* at 894.

- ⁴⁹ *Id.* at 893.
- ⁵⁰ 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 (2005).
- ⁵¹ *Kenna*, 435 F.3d at 1016.
- ⁵² *Id.* at 747.
- ⁵³ *Marcello*, 370 F. Supp. 2d at 747-48.
- ⁵⁴ *Id.* at 748.
- ⁵⁵ *Beloof*, *supra* note 30, at 299 (collecting rights to allocute at sentencing in state jurisdictions).
- ⁵⁶ Colorado victims' rights provide that "any person who is a victim of a criminal . . . [s]hall have a right to be heard when relevant . . ." Colo. Const., art. 2, § 16a. The Florida Constitution provides, "Victims of crime . . . are entitled to be heard when relevant." Fla. Const. art. 1, § 16(b)(2002).
- ⁵⁷ *Beloof*, *supra* note 30, at 299 (collecting rights to allocute at sentencing in state jurisdictions).
- ⁵⁸ *State v. Casey*, 44 P.3d 756, 764 (Utah 2002).
- ⁵⁹ *Degenhardt*, 405 F. Supp. 2d at 1346.
- ⁶⁰ *Marcello*, 370 F. Supp. 2d at 747 n.3.
- ⁶¹ *Doe v. United States*, 666 F.2d 43, 46 (4th Cir. 1981) (brackets added).
- ⁶² *Beloof*, *supra* note 1, at 331-42.
- ⁶³ *Beloof*, *supra* note 12, at 293-98 (examining victim harm and secondary harm as the bases of victims' rights).
- ⁶⁴ *Beloof & Cassell*, *supra* note 11, at 534-38 (explaining bases for victims attendance).
- ⁶⁵ *Kyl*, *supra* note 4; *Beloof*, *supra* note 1, at 368-69.
- ⁶⁶ *Beloof*, *supra* note 30, at 299.
- ⁶⁷ *Degenhardt*, 405 F. Supp. 2d at 1345.
- ⁶⁸ *Id.* at 1346-47.
- ⁶⁹ 18 U.S.C. § 3771(d)(3).
- ⁷⁰ *Degenhardt*, 405 F. Supp. 2d at 1343.
- ⁷¹ *Kyl*, *supra* note 4; *Beloof*, *supra* note 1, at 368-69.
- ⁷² 18 U.S.C. § 3771(d)(3).
- ⁷³ *Beloof*, *supra* note 1, at 345-46 (identifying jurisdictions using writs).
- ⁷⁴ *Id.*
- ⁷⁵ *Id.* at 304-305.
- ⁷⁶ *Kenna*, 435 F.3d at 1017-18.
- ⁷⁷ 5 U.S. (1 Cranch) 137, 163 (1803).