WHERE WE ARE WITH VICTIMS’ ENFORCEABLE RIGHTS

Jennifer Bishop-Jenkins
Director, Marsy’s Law for Illinois
Jennifer@MarsysLaw.us

Bill Jenkins
Author, What To Do When The Police Leave: A Guide To The First Days of Traumatic Loss
WBJPress@aol.com
Marsy’s Law For All
Equal Rights for Crime Victims
A BRIEF HISTORY OF VICTIMS RIGHTS

- **2000 B.C.E. Code of Hammurabi**
  - Earliest written codification of laws & first “victims rights” statutes
  - Emphasized protection of weaker from the stronger
  - Asserted power of the state to enforce laws and justice
  - Restoration of equity between victim and offender
  - Noted for its emphasis on the rights of crime victim

- **Roman Law – The Twelve Tables**
  - First introduced the concept of Public & Private Law: the beginnings of Civil and Criminal law

- **The Bible – The Book of Deuteronomy**
  - First mention of Restitution to victims since Code of Hammurabi

- **English Common Law – The Middle Ages**
  - Established legal precedence and a public legal record

- **The Magna Carta of 1215**
  - The universality of rights to all citizens
“Like their English counterparts, the American Attorneys General could represent the Crown in both civil and criminal cases but left criminal prosecution largely to the victim.”
United States of America
1789

- Very few professional prosecutors
- Many times there were no courthouses. Judges rode their “circuit” from town to town to hold court.
Victims in the role of Prosecutor

- **Victims were the prosecutors in most cases.** There was no question of their participation in their own cases.

- **At the time the Constitution was drafted,** it was standard practice for victims—not public prosecutors—to prosecute criminal cases.

- **Because victims were parties to most criminal cases,** they enjoyed the basic rights to notice, to be present, and be heard. Therefore, it is not surprising that the Constitution does not mention victims.
Every Right Must Have A Remedy

Without Enforceability, there is NO Right.
Crime victims were no longer central players in most jurisdictions. Criminal justice system becomes professionalized.

A public prosecution system became the norm.

The victims’ role was gradually reduced until they essentially had no formal legal status beyond that of witness or piece of evidence.
By the latter half of the 20th Century...

- There was usually no notice,
- no protection or assurance that a victim would be heard in a case or in sentencing,
- no restitution, no victim impact statements,
- no right to consult with prosecutors, etc.
The Modern Movement for Victims’ Rights
Key Federal Victims’ Rights Legislation since 1974

- 1974  Child Abuse Prevention and Treatment Act
- 1980  Parental Kidnapping Prevention Act
- 1982  Victim and Witness Protection Act
- 1982  Missing Children’s Act
- 1984  Victims of Crime Act (VOCA)
- 1984  Justice Assistance Act
- 1984  Missing Children’s Assistance Act
- 1984  Family Violence Prevention and Services Act
- 1985  Children’s Justice Act
- 1988  Drunk Driving Prevention Act
- 1990  Hate Crime Statistics Act
- 1990  Victims of Child Abuse Act
- 1990  Victims’ Rights and Restitution Act
- 1990  National Child Search Assistance Act
- 1992  Battered Women’s Testimony Act
- 1993  Child Sexual Abuse Registry Act
1994    Violent Crime Control and Law Enforcement Act
1994    Violence against Women act
1996    Community Notification Act ("Megan’s Law")
1996    Antiterrorism and Effective Death Penalty Act
1996    Mandatory Victims’ Restitution Act
1997    Victims’ Rights Clarification Act
1998    Crime Victims with Disabilities Awareness Act
1998    Identity Theft and Deterrence Act
2000    Trafficking Victims Protection Act
2001    Air Transportation Safety and System Stabilization Act
        (established September 11th Victim Compensation Fund)
2003    PROTECT Act ("Amber Alert" Law)
2003    Prison Rape Elimination Act
2003    Fair and Accurate Credit Transactions Act
2004    CVRA: VOCA expanded, made enforceable. Justice for All Act
2006    Adam Walsh Child Protection and Safety Act
Are statutory rights enough?

Statutes are always lesser laws than constitutional laws.

- Statutory rights can be more easily amended and always have lower legal status than constitutional language.
- The accused has constitutional rights and therefore more rights in court than the victim.
Constitutional Rights of the Accused

- **Due Process - 5th and 14th Amendment**
  - The State may not deprive a person of “life, liberty, or property, without due process of law.”

- **Right to Counsel - 6th Amendment**
  - A defendant in a criminal case has a right to representation by an attorney. This requires the State to provide an attorney for people who cannot afford one, and means that police may not interrogate a person who has requested an attorney.

- **Speedy Trial - 6th Amendment**
  - The Sixth Amendment provides a right to a “speedy and public trial,” meaning the State cannot drag a case out for an unreasonable length of time, nor try the case entirely behind closed doors.
- **Jury Trial - 6th Amendment**
  - Defendants in a criminal case have a right to have their case decided by an “impartial jury.”

- **Confrontation of Witnesses - 6th Amendment**
  - A criminal defendant has the right “to be confronted with the witnesses against him” under the Sixth Amendment. Typically this means that the State must present all evidence, including testimony of witnesses, it is using to prove guilt in open court, and to give the defendant the opportunity to cross-examine witnesses and challenge the evidence.

- **Suppression of Evidence - 4th Amendment**
  - The Fourth Amendment prohibits “unreasonable searches and seizures” conducted by police without a warrant. It also allows a defendant to move for the court to suppress evidence obtained by the State in violation of this provision.
- **Self-Incrimination - 5th Amendment**
  - No one may be compelled to give testimony against themselves. The State cannot use a defendant’s refusal to testify as evidence of guilt.

- **Double Jeopardy - 5th Amendment**
  - If a judge or jury acquits a defendant, the State generally cannot prosecute the defendant again for the same crime.

- **Excessive Bail or Fines - 8th Amendment**
  - Requires that the State prescribe fines and other punishments that are reasonably proportional to the crime. It also prohibits courts from imposing unreasonable or disproportionate bail for people in police custody.

- **Cruel and Unusual Punishment - 8th Amendment**
  - Punishments that might be considered “cruel and unusual” could include lengthy prison terms for nonviolent offenses, or the death penalty for any crime other than capital murder.
The Need for Equal Constitutional Standing
1982

Task force appointed by President Ronald Reagan recommended that the Sixth Amendment of the U.S. Constitution be augmented to include the rights of crime victims.

"... the victim, in every criminal prosecution, shall have the right to be present and to be heard at all critical stages of judicial proceedings."
Professor Doug Beloof, Law Professor, Lewis and Clark University, Author of award-winning case book *Victims in Criminal Procedure*, writes in 2005:

**The Third Wave of Crime Victims’ Rights:**

Wave One: States pass victims’ rights statutes.
Wave Two: States amend their constitutions for victims’ rights.
Wave Three: Enforceability: Standing, Remedy, and Review
National Victims’ Constitutional Amendment Passage
Section 1. The following rights of a crime victim, being capable of protection without denying the constitutional rights of the accused, shall not be denied or abridged by the United States or any State. The crime victim shall have the rights to reasonable notice of, and shall not be excluded from, public proceedings relating to the offense, to be heard at any release, plea, sentencing, or other proceeding involving any right established by this article, to proceedings free from unreasonable delay, to reasonable notice of the release or escape of the accused, to due consideration of the crime victim's safety, dignity, and privacy, and to restitution. The crime victim or the crime victim's lawful representative has standing to assert and enforce these rights. Nothing in this article provides grounds for a new trial or any claim for damages. Review of the denial of any right established herein, which may include interlocutory relief, shall be subject to the standards of ordinary appellate review.

Section 2. For purposes of this article, a crime victim includes any person against whom the criminal offense is committed or who is directly and proximately harmed by the commission of an act, which, if committed by a competent adult, would constitute a crime.

SECTION 3. This article shall be inoperative unless it has been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within 14 years after the date of its submission to the States by the Congress. This article shall take effect on the 180th day after the date of its ratification.
What is Marsy's Law?
38 states currently have some constitutional protection for victims of violent crime.
65,200,000 Americans now live in a state with Marsy’s Law in their state Constitutions – one in five Americans.

If we are successful with our anticipated 2018 November Ballot campaigns, the number of Americans with Marsy’s Law in their state constitution will jump to 118,670,000 – well over one in three Americans!

If we are successful in qualifying and passing Marsy’s Law in just the rest of our currently active states, the number of Americans with Marsy’s Law in their state constitution leaps to 144,820,000 – about 45% of the American population.
Without standing, a crime victim’s “rights” are simply illusionary.

- “Standing is the ability of victims to defend a denial of their rights in appellate courts.”

- If a crime victim does not have standing, they are left without remedy if their rights are violated.

http://digitalcommons.law.byu.edu/cgi/viewcontent.cgi?article=2230&context=lawreview
If a victim has standing, appellate courts are the ultimate arbiters of the meaning of constitutional rights.

If a crime victim has trial-level standing only and no appellate court standing, they have no real rights.
Without standing, trial courts can interpret or determine constitutional rights without fear of reversal from a higher court.

This will result in different rights for different victims based on which trial judge presides over the case.
Marsy’s law would amend a State Constitution to provide:

- Constitutional right and standing.
- Provides notification of rights and of court proceedings.
- Guarantees victims a voice in the criminal justice process.
- Full and timely restitution.
Marsy’s Law for All fulfills a state’s moral obligation to require fair and compassionate treatment to victims of violent crimes and their families.
Be treated with courtesy, fairness and respect for their dignity and privacy throughout the criminal justice proceedings.

Receive information about their rights and the services available to crime victims.

Receive timely notification of proceedings and other major developments in their case.
The Right To...

- Receive timely notification of changes to the offender’s custodial status.
- Be present at court proceedings.
- Provide input to the prosecutor before the plea agreement is finalized.
The Right To...

- Be heard at plea or sentencing proceedings or any process that may result in the offender’s release.
- Restitution as provided by law.
Myth: 
Forcing prosecutors to get input from the victim will allow the victim to interfere with the prosecutor’s case.

Fact: 
Marsy’s Law gives the victim a voice, not a veto. The prosecutor’s role in a criminal case is unchanged by Marsy’s Law.
Myth:
There will be a flood of filings to enforce rights.

Fact:
More than 30 other states have victim rights constitutional amendments and none have reported a significant number of filings. Courts and prosecutors respect the importance of constitutional rights. As long as courts and prosecutors respect victims’ rights there will not be a flood of filings. This is why having constitutional victims’ rights is vital.
Myth:
Marsy’s Law will make the victim a party to the criminal case.

Fact:
The victim’s role in the criminal case will not change. The victim is not a party to the criminal case. The prosecutor remains in control over the case and makes all the decisions in the prosecution of the crime. Marsy’s Law recognizes that the victim is the individual most affected by the crime and interested in the outcome of the prosecution.
Myth:
States provides victims with a statutory crime victim bill of rights and that should be enough.

Fact:
Statutory rights are insufficient and illusory because they are not enforced. Victims deserve to have constitutional protections, just as those who are accused and convicted.

The Bill of Rights as adopted in 1789-1791 assumed that victims were already participants in their own cases.
Myth:
Victim’s rights will trump defendant’s rights.

Fact:
Victims’ rights will not trump defendants’ rights. Victims’ constitutional rights create balance with defendant’s constitutional rights. The United States government is founded on a system of checks and balances. The courts have the ability to balance rights if a conflict arises between a victim’s right and a defendant’s right.

Those who see victims’ rights as somehow adversarial to the rights of the accused are just wrong.
Myth:
Forcing prosecutors to speak to the victims before finalizing a plea deal, giving victims’ notice of court hearings and providing victims with the right to provide input at hearings will cause long costly delays in the prosecution.

Fact:
More than 35 states have constitutional victims’ rights and their criminal courts have not been derailed. Speaking to a victim before finalizing a deal or a bail hearing is just common sense. The victim may have information that may change the court’s decision. Court hearings are normally scheduled days, weeks and months in advance. This is sufficient time to contact victims.
Myth:
Allowing the victim to have rights will be costly.

Fact:
Cost should not prevent us from doing what is right. Most prosecutors’ offices already have Victim Witness Counselors who provide victims with notice and information. There will be administrative costs (court time, etc.) if a victim is forced to seek enforcement of his or her rights. The way to eliminate this cost is to ensure that the victims’ rights are not violated. Having the means to correct an oversight is worth a few minutes of a court’s time.

Court cases can run more smoothly with fewer problems when victims and witnesses participate early on in the process.
"When someone is a victim, he or she should be at the center of the criminal justice process, not on the outside looking in."

"Participation in all forms of government is the essence of democracy. Victims should be guaranteed the right to participate in proceedings related to crimes committed against them."

"People accused of crimes have explicit constitutional rights. Ordinary citizens have a constitutional right to participate in criminal trials by serving on a jury. The press has a constitutional right to attend trials. All of this is as it should be."

"It is only the victims of crime who have no constitutional right to participate, and that is not the way it should be."

President William Jefferson Clinton, Remarks at Announcement of Victims' Rights Constitutional Amendment June 25, 1996
VICTIMS RIGHTS
LEGAL EXPERTS & RESOURCES

Paul Cassell, Utah
Doug Beloof, Oregon
Meg Garvin, Oregon, National Crime Victim Law Institute (NCVLI)
  www.victimlaw.org
Steve Twist, Arizona
Russell Butler, Maryland
Steve Derene, WI, Exec Dir VOCA Fund Administrators
Gloria Allred, NY & CA
Nina Salarno Ashford, California
Cindy Hora, Illinois
Lyn Schollettt, New Hampshire
Mai Fernandez, Jeff Dion, Susan Howley – NCVC, Washington DC
Michael Andrews – DC Crime Victims Resource Center
Lawrence Tribe, Harvard Law, “In Support of a Victims Rights Constitutional Amendment.”
  . . .and . . . NAVRA
Marsy’s Law for All

www.MarsysLaw.us
WHERE WE ARE WITH VICTIMS’ ENFORCEABLE RIGHTS

Jennifer Bishop-Jenkins
Director, Marsy’s Law for Illinois
Jennifer@MarsysLaw.us

Bill Jenkins
Author, What To Do When The Police Leave: A Guide To The First Days of Traumatic Loss
WBJPress@aol.com