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Finally Getting Victims Their Due:
A Process Evaluation of the NCVLI Victims'
Rights Clinics

Abstract

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August 29, 2009

This report describes a process evaluation conducted by the RAND Corporation and National Center for Victims of Crime of the National Crime Victim Law Institute (NCVLI) state and federal victims' rights clinics. The clinics were conceived as a response to the fact that, in spite of burgeoning victims' rights legislation in all states, many victims still are not receiving the rights they are entitled to under law. The NCVLI clinics were intended to promote awareness, education, and enforcement of crime victims' rights in the criminal justice system. In establishing the victims' rights clinics, NCVLI sought to change the legal culture with respect to observance of victims' rights. The vehicle for doing this was providing direct representation to individual victims in criminal court. By giving victims attorneys, NCVLI hoped that it could increase the observance of rights in those particular cases. But it also hoped that the presence of victim attorneys in some cases and trainings held for court officials would result in an increased attention to victims' rights by prosecutors, judges, and police officers in all cases – not just in the cases where victims were represented by attorneys.

The process evaluation placed a significant focus on how the clinics approach their work. We noted that the clinics ranged in their organizational aegis from being housed within victim services programs to being located within a law school to being one component within a full service law firm, and that these arrangements had implications for how the clinics conducted their work. We noted that every clinic has made an effort to train pro bono attorneys and refer cases to them. However, the experience has not always been positive because pro bono attorneys often do not have the knowledge, commitment, or availability to be of significant help. We noted that, while their primary focus has always been on addressing violations of clients' legal rights, most of the clinics also have developed a focus that includes addressing all of victims' crime-related needs, either directly or through referrals to other service providers. We noted that there is a large disparity between clinics in the number of cases opened annually and the geographic coverage of each across the states in which they are located.

The report finds that clinics have dealt with a range of victims' rights issues in trial courts including the right to be present, right to be consulted about plea offers, right to make an impact statement, right to be notified of changes in defendants' detention status, right to restitution, right to privacy, and so forth. However, the principal issue has been victim standing before the court to enforce their rights. In some states, standing has been acknowledged, at least in limited ways. In other states, clinics have made or are making steps toward such recognition, or have been successful in representing victims without the issue being directly confronted. In one state, the ability of attorneys to represent victims in criminal court is currently in serious question. The report also discusses how some clinics have won significant gains at the appellate and federal court levels concerning victim standing, the rights to be consulted and heard, and the right to privacy.

Based on the information we gathered during the course of the process evaluation, we believe that the state clinics are beginning to fulfill the intentions of their architects and funders. All of the clinics have pushed the envelope of victims' rights in their state courts. Some have won significant victories in gaining standing for victims and expanding the definition of particular rights. Others are enjoined in the battle. But all have raised awareness of victims' rights with prosecutors, judges, defense attorneys, and police officials.

Securing Rights for Victims:
A Process Evaluation of the National Crime Victim
Law Institute's Victims' Rights Clinics

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I. INTRODUCTION

This report describes a process evaluation conducted by the RAND Corporation and National Center for Victims of Crime of the National Crime Victim Law Institute (NCVLI) state and federal victims' rights clinics. The clinics were conceived as a response to the fact that, in spite of burgeoning victims' rights legislation in all states, many victims still are not receiving the rights they are entitled to under law. The NCVLI clinics were intended to promote awareness, education, and enforcement of crime victims' rights in the criminal justice system.

NIJ's evaluation plan proposed a two part effort: A process evaluation that would be descriptive in nature, followed by an impact evaluation that would attempt to determine measurable benefits of the clinics. We interpreted this to mean an initial phase of work that would feature case studies of NCVLI and the eight clinics.¹ The case studies of NCVLI and each of the eight clinics, presented in this report, examine the implementation process, the environments in which the clinics operate, problems encountered, and solutions. This report synthesizes commonalities of experiences among the eight clinics as well as differences in their approaches and environments. During the course of the process evaluation, we also constructed a logic model to describe the goals and measurable outcomes of the clinic's work, which was vetted with NCVLI. In the second phase of work, we will conduct theory-based evaluations of the effects that the clinics have had on enforcement of victims' rights in the criminal justice system in the states and localities where they are based. This phase of work will be based on the clinic logic model refined during the earlier phase of work. The impact evaluation will assess the impact of the clinics on the individual level, the system level, and the community level.

Topics Addressed in the Process Evaluation

The process evaluation addresses a number of NIJ/OVC interests. First, an assessment of implementation problems faced by the clinics: How were they accepted by the state criminal justice community? How did they publicize their existence? From what sources did they get case referrals, and did the referral sources change over time? Second, an examination of ways that the clinics have been able to leverage federal resources, particularly through the use of law students and pro bono attorneys: How successful have efforts been to recruit low cost or free sources of labor? Is training that students or pro bono attorneys receive on victims' rights issues useful when they go on to other endeavors? Third, an evaluation of how successful clinics have been in changing the legal landscape: What kinds of appellate decisions have they been involved in as a party or in an *amicus curiae* ("friend of the court") capacity, and what is the significance of the cases? Have appellate losses led to changes in victims' rights statutes? Have there been changes to court rules that promote enforcement of victims' rights? A list of topics covered in the process evaluation is contained in Table 1 below.

¹ The original number was nine clinics, counting Arizona's state and federal work as two separate clinics. However, the state and federal sides of Arizona's Crime Victim Legal Assistance Project have since merged into a single clinic, hence this report deals with eight clinics.

Table 1: Process Evaluation Issues

Information about Clinic Activities

- Major clinic activities and approximate proportion of staff time devoted to each
- Changes over time in clinic goals and activities
- Number of individual clients represented, number of motions filed, numbers of court appearances on behalf of clients, number of trainings by clinic staff

Criminal Justice Context

- Geographic dispersion of courts in which clinic staff have represented clients
- Extent to which victims' rights statutes facilitate or hinder the work of the clinic
- Jurisdiction in which clinic has done the most work (target jurisdiction)
- Receptivity of judges, prosecutors to victims' rights and work of the clinic
- Principal victim service organizations; nature of cooperation with clinic

Pro Bono Staff

- How many pro bono attorneys has the clinic worked with?
- How successful have these arrangements been?

Recruiting and Screening Mechanism for Selecting Clients

- Eligibility criteria for representing victims (eg., types of cases, types of issues)
- Sources through which clients are referred and any changes over time
- Number of cases identified or referrals determined to be eligible for clinic services; numbers accepted
- Numbers of cases determined to be eligible that were not accepted for assistance; reasons for not taking cases
- Outreach mechanisms clinic staff use to identify and reach victims in need of assistance; any efforts made to reach underserved populations

Information for Impact Study

- What does clinic staff believe are the best ways to assess the impact of their clinic? What data do they have to evaluate these program effects? How do they define success?
- Ways in which the clinic has changed the climate for victims' rights in state
- Any unintended consequences (positive or negative) of the clinic
- Would they be willing to participate in an impact study?

Suggestions to Improve Clinic Operations

- Obstacles faced in meeting clinic goals; steps taken to overcome those obstacles
- Suggestions to improve the effectiveness of the local clinic or effectiveness of NCLVI program generally

Evaluation Methods

Much of the information for the process evaluation came from interviews conducted with clinic staff, criminal justice officials familiar with the work of the clinics, and from clients of the clinics. Initially, we sought and received approval for interview procedures, informed consent statements, and data safeguarding procedures from RAND's Institutional Review Board (IRB). In all interviews conducted, one project staff person had principal responsibility for asking questions from a list of topics and another staff person took written notes.

In order to gain information on the above topics to construct the series of case studies, we carried out site visits to each of the clinics. During the multi-day visits, our principal source of information came from interviews with the clinic director and staff. Clinic directors and their staff were all generous with their time and, we believe, forthcoming about their experiences and problems. A list of topics covered in the interviews is contained in Appendix C.

Each of the site visits entailed one or more focus groups with victims who were past or present clients of the clinic. We requested that each clinic director attempt to recruit 6-8 of their clients to participate in a ninety-minute focus group. All were able to gather together a group of victims who provided a client perspective on the clinics and helped us further refine questions and measures for the subsequent impact study. Illustrative focus group topics included:

- How did they learn about the clinic?
- What types of services were provided by clinic staff?
- How did the services they received help them?
- Were they satisfied with the people who provided the services?
- What suggestions do they have for improving the criminal justice process?

Victims received a stipend of \$25 to cover the cost of travel to the 1-1/2 hour meeting. (Some participants traveled as long as two hours to participate.) We did not record names of the participants and notes of the meetings do not contain identifiers. Refer to Appendix C for a complete list of topics covered in the focus groups.

It was our aim to collect from each clinic information on the number of victims represented, types of cases and victims' rights issues the clinics were involved in, county and court in which cases originated, clinic actions on behalf of victims and the results of those actions, and demographics of victims represented. Because of confidentiality concerns, it was not possible for the research staff to abstract information from the files. Instead, staff at each clinic agreed to gather the information for us according to our instructions. This raises some concerns about the consistency of how information was categorized, especially information on the types of rights issues in clinic cases. If a victim failed to be consulted about a potential plea agreement, for example, one clinic may have coded the rights issue as failure to be consulted about a plea agreement, while another may have coded it as a violation of the victim's right to be notified and present.

Moreover, it turned out that clinics collected little or no demographic information on clients. We believed (and still do) that one of the important questions about the clinics is whom they are representing. There is reason to suspect that the relatively few victims who become clients (of

the large number who probably have their rights violated in one way or another) tend to be especially vocal and aggressive – and probably better educated and relatively well-off. One of the questions that we would have liked to address in the process evaluation is what the demographic profile of clients looks like. Although information was not available during the process evaluation period to answer this question, NCVLI did instruct the clinics to begin to gather basic demographic information on new cases in the fall of 2008. Within a few months, there should be enough new cases in each site to begin to create profiles of each clinic's clientele.

While we were on site, we developed with each clinic director a list of positional informants -- people in the criminal justice community who were knowledgeable about their work. We requested that the list include both individuals supportive of the clinic's work and those who had been critics. Interviewing these individuals – judges, prosecutors, victim advocates, and defense attorneys – was an important way to corroborate or challenge what we learned from the clinic staff (who understandably want to portray their program in the best light). We aimed to interview two individuals within each of the aforementioned four groups of criminal justice professionals and, in most instances, we met that goal. The 15-20 minute interviews with positional informants asked about respondents' opinions on the need for the clinics, on the work that the clinics are doing, and on the extent to which criminal justice officials support victims' rights. Because the individuals interviewed were hand-picked by the clinic directors, we cannot know whether the samples were representative of professional opinions of the clinics. We do know, however, that we did encounter in the interviews statements that were critical of aspects of the clinics' work. Refer to Appendix C for topics covered in interviews with positional informants.

Research project attorneys prepared a compendium of victims' rights legislation in the states of each clinic visited. They also summarized any appellate cases and published opinions about victims' rights. We attempted to ascertain from the clinics which of these legislative and case law developments the clinic staff had been involved in.

For each site visited, we prepared a report describing the operations of the clinic and what we learned from all components of the site visit. The site reports described the legal context within which the clinics work, clinic operations, obstacles encountered and responses to those obstacles, and measures that would best assess clinic impact.

Finally, we conducted two visits to NCVLI offices in Portland, once at the start of the process evaluation and another after the clinic site visits had been completed. The interviews with NCVLI's director gathered information about the motivation and history of the clinic program and goals for the program. We also used the visits to gain feedback on our impressions and conclusions from the site visits.

Layout of the Report

This body of the report summarizes what we have learned during the course of the process evaluation. Following this introduction, the second section discusses the development of victims' rights in America. The third section describes NCVLI and the goals of the clinics. The

fourth section summarizes changes to the legal landscape for victims' rights in the states where the clinics are located, both through appellate cases and through changes in victims' rights statutes, some of which clinic cases have instigated. The fifth section describes clinic operations – the types of business models adopted by the clinics, their experience with pro bono attorneys and student help, and their approach to serving their clientele. The sixth section presents data gathered from clinic case files on referral sources, caseload size and composition, types of rights issues dealt with by the clinics, and geographic diversity of the clinics' caseloads. The seventh and eighth sections deal with clinic work at the trial court and appellate levels, respectively. The ninth section discusses how the clinics have dealt with implementation challenges. Finally, the conclusion draws lessons learned from the process evaluation.

The report contains two sizeable appendices. Appendix A contains the individual site reports for each of the clinics visited. The individual site reports provide more detail from each site on issues discussed in the body of the report. Appendix B presents a detailed description of victims' rights legislation and case law in the eight NCVLI clinic states, which is summarized in the fourth section of the body of the report.

II. THE DEVELOPMENT OF CRIME VICTIMS' RIGHTS IN AMERICA

Legal rights for crime victims have been developed and expanded over the past three decades. These rights have transformed the relationship between the crime victim and the criminal justice system, as victims gained the rights to be informed, present, and heard during the criminal and juvenile justice processes. This change has been driven largely by crime victims and survivors, with the support of advocacy organizations, leaders within the criminal justice field, and policymakers.

The adoption of victims' rights accelerated in the early 1980s following the release of the Final Report of President Reagan's Task Force on Victims of Crime. That Task Force had been assembled to investigate the treatment of victims by the criminal justice system. Its 1982 Final Report defined an agenda for bringing a balance between the rights of defendants and victims. It called for increased participation by victims throughout criminal justice proceedings, and restitution in all cases in which victims suffer financial loss.²

At the same time the Task Force was undertaking its work, Congress was developing legislation to provide protections for victims at the federal level. The 1982 Victim Witness Protection Act authorized victim restitution and the use of victim impact statements at sentencing in federal cases.³ It also required the Attorney General to issue guidelines for the development of further policies regarding victims and witnesses of crimes. Soon after, the 1984 Victims of Crime Act (VOCA) implemented more of the Task Force's recommendations on victim compensation and assistance. This second act by Congress redistributed monies levied from federal offenders to states, funding local aid to victims.⁴

In 1990, Congress passed the Victims' Rights and Restitution Act, giving crime victims in federal cases the right to notification of court proceedings and the right to attend them, the right to notice of changes in a defendant's detention status, the right to consult with prosecutors, and the right to protection against offender aggression.⁵

In 1994, the Violent Crime Control and Law Enforcement Act gave victims in federal cases the right to speak at sentencing hearings, made restitution mandatory in sexual assault cases, and expanded funding for local victim services.⁶ Rights for federal crime victims were further strengthened as part of the Antiterrorism and Effective Death Penalty Act of 1996, and the Victims' Rights Clarification Act of 1997.⁷

² Presidential Task Force on Victims of Crime, *Final Report* (Washington, DC: Government Printing Office, 1982).

³ 96 Stat. 1248 (1982).

⁴ 98 Stat. 2170 (1984). "Constitutionalizing Crime Victims' rights," *Criminal Law Bulletin* 33, No. 5 (1997): 395-423, 398; Barbara E. Smith and Susan W. Hillenbrand, "Making Victims Whole Again: Restitution, Victim-Offender Reconciliation Programs, and Compensation," in *Victims of Crime*, 2nd edition, eds. Robert C. Davis, Arthur Lurigio, and Wesley Skogan (Thousand Oaks: Sage Publications, 1999), 247-249.

⁵ 104 Stat. 4820 (1990).

⁶ 108 Stat. 1796 (1994).

⁷ 110 Stat. 1214(1996); 111 Stat. 12 (1997).

Then in 2004, Congress passed the Crime Victims' Rights Act (CVRA) as part of the Justice for All Act of 2004.⁸ The CVRA generally strengthened the rights of federal crime victims and transferred them from Title 42, the Public Welfare Code, to Title 18, the Criminal Code, elevating their profile within the federal justice system. The rights protected under the CVRA include the right to be reasonably protected from the accused; the right to be informed of criminal proceedings and the custody status of the defendant; the right to be present in the courtroom; the right to be heard at proceedings involving release, plea agreement, sentencing, or parole; the right to confer with the prosecutor; the right to restitution from the defendant; the right to proceedings free from unreasonable delay; and the right to be treated with fairness, dignity and respect.

Victims' rights at the state level also progressed dramatically during this same time period. By the early 1980s, four states had broad laws providing a range of rights to victims, eight required a victim impact statement at sentencing, six had open parole hearings, and eight mandated restitution for victims.⁹ The first state victims' rights legislation was largely advisory; many were called "guidelines" for the treatment of victims, rather than "rights."

As at the federal level, the release of the Final Report of the President's Task Force in 1982 spurred the states to strengthen and expand victims' rights. By the early 1990s, every state provided violent crime victims the right to victim compensation and provided victims of serious crime with a set of legal rights including the rights to be informed, present, and heard during the criminal justice process and to receive restitution from the offender.¹⁰ Many also gave victims rights to protection from the defendant, speedy trial, privacy, and other rights to fair treatment by the criminal and juvenile justice systems.

Along with statutory rights for victims, thirty-two states amended their constitutions to provide additional protection for the rights of victims. While amending a state's constitution is a cumbersome process, typically requiring multiple levels of approval by a state legislature as well as ratification by the voters, victim advocates pursued these amendments for the additional authority they give to victims' rights. Rights protected by the constitution cannot be diminished by anything in a state's statutes, court rules, or administrative code provisions. A constitutional amendment also provides a level of permanency to the victims' rights, since they can only be changed by another cumbersome, multiyear amendment process. And constitutional rights offer a level of implied enforceability.

State victims' rights amendments generally take one of two forms. The first is a short and broad statement of rights. Colorado's amendment takes this approach:

Any person who is a victim of a criminal act, or such person's designee, legal guardian, or surviving immediate family members if such person is deceased, shall have the right to be heard when relevant, informed, and present at all critical stages of the criminal justice

⁸ 118 Stat. 2260 (2004).

⁹ *Four years later: A Report on the President's Task Force on Victims of Crime*, United States Department of Justice. (May 1986).

¹⁰ Every state provides rights to victims of violent felonies. Most states extend rights to victims of any felony as well as any violent misdemeanor. A few states provide rights to a victim of any crime.

process. All terminology, including the term "critical stages", shall be defined by the general assembly.¹¹

In contrast, Arizona's amendment provides a list of twelve rights, as well as a definition of "victim" and other language to guide implementation.¹²

Most of the state amendments mandate notification of victims concerning events in court and the parole or release of offenders, and permit victims to participate in their case through oral or written input at sentencing. Fewer state constitutions extend other rights, such as the right to a speedy trial and the right to participate in parole proceedings or proceedings involving pretrial release.

States also began to amend their court rules of criminal procedure and evidence to incorporate the rights of victims. While victims' rights across the states are not uniform in scope or application, most victims of serious crime are entitled to basic rights under the law.

Enforceability of Crime Victims' Rights

Despite this remarkable progress in the passage of crime victims' rights, advocates have been dismayed to see that, too often, victims' rights were violated with impunity. An NIJ-funded survey of crime victims in 1998 found that even within states with strong victims' rights legislation, "many victims were not notified about key hearings and proceedings, many were not given the opportunity to be heard, and few received restitution." Although victims in these states generally fared better than those in states with weak victims' rights legislation, as many as one-third of victims in strong-protection states were not afforded the opportunity to exercise certain rights.¹³

Few states—even those that have adopted constitutional amendments—provide recourse to victims when their rights are not honored. With the exception of Arizona, all states ban any civil action for damages caused by a violation of rights. State victims' rights laws also typically provide that a violation of rights will not constitute grounds for a new trial or to overturn a sentence or other disposition. Several states restrict enforceability even further, providing that the victims' bill of rights creates no cause of action against the state. In those states, the term "cause of action" is not specifically limited to actions for damages, so the language could be interpreted in some courts to bar any action to enforce the rights of victims.¹⁴ Two states, New York and

¹¹ Colo. Const. art. II, § 16a.

¹² Ariz. Const. art. II, §2.1.

¹³ Dean G. Kilpatrick, David Beatty, and Susan Smith Howley, *The Rights of Crime Victims: Does Legal Protection Make a Difference?* (Washington, DC: U.S. Department of Justice, National Institute of Justice, 1998).

¹⁴ This is not necessarily the case, however. Florida's victims' bill of rights both provides that "Nothing in this section or in the guidelines adopted pursuant to this section shall be construed as creating a cause of action against the state or any of its agencies or political subdivisions" and gives crime victims standing to assert their rights. See Fla. Stat. § 960.001(5) and (7). Thus, it would seem that the intent of "cause of action" here is restricted to monetary damages, although it is not specifically stated.

North Dakota, have legislative language providing that a violation of their victims' bills of rights gives rise to no cause of action for money damages or injunctive relief.¹⁵

Only four states—Arizona, Florida, Indiana, and Texas—provide victims express legal standing through their constitution or statutes to assert their rights.¹⁶ Another two—Maryland and Utah—provide a clear right for victims to seek an appeal where their rights are denied,¹⁷ and several others expressly allow a limited legal remedy, such as authorizing the prosecutor or a state victim advocate to assert a victim's rights, or allowing the victim or others to seek a writ of mandamus ordering an official or agency to comply with the victims' rights law.¹⁸

At least nine states have created or designated an entity to receive and investigate reports of violations of victims' rights. These may take the form of a state ombudsman, a committee or board, a state victim advocate or victims' rights office, or another designated office or individual.

The issue of enforceability of victims' rights came to the federal level in 2004, when Congress passed the Crime Victims' Rights Act (CVRA) as part of the Justice for All Act of 2004. Along with listing the rights of victims, the CVRA also gave victims legal standing to enforce their rights in court and called for the creation of a mechanism to receive and investigate reports of victims' rights violations. The larger Justice for All Act also promoted the enforceability of victims' rights at the state level by authorizing funding for legal clinics to represent the rights of victims in criminal proceedings.¹⁹ The statute specified that funding would be provided to the Office for Victims of Crime for the National Crime Victim Law Institute to provide grants and assistance to lawyers to help victims of crime in court.

¹⁵ N.Y. Exec. Law § 649(2008); N.D. Cent. Code § 12.1-34-05(2008). In both of these states, however, this prohibition is limited to the general listing of rights, in both states called the Fair Treatment Standards, and does not appear to apply to other, discrete rights of victims that appear elsewhere in the code, such as the right to be heard at specific proceedings or the right to restitution.

¹⁶ Ariz. Rev. Stat. § 13-4437 (2008); Fla. Stat. § 960.001(7) (2008); Ind. Code § 35-40-2-1 (2008); Tex. Const. art. I, § 30 (2008).

¹⁷ Md. Code Ann. Crim. Proc. § 11-103 (2008), Md. Rules 8-111 and 8-204 (2008); Utah Code Ann. § 77-38-11 (2008).

¹⁸ *E.g.*, Ala. Code § 15-23-83 (2008) (authorizing attorney general or district attorney to assert victims' rights); Conn. Gen. Stat. § 46a-13c (2008) (authorizing the state Victim Advocate to file a limited special appearance for the purpose of advocating for a victim's rights); N.C. Gen. Stat. § 15A-840 (2008) (authorizing a victim to seek a writ of mandamus enforcing the victim's rights).

¹⁹ 118 Stat. 2260, Sec. 103 (1994).

III. NCVLI AND CLINIC GOALS

The National Crime Victim Law Institute (NCVLI) was established in 2000 in an effort to promote the enforcement of victims' rights as well as awareness and education in the area of crime victims' rights. According to its website, NCVLI was conceived as "a national resource for crime victim lawyers and victims to support the assertion and enforcement of victims' rights in criminal and civil processes." Its mission is to promote balance and fairness in the justice system through crime victim centered legal advocacy, education, and resource sharing. To achieve its mission NCVLI seeks:

- To promote victims' rights, including those of underserved and marginalized victims, in the criminal and civil justice systems.
- To conduct, support, and promote impact litigation through NCVLI's independent participation.
- To provide support, and promote legal technical assistance to victims' attorneys and others serving victims.
- To educate primarily lawyers, judges, law students, victims, victims' advocates, the law enforcement community and the public.
- To reform law through model laws and protocols, public policy advocacy, and advocacy assistance.

NCVLI hosts an annual conference on crime victims' rights law and has a membership organization, the National Alliance of Victims' Rights Attorneys (NAVRA). NAVRA is an "alliance of attorneys committed to the protection, enforcement, and advancement of crime victims' rights nationwide." NAVRA currently has 631 members, of which 268 are attorneys, 296 are advocates, and 67 are others interested in victims' rights. NCVLI provides NAVRA members with a listserv, conference call training on crime victims' rights issues, quarterly Case Updates, which are case summaries compiled by rights topic, email updates on *New & Noteworthy* cases immediately upon the decision issuing, a weekly digest on news touching on victims' rights both domestically and internationally, a bi-annual newsletter with substantive articles on victim law, a discount at NCVLI's annual conference, and access to NCVLI's brief and memoranda bank.

In 2002, to help secure enforcement of victims' rights through direct pro-bono representation of victims in the criminal justice process, the Office for Victims of Crime within the U.S. Department of Justice entered into a cooperative agreement with NCVLI to establish pro bono legal clinics in several jurisdictions. The "State and Federal Clinics and System Demonstration Project" was created to advocate for victims' rights in criminal justice systems and to educate legal professionals about victims' rights law. In 2004, the federal Crime Victims' Rights Act, 18 U.S.C. § 3771, passed and included an authorization for an appropriation of funds to help protect the newly provided victims' rights, as well any substantially equivalent rights found in states, through direct representation. The first funds appropriated under this authorization came in 2005.

According to NCVLI's director, the strategy for advancing victims' rights came, in part, from the NAACP's legal strategy against segregation. According to an authoritative book on that legal battle,²⁰ the NAACP strategy involved both intelligent general litigation and local support. The national litigation was considered to be an ad hoc exercise, requiring flexibility and a recognition that setbacks are inevitable and part of the process. Local communities provided plaintiffs as well as political support. This seems to fit well our observations of NCVLI's strategy that combines a focused strategic litigation program that capitalizes on opportunities presented by local complainants with efforts to win the "hearts and minds" of local criminal justice officials.

In launching the Project, including establishing the victims' rights clinics, NCVLI sought to change the legal culture with respect to its treatment of crime victims such that the system would see the victim as a participant with legally cognizable rights. One vehicle for doing this was providing direct legal representation to individual victims. By giving victims attorneys, NCVLI hoped that it could increase enforcement of rights in those particular cases. But it also hoped that these cases would establish precedent that would lead to enforcement of rights in future cases, and that the mere presence of victim attorneys in some cases and trainings held for court officials would result in an increased compliance with and enforcement of victims' rights by prosecutors, judges, and police officers in all cases – not just in the cases where victims were represented by attorneys.

Moreover, initiating strategic litigation at the appellate level was designed to expand judicial enforcement of victims' rights in state and federal court and create precedent. This could happen through published, or even unpublished, appeals court opinions. In NCVLI's view, when victims' rights are litigated well, even losing cases at the appellate level could result in long-term gain; cases that are lost can clarify the law and show what victims' rights statutes actually mean. The new clarity may impel legislators to enact new and broader statutes. In addition, change of the criminal justice culture could be achieved through changes to court rules.

The individual clinics share the same goals as NCVLI. An examination of their funding proposals to NCVLI revealed that all espoused the goals of providing effective representation to crime victims and educating criminal justice professionals—judges, prosecutors, police officers, and victim advocates—on victims' rights issues; assessing victims' crime-related needs and making appropriate referrals; and establishing a network of pro bono attorneys. The Utah clinic listed training law students as one of its goals.

Although the goals of NCVLI and the state clinics are congruent, there is a difference in emphasis. NCVLI is focused on system change. NCVLI argues that it is not the number of victims represented or even the number of appellate decisions that matters, but the quality of the opinions and the extent to which they broaden the definition and enforceability of victims' rights. On site visits to state clinics, we often heard clinic staff emphasize their duty to their clients. For example, while a clinic attorney might want to appeal a lower court decision in order to get a published opinion that clarifies certain rights, he or she will respect the wishes of victims who do not want to go forward with an appeal. In deciding whether to take a case, a state clinic is likely to consider need of the victim as seriously as the potential of the case to result in an outcome that

²⁰ Tushnet, M.V. (2005). *The NAACP's legal strategy against segregated education, 1925-1950* (2nd edition). Chapel Hill: University of North Carolina Press.

will help to change the culture. This tension between the goal of changing the legal culture and the duty to act as advocates for individual victims should not be overstated. The directors of all the clinics are intent on using the clinics and litigation to expand victims' rights, exactly as intended by NCVLI, just as NCVLI acknowledges that system change work must always bow to the interests of the individual client. The difference is one of perspective: NCVLI staff are able to take a long view, while state clinic attorneys are "in the trenches" dealing with people who have been hurt and who have immediate needs—psychological, financial, and physical—as well as legal.

Clinic Grant Requirements

The grant programs through which NCVLI receives federal funds and sub-grants them to the clinics have undergone several iterations since the beginning of the Demonstration Project in 2002. NCVLI received its first grant that year to develop the clinic program, and the first clinic to come on board was Arizona in 2003, followed by Maryland, New Mexico and South Carolina, (as well as California and Missouri, which are no longer in the program) in 2004. The Arizona clinic was selected as the clinic to undertake federal work that same year. In 2005, NCVLI added the Idaho, New Jersey, and Utah clinics to the Demonstration Project. The Demonstration Project officially ended in 2009, although the clinics wrapped up their efforts prior to this date, and since then the clinics have been funded under additional federal grants for victims' rights enforcement, with all clinics now having the ability to do both federal and state work.

With each new federal grant and its attendant sub-grants, the requirements for the clinics have changed somewhat. Core to every grant has been the requirement that the clinics provide free legal assistance to crime victims in criminal court, including motions practice.²¹ Because motions practice is the core strategy for NCVLI's goal of changing the legal culture to more regularly afford victims' rights, it has also been the key requirement of all clinics from their inception. The initial grant included a requirement for the clinics to recruit, train, and use pro bono attorneys, but NCVLI has since reduced the stringency of the pro bono requirement, making it an aspect of achieving effective representation for victims rather than a separate goal and objective of the clinics. Conversely, the requirement for the clinics to help crime victims secure nonlegal "support services," has strengthened over the different grant versions, with the original requirement being the development of a victim services network and more recent grants requiring assessment of victims' needs and coordinating access to social services. Some clinics achieve this through their own in-house victim advocates while others do it through referrals to local victim service providers. NCVLI sub-grant funds may be used for these nonlegal support services, as long as the provision of legal services remains at the forefront of the clinics' work.

NCVLI Support for the Clinics

NCVLI supports clinic activities in a variety of ways. NCVLI technical assistance generally breaks down into three categories: general organizational development support, direct TA to an

²¹ The term "motion practice" refers to an attorney filing motions with the court. Motion practice is central to NCVLI's legal strategy, because it is the only way to inject victims' rights issues into the court's written records and to spur judicial decisions on victims' rights matters. While other forms of practice, such as letters to prosecutors and courts, may help individual victims and advance rights, they generally cannot create precedent and therefore do not substantially advance victim law as a field.

individual clinic on a legal issue or upcoming training, and fostering peer support among the network of clinics and NAVRA members

General Organizational Support

As an intermediary organization that “passes through” government grant funds, NCVLI has an essential role in ensuring that its subgrantees—the clinics—follow all federal rules and procedures for handling grant funds. This may include helping the subgrantees to set up or modify their accounting and data tracking procedures in ways that ensure compliance with grant requirements, advising them on hiring and training new staff and setting up supervision procedures, and other types of organizational support.

Direct Legal Technical Assistance

Each legal clinic is assigned one attorney staff member at NCVLI as its primary contact for legal technical assistance. That NCVLI attorney, together with the NCVLI program manager and executive director (also attorneys), will work with the individual clinic as much or as little as is needed, according to the experience of the clinic staff and the specific challenges being encountered. The general rule is that NCVLI holds an individual check-in call with new clinics monthly for the first six to nine months of the clinic’s existence, to monitor its start-up period and ensure a solid foundation. For all clinics—new and more experienced—the assigned NCVLI attorney, program manager, and the executive director are available as needed for help with legal research and guidance with preparing motions, briefs, oral arguments, and training materials.²² According to NCVLI’s director, the frequency with which the clinics take advantage of these services ranges from only the check-in calls to several times per week. Finally, NCVLI files *amicus curiae* briefs on important victims’ rights issues in state and federal cases, sometimes in cases unrelated to the clinics and sometimes in cases where a clinic is directly representing the victim.

Fostering Peer Support

NCVLI undertakes several activities to foster peer support and knowledge-sharing among the clinics. It holds regular conference calls with all clinics during which NCVLI gives general grant guidance and the clinics share recent successes and challenges and learn from each other’s experiences. The frequency of these conference calls has changed over the years since the inception of the clinics, from monthly to bi-monthly to quarterly. (New clinics that need more frequent guidance receive individual calls as described above.) Another way that NCVLI helps the clinics to learn from each others’ work is through its “brief bank”—a collection of legal briefs filed by victim attorneys on various victims’ rights issues—that can help jump start the drafting of a brief or legal argument by other victims’ rights clinics or attorneys. NCVLI also encourages the clinics to use a clinic listserv to conduct “case rounds,” in which a clinic will present a case or an issue they are working on to the other clinics and pose questions that tap the other clinics’ experience with similar cases or issues. This same listserv is also used to highlight successful legal and educational strategies, as well as to identify hurdles experienced.

NCVLI’s signature peer learning event, which was mentioned by nearly all clinic attorneys as being extremely helpful, is its annual clinic cluster meeting and national conference. The cluster

²² While each clinic has an assigned attorney, the technical assistance requests are often spread to other attorneys and law students working within NCVLI.

meeting is a day-long meeting of staff from all NCVLI-funded clinics. Evaluation staff attended the cluster meetings in 2008 and 2009 and observed three principal activities: presentations by NCVLI staff to provide guidance on grant requirements and perspective on the overall victims' rights movement; presentations by the clinic attorneys to their peers on specific aspects of victims' rights practice with recent case examples; and social support and networking among the clinic staff. Because the clinics are dispersed geographically, this is generally the one time each year that the staff members of the different clinics see each other in person. Clinic staff reported that this aspect of the meeting—simply getting together with others who are engaged in the same challenging work—is one of the most important to them, as it helps to keep them grounded and motivated in the difficult work they are doing. The cluster meeting, which is exclusively for the clinics, is followed by a two-day victims' rights conference that is open to anyone and generally draws an audience of over 125 attorneys, victim advocates, counselors, and others interested in victims' rights laws and their enforcement. The clinic attorneys regularly present sessions at the conference, along with other presenters who are national experts in different aspects of victims' rights.

IV. VICTIMS' RIGHTS DEVELOPMENTS IN CLINIC STATES

Each of the eight clinic states has a long history of support for crime victims' rights. All have protected the rights of victims through amendments to their state constitutions, and have adopted statutory victims' bills of rights. Some have worked steadily to expand victims' rights laws beyond the amendments and bills of rights, incorporating victims' rights wherever appropriate throughout their criminal procedure and corrections codes, in their court rules of criminal procedure and evidence, and in their administrative codes. Arizona, Maryland, and Utah provide the best examples of this evolution in victims' rights.

Certain developments in victims' rights in the clinic states have directly affected the ability of clinics to represent victims; others have affected the issues the clinics have addressed.

Victim Standing

One significant area of legal development—and one that directly affects the work of the clinics—has been the issue of crime victims' legal standing to assert their rights.²³ Crime victims do not automatically have legal standing in criminal proceedings, since they are not a party to the action. Instead, criminal actions represent a contest between the state and the defendant. However, some form of legal standing is essential if victims are to be able to assert their rights in the criminal case. What's more, legal representatives—in this case, the clinics—are limited by the scope of legal standing given to the victims themselves. Therefore, crime victim legal standing underpins the viability of the legal clinics.

While most states—even most states with funded victims' rights clinics—do not have express victim standing to enforce their rights, standing can be implied where those rights are guaranteed by constitution. Since the United States Supreme Court's ruling in 1803 in the case of *Marbury v. Madison*, it has been understood that “where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear, that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.” *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60 (1803). While this is a contestable legal argument, it has been used by advocates as a basis for inferring victim standing.

Arizona

Of all the clinic states, Arizona has the clearest law providing crime victims legal standing to assert their rights. Legislation adopted to implement the state's victims' rights amendment in 1991 gave victims standing and provided that victims could be represented by private counsel.

²³ The federal legislation authorizing funding through OVC for the support of victims' rights clinics restricts that funding to those serving victims in “Federal jurisdictions, and in States and tribal governments that have laws substantially equivalent to the provisions of chapter 237 of title 18, United States Code.” Chapter 237 is the Crime Victims Rights Act, which not only sets out the legal rights of victims but provides that victims or their lawful representatives and the federal prosecutor have the ability to assert those rights. The CVRA also permits the victim to seek a writ of mandamus from The U.S. Court of Appeals to enforce the victim's rights.

Thus, all clinic states, in securing federal funding, had to demonstrate that they had enforceable victims' rights. Indeed, crime victim standing to assert their rights is key to the functioning of the clinics, since they would be powerless to assist victims who had no legal ability to assert their rights in court.

That statute has been expanded over the years, and today provides that “The victim has standing to seek an order, to bring a special action or to file a notice of appearance in an appellate proceeding seeking to enforce any right or to challenge an order denying any right guaranteed to victims under the [constitutional amendment], any implementing legislation or court rules. In asserting any right, the victim has the right to be represented by personal counsel at the victim's expense.” Ariz. Rev. Stat. § 13-4437. The statute also gives the prosecutor the right to assert the victim’s rights, and gave victims the right to bring a civil action for damages where the victim’s rights were intentionally violated.

In 2005 the law was extended to require that the victim’s attorney if present must be included in all bench conferences, chambers meetings, and sessions with the trial court where those proceedings involve a victim’s constitutional right. The legislature also gave the victim standing to file a notice of appearance in an appellate proceeding, at the juvenile or criminal level, seeking to enforce any right or challenge an order denying any victim’s right. And it gave victims who file a notice of appearance the right to respond to a request for an extension of time to file a brief in any appellate or other post-conviction proceeding in a capital case.

This law has been further extended. In 2006, the legislature provided that failure to comply with a victim’s right is grounds for the victim to request a reexamination proceeding within 10 days of the violation or with leave for the court with good cause shown. The court must reconsider any decision arising from the proceeding at which the victim’s rights were not protected. This right to reexamination, however, does not give the victim grounds to seek to set aside a conviction after trial or provide grounds to seek a new trial.

In 2007, Arizona law was further amended to give victims the right to receive, at no charge, the minute entry or portion of the record of any court proceeding reasonably necessary for the purpose of pursuing their rights.

Maryland

Maryland’s journey toward legal standing has also evolved over time. The Maryland legislature first gave victims of violent crime the right to seek the appeal of the denial of certain of their rights in 1993. It provided that “Although not a party to a criminal proceeding, the victim of the violent crime for which the defendant is charged has the right to file an application for leave to appeal to the Court of Special Appeals from an interlocutory or final order that denies or fails to consider” the rights to be informed of their rights, to be present, to be heard, and to receive an order of restitution. Md. Code Ann. Crim. Proc. § 11-103.

Since that time, due to the efforts of the Maryland clinic’s parent organization (the Maryland Crime Victims Resource Center) and, indirectly, through the work of the clinic, victim standing has been further developed. The legislature extended the statutory right to seek appeal to victims of violent offenses committed by juvenile offenders. Court rules facilitating the right to seek an appeal (Md. Rules 8-111 and 8-204) were adopted. And, perhaps most significantly, a court rule was adopted that authorizes a victim’s attorney to enter a formal appearance in a criminal or juvenile case to represent the rights of the victim. Md. Rule 1-326.

Utah

Utah included various measures victims could take to secure their rights as part of the implementing legislation adopted for its victims' rights amendment in 1994. These measures include the right to "bring an action for declaratory relief or for a writ of mandamus defining or enforcing the rights of victims and the obligations of government entities under this chapter," the right to petition to file an amicus brief in any case affecting crime victims, and the right to appeal adverse rulings on these actions. In 1995, this statute was expanded to permit victims to appeal adverse rulings "on a motion or request brought by a victim of a crime or a representative of a victim of a crime."

This general right of victims to appeal adverse rulings relating to their rights has been affirmed by the state's Supreme Court. *State v. Casey*, 2002 UT 29, 44 P.3d 756, 762 (2002). (The victim in that case was represented by NCVLI staff and Paul Cassell, one of the founders of the Utah clinic and author of the state's amendment and implementing legislation.)

South Carolina

South Carolina does not provide crime victims express legal standing to assert their rights. However, in the victims' rights amendment to its constitution it does provide that victims' rights "may be subject to a writ of mandamus, to be issued by any justice of the Supreme Court or circuit court judge to require compliance by any public employee, public agency, the State, or any agency responsible for the enforcement of the rights and provisions of these services." The constitution is silent on the question of who has the authority to seek such a writ.

The ability of attorneys to represent victims with regard to their legal rights was recently affirmed by the South Carolina Attorney General. In 2007, the clinic was involved in a criminal domestic violence case, and the solicitor (prosecutor) failed to notify the victim's attorney (the clinic director at the time) of a bond hearing for the defendant. After being contacted by the clinic's parent organization, a state senator requested an opinion from the Attorney General regarding the solicitor's obligation to give notice of judicial proceedings to attorneys who have filed a formal notice of appearance on behalf of a crime victim. In his written opinion, the Attorney General reviewed the statutory requirements regarding victim notification and the legislature's intent that victims' rights be protected to the same degree as the rights of defendants, and noted that the state constitution protected victims' right to be informed. The Attorney General ruled that where a formal notice of appearance has been filed by a victim's attorney, the attorney should be provided written notice contemporaneously with the prosecution and defense of all court hearings, and that if an attorney files notice with law enforcement and prosecuting agencies that also have a responsibility to notify victims, those agencies should also attempt to send notice to the attorney as well as to the victims. SC Attorney General Opinion No. 07-034.

The remaining states have no statutory or constitutional provisions expressly providing victims a general or limited ability to assert their rights.

New Jersey

New Jersey law does not expressly provide legal standing to victims to enforce their rights. However, the courts have considered crime victim actions relating to their rights. In 1997, a

judge in a division of the appellate court specifically held that the victims' rights amendment "provides victims with specific rights, and that these rights carry with them standing for a victim to voice their concerns and protect their constitutional rights." In re K.P., 709 A.2d 315, 321 (NJ Super. Ct. Ch. Div. 1997). In its decision, the court noted a prior New Jersey Supreme Court case that referenced the voters' expression of support for that state's victims' rights amendment in upholding one of the statutory rights that implemented it. *State v. Muhammad*, 145 N.J. 23, 678 A. 2d 164 (1996). Although there has been no appellate case denying victim standing and one that upholds it, the New Jersey clinic considers the issue unsettled and is hoping to see victims explicitly granted standing in a future revision of the statutory victims' bill of rights.

New Mexico

New Mexico's laws are also silent on the ability of victims to assert their rights. In fact, as noted earlier, New Mexico's statute provides that violation of the victim's rights does not create any cause of action against an official or agency responsible for enforcement of those rights. Even so, the New Mexico clinic has been successful in obtaining an *unreported* Supreme Court order granting standing to the victim in the case at issue. *Nasci v. Pope et al.*, No. 29,878 (N.M. Nov. 8, 2006). While the language of the order was limited, when considered in conjunction with the pleadings of the victim, defendant, and an amicus brief from the state criminal defense attorney association, the statutory language providing that violation of rights creates "no cause of action" in the statutory enabling legislation was determined to only refer to *monetary* causes of action, because action by the legislature to refuse victim standing would exceed its authority under the separation of powers under the New Mexico Constitution – as standing to assert constitutional rights is a matter for the courts to determine rather than the legislature. The result was that victims have standing to assert a claim for injunctive relief under the Victim's Rights Constitutional Amendment. Ordinarily, unpublished orders have no precedential value in other cases. However, because the New Mexico Supreme Court considered the issue *en banc* and was unanimous in its decision, the clinic considers this order a monumental step, and they have actively and successfully made use of it to promote victim standing in trial courts.

Colorado

Colorado's laws, too, are silent on victim standing. The Colorado Supreme Court has addressed a limited question of victim standing. In the case of *Gansz v. People*, a victim sought to appeal the dismissal of criminal charges. The Supreme Court ruled that the victim did not have standing to appeal a dismissal of criminal charges. Importantly, this action was outside of the scope of the crime victims' rights laws. "There is no statutory right to be heard at a hearing on a district attorney's motion to dismiss criminal charges." The Supreme Court has not ruled, generally, on the victim's ability to assert his or her legal rights. *Gansz v. People*, 888 P.2d 256, 19 BTR 46 (Colo. 1995).

Idaho

Idaho's laws make no mention of victims' ability to assert their rights, and there has been no appellate level consideration of the victim's standing in that state.

Laws that Further Crime Victim Representation in Criminal Matters

While laws providing victims the authority to assert their rights are most important to the functioning of the clinics, a few states have also seen legal developments that financially support or in other ways facilitate the work of the clinics.

Maryland created a source of financial support for the clinic or other efforts to represent crime victims. It amended its restitution law to provide that restitution collected for a victim who cannot be located will be deposited into a fund to provide grants for victim legal representation.

New Jersey added new duties to the victim-witness rights information program, requiring that victims be informed about their constitutional and statutory rights and about obtaining legal advice or representation, and requiring the information program to conduct trainings for attorneys. The state also amended its victim compensation law to authorize the compensation program to reimburse the victim for attorneys fees for legal assistance in any legal matter relating to the offense. There is a cap on the amount of such fees that can be claimed. Previously, the law limited compensation for attorneys fees related to legal representation of the victim on matters regarding the compensation claim itself—for example, appealing the denial of a claim.

Crime Victims' Right to Privacy

Another area of development in victims' rights common to several of the states relates to the victims' right to privacy. These developments have opened up a new area for legal representation of victims.

Two states—Arizona and Utah—have taken on the issue of abuse of blank subpoenas by defense counsel to request the private records of victims, usually including counseling records. In 2006, Arizona passed a statute prohibiting the use of blank subpoenas to access the records of a victim, providing that records relating to recovered memories may be subpoenaed only if certain conditions are met, and giving victims the right to be notified and heard at any proceeding involving a subpoena of their records.

Utah passed similar restrictions through amendments to its court rules in 2007. The revised rule requires that before a victim's records can be requested, the court must first hold a hearing and determine that the defendant is entitled to such records. The revision also requires that the prosecutor and any attorney representing the victim be informed of the request for subpoena. Additional protections are included. Notably, an Advisory Committee note to the rule amendment states that the addition of this new subsection is “intended...to adopt a procedure consistent with current applicable law that balances a victim's state constitutional right ‘[t]o be treated with fairness, respect, and dignity, and to be free from harassment and abuse throughout the criminal justice process,’ with a defendant's constitutional right to due process. Requiring a defendant to apply to the court for the production of a victim's records ensures that a victim or his or her representative will have an opportunity to assert any privileges or reasons why the records should not be subject to either release or *in camera* review.”

Other provisions addressing victim privacy have also been adopted in clinic states during the time the clinics have been functioning. Arizona passed a law protecting victim information in publicly accessible records relating to the case, with an exception for the victim's name and the location of the crime; Colorado made victim compensation records confidential; Idaho protected the social security numbers of persons contained in court records. Maryland amended court rules to prevent remote electronic access to information pertaining to victims and non-party witnesses in criminal cases, and to shield information in court records pertaining to a person who sought a protective order or who is a victim of domestic violence. New Jersey added an administrative code provision that denied convicted offenders access to a government record containing the personal information about a victim or the victim's family. South Carolina required that victim information be kept confidential by custodial authorities. Utah created a court rule addressing the selective closing of court records relating to victims and witnesses for safety and privacy reasons. And Colorado, Idaho, Maryland, and New Mexico all created address confidentiality programs that provide alternative official addresses for domestic violence victims and certain others.

Other Changes

All of the clinic states continued their general drive to expand the rights of victims, extending the right to be informed to additional proceedings and events, clarifying the right to restitution and improving the process for collection, extending the victims' rights at parole, and increasing the rights of victims of juvenile offenders. These changes are detailed in Appendix B.

V. CLINIC OPERATIONS

The NCVLI clinics work to promote observance of victim rights by representing victims in individual cases and by working to change the legal culture through example, trainings; and appellate decisions and court rules that acknowledge victim rights. When they become aware of a potential rights violation, the first step may be to place a call to a criminal justice official to see if the condition can be easily remedied. For example, they may try to convince police to file a case with the court or to convince a prosecutor to advance a trial date. Or they may ask a prosecutor to oppose a defense motion to order a victim to release medical records. Clinic attorneys also file motions in trial courts on behalf of their clients. In some states, clinic attorneys have filed motions to amend a plea to include restitution or other conditions based on statutory rights. Other attorneys have filed writs with appeals courts to get victims admitted into the courtroom after they were denied the right to be present by a trial court judge. Finally, clinic attorneys work at the appellate level to seek published rulings that clarify or expand the scope of victim rights on critical issues like victim standing and privacy.

While clinics share these common interests and activities, their ways of going about their work differ in some important respects. In this section of the report, we discuss differences in the ways that clinics are structured and how they operate. Differences along these dimensions have potential implications for the number and geographic diversity of cases that clinics handle, sources of client referrals, types of cases handled, and funding sustainability.

Type of Business Model

There is great diversity in the way that clinics have been structured. Clinics we have visited have ranged in their organizational aegis from being housed within victim services programs to being located within a law school to being one component within a full service law firm. Each of these arrangements has implications for how the clinics function.

Law clinic model

Two clinics are formally affiliated with law schools. The Idaho clinic, as one of eight clinical programs at the University of Idaho College of Law, receives considerable benefits from the law school, including office and classroom space, use of the office manager and financial manager for the general clinics program, travel support, and supplemental funding. Third-year law students registered for the three credit clinic course represent victims under direction of a supervising attorney. Since the students leave after a semester or an academic year at best, the supervising attorney's involvement is essential to continuity with the cases and clients. As a component of the law school, the clinic's first priority is educating students by exposing them to litigation and its secondary mission is to ensure access to justice. This is a clear distinction from the victim focus and interest in helping with all of victims' needs that are the aims of most of the clinics.

The Arizona clinic, while not technically a law school clinic, is affiliated with Arizona State University law school, where the founder teaches a class. Most of the students in the class volunteer for the clinic in order to receive extra credit for the class. The class is not qualified as a

“true clinic” by the law school because the students do not directly represent clients. Rather, they assist the clinic’s two contract attorneys by conducting legal research. In contrast to the Idaho clinic, the Arizona clinic emphasizes full representation of its clients, including a social worker as well as an attorney in a team approach. The team generally accompanies victims to all court proceedings. Staff emphasized that, once they enter into a representation agreement, they “stick” with the client even absent any victims’ rights problems.

There are several advantages of the law school clinic model. First, the connection with a university law school provides some stature to programs that they might not have if they were independent programs. Second, the use of free student labor potentially allows clinics to take on a much larger caseload than would otherwise be possible on a fixed budget. Finally, while it is unlikely that students who participate in a clinic will take on victims’ rights work as their primary vocation, they will take their knowledge of victims’ rights and use it in their jobs as prosecutors, public defenders, guardians ad litem, or advocates for victims in civil cases.

Statewide victim service provider model

Three of the clinics are under the umbrella of statewide victim service providers. Perhaps the clearest example is the Maryland clinic where the clinic resides within the Maryland Crime Victims’ Resource Center (MCVRC), an organization that takes a “full service” approach to victim assistance and serves victims of all types of crime. The clinic shares general staff and overhead costs with MCVRC, including rent, utilities, equipment, and supplies. MCVRC staff conducts client intakes, ensuring that each client receives the unique set of services he or she needs. Clients are referred to caseworkers within MCVRC or to social service agencies throughout the state that can address their specific needs. In addition, social workers and staff attorneys help clients to understand their legal rights and educate clients on what they can expect during each stage of the legal process. While assessing victims’ needs, intake staff note whether there are restitution or other potential victims’ rights issues, and clients with rights issues are referred to the clinic.

The South Carolina victims’ rights clinic has a slightly looser relationship with its sponsoring victim advocacy organization. The clinic is housed within the South Carolina Victim Assistance network (SCVAN), a statewide victim advocacy organization that provides training, referrals, and direct service. While SCVAN provides administrative support and grants management as well as some outreach efforts, the clinic’s director is solely responsible for all legal matters handled by the clinic. Intake on clinic cases is not conducted through the parent organization, as is the case in Maryland. However, like the Maryland clinic, the South Carolina clinic benefits from being nested within a victim service organization. Victims seeking help from SCVAN that have legal issues are referred to the clinic. Conversely, clinic clients in need of additional services can easily access them through SCVAN’s services and network.

The fledgling Colorado clinic is also based within a state network of victim service providers, the Colorado Organization for Victim Assistance (COVA). Like the South Carolina clinic, the Colorado clinic will share offices and some administrative staff with its parent organization, but maintain a separate intake process.

The statewide victim service provider model has several arguments in its favor. Sharing intake, office, and administrative costs with a host organization keeps clinic costs down. Typically, the host organization is well-established in the victim service field, and lends the clinic stature that it would otherwise have to earn as well as invaluable connections through its board of directors and other contacts. These connections can help get the word out quickly and help bring in referrals. Moreover, in some cases, the host organization is able to engage in lobbying efforts – forbidden to the clinics on federal dollars – that build on clinic appeals cases to improve legislation.

Other partnership models

The Arizona clinic is under the umbrella of the Arizona Voice for Crime Victims (AVCV) and has no separate legal or organizational identity. AVCV is not a victim services organization, but rather an advocacy organization which, in addition to operating the clinic, advocates for improvements to victims' rights at the state level in Arizona. This relationship has been very beneficial to furthering Arizona's extensive legal rights for victims, as the clinic cannot conduct legislative advocacy with its federal funding, but it can make AVCV aware of issues that arise in its cases, and AVCV then undertakes legislative advocacy with private funding.

The Utah and New Mexico clinics are housed within local, crime-specific victim-serving organizations (a sexual assault program and a drunk driving prevention and victim services program, respectively) and benefit from inexpensive office space. The New Mexico clinic is headed by the executive director of the DWI Resource Center, who employs a part-time staff attorney for clinic work. Although the Utah clinic may get occasional referrals from its landlord, there is no formal coordination between the work of the clinic and the work of the host sexual assault agency.

Independent law firm model

Only the New Jersey clinic is based within a private law firm founded by the clinic director. The clinic director dedicates his full time efforts to victims' rights cases. NCVLI funds cover the salaries of the director and an assistant. The director is partnered with two attorneys with whom he runs a full service law firm. The two other attorneys handle real estate law, matrimonial issues, and other civil cases, while each dedicates 25 hours per week to victims' rights work on a pro bono basis. This continues the original New Jersey model in which—before federal funding—proceeds of the law firm were used to fund victims' rights work. Eventually, the Center director hopes that monies brought in from settlements won by the law firm's civil litigation caseload will be able to sustain the victims' rights work.

There are at least two advantages to this arrangement. One is that, if the director's vision is fulfilled, there is a clear path to independence from grant funding toward a stable source of permanent funding. The other is that the New Jersey clinic has been able to sustain a caseload far in excess of the other clinics, in spite of the fact that it has the geographically most dispersed caseload of all the clinics.

Use of Pro Bono Attorneys and Student Help

Although every clinic has made an effort to train pro bono attorneys and refer cases to them, we have heard many reservations about the use of pro bono attorneys from the clinic directors. Most clinic directors argued that pro bono attorneys seldom have the knowledge, commitment, or

availability to be of significant help. The most strident objection came from the New Mexico clinic. Prior to the New Mexico Supreme Court recognizing standing, the clinic did not feel that it was wise to let other attorneys control the litigation. Even now that the New Mexico Supreme Court has recognized victim standing, the clinic staff is concerned that other attorneys will not adequately protect victims. The clinic's cardinal rule is, "First, do no further harm (to victims)," and they felt that involving pro bono attorneys might jeopardize that principle. One concern mentioned was that the outside attorneys may put their own egos ahead of the needs of the victim and that they will "re-victimize the victim in the hope of saving them." Another concern, based on prior experience with pro bono attorneys, was that these attorneys would give paying clients priority over non-paying clients. This was summed up in the remark, "You get what you pay for."

The New Jersey clinic director also has reservations about using pro bono attorneys. However, the clinic has successfully used a few pro bono attorneys who are acquaintances of the director to handle cases in disparate parts of the state. This may be part of the reason that the clinic has been able to open up a large number of cases throughout the state. The clinic also uses occasional student interns in an administrative capacity.

The Maryland clinic has taken an intermediate stance on the pro bono issue. It uses a small panel of pro bono attorneys to handle mostly collateral civil cases (e.g., estate, housing, or creditor issues), which fall outside the scope of clinic funding. The clinic also uses pro bono attorneys to help to collect restitution and to aid in writing *amicus* briefs for appellate cases. The clinic finds that using pro bono attorneys in this way avoids some of the problems associated with using pro bono attorneys in criminal cases—insufficient knowledge of victims' rights issues and criminal procedure, extensive need for training, and schedules that did not permit them to make necessary court appearances in clinic cases on short notice. Law courses taught by the clinic director ensure a supply of law student interns who help clinic attorneys with case research and assist other clinic staff with intake and administrative tasks.

Other clinics, while acknowledging limitations, have more fully embraced the concept of free help. The Utah clinic has been assisted by three pro bono attorneys representing victims in court. Two of those were identified by actively calling around in each judicial district to try to identify an attorney willing and able to take the cases. The third pro bono attorney is a retired prosecutor, who, after initially acting as a pro bono attorney, now works as a part-time contract attorney for the clinic. Moreover, the clinic plans to expand its use of pro bono attorneys through targeted recruiting—reaching out to victim advocates for the names of potential pro bono attorneys. The clinic is developing a free continuing legal education course for attorneys in exchange for their taking one victim case within the year following the training. (Some of the other clinics have also offered CLE courses for pro bono attorneys.) The Utah clinic also has a very active intern program. Each semester they recruit two to four law student interns from nearby law schools, as well as four interns over the summer. Interns contribute 100-200 hours per semester (typically one full day per week).

The South Carolina clinic is proud of its success at implementing a pro bono attorney network. Early directors of the clinic used personal contacts with lawyers across the state to develop the pro bono attorney pool. Currently the clinic has a pool of 13 pro bono attorneys who handled 18

percent of the cases the clinic opened in 2007. The clinic reports that the pool is of high quality and well placed geographically around the state. Pro bono attorneys have been especially helpful in working with clients in areas that are more distant from the clinic's offices. Pro bono attorneys take cases from start to finish. As the program grows, the clinic sees the role of pro bono attorneys expanding to help manage a growing caseload. The clinic is likely to seek the help of pro bono attorneys in cases in distant counties, where it would be difficult for clinic staff to make an appearance in court and/or in cases involving relatively simple victims' rights issues (for example, the ability to offer a victim impact statement). The clinic also tends to use pro bono attorneys in cases where there are civil legal issues that clinic staff is not allowed to address. This situation works well since the pro bono attorneys are permitted to collect a fee for the civil legal assistance while representing the victims in their criminal cases free of charge. A change currently under consideration to a requirement that all lawyers in South Carolina take appointments referred by the court would count pro bono work on behalf of victims as credit toward their state requirements.

We have already discussed in the section above the benefit that the Arizona and Idaho clinics receive from student help as a result of their law school affiliations. The models differ – in Idaho, students represent victims in court, while in Arizona, their efforts are confined to conducting legal research to assist clinic attorneys. Both applications of student help can reduce the costs of running victims' rights clinics. Idaho has not found a need for pro bono attorneys beyond the law students, as its caseload has remained small to date. Arizona does make limited use of a few trusted pro bono attorneys.

NCVLI has developed a circumscribed view of the utility of pro bono attorneys to contribute to the state clinics. Where once pro bono attorneys were envisioned as the long-term solution to victims' rights enforcement, now the NCVLI director sees pro bono attorneys as helpful in a more limited fashion. From a systems change perspective, they often are unable to get up to speed in time for cases capable of pushing forward the victims' rights agenda. The NCVLI director believes pro bono attorneys are best used in cases where victims' rights issues are less complex—for example in arguing for restitution for victims.

If an appropriate model is used, there are obvious benefits to using pro bono or student help in order to leverage the relatively small budgets that clinics operate on. The Utah plan to develop a course to train private attorneys who are seriously interested in victims' rights work should remove two of the objections to the use of pro bono attorneys: Taking the course will ensure that volunteers are both interested and satisfactorily trained in victims' rights law.

We learned that there are hard limits on what can be expected by using free help, whether it be in the form of pro bono attorneys, law student clinics, or interns. We believe that each has their place, and all clinics employ at least one of these resources. There may be room for law students to play a significant role in litigation activities – this idea has not been well-tested. Also, pro bono attorneys who are exceptional in their interest, time commitments, and training in rare cases may be able to accept responsibility for litigating some cases in counties that are inaccessible to clinics. With those possible exceptions, however, we conclude that free sources of help can play a significant support role for clinics, but are not a substitute for litigators trained in victim rights law and committed to the work of the clinic.

Addressing Victims' Non-Legal Needs

While their primary focus has always been on addressing violations of clients' legal rights, all of the clinics also have developed a focus that includes addressing all of victims' crime-related needs, either directly or through referrals to other service providers. This orientation is clearest in the two clinics that are under the umbrella of statewide victim service providers. As discussed above, in the Maryland clinic, the director of services of the parent organization meets with the victim advocates and the clinic's legal staff weekly to develop service plans for each client. We also noted that, in the South Carolina clinic, clinic clients in need of additional services can easily access them through the parent organization's network of service providers. The Utah clinic receives many referrals from victim advocates of clients who already are connected with service providers, and the clinic itself has a VOCA-funded victim advocate on staff. In Arizona, every case is assigned both an attorney and a social worker, who is responsible for accompanying victims in court, providing emotional support, and ensuring the victims are connected with any non-legal services they need. The New Mexico and Idaho clinics have developed extensive referral networks.

Perhaps surprisingly, the most holistic approach is taken by the New Jersey clinic which is not affiliated with any victim service provider. Like other clinics, the New Jersey clinic aids victims in getting help with emotional and practical problems stemming from crime, aiding victims in filing applications for state compensation and referring them to a network of trusted therapists experienced in dealing with victimization issues, and to other service providers as needed. In addition to attending to victims' non-legal needs, the New Jersey clinic's holistic approach also encompasses handling civil issues for clients as well as violations of victims' rights in criminal proceedings. The two types of cases are mutually reinforcing. According to the director, "A lawyer does not wear one hat. I see that as one of the biggest weaknesses out there. You can't parcel the issues with your client. If you're the victims' rights lawyer, you're their lawyer on everything to do with the victimization. You can't say 'I don't do that.'" The New Jersey clinic is unique in providing both civil and criminal legal help to victims, on top of emotional support, advocacy, and referrals.

The fact that the clinics have concerned themselves with the totality of client needs – not just the potential value of cases in litigating rights issues – highlights the way that the clinics' and NCVLI's approaches complement one another. Clinic attorneys appropriately act as client advocates for many crime-related needs. NCVLI, meanwhile, maintains its focus on changing the legal landscape and keeping an eye out for the cases that are likely to push its reform agenda significantly ahead.

VI. OUTREACH AND SOURCES OF CLIENTS

In this section we discuss variations between clinics in recruitment methods and implications for referral sources, number of cases and types of cases represented, and types of victims' rights issues dealt with. To its credit, NCVLI has not insisted on a single model for the state clinics. As discussed in the last section, there are substantial variations in business models adopted by the clinics and in their use of pro bono attorneys and student help. As this section shows, there also are significant differences in recruitment and caseloads. The freedom that the clinics have in developing different methods allows evaluation of how differences affect clinic outcomes.

As mentioned earlier, because we did not have direct access to client files, it is likely that there are inconsistencies from site to site in how information on rights issues was coded. The reader should also note that the data presented in this section may disagree in minor ways with data presented in the individual site reports. This is due to the fact that, in order to combine data across the clinics for this section, we created broader categories than were used in the site reports. For example, one of the categories in the table on referral sources for the Arizona clinic is "Parents of Murdered Children." In the corresponding table in this section, these cases appear in the category, "Community program/therapist/doctor."

Referral Sources

Table 2 displays sources of referral for the clinics. As the table makes clear, different clinics relied on different methods of recruitment. The Utah and South Carolina clinics received nearly half of their referrals from prosecutor victim advocates, while all of the other clinics had less than 20 percent of caseloads referred by prosecutor victim advocates. The director of the Utah clinic, a former prosecutor, has made special efforts to reach out to prosecutors. Prosecutor referrals are especially common in cases where the defense is seeking private records of the victim. It is interesting to note that staff of the South Carolina clinic did not name prosecutors as a major source of referral in our interviews and, in fact, indicated that there had been some friction between former clinic attorneys and prosecutors in the past. Staff did report that they conducted 27 trainings sessions for prosecutors in the second year of the project.

Table 2: Referral Sources

	MD	SC	NJ	NM	ID	UT	AZ
Prosecutor	11%	0%	16%	10%	24%	13%	44%
Police victim assistant/prosecutor victim assistant	11	45	18	10	10	46	0
Community program/therapist/doctor	14	32	42	20	21	22	26
Website, brochure, friend/self referred	46	0	14	40	21	4	7
State or local official	14	14	4	5	3	0	4
Police, probation officer, corrections, private atty	3	9	6	10	0	6	7
Solicited	0	0	0	0	7	0	0
Other	0	0	0	1**	9*	9**	11***
	100% (n=35)	100% (n=22)	100% (n=50)	100% (n=20)	100% (n=29)	100% (n=85)	100% (n=27)

* Referrals from within the university system (3 cases)

** Unknown (8 cases)

*** Referrals from NCVLI (3 cases)

The Maryland and New Mexico clinics had a plurality of referrals from their websites, brochures, and word of mouth. This squares with comments of the director of the Maryland clinic, who noted during our site visit that the clinic received many referrals from its website. Websites and brochures are relatively easy and inexpensive ways to garner more referrals, and do not depend on the good will of system actors. In that respect, they may be especially useful for start-up clinics working in hostile environments. In the case of New Mexico, the clinic director told us that prosecutors' advocates sometimes make "secret" referrals, asking not to be identified as having provided the referral, for fear of angering the prosecutors (their bosses). These "secret" referrals probably make up a portion of the cases listed as self-referred.

The New Jersey and South Carolina clinics received more than one in three referrals from therapists or community organizations. That makes sense given what we learned about both of these clinics. The New Jersey clinic has a well-developed network of therapists and community organizations that it works with. The South Carolina clinic is located within a state victim advocacy organization that consists of a network of grassroots programs.

Maryland and South Carolina – states that both have state victims' rights compliance officers -- each received 14% of their cases from state and local officials, while other clinics received less than 5% from officials. (New Mexico also has a state victim compliance officer, but she contributed only one clinic referral.) Finally, Idaho was unique in that it solicited a small proportion (7%) of its clients involved in high-profile cases that resulted in media coverage. This unique attempt to generate additional clients early in the clinic's career is a good example of how freedom of clinics to experiment with different methods of operations led to creative solutions to

problems (in this case, low case numbers due to the clinic's rural location and newness on the scene).

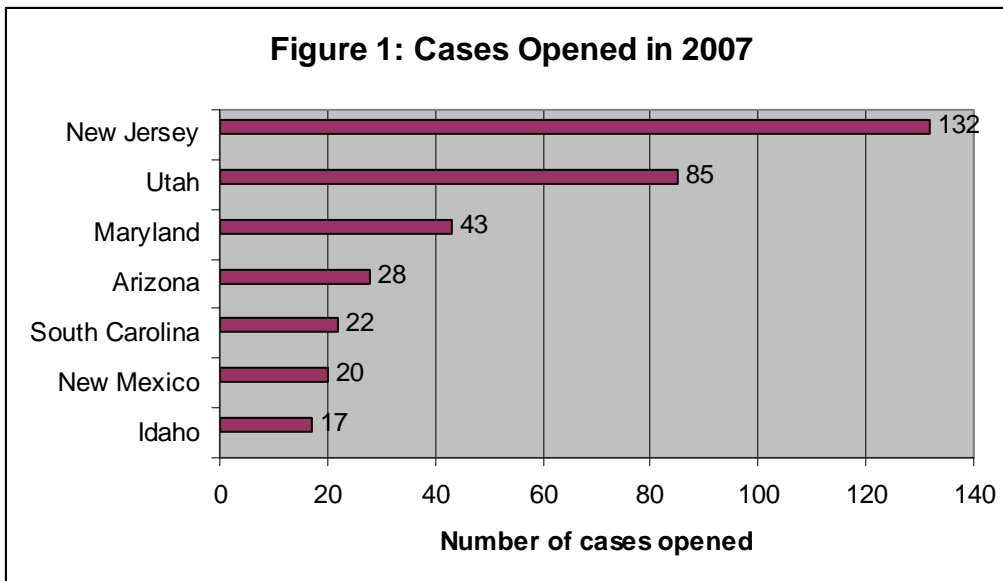
Caseload Size and Composition

Clinics take different approaches to representing clients. Some accompany victims to all court hearings, while others may make only a single appearance at a critical stage in the proceedings. Additionally, some cases are more time-consuming than others (a capital murder case will require much more attorney time than a domestic violence protective order case, for example). Additionally, the different clinics do not necessarily have common definitions of what they count as a "case." For all of these reasons, caseload is not a perfect measure of the amount of advocacy activity undertaken by the state clinics. However, in the absence of more precise statistics, caseload does provide at least a gross measure of clinic success in gaining referrals.

Figure 1 shows that the largest caseloads tend to be associated with clinics that are built on the work of individuals who already had stature as leaders in victims' rights in their states, likely reflecting greater acceptance by prosecutors and victim advocates. The New Jersey, Utah, and Maryland clinics opened far more cases than the other state clinics, signing 132, 85, and 43 representation agreements in 2007, respectively. The less mature clinics (South Carolina, New Mexico, and Idaho) have not yet achieved the same level of acceptance, as gauged by the number of referrals. Each is making efforts to train prosecutors, victim advocates, and judges about victims' rights and about the availability of legal representation for victims. These clinics are fighting battles for acceptance of the idea of legal representation for victims. Each has felt itself in an adversarial role vis-à-vis criminal justice officials as they struggle for legitimacy, although the South Carolina clinic has made a concerted effort recently to conduct quiet diplomacy with prosecutors or law enforcement officials where possible rather than immediately filing motions to remedy failure to observe the rights of clients.²⁴ The Arizona clinic has a relatively low caseload because the clinic is selective in taking cases that can be used to further victims' rights issues in significant ways, and because it accompanies its clients to every court proceeding—thus each case take a significant amount of attorney time.²⁵

²⁴ The South Carolina clinic believes it achieves more success for individual victims by taking this non-confrontational route, and NCVLI confirms that South Carolina has, indeed, achieved much through its diplomacy with prosecutors and judges. On the other hand, this approach, if taken exclusively, precludes the possibility of creating case law that furthers the victims' rights movement. There is an ongoing dialogue among NCVLI and the clinics on the merits of diplomacy vs. aggressive litigation (and the continuum between these end points).

²⁵ We note that the substantial differences between clinics in the number of clients may reflect different size populations in each state. For example, although the Idaho clinic has the fewest clients and the New Jersey clinic the most, the rate of clients per 1,000 state population is similar.



We noted substantial diversity on the types of crimes dealt with by the state clinics. Table 3 displays the types of cases in which clinics signed representation agreements with victims. Nearly two-thirds of the New Mexico clinic’s caseload consists of sexual assaults. Relative to the other clinics, Utah’s clinic handles a large proportion (40%) of domestic violence and stalking cases. About three in ten of the New Jersey and Arizona clinics’ caseload involved child abuse charges. Arizona also represented a far larger proportion (44%) of homicide victims than the other state clinics.

Table 3: Types of Crimes in Cases Where Representation Agreements Were Signed

	MD	SC	NJ	NM	ID	UT	AZ
Sexual assault	14%	29%	27%	60%	28%	24%	0%
DV/stalking/harassment	19	24	5	10	28	40	7
Child abuse	0	0	29	0	10	16	33
Homicide/manslaughter	23	10	14	20	3	9	44
Assault/robbery	19	14	24	10	21	7	0
Other*	26	24	2	0	10	5	15
	100% (n=43)	100% (n=21)	100% (n=49)	100% (n=20)	100% (n=29)	100% (n=85)	100% (n=27)

* Includes Voyeurism, fraud, compensation claims, parole violation, burglary, witness tampering, DWI victim, and human trafficking

Rights Issues Dealt with in Cases Opened by the State Clinics

We are least certain about data on the kinds of victims’ rights issues addressed in cases opened by the state clinics. Information on rights issues is most subject to differences in interpretation by the different individuals doing the coding in each of the clinics. Moreover, categorization may be influenced by the wording of particular victims’ rights statutes. Table 4 suggests that the New Mexico clinic is more active in plea agreements than the other clinics. While all but one of

the clinics had a good number of cases involving the right to be notified/present/heard, these issues formed a majority of the caseloads of the South Carolina and Utah clinics. Maryland was the only clinic that represented a number of victims in state compensation claims.²⁶ The Idaho clinic was relatively more active than others in representing victims at the point of charging and on restitution issues.

Table 4: Victims' rights Issues in Clinic Cases

	MD	SC	NJ	NM	ID	UT	AZ
Charging decision	5%	0%	12%	0%	28%	0	0%
Plea agreement	0	5	8	35	28	0	7
Right to be notified/present/heard	33	67	38	0	3	60	22
Speedy trial	0	5	2	5	0	5	19
Right to privacy	13	0	7	10	3	6	26
Safety from harassment/ Restraining order issues	0	10	13	5		19	19
Restitution	13	5	2	5	21	4	7
Respectful treatment	0	10	6	40	10	6	0
General/other issue*	36	0	12	0	7	1	0
	100% (n=39)	100% (n=21)	100% (n=39)	100% (n=20)	100% (n=29)	100% (n=85)	100% (n=27)

* Includes legal representation, assistance with compensation claim, referral for services

Geographic Diversity of Caseload

It is very difficult for a small budget victims' rights clinic to represent cases from all over the state. In this section of the report, we examine the extent to which clinic caseloads are geographically diverse or concentrated in the locale where the clinics reside. We note that clinics do not have to serve the entire state to be successful in NCVLI's mission to promote victims' rights. However, since it has also been acknowledged that it is a purpose of the clinics to represent individual victims in need, it follows that representation ought to be available to victims in all parts of a state.

One of the pieces of data that we asked the clinics to abstract for us was the counties in which 2007 cases originated. When we examined the distribution of cases by county, it immediately became clear that clinics varied considerably in terms of the geographic diversity of caseloads. As Figure 2 shows, cases of most of the clinics were concentrated in the counties where the clinics were based. The New Jersey clinic appeared to have the greatest diversity, with cases in all but two of the state's 21 counties and just 10% of its caseload originating in the clinic's home county. In contrast, 53 of the Utah clinic's 85 cases originated in Salt Lake county, where the clinic is based. For the other clinics, between a third and half of their caseloads consisted of local cases.

²⁶ According to NCVLI, other clinics have helped victims with compensations claims over the years if they arose in the course of their case, but Maryland specifically marketed its services in the compensation arena and therefore did many more compensation cases, until the terms of the federal grant changed and such cases were disallowed in 2008.

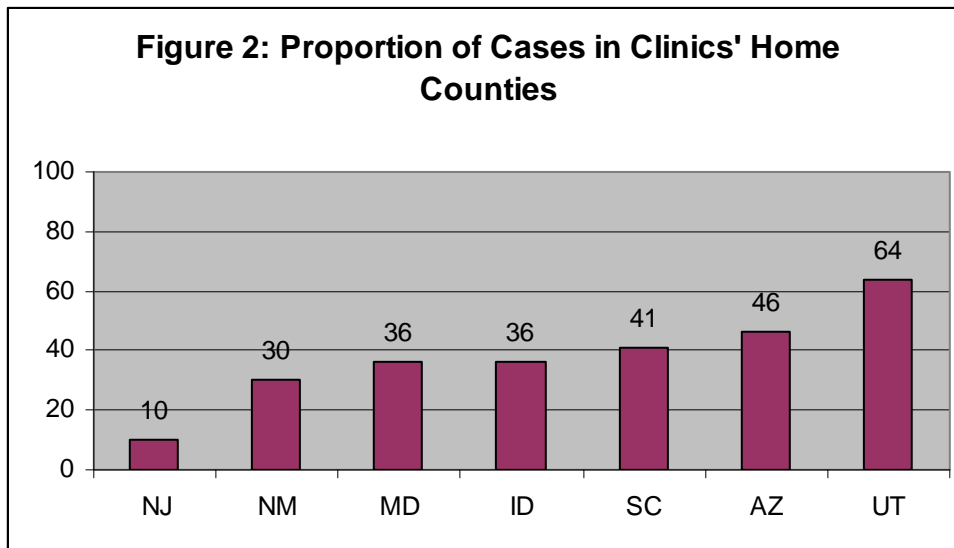


Table 5 summarizes the preceding discussion of contrasts between the clinics on a number of the dimensions discussed in this section. Entries in the cells denote strong, moderate, or weak positions on each dimension.

Table 5: Comparisons of Clinics on Key Process Measures

	MD	SC	NJ	NM	ID	UT	AZ
Relationship to victim organization	S	S	W	M	W	M	W
Specialize in violence against women	M	S	M	S	S	M	W
Holistic approach to client services	S	S	S	W	W	M	M
Community or victim advocate as major source of referrals	M	S	S	M	M	S	M
Caseload size	M	W	S	W	W	M	W
Geographic caseload diversity	M	S	S	M	M	W	M

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VII. CLINIC WORK IN TRIAL COURTS

Trial court advocacy is at the heart of the clinics' work on behalf of victims. Although the general outlines of this advocacy are the same in each clinic, there are some differences among them based on both the laws and legal culture of the states in which they operate and the differing approaches of the clinic directors. In general, the clinics receive a call from a victim, conduct some type of intake screening, open a case, and then proceed—according to the victims' needs in the case—to do one or several of the following: contact the prosecutor, file a notice of appearance with the court, attend court proceedings to accompany the victim, raise oral arguments, file briefs and motions, and connect the victim with non-legal services as needed.

Standing to Appear Before the Court

Although every state with a victims' rights legal clinic in this evaluation has some form of victims' rights in its state constitution as well as state statutes, it is still unclear in several of those states whether victims have legal standing to assert their rights in court.²⁷ Although the argument could be made—and has been made, by NCVLI and some of the clinics—that victims' rights are meaningless without victim standing to assert them, some judges, prosecutors, and defense attorneys have been slow to accept the idea of victims and their attorneys being allowed to go before the judge and make oral arguments, file motions, or submit briefs. Where the statute or constitution does not explicitly spell out victim standing to assert their rights, and where challenges to standing have arisen, the clinics and advocates for victims have gone about trying to establish victim standing in different ways.²⁸

Appealing a denial of standing to a higher court is one route to establish the right of victims and their attorneys to argue before a judge on matters affecting the victim's rights. However, clinics have had to tread carefully when considering appealing such denials, because losing an appeal of that nature would achieve the opposite of the desired outcome: it would establish precedential law that victims do not have standing to seek enforcement of their rights in criminal court. The New Jersey clinic, for example, had a case where the victims were denied the right to be present at a waiver hearing and the judge refused to discuss the issue with the clinic director. Normally in such a case the clinic would ask the prosecutor to file an appeal to assert the victims' right to be present. However, in this case, the prosecutor declined to file the appeal, and so it was up to the clinic and the victims to decide whether to appeal. In this case, the victims and the clinic together decided not to appeal, because the clinic director feared not only losing the appeal on their right to be present, but being challenged on the victim's standing to file the appeal in the first place, and thereby creating bad law on standing.²⁹ Instead, the New Jersey clinic director has gone the route of working with state legislators to draft legislation that would revise the

²⁷ A detailed discussion of the legal foundation for victim standing in each clinic state is included in Section IV of this report.

²⁸ Currently victim standing is explicit only in Arizona's law and, to a more limited extent, Utah's and Maryland's. The South Carolina clinic has never been challenged on standing. The rest of the clinics have had to confront the issue in various ways.

²⁹ It is because of the lack of clarity in New Jersey law on victim standing that the clinic usually tries to have prosecutors file appeals on behalf of victims. The clinic director's reading of the current make-up of appellate court judges causes him to fear that the appeals courts would reject an appeal from him based on lack of standing, and should that happen, a victim's lack of standing to appeal would be enshrined in precedential case law.

New Jersey victims' bill of rights to explicitly give victims standing to assert their rights. This legislation has passed the state Assembly and is awaiting action in the state Senate.

The New Mexico clinic did mount a successful appeal to a denial of standing. However, the decision was unpublished and therefore not technically binding precedential authority applicable to other cases. Despite the fact that it is not a formal opinion, the clinic lawyers have often successfully cited it as persuasive authority to establish standing when challenged.

In Maryland, victim standing was established through a series of appellate decisions as well as several statutory changes advocated by the clinic's parent organization, the Maryland Crime Victims Resource Center. Once standing was established in law, but not yet in practice, the clinic director provided assistance to a judge in drafting a rule to clarify the right of a victim's attorney to enter an appearance to represent the rights of the victim. The rule was subsequently adopted, and the clinic cites it whenever they are challenged on standing. They have had no further problems entering appearances on behalf of victims.

Idaho is the clinic that has experienced the most serious setback when it comes to victim standing. After having accepted the clinic attorney's presence in court on a number of cases, a local judge took it upon himself to seek explicit legal authority for the clinic's appearances in the courtroom. Finding none, he sent the clinic a letter asking them to justify their participation in criminal cases on behalf of victims. The clinic's response failed to persuade the judge, and he ordered his clerk to stop accepting filings from the clinic's attorney. Subsequently, another judge in a neighboring district followed the first judge's example and refused to accept the clinic's notices of appearance. The clinic is hoping a new rule can be adopted to clarify the issue and get them back in those courtrooms where individual judges have denied them standing, despite the existence of victims' rights in the Idaho state constitution.

Clinics' Approach to Trial Court Advocacy

Within the NCVLI Legal Clinics project, there is an ongoing dialogue among NCVLI and the clinics about the system-level and client-level goals of the clinics' legal work, as described in Section II. NCVLI approaches the issue of victims' rights enforcement from a global systems perspective and has the broad goal of changing the criminal justice system and the legal culture so that victims' rights become as natural a part of the system as defendants' rights are currently. The primary system-level goal of the clinics project is to create case law that fleshes out the victims' rights already in states' statutes and constitutions so that enforcement of those rights becomes commonplace. A second aspect of this movement to establish more enforceable victims' rights law is to use the cases the clinics lose to demonstrate the need for better legislation, pass that legislation, and then, again, test it in court to establish precedential case law.³⁰ A third aspect of creating systems change is to educate all actors in the criminal justice system, but especially judges and prosecutors, so that victims' rights is no longer a novel concept but a natural part of the legal culture.

Broadly speaking, the legal clinics share these goals of NCVLI, but also have client-focused goals which at times do not align with the larger system-level goals. Legal ethics bind the clinic

³⁰ Neither NCVLI nor the clinics use federal funds to lobby for legislation. They conduct all legislative advocacy either as individuals on their own time or under non-federal funding.

attorneys to represent their clients' interests to the best of their abilities. This means that if an individual victim seeks some action that will not further the system-change goals, the clinics must pursue it anyway. And conversely, if there is a victims' rights issue that the clinic believes it can use to establish good case law, but the victim in that particular case is not interested, the clinic must forego the action that could be beneficial to the movement as a whole. According to the clinic staff we interviewed, these differences arise in only a small number of cases. For the most part, what is good for individual victims is good for the movement. Also, from NCVLI's perspective, the systems approach must always bow to the interests of the individual victim when the two do not align.

Another way in which these different emphases can be felt is in how the clinics prioritize the cases they accept. A more systems-focused outlook would prioritize cases with the best potential for establishing case law favorable to victims' rights. This approach is generally followed by the Arizona clinic. A more client-focused outlook prioritizes helping as many victims as possible, whether or not their case has the potential for establishing legal precedent. This is the approach of the New Jersey clinic. But most of the clinics report taking all appropriate cases that are referred to them, which means that by and large the clinics are not turning away victims because their cases are not of interest to the victims' rights movement.

Sometimes the clinics pursue an issue that does have the potential for establishing a written record, but the issue is resolved in such a way that it does not enter into the written record of the court, resulting in a win for the individual victim but no potential for impacting future cases. For example, the Maryland clinic represented a victim seeking funeral expenses through restitution. The judge inappropriately capped the amount of the restitution for this expense based on estate law, and when the clinic filed an application for leave to appeal, the defense offered to pay the full amount the victim sought. Thus the victim's goal was met without a need to appeal the trial court's decision to cap restitution. This was good for the victim in that case, but it also eliminated the possibility of establishing a precedent through appeal in favor of the general victims' right to full restitution.

The clinics, and many of the criminal justice professionals and victims we interviewed, also believe that the mere presence of an attorney for the victim compels better behavior from all actors in the courtroom with regard to victims' rights. Again, this may be to the benefit of the current victim, but without repercussions for future victims, if the behavior change is limited to those cases in which the attorney is physically present. Or it may suggest the need for victims' attorneys to always be present, just as defense attorneys are, to see that their clients' rights are enforced. The matter of short-term versus long-term behavior change in criminal justice officials will be explored in the impact evaluation.

Another important difference among the clinics is the degree to which they practice informal advocacy on behalf of victims versus motion practice in court. Following on the above discussion, only motion practice (which creates a written record) can achieve the result of establishing new case law that advances the victims' rights legal movement. On the other hand, an individual client's problem may be more efficiently resolved with a call to the prosecutor which, if successful, spares the victim from having to spend time in court fighting for the right. Most clinics have found it beneficial, for their own ability to function, to try to work actively

with prosecutors to ensure victims get their rights, and to file motions only when this approach is unsuccessful or insufficient. The one exception is the New Mexico clinic, which began with a more informal and cooperative approach toward prosecutors and has determined that more litigation is necessary to achieve success for its victims. The South Carolina clinic takes a different approach, spending much more time and energy on out-of-court work on behalf of victims than on motion practice in court.

Related to the emphasis on informal versus formal legal work is the question of when and how the clinics open a case, and which services they provide to victims with and without a formal representation agreement. Arizona and New Jersey represent the two ends of the spectrum. In New Jersey, the clinic director will meet personally with any victim and make calls on the victim's behalf to the compensation board, the prosecutor, therapists, or other community resources, all without a formal representation agreement. According to the clinic director, if a victim comes in for a meeting and afterwards there is further work to be done, then a case is opened and a representation agreement signed. With or without this agreement, the clinic makes every effort to connect victims to the resources they need, in many cases with a personal call from the clinic director to ensure the connection is made. In Arizona, on the other hand, the clinic attorneys will not perform any informal advocacy on behalf of victims unless and until a representation agreement is signed, because Arizona legal ethics, in their view, dictate that either they represent a client or they do not, and if they do not, then any informal advocacy is prohibited as unauthorized practice of law. If the Arizona clinic cannot represent a victim for whatever reason, they will refer the victim to another resource.

Victims' Rights Issues

Although the rights enumerated in each state's laws (constitution and statute) are somewhat different from state to state, the basic core of victims' rights is similar, and many of the same issues regularly come up for all of the clinics.

Pre-charge cases

One issue the clinics have had to contend with is whether to accept cases before charges are filed. For many victims, the initial complaint is that the investigation is not progressing or that the prosecutor is declining to file charges. Clinics have approached this issue differently. Some have sought meetings with the prosecutors and the victims to find out whether anything can be done to advance the case (or, alternatively, to help victims understand why the case can't proceed if the clinic is in agreement with the prosecutor); New Jersey often takes this approach. In the first year of the Idaho clinic, many of its cases were of this type, and the law students worked actively with police and prosecutors to try to push cases into prosecution. They had some success in getting cases that were still under investigation moved into prosecution, but no success in changing prosecutors' previously made decisions not to proceed with a case. The Arizona clinic currently does not take state cases prior to charges being filed. They have found that pre-charge cases are time-consuming and technically are not victims' rights cases, since victims' rights do not attach until a case is filed in court under Arizona state law. Under federal law, however, victims' rights attach upon the commission of the crime, so the Arizona clinic will take federal cases pre-charging.

Confer with the prosecutor.

Victims' right to confer with the prosecutor on plea agreements is an important area being addressed by all of the clinics. Many victims have turned to the clinics when they learned that prosecutors were accepting pleas to much lower offenses than those charged and/or with little to no jail time. In cases where the victim is aware of the potential plea offer before it is submitted to the court, the clinic has an opportunity to intervene with the prosecutor and potentially offer arguments from the victim's perspective that cause the prosecutor to change aspects of the plea offer. Or, if the prosecutor is not willing to change the plea offer, victims can exercise their right to be heard and ask the judge not to accept the plea. In cases where victims were not notified of the plea offer before it was submitted and accepted by the court, the clinics have sought redress of the violation of the victims' rights to be notified and heard, generally by asking that the plea be vacated and a new hearing held.³¹

Right to privacy.

Privacy of victim records, especially in sexual assault cases, is a significant area of concern for many of the clinics. According to clinic directors, defense attorneys sometimes attempt to gain access to victims' confidential medical or counseling records through use of subpoenas during the discovery process or through challenges to restitution orders that include counseling expenses. The clinics and victim advocates are concerned about the erosion of rape shield protections when defense subpoenas for victim records are allowed, and they fear that this may lead to fewer sexual assault prosecutions. Prosecutors seem to share this concern, and several of the prosecutors we interviewed reported that having the clinics represent the victim's interest in these privacy cases has been very helpful. Judges appreciate hearing from both the state and the victim on these issues, according to both prosecutors and judges we interviewed. Challenges to defense subpoenas of victim records are generally premised on the victims' right to privacy, dignity, respect, and/or to be free from harassment, as well as the states' specific rape shield laws.

Right to be heard.

Although victim impact statements at sentencing are now fairly common in most jurisdictions, the clinics continue to litigate some issues involving the victim's right to be heard. These often involve the rights of more than one victim to be heard (for example, several survivors of a homicide victim), or the use of photos or audio or video recordings of the victim as part of the victim impact statement. Some of the clinics have also litigated cases challenging the prohibition on sentencing recommendations from victims in death penalty cases. The clinic cases on this issue have often involved a victim who wanted to advocate for a sentence other than death, but was ordered to limit testimony to the impact of the crime and refrain from making any specific recommendations about the sentence. The clinics have also represented victims seeking to be heard on plea agreements, which is an area where prosecutors in some jurisdictions continue to move quickly and neglect to hear from victims or inform them of the status of plea negotiations or even of hearings on plea agreements.

Right to review the pre-sentence report. In some states, victims have a right to view the pre-sentence report. Pre-sentence reports are important because the court frequently bases sentences upon the recommendations contained therein, and errors may result in unjust sentences. This is

³¹ A New Jersey case of this type is discussed in Section VIII.

obviously important for defendants, but it also matters for victims, as some of the information in those reports pertains to the victim and the impact of the crime. This is a newer area of victims' rights, and victims are only granted the right to see these reports in a few states (Arizona, Idaho, Colorado, and to a limited extent Utah). The federal Crime Victims' Rights Act does not include explicit permission for victims to have access to these reports, and the Arizona clinic argued unsuccessfully for such access in one federal case, In re Kenna, 453 F.3d 1136 (9th Cir. 2006). In state court, the Arizona clinic generally does not have problems gaining access to presentence reports. In Idaho, victims are granted access to pre-sentence reports; however, courts have been slower to allow access to victims' attorneys. The Idaho clinic has had both successes and failures at gaining access for its attorney and the victim to the pre-sentence report.

Other Types of Assistance

The clinics also offer some assistance to victims in venues other than trial or appellate court. The New Mexico clinic fought for a victim's right to be present at parole hearings. They threatened to litigate, but in the end didn't have to. The parole board changed its procedures and now routinely allows victims to be present at parole hearings.

The clinics often will continue to help victims seek enforcement of restitution orders, even after these have been converted to civil orders. The Arizona clinic routinely files liens on behalf of victims with the Department of Motor Vehicles, the Secretary of State, and the Recorder of Deeds, in order to capture restitution when an offender attempts to sell a car, boat, house, or other property.

Federal Cases

In the time since this evaluation was first funded, all of the clinics have expanded the scope of their work to include federal cases. However, for purposes of this evaluation, only federal work being done by the Arizona clinic was included, as that was the only clinic doing federal work when NIJ solicited proposals for the evaluation.

Most of the victims represented by the Arizona clinic in federal court are cases referred from tribal courts. The clinic has done outreach on several Indian reservations and is building a reputation there as a valued outside party: not the government and not the defense. As a result of its work in one particular case, referrals have sharply increased from one of the Apache reservations in Arizona. In tribal cases, the clinic will start with the victim in tribal court and help ease the transition when the case moves from tribal to federal court, which can be an extremely intimidating process for victims. They must go from the reservation (wherever in the state that may be) to Phoenix, and from a system that is based in their own culture and community to a large federal system. The legal issues in these cases tend to be the same or similar to the issues that arise in other cases, with the addition at times of working to get the federal courts to recognize certain aspects of the Native culture where appropriate. For example, in one case, the Arizona clinic helped a domestic violence victim get restitution to cover the costs of a Navajo cleansing ceremony she sought to aid her healing from the severe beating she experienced.

VIII. CLINIC WORK AT THE APPELLATE LEVEL

When the clinics are successful at the trial level, there is no opportunity to bring cases up on appeal and establish precedential case law. In this way, appellate practice is often a judgment call related to service to the individual victim: the clinics must decide whether to push an issue they are likely to lose *so that* they can appeal, or whether they should not push the issue to spare the victim going through the appellate process, especially where the potential benefit to that particular victim may be minimal. Conversely, there may be issues that specific victims want to press on appeal, but the clinic must weigh the possibility of losing the appeal and creating bad law. In considering taking a victims' rights case up on appeal, it is important to have a victim who understands the risks of both filing and not filing an appeal and can make an informed decision. Defense-initiated appeals, on the other hand, do not present the same issues: if the defense appeals a victim's assertion of their right, and the court accepts the case, the victim's side must be argued. When they do not represent the victim, the clinics still can provide the court with arguments based on victims' rights laws by filing *amicus curiae* ("friend of the court") briefs.

When the clinic loses an appeal, this can help demonstrate the need for new legislation. The advocacy partners of the clinics often then take up those causes and win the passage of new legislation remedying the need discovered through the lost appellate case. The NCVLI clinics have had both wins and losses, and have filed numerous *amicus* briefs as well, in state appellate and supreme courts. The signature wins have come on the issues of victim standing, the right to be heard, and the right to privacy. The losses primarily relate to the lack of remedies in the law for violations of victims' rights. Such losses play an important role in highlighting the need for new legislation to ensure the enforceability of crime victims' rights.

Clinic Cases Representing Victims

The Maryland clinic has had three appellate cases related to victim standing. In the first, *Surland v. State*, 895 A.2d 1034 (Md. Ct. App. 2006), the clinic represented the parents of a murder victim. The defendant was convicted and immediately filed an appeal. The defendant then died while the appeal was pending, and the defense attorney moved to have the court dismiss the appeal and vacate the conviction. Both the state and the victims opposed the defense motion to dismiss the conviction, with the clinic arguing that such a dismissal constituted unfair treatment of the victims, a violation of their rights under the law. When the defense attorney filed a petition with the state's highest court, the victims (through the clinic) filed a petition of their own, and the Court of Appeals ruled that the victims were not a party to the case and did not have standing to file petitions with the court. The case was therefore a loss on victim standing; however, it can be seen as contributing to the further evolution of victim standing in Maryland by illuminating the need for clearer rules and legislation with regard to standing. On the issue of unfair treatment, ultimately the victims did get what they wanted: the defense was given sixty days for the deceased defendant's estate to appoint a substitute for the defendant so that the appeal could continue; when no substitute was appointed, the murder conviction was left intact.

In the second case related to victim standing, *Lamb v. Kontgias*, 169 Md. App. 466 (2006), a registered victim of child sexual abuse was not notified of a hearing to reconsider her assailant's

sentence. The question was whether the victim had standing to challenge a judgment vacating the original conviction and sentence. The Court of Special Appeals (Maryland's intermediate court of appeal) held that the circuit court had jurisdiction to decide whether the victim had standing to challenge the revised judgment. However, the court also determined that the victim could not challenge the sentence. The court held that any available remedy depended on legislative expansion of the victim's right to appeal.

The Maryland courts further clarified the issues of victim standing and remedies for violations of rights in the case of *Hoile v. State*, 2008 Md. LEXIS 248 (2008). In that case, the clinic represented a victim who was not notified of hearings reconsidering the sentence of her assailant, and, thus, was denied an opportunity to be heard at those hearings. The clinic, on behalf of the victim, sought to vacate the altered sentence on the grounds that she had been denied her rights. The trial court granted her request, and the defendant appealed.

The court found, significantly, that under the newly expanded court rule, Maryland Rule 8-111, the victim had the right to participate in a criminal appeal in the same manner as a party regarding issues that directly and substantially affect the victim's rights. Clinic staff, therefore, was authorized to represent the victim in this case, including by participating in oral argument and filing a brief in the case.

However, the court in *Hoile* went on to find the victim was not entitled to relief in the case. The legislature had not permitted a victim to seek invalidation of an otherwise legal sentence merely because the victim's rights in regard to imposition of that sentence had been violated. The court noted "Although a victim now has more opportunity to participate in an appeal, there remains no effective tangible remedy for a victim to seek to 'un-do' what already has been done in a criminal case." Thus, the *Hoile* case was a win on standing and a loss on remedies for victims' rights violations.

In a fourth case litigated by the Maryland clinic, *Lopez-Sanchez v. State*, 388 Md. 214 (2005), the Court of Appeals examined the question of whether a victim of a crime committed by a juvenile offender was entitled to seek reconsideration of a Consent Order for Restitution that the trial court had approved without affording the victim his rights to notification or the opportunity to be heard. The court found that the right to seek a special appeal for a denial of victims' rights under section 11-103 of the Criminal Procedure Article did not extend to victims of delinquent acts, and because the victim is not a party to a delinquency proceeding, a victim cannot exercise a general right to appeal.

The *Lopez-Sanchez* case is perhaps the best example of a clinic's loss at the appellate level leading directly to legislative change. A member of the clinic's pro bono panel that had represented the victim in *Lopez-Sanchez* successfully ran for state delegate during the period of representation. As a delegate, and following his loss in the courts, he co-sponsored legislation to establish that victims' rights to appeal a denial of their rights also applies to victims of juvenile offenders. The legislation passed in 2006.

The New Mexico clinic had one successful appellate case in 2006 on victim standing, and although it resulted only in an unpublished opinion, the clinic has been successful in citing it as

persuasive authority in other cases. In that case, *Nasci v. Pope et al.*, No. 29878 (N.M. Nov. 8, 2006), the clinic had represented a sexual assault victim who sought to file a motion with the district court to attend all public court proceedings that the offender has a right to attend. After oral argument by the clinic attorneys, the Supreme Court issued an order of remand granting the victim standing to assert her rights and ordering the district court to try to maximize the constitutional protections available to the victim under the state's statutes and constitution and the rules of procedure and evidence.

The Utah clinic has one appellate case currently pending, in which it is representing two widows whose husbands were killed in a drunk driving crash (the widows were injured in the crash). The victims allege that the prosecutor deliberately misled them about her planned plea agreement with the offender and then gave them the wrong hearing date so that they would not be there to object. Contrary to what the victims had initially been told by the prosecutor, the deal included no conviction if the offender complied with the conditions of the plea and limited restitution to \$1500, which the prosecutor then converted to a court fee, leaving the victims with nothing. The clinic seeks to have the court set aside the plea agreement on grounds that the victims' rights to notice, to be heard, and to be treated with fairness, dignity, and respect were violated, and also that the prosecutor committed a fraud upon the court when she asserted that the victims had been informed of the plea agreement and agreed with it.

The New Jersey clinic was also involved in an appellate case involving the failure to properly notify a victim of a plea agreement. In *State v. Means*, the New Jersey Supreme Court considered the question of whether a trial court could set aside a plea agreement solely because the prosecutor failed to notify the victims before entering a plea agreement. In the case, a child abduction and molestation, the trial court accepted a plea without notifying the victim's parent as required under the state's victims' rights laws. The Law Center filed a motion to vacate the plea, and the motion was granted. The defense appealed, and the Law Center filed an amicus brief in the resulting state Supreme Court case opposing the defendant's request to have the original plea bargain enforced. The Supreme Court ruled that the failure to notify the victim was insufficient grounds to vacate a plea agreement. In its ruling, the Supreme Court explained that while a trial court should consider the victims' concerns, it also may not impinge on a defendant's constitutional rights. The ruling noted that the trial court had vacated the guilty plea without having information to fairly evaluate the victim's concerns, because it did not know whether the victims had an objection to the plea agreement. Instead, the ruling continued, the trial court could have heard from the victims at sentencing, at which time it would have been in a better position to decide whether to continue to accept the terms of the plea agreement or to reject the plea. The matter was remanded to the trial court.

In an important Arizona privacy case, *P.M. v. Gould*, 136 P.3d 223 (Ct. of App. 2006), the clinic represented a victim with cerebral palsy who was retarded and had been molested by her father. When the state informed the court of its intention to call the victim's counselor as a witness to prove the aggravating factor of emotional harm, the defense subpoenaed the victim's counseling records, arguing that it needed the records to prepare for cross-examination of the counselor. The state agreed that the defense could have the records, and the trial court ordered an *in camera* review of these records. The clinic appealed with a special action to the Arizona Court of Appeals. That appellate court found that the trial court should first determine whether the

victim's counseling records or the counselor's testimony were essential to the state's effort to seek an aggravated sentence. The appellate court further declared that the trial court should balance the victim's constitutional right to refuse discovery against the state's interest in calling the counselor, especially in light of the fact that the state intended to prove six aggravating factors to the crime and only one was needed for the aggravated sentence. Furthermore, the appellate court indicated that if the trial court still considered that the state's interest in calling the counselor to prove emotional harm was compelling, it should consider whether the counseling records were really necessary to cross-examine the counselor.

The clinics are not always successful in their appeals. For example, the Arizona clinic was especially disappointed in *State v. Glassel*, 116 P.3d 1193 (Az. 2005) in which the Arizona Supreme Court rejected the argument that the victim had a right to inform the jury that he would prefer the defendant to be sentenced to life in prison rather than death. In this case, the victim was the widower of a homicide victim—his wife had been shot at a homeowner's association meeting by a disgruntled resident. The couple were two months short of their 50th wedding anniversary. The surviving victim had been in law enforcement his entire life and was aware that if the defendant was sentenced to death, the case would not be over in his lifetime. Therefore he wanted to ask for a sentence of life in prison during his victim impact statement, but he was not allowed by the court to make a specific sentencing recommendation. Nationwide courts are split on this issue and the clinic staff is hopeful that the issue will be resolved by the United States Supreme Court.

At the federal level, the Arizona clinic has had one big win and two losses. The win and one of the losses were both tied to the same case, that of Moshe and Zvi Leichner, a father and son, who defrauded numerous victims out of nearly \$100 million. Mr. Kenna was one of their victims. In *Kenna v. United States District Court for the Central District of California*, 435 F.3d 1011 (9th Cir. 2006), the clinic won Mr. Kenna the right to be heard at the sentencing of the second defendant, after the judge had refused to allow the same victims that had spoken at the sentencing of the first defendant to speak again. Kenna filed a petition for writ of mandamus with the Ninth Circuit, and the court concluded that under the CVRA, "[v]ictims now have an infeasible right to speak, similar to that of the defendant," and found that Mr. Kenna's statutory right was violated when the district court denied him the right to speak at Zvi's sentencing.

Mr. Kenna's second attempt to assert a victim's right—to read the pre-sentence report—was not successful, however. Although this right is explicitly accorded to victims in some states, including Arizona, it is not spelled out in the CVRA, and therefore the clinic's seeking this right for Mr. Kenna in the federal case was a bit of a long shot. In that case, *In re Kenna*, 453 F.3d 1136 (9th Cir. 2006), Mr. Kenna petitioned for a writ of mandamus to order the district court to release the presentence report to the victims. The U.S. Court of Appeals for the 9th Circuit denied the petition holding that the U.S. District Court for the Central District of California did not abuse its discretion or commit legal error when it found that the Crime Victims' Rights Act does not confer a general right for crime victims to obtain disclosure of a defendant's presentence report.

The Arizona clinic also received special permission to represent some victims in the Enron-related proceedings, which was in the 5th federal circuit (the clinic normally practices in the 9th circuit). Because the defendant, Ken Lay, died during the pendency of his federal direct appeal, restitution orders were voided. The clinic argued (unsuccessfully) that the victims should receive restitution from his estate, despite his death in *U.S. v. Lay*, 456 F.Supp.2d 869, *mand. denied*, (06-20848) (5th Cir. 2006).

The Idaho, Colorado, and South Carolina clinics have not yet taken any cases up on appeal.

Clinic as Amicus

When not directly representing the victim, the clinics will at times file *amicus curiae* (“friend of the court”) briefs on victim-related issues before the appellate courts. According to the New Jersey clinic director, it is sometimes preferable to participate in a case as *amicus*, because it provides the opportunity to lay out all the relevant legal issues in an extensive brief, something which might not be appropriate in the context of representing the specific victim’s interests. Among the *amicus* briefs filed by the clinics that we are aware of, two were in cases won by the victim. The other briefs either were not mentioned in the court’s ruling or are in cases that are still pending.

One case was an appellate win on victims’ right to privacy in New Jersey. The case, *State vs. Gilchrist*, pitted a rape victim’s right to privacy against the defendant’s right to confront his accuser. During his prosecution for aggravated sexual assault, kidnapping, burglary, and criminal restraint, the defendant filed a discovery motion requesting that a photograph of the victim be taken and provided to him. The trial court granted the request over the objections of the prosecutor. The appellate court reversed, stating that any possible benefits to the defendant from a court-ordered photograph were speculative, and were outweighed by the victim’s “right to privacy; her right to be treated with fairness, compassion, and respect; her right to be free from intimidation; and the need to encourage crime victims to cooperate and participate in the criminal justice system.” The Law Center got involved as *amicus* when the defense appealed the case to the state supreme court. However, the case never made it to oral argument, because the defendant withdrew his appeal as part of a plea deal. Thus the appellate ruling in favor of the victim stood, which was significant because it pitted the right to privacy against the right to discovery.

The other successful victim case was *Opert v. Criminal Injuries Compensation Board*, in which the Maryland clinic filed an *amicus* brief and also helped the victim’s attorney to write his reply brief. Although the court declined the clinic’s brief, the clinic notes that many of the arguments made in its declined amicus brief were in fact asserted in the court’s opinion. The case involved a motorcyclist, Opert, who had been injured in a crash on the Baltimore beltway when a pedestrian walked out onto the highway with or on a bicycle in violation of the law. The issue was whether Opert was a “crime victim” for purposes of victim compensation. Lower courts and the compensation board had ruled he was not. The Court of Appeals found he was. Though the language of the statute was ambiguous, after examining the legislative history the Court agreed that finding Opert a “victim” was more likely reflective of the legislative intent.

Several of the briefs in unsuccessful or pending cases revolve around evidentiary issues in child sexual abuse cases, such as whether to admit evidence or accusations of other assaults and whether to admit statements made by the victim to a social worker, as well as the protection of victims' private records. The South Carolina clinic filed a brief in a 2004 case arguing against a defense request for a psychiatric evaluation of a child sexual abuse victim, but the state's Supreme Court found the examination proper. The dissent echoed many of the arguments in the clinic brief.

Despite not yet having taken any clients, the Colorado clinic has filed one *amicus* brief on behalf of a dating violence victim who was being asked to provide explicit proof that the relationship was "intimate" in order to invoke a domestic violence sentencing enhancer. The case is pending. *State v. Disher*, 2008 Colo. LEXIS 432 (Colo. 2008)

The NCVLI victims' rights clinics are actively pursuing appellate actions when: (a) victims are denied their rights at the trial level, (b) a victim desires to press their case forward, and (c) when the clinic sees an opportunity to advance victims' rights through appellate case law. Though not all clinics have yet filed appeals, all report waiting for "the right case" to take up on appeal; that is, a case that offers both an opportunity for clarifying or broadening a victim's right and a good chance of the victim winning.

IX. IMPLEMENTATION CHALLENGES

This section will discuss some of the implementation challenges the clinics have faced in their first few years of federal funding, and how they have worked to overcome them. Some of the challenges, such as initial resistance from prosecutors and funding limitations, have affected all of the clinics, while other challenges have been experienced by only a few of the clinics.

Resistance to Change

Perhaps the biggest implementation challenge for the clinics overall has been finding ways to break down the resistance of prosecutors, and some judges, to the idea of victims being represented by attorneys in court. Although, as detailed in Section II, victims' rights legislation has been in existence for more than thirty years, the NCVLI legal clinics represent the first concerted effort for victims to enforce those rights in court. For the two-party U.S. criminal justice system, the integration of attorneys for victims has presented a significant challenge to traditional thinking.

The degree of prosecutor and judicial resistance has varied in the different clinic sites. As a former prosecutor, the director of the Utah clinic has been able to ease her former colleagues into an understanding of how victims' attorneys can support and not undermine the prosecutorial role. The New Mexico clinic, on the other hand, reports opposition so strong from prosecutors that one sought to eliminate the clinic's funding while another "threw" a case because of the clinic's involvement. All of the clinics have had to conduct ongoing education campaigns, introducing themselves and the clinic's work to prosecutors time and again and clarifying the role they seek in helping victims to enforce their rights. New Mexico reports that crimes against children have served as a "bridge issue," as everyone seems to recognize the legitimacy of a child victim being represented by an attorney. These cases can help pave the way for adult victims' attorneys to also be accepted in court. With the clinics (with the exception of Colorado) now in their fourth or fifth year of operation, most report that prosecutor distrust has eased significantly over time, if not evaporated altogether.

Staff Turnover or Inexperience

Attorneys who are well-suited to victims' rights work are not necessarily easy to find and keep, and this has proven to be another challenge for some of the clinics. There has been significant turnover of clinic leadership in South Carolina and Colorado (a clinic that has not yet taken any cases but is already on its third director). The Idaho clinic has transitioned from a supervising attorney who was a former judge, though not necessarily steeped in victims' rights, to a relatively inexperienced attorney whose background was in defendants' rights. There are various reasons for staff turnover, but the common thread for a number of the staff vacancies has been the uncertain funding stream. Attorneys who have families to support are apt to be lured by offers of more money and greater job security. According to NCVLI, an additional factor in attorney turnover may be vicarious trauma—attorneys may not have training in handling the emotional impact of working with crime victims day in and day out.

Based on our interviews with both clinic staff members and criminal justice professionals, the turnover and lack of experience in these three clinics has impeded their progress to some degree. On the other hand, the clinics in New Jersey, Arizona, and Maryland are headed by three of the most prominent voices in the victims' rights movement nationally (the Arizona clinic's founder is not on staff, but the clinic is associated with his name regardless). The Utah clinic also benefits from the distinguished victims' rights history of one of its board members. In these four clinics, the founder/directors' long personal histories in victims' rights and strong personal reputations among criminal justice professionals has clearly benefitted the clinics, giving them access to a pre-existing network of relationships statewide, including prosecutors and legislators. In New Mexico, the clinic director is a long-time and well-known victim advocate, but there has been some attorney turnover; additionally, that clinic appears to have encountered even more resistance among prosecutors to the idea of victims' attorneys than other clinics have.

In those clinics with less well-known attorneys and directors, outreach has proven to be somewhat of a challenge. Caseloads in several of the clinics have been surprisingly low: just 17, 20, and 22 cases opened in 2007 in Idaho, New Mexico, and South Carolina, respectively. These clinics have to work harder both to get the word out about their availability for victims and to build confidence in their work among potential referral sources. All of the clinics with low caseloads (based on the number of cases opened in 2007) report that their caseloads are increasing as they become better known around the state and as criminal justice system resistance to victims' attorneys lessens.

Demand for Services

Some clinics have had the opposite problem: more cases than they can comfortably handle. The Arizona clinic has recently implemented a waiting list, maxing out at about 40 cases (representing 55 to 60 victims) open at one time, while the New Jersey clinic may have as many as 100 cases open at any given time. The difference between these two clinics appears to be the amount of time spent in court: while the Arizona clinic attorneys attend every court proceeding with victims, the New Jersey attorneys attend court only when they expect a victims' rights issue to arise, and they instruct victims to call them if anything comes up when they are not there. The New Jersey clinic director also regularly works more than 80 hours per week. In Utah, the high demand for services led to their inability to screen cases quickly, which they believe led to a subsequent drop in referrals. However, they recently added a new attorney and believe that referrals will pick up again, as has happened in the past when word got around that their staff had increased.

Sustainability

Another significant implementation challenge for the clinics is securing funding. The federal funding under which the clinics currently operate has not always been secure from year to year, and non-federal funding has been hard to come by. None of the clinics evaluated felt it could survive without the federal grants, with the possible exception of Idaho, which is well-integrated into the law school's clinical program. Several of the clinics did have additional sources of funding, most commonly state VOCA grants, and these funds allowed them to pay victim advocates or outside contract attorneys for a certain number of hours (often less than full-time). When we asked the criminal justice officials we interviewed about potential sources of funding for victims' attorneys, most felt that to keep programs like the clinics going, or to pay other

attorneys for victims, states would need to set aside a portion of offender fines (or levy new fines) for victim legal services, or continued federal funds would have to be available for legal representation of victims.

As a way of controlling costs, NCVLI and the clinics initially envisioned making broad use of free help in the form of pro bono attorneys and law students. However, as the clinic implementation has progressed, NCVLI and most clinic directors have come to the conclusion that pro bono help is not as promising as was once thought, primarily because of a lack of the specialized knowledge that is required in victims' rights cases. Because it is a relatively new and complicated area of the law, a good deal of expertise is needed to be successful in many cases of the types taken by the clinics. Pro bono attorneys who specialize in other areas of the law require a good deal of training in victims' rights law. Law students have been helpful to some of the clinics with research, but their helpfulness is also bounded by their limited knowledge of the law and criminal procedure.

Clinic sustainability will be examined in more detail in the impact evaluation through interviews with each clinic on their past, current, and projected future sources of funding, as well as other topics related to organizational sustainability.

X. CLINIC SUCCESSES AND PROMISING PRACTICES

All of the clinics were able to point to numerous trial court successes in ensuring that victims' rights were honored, and four of the seven active clinic sites had had at least one successful appellate case. Victims interviewed at each site sang the praises of the clinics and left no doubt that the clinics' work in individual cases was highly valued.

The different clinics had, mostly through trial and error and sometimes on instinct, developed certain practices that helped overcome challenges and led to specific successes. Below we highlight some of these "promising practices."

Offering help to prosecutors. Several of the clinics were able to gain the good will of prosecutors by pointing out how their efforts could aid the prosecutors and/or save the prosecutors and their staff time. The most common ways that clinics make themselves helpful to prosecutors are by:

- Filing motions to protect the privacy of victim records. We were told several times in interviews with both prosecutors and judges that when the clinics assert victims' privacy rights it is more persuasive to judges than the prosecutor's argument alone.
- Helping victims gather their paperwork on crime-related losses and calculate the amount of restitution to be requested. According to prosecutors interviewed, this saves an enormous amount of time for their victim advocates. From the clinic perspective, it also means that victims stand a better chance of receiving full restitution.
- At times brokering the relationship with dissatisfied victims by helping them understand the legal system and why the prosecutor's office might be taking (or not taking) certain actions.

Offering free Continuing Legal Education (CLE) training for pro bono attorneys. Several of the clinics had offered or planned to offer free training for pro bono attorneys, for which the attorneys could receive CLE credit. This is a practice that could potentially overcome some of the hurdles to involving pro bono attorneys with victims' rights cases: specifically, their lack of knowledge of both victims' rights and criminal procedure, and the apparent lack of interest and willingness to take cases of this type. Many clinics noted that law schools focus almost exclusively on defendants' rights and therefore most practicing attorneys know little about victims' rights and don't even realize it is a potential area of practice or pro bono work.

Writing detailed and well-researched briefs on victims' rights issues. The New Jersey clinic director told us that, "You have to blow everyone out of the water with your brief." Because the clinic attorneys are generally the most knowledgeable parties in the courtroom on victims' rights legal issues, their briefs should reflect that expertise. According to the New Jersey clinic director, when faced with a detailed and well-researched and documented brief, defense attorneys will often accede to the victim attorney's request rather than attempt to write a response brief on legal issues with which they are unfamiliar. Judges also appreciate these briefs because they serve to update them on a new area of law, and prosecutors, even when they know victims' rights laws, generally do not have the time to author such briefs.

Being willing to take a risk. When a victim is willing to go through the appellate process, following that process to the end can pay major dividends for future victims. The New Mexico

clinic's success in establishing standing for victims the *Nasci v. Pope* case was a result of the courage of the victim and the clinic's willingness to go with her all the way to the state's Supreme court.

Using losses to spur change. NCVLI and several of the clinics noted that a courtroom loss can be a win for the movement, because it often provides a concrete example of why current victims' rights legislation is not working. Several of the clinics hold regular meetings with advocacy groups (either internal or external to their organizations) to communicate about "holes" in victims' rights laws that are revealed by the cases the clinics lose, and to strategize about advocating for legislative fixes for these holes.

Positioning the clinic as the expert on victims' rights. One successful form of outreach for gaining referrals was the New Jersey clinic's e-mail list, through which they send case updates and information on victims' rights to a wide array of criminal justice practitioners and interested parties throughout their state. They also publish a magazine once a year that provides in-depth analysis of important victims' rights cases and issues. These informational resources are appreciated by prosecutors, who view the clinic as the statewide expert on victims' rights and are likely to call them for assistance and refer them cases when victims' rights issues arise.

Gaining word-of-mouth referrals. In the words of the South Carolina clinic director, "Do a good job on every case, and more cases will come, and change will come." Several of the clinics noted how one case in a particular community or from a particular referral agency led to more referrals from that community or agency when they saw and appreciated what the clinic did. Cultivating community-based referral sources was a very important strategy for gaining more cases and increasing the clinics' reach.

Offering services to victims in high-profile cases. The Idaho clinic, the only clinic situated in a rural area, watches the local news for crime cases and seeks out referral to those victims by contacting other professionals who may be in touch with the victims and asking them to provide the victims with the clinic's information. According to the Idaho clinic attorney, this entrepreneurial spirit is essential in an area that is somewhat remote and has fairly low crime rates.

Thinking outside the box on sustainability. While most if not all clinics had applied for other grants in addition to NCVLI funding to sustain their clinic work, some had also come up with more innovative ways to stretch their grant dollars. Of particular note were the Arizona clinic's subsidized office space provided by a corporate donor, and the New Jersey clinic's law firm model, through which the clinic director's salary is covered by the NCVLI grant, and his two law firm partners work on typical civil legal cases and donate a portion of their profits, as well as pro bono hours, to the work of the clinic. The clinic also refers victims to the civil practice when appropriate, with fees from those cases contributing to the law firm's revenues. The Colorado clinic is exploring possibilities for direct funding from the state's 13 judicial districts, each of which has public funds it can dedicate to criminal justice programs.

XI. CONCLUSIONS AND RECOMMENDATIONS

Based on the information we gathered during the course of the process evaluation, we believe that the state clinics are beginning to fulfill the intentions of their architects and funders. All of the clinics have pushed the envelope of victims' rights in their state courts. Some have won significant victories in gaining standing for victims and expanding the definition of particular rights. Others are enjoined in the battle. But all have raised awareness of victims' rights with prosecutors, judges, defense attorneys, and police officials.

How far the clinics have managed to alter the legal culture remains to be determined through the second, or impact, phase of this evaluation. Two significant parts of that effort will be to (a) determine how court officials' opinions and observance of victims' rights has changed and (b) assess the extent to which basic victims' rights such as being informed of rights or receiving restitution has increased since the clinics opened. We plan to assess the former issue through systematic surveys with judges, prosecutors, victim advocates, and defense attorneys who deal with felony cases and the latter issue through examination of case files before and after the clinics opened their doors.

One of the good things about how NCVLI has gone about setting up the state clinic program is that it has funded different clinic models, as defined by where the clinics are housed, what kinds of cases they tend to specialize in, whether they use litigation as a first or last resort, and how much use they make of pro bono attorneys or student help. This diversity creates the ability to explore the kinds of outcomes achieved by different models, in terms of the numbers and types of clients served, in terms of getting favorable published opinions or changes to court rules, and in terms of changing observance of victims' rights by court officials. For example, it may be that a successful pro bono program is associated with a greater number of clients served, while a focus on litigation is associated with successes in obtaining favorable published opinions on victims' rights. Although the small number of clinics and model types make definitive statements about the impact of the model type on the clinic outcomes impossible, we will explore these factors in the impact evaluation and attempt to identify any correlations between model types and outcomes.

One thing that the process evaluation has made clear is that clinics that build on the networks and reputations of experienced clinic directors and boards have an easier time of it than clinics that have to start from a zero point. Clinics with directors and boards that are well-connected gain more referrals and have more success getting prosecutors and judges to accede to their desired outcomes, even without having to litigate. A good part of their success may also result from trust that the directors have built up with local officials in their years of victims' rights work. It will be instructive to see whether the clinics starting from a zero point are able to make up ground over time and develop the same kinds of respect and relationships that the Maryland, New Jersey, and Arizona clinics enjoy as a result of their directors' contacts or the Utah clinic enjoys as a result of contacts of board members.³²

³² Of course, one of the dangers of an organization built upon the strength and reputation of a single individual is that the organization may collapse when the individual leaves. It is not clear that this presents an immediate danger since the clinics are still young and the directors are relatively young and very dedicated to their work.

Thoughts on the Future of the Demonstration Project

To the extent that we can tell at this point, the clinics have made significant progress in gaining acceptance for victims' rights. For the most part, they have done this by focusing on a small number of cases that have the potential to set precedent that will strengthen and expand the definition of victims' rights. Thus, they have acted, as NCVLI intended, to increase court officials' awareness of victims' rights and to create new interpretations of law.

It is certainly true, however, that the clinics serve only a tiny fraction of victims in their states whose rights are not honored. The clinic model was never intended to accommodate large numbers of cases, yet the clinics' experience has pointed out that many court officials still feel that victims' rights are only to be accommodated when it is convenient or when they coincide with the interests of the justice system. It seems to us that the clinics have a significant role to play in thinking about how a larger number of victims could have recourse to assistance with rights issues – at a cost that is politically feasible.

The victims' rights clinics currently play at least three somewhat distinct roles. Although the attorneys probably do not intentionally segment their work in this way, in our evaluation we observed that the work could more or less be divided into three categories: informal advocacy that does not involve litigation (e.g., serving as a bridge between the victim and the prosecutor when there are disagreements); litigation of the more common victims' rights issues (e.g., the ability to give a victim impact statement or receive an order for full restitution), and litigation of more complex cases, including those that go up on appeal and have the potential for establishing appellate case law.

It strikes us that, perhaps, these three roles could actually be played by different groups of professionals to increase efficiency and reduce costs. The first role, that of intervening with prosecutors or other actors in the criminal justice system in ways that are short of litigating, could be played by state compliance officers, which already exist in some states and perform this work to a limited extent. The second role, that of litigating the more common rights violations, could potentially be played by pro bono attorneys who have completed required training and with technical assistance from an organization such as NCVLI. The final role, that of litigating the more complex and cutting-edge victims' rights cases, could be played by the more experienced paid victims' rights attorneys at the NCVLI clinics. A limited expansion of this cadre to cover each state with at least one or two paid, experienced victims' rights litigators might do the job.

This model presents significant challenges. For example, the way that most state compliance officers currently operate would not be sufficient to fill the role of what we are calling "informal advocacy," because compliance officers' work most often happens after the fact and is geared more toward changing the system for future victims than for righting a wrong to a particular victim. For such professionals to be effective in current, ongoing cases, their mandate would need to be modified and prosecutors would have to be legally required to inform victims of the existence of such professionals so that victims could call upon them in a timely manner. Victim advocates would have to be trained and encouraged to alert compliance officers to potential problems at a stage when action can be effective and not after a plea has been taken or a sentence

issued. Even so, many of the actions brought by a compliance officer would be too late to help a particular victim and would involve trying to change a pattern of rights violations emanating from particular counties or particular courtrooms.

The other weakness of using compliance officers for informal advocacy is that such advocacy by non-attorneys may not carry the same weight as informal advocacy by attorneys who have the ability to eventually litigate if the informal route proves unproductive. Therefore, such a compliance scheme would have to be designed with some sort of “teeth” that would provide a source of reserve power to the compliance officer comparable to that which attorneys possess by virtue of their ability to go before a judge.

There is also some risk in separating what we are calling “common” victims’ rights issues from “complex” victims’ rights issues. At the start of a case, it may not be apparent which category a case may fall into: a case that looks routine at the beginning may run into complexities that would entail the need to call in more experienced litigators. Such transitions from one attorney to another might be upsetting and disruptive for victims and make for less effective legal work than if the same attorney or team of attorneys stuck with a case from beginning to end. This possibility would have to be balanced against the potential benefit of having many more victims represented under this scheme.

Notwithstanding the limitations outlined here, the three-role concept represents a potential way to expand protections to a larger number of victims. There are surely other schemes that could be developed, and the impact phase of this evaluation may point the way to even more effective practices for achieving more consistent enforcement of victims’ rights laws and helping more victims.

Thoughts on Future Evaluation Work

One thing that we noticed during the course of the process evaluation is that the clinics varied in the sophistication of their record-keeping systems. The emphasis of the clinics is, appropriately, on serving clients and maintaining confidentiality of client information. We note, though, that in order for NCVLI and outside evaluators to be able to assess the work of the clinics, comprehensive and consistent record-keeping is important.

We recommended – and the clinics agreed – to collect data on client demographics, essential to understanding the client base that the clinics serve. We also noted in this report that the clinics have different ways of recording the presenting problems that brings clients to the clinics and the type of service that the clinics provide. Comparison of clinics would be facilitated if this information was recorded consistently from one clinic to the next. Developing consistent coding would entail NCVLI developing categories for recording data on these two dimensions and definitions of what those categories consist of. This would allow, for example, comparing the kinds of legal needs of families of homicide victims to the needs of sexual assault victims.

Formal tracking and reporting of requests for clinic services and clients turned away or wait-listed would also help NCVLI to evaluate staffing levels of the clinics and make the argument that more staff was needed in particular states. It would also be useful if the clinics tracked and reported the number of attorney hours spent on gathering information from potential clients,

conferencing with clients, advocating for clients' legal needs, spending time in court, and connecting clients with needed social services. That would allow NCVLI and others interested in measuring clinic performance to compare NVCLI's statistics to public service standards for reasonable caseloads per attorney and determine how efficiently clinics are serving their clients.

Lastly, the client satisfaction surveys should be expanded and reported with greater regularity. Client satisfaction is an important yardstick to gauge how the clinics are doing. Surveys are done now, but they are few in number and not reported on a consistent basis. NCVLI should insist that clinics forward satisfaction surveys for all cases that are opened by the clinics (or a written record of unsuccessful attempts to conduct the interviews). NCVLI should also consider contracting this function out in order to reduce bias that is likely to occur when the same individual who provides service to victims also queries them about their satisfaction with those services.

This process evaluation has begun to shine a light on the work being done in eight state clinics on very limited budgets; more remains to be seen about the effectiveness of this work and the best ways to obtain for all crime victims the rights, respect, and dignity for which countless advocates have long struggled.

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APPENDIX A: SITE REPORTS

Arizona Crime Victims' Legal Assistance Project

Legal Context

Compared to other states, support for victims' rights in Arizona is very strong. Arizona has an extensive bill of rights for victims, and a separate bill of rights for victims of juvenile offenders. Victim provisions are also incorporated throughout the state code, where relevant. Victims' rights advocates in Arizona also ensured that victims' rights were incorporated into the rules of criminal procedure.

The Arizona victims' rights' amendment includes the most common rights of victims, as well as some unusual constitutional provisions. These include the right "to have all rules governing criminal procedure and the admissibility of evidence in all criminal proceedings protect victims' rights and to have these rules be subject to amendment or repeal by the legislature to ensure the protection of these rights." It also includes the right for the victim to refuse an interview, deposition, or other discovery request by defense counsel; and the right to review the presentence report if it is available to the defendant. The amendment received a relatively low voter approval rating in 1990: 58%. According to the clinic founder, who also drafted the amendment, the low approval rating can be attributed to the extensive reach of the amendment, which included many more provisions than other states' amendments.

The implementing legislation was noteworthy because of its enforcement provisions, giving crime victims explicit standing to enforce their rights, and the ability to seek injunctive relief, and even the ability to bring a civil action for damages in the case of a willful violation of rights.

Moreover, unlike in most other states, the Arizona courts decided some early pro-victim cases. As far back as 1994, the Arizona Supreme Court granted victim standing in *State ex rel Hance v. Az Pardons and Parole*, 875 P.2d 824 (Az. Ct. of App.1994). In that case, the parole board did not tell the victim of a parole hearing and voted to release the defendant. The victim filed a petition to the Arizona Court of Appeals which ordered a "do-over" of the parole hearing. This case established that victims had appellate standing and that victims' rights were enforceable, long before the clinic was developed.

Project History

The Crime Victims' Legal Assistance Project (CVLAP) is a project of the Arizona Voice for Crime Victims (AVCV), a victims' rights organization founded in 1996. AVCV's mission is to "ensure that crime victims receive their rights to justice, due process and dignified treatment throughout the criminal justice process." The organization grew out of the founder's efforts to advocate for an amendment to the Arizona state constitution by ballot initiative in the late 1980s. The founder is a former Chief Assistant Attorney General of Arizona with a longstanding interest in victims' rights issues. He has worked to promote victims' rights for more than 30 years, providing assistance to Congress, state legislatures, tribal governments, and local organizations in drafting, passing, and implementing victims' rights statutes and amendments. He authored the Arizona constitutional amendment for victims' rights and the Arizona Victims' Rights

Implementation Act and has served as an informal advisor on other victims' rights legislation. He was also one of the founders of NCVLI in 2004.

Having been instrumental in enacting both an Arizona constitutional amendment and enabling legislation, the clinic founder initially believed that the clearly enumerated victims' rights would be enforced by prosecutors and judges. By the late 1990s, however, he realized that very little had changed and that victims' rights were going to have to be enforced by attorneys, in the same way that defendants' rights are enforced. The idea of modeling the enforcement of victims' rights on the enforcement of criminal rights for defendants has been an important principle for the clinic.

AVCV's founder started the Crime Victims' Legal Assistance Project at Arizona State University law school in 2001, after receiving a state VOCA grant. The clinic began representing clients in January 2002, operating out of a small space at the law school with initially one paid staff attorney--a former prosecutor--and another attorney assisting in a pro bono capacity. Initially, law students were involved in most aspects of the clinic functioning, but the law students' role has diminished over time, as the clinic staff's specialized expertise has developed.

After the initial VOCA grant, the clinic secured a federal grant as part of the NCVLI demonstration project in 2005 to continue its work enforcing victims' rights in Arizona state courts. Then, in 2006 the clinic secured a separate grant directly from OVC to work on enforcing the Crime Victims' Rights Act in federal court. This grant required the clinic to keep its federal and state court operations completely separate. For one year, the clinic maintained separate staff and offices for its state and federal work.

Since the initial federal enforcement grant concluded, the clinic has been able to use both VOCA and federal (OVC, through NCVLI) grant funds to work on both state and federal cases. In February 2008, clinic staff began outreach to the Apache reservation tribal courts, as well as several other Native communities around the state. Since that time, a majority of the clinic's federal case load has been from tribal courts.

Business Model

The clinic is under the umbrella of the Arizona Voice for Crime Victims and has no separate legal or organizational identity. The clinic founder is the president of the board and plays an important role in the organization, though he is not a paid staff member.

The clinic only has two employees – the paralegal and the office assistant. Two attorneys and two social workers are independent contractors. The paralegal also handles some of the accounting work, which has allowed the clinic to cut back on outside accounting services. The clinic also occasionally employs an information technology consultant.

The clinic is affiliated with Arizona State University law school, where the founder teaches a class. Most of the students in the class volunteer for the clinic in order to receive extra credit for the class. The class is not qualified as a "true clinic" by the law school because there are many students in it and the students do not directly represent clients. The clinic staff felt that while

having students work directly on cases was sometimes helpful, it also took a great deal of time to supervise. Working with students is seen as a way of educating future lawyers rather than a viable way to actually represent more clients than would otherwise be possible. The students do contribute to the clinic's work by doing legal research that is relevant to clinic cases.

The clinic emphasizes full representation of its clients with a team of a social worker and an attorney generally present with the victim at every proceeding in the victim's case, from pre-trial status conference to sentencing. Clinic staff teach a "Trial 101" class to victims and their families so that they know exactly what to expect and what not to expect from the process. The staff emphasized that once they enter into a representation agreement, they "stick" with the client even absent any victims' rights problems.

The clinic does not undertake informal advocacy, such as phone calls, on behalf of victims it does not formally represent. The clinic lawyers believe that this would constitute the improper practice of law under the relevant Arizona rules of professional responsibility. If the clinic is unable to represent a victim, either because of a full caseload or because the victims' needs are outside the usual scope of the clinic's services, the clinic will attempt to refer the victim to another appropriate agency or attorney. The clinic will, however, offer informal technical assistance to prosecutors who contact the clinic about a victims' rights issue.

According to clinic staff, their relationship with prosecutors and law enforcement is excellent and they often receive referrals from prosecutors and victim advocates at prosecutor's offices. Clinic staff state that victims who work with them create less work and fewer headaches for prosecutors and judges. The clinic welcomes victims that prosecutors see as "difficult." For example, in one case they represented a victim who had been shot in the head. The brain damage he suffered made him impulsive and very difficult to work with. He was also the only witness to the completed murder of his friend. The clinic represented both him and the family of the deceased victim (assigning a separate attorney to each family) during the trial to make sure there were appropriate accommodations made for his disabilities, and to secure his testimony about the murder of his friend, the clinic's other client.

The clinic mentioned only one difference in the way that state and federal cases are handled. In state court, victim's rights "attach" or come into effect only when a defendant is formally charged. As a result, they tend not to take state cases prior to a defendant being charged. According to clinic staff, pre-charge cases are very resource intensive and there are more resources available from other organizations to aid victims pre-charge. In contrast, under federal law, the victims' rights attach upon the occurrence of the crime. As a result, they sometimes take federal cases prior to any charges being filed.

The clinic receives modest corporate contributions which have allowed it to occupy an attractive suite in a downtown office building. The clinic's founder indicates that these contributions are not sufficient to allow the clinic to continue functioning absent the state and federal grants.

The founder believes that ultimately any victim who wishes to have counsel should receive it and that victims' rights are best advanced by loosely following the pattern of the expansion of defendants' rights – litigating rights in the courts.

Staffing

The clinic staff includes two attorneys, two social workers, a paralegal, and another assistant, although, as stated above, all but the paralegal and the assistant are contract employees. Each case is generally staffed by an attorney and a social worker. The paralegal provides additional assistance and, with a background in victim advocacy, sometimes attends court to help support victims, particularly in cases with large numbers of victims or on days when several cases are in court at the same time. The social worker and the paralegal also allow the attorney to focus more on the legal aspects of the case and less on the victims' immediate needs.

The clinic has relationships with five or six attorneys that accept victim cases on a pro bono basis. The clinic attorneys know these attorneys and know that they will do a good job. One larger local firm also takes a few cases, particularly cases in which the clinic has a conflict of interest. Originally, the clinic envisioned a large network of pro bono counsel, but gradually realized that the necessary knowledge and expertise were very specialized. In particular, the emotional skills necessary to interact sympathetically and professionally with a victim are not possessed by every attorney. The law firm does a good job, but it takes about two weeks for the firm to undertake its conflict of interest check and for some clients, this delay is problematic.

The clinic also tries to get pro bono attorneys involved in restitution issues as a case is concluding. These are fairly straightforward and require fewer specialized skills.

How the Clinic Gets its Clients

The clinic advertises its existence through a website and ongoing training sessions around the state, litigation, and occasional contacts with local media. Most clients were referred through law enforcement agencies and the victim advocates in the prosecutor's offices. They have also created a brochure. While the previous director engaged in more media contact, the current director has generally avoided press conferences. The clinic also works with advocacy groups like Parents of Murdered Children and other community groups, which are another significant referral source. Most cases now come through word of mouth, as the clinic's reputation has grown.

Geographically, the clinic estimates that approximately 60% of their caseload comes from Maricopa County (where Phoenix, and the clinic, is located). This estimation is consistent with the case statistics that were provided for all the cases that were opened in 2007. However, as a result of their recent outreach on an Apache reservation about three hours from Phoenix, many of the newer cases are coming from there.

When the clinic is contacted by a potential client, one of the two social workers conducts a thorough intake. In some cases, the victim is obviously seeking services that the clinic cannot provide. In these instances, the social worker attempts to refer the caller to the appropriate resource. Originally students were tasked with doing intakes, but results were more uneven and students were not as aware of available social service agencies.

The staff then reviews the intakes and meets weekly or close to weekly to decide which cases to take. The clinic recently had to institute a waiting list as a result of demand for their services

exceeding supply. This makes them somewhat wary of advertising or trying to increase the public profile of the clinic. As they close cases, they are able to take cases from the waiting list, which currently runs about four to six months. Some homicide cases, for example, typically last 3-5 years. While they look for victim's rights violations, they are not a prerequisite to the clinic accepting the case.

Cases are not necessarily taken from the waiting list in the order they were put on it. Some cases are considered "have-to" cases by the clinic. Clinic staff cited child victims, high-profile media cases, and death penalty cases as "have-to" cases. Also, if a victims' rights violation occurs in a case on the waiting list, it may be bumped into active status so the clinic can help on the immediate issue. The clinic attempts to take as many cases as the staff feel they can responsibly handle, and the staff exercises quite a bit of discretion in determining which cases need immediate attention and which can stay on the wait list a bit longer.

Altogether, clinic staff estimated that the clinic presently represents about 55-60 clients in about 40 cases. The discrepancy between number of cases and number of victims results from cases in which there are multiple victims, often many family members who were affected by the offense.

Table 1: Source of Referral

Source of Referral	Percentage
Website	4%
Unknown	4%
Prosecutor's Office (including victim advocates)	43%
NCVLI	11%
Police Department	0%
Friend/Acquaintance of Victim	4%
Parents of Murdered Children	25%
Judge or other court official	7%

Training Criminal Justice Officials

Clinic staff members have trained prosecutors, judges, victim advocates and some of the religious community who work with victims. The clinic has also been invited to a national training for state judges. They recently conducted a continuing legal education (CLE) session for lawyers. They would like to be able to conduct more training but they are limited by their case load.

In Arizona, for the last three years, they have participated in the two-week orientation program for new judges by leading a two hour training session on victim's issues. The clinic has also

presented at state judicial conferences, where they brought in five victims to speak. The clinic has also trained probation officers.

Victims' rights have powerfully affected the local criminal justice culture. For example, the clinic has been asked to help redesign the courthouse to make it more victim-friendly, by, for example, creating separate seating areas for the victims apart from the family members of the accused.

How the Clinic Affects the Exercise of Victims' Rights in the State Courts

By being present at every proceeding, the clinic attorney protects and enforces the victims' rights under Arizona and federal law.

Clinic staff report that after some initial resistance from some prosecutors and judges, the criminal justice system adapted to victim representation well. In one early isolated case, the Arizona Attorney General said that the presence of an attorney for the victim makes the AAGs look like they cannot do their job well. The clinic feels as though they are helping the prosecution stretch their limited victim advocate resources. They are "not bomb-throwers" and emphasize their willingness to cooperate with judges and prosecutors. When they first started, both judges and prosecutors were nervous but they saw that represented victims were easier to deal with, particularly victims who had a reputation for being difficult. Judges appreciated an "unfiltered" expression of the victim's position. The clinic's policy of representing the client throughout the case (and not just when the prosecutor or judge violates the victims' rights) probably facilitated acceptance by prosecutors and judges. The victim advocates also appreciate the fact that their workload is lightened by the support the clinic social workers provide to victims on their cases.

According to clinic staff, defense counsel perspectives remain mixed. The more accepting defense attorneys understand that the clinic attorneys are representing their clients' interests and accept their role. Some defense attorneys have referred cases to the clinic. Others fear that the victims' active involvement usually means worse outcomes for the defendant. The clinic emphasizes that that is not always the case and that both in death penalty cases and in others, the victim sometimes prefers something less than the maximum penalty. The clinic is frustrated that victims are not permitted to give their opinion as to the appropriate sentence in death penalty cases. Particularly in cases where surviving victims are against the death penalty, having to restrict their statement to the impact of the crime on their family may leave the impression that they want death for the defendant when in fact they do not.

The clinic staff also emphasized the fact that conversations between victims and the clinic social workers are legally privileged (under an extension of attorney-client privilege) and thus not discoverable by the defense. According to the clinic, it is more uncertain as to whether or not conversations between victims and victim advocates from prosecutor's offices were potentially discoverable by the defense.

Table 2: Victims' Rights Issue in Cases Opened by Clinic

Reason for Clinic Involvement	Percentage*
Right to Privacy (refusing defense interview)	25%
Right to be present/heard	29%
Victim Sought Fairness and Respect	11%
Right to Protection/Safety	29%
Restitution	7%
Right to Notification	7%
Right to timely disposition	7%
Represented victim as guardian ad litem	7%
Other Victim Issue	11%

*The total is more than 100% because some cases involve more than one issue.

Right to be heard issues often arise, particularly in homicide cases where there are multiple survivors who wish to be considered victims for the purposes of the right to be heard.

Restitution issues often arise. The clinic aggressively pursues restitution in every case, even when the defendant appears indigent. This includes filing liens with the Department of Motor Vehicles, the Secretary of State and the Recorder of Deeds. In the clinic's experience, even indigent defendants occasionally attempt to transfer title to a car or boat. The clinic also believes that these liens eliminate incentives that defendants might have to profit from their crimes with book deals or sales of items related to the crime. This also makes it unnecessary for victims to hire their own private lawyers to seek restitution.

About 25-30% of the clinic's clients are Spanish-speaking. The attorneys are not fluent in Spanish, but the paralegal does speak Spanish. Clinic attorneys often ask for and receive a dedicated victim interpreter for court proceedings.

How the Clinic Affects the Exercise of Victims' Rights in the Federal Courts

In federal court, the clinic staff indicates that it is more difficult to represent victims. For example, they have had some difficulty in obtaining the pre-sentence report prior to sentencing. Since the judge relies heavily upon the pre-sentence report in deciding the appropriate sentence, an inaccuracy can make a large difference. The clinic attorney reported that the federal courts are about where the state courts were a few years ago. Awareness on the part of judges and U.S. Attorneys is still at an early stage compared to Arizona state and county officials.

Clinic staff members were particularly proud of recent outreach that they made to victims at the Apache reservation. According to the clinic staff, there is a very high crime rate and methamphetamine production and consumption are big problems. Law enforcement can be indifferent and there is frequent prosecutor turnover. By serving as outside observers, clinic staff members feel as though they help prevent corruption. They found that victims and witnesses were often being intimidated by the families of the criminal defendants. By filing for orders of protection, they were able to prevent this from occurring. The clinic staff feels as though positive word of mouth is spreading and that they have helped facilitate a movement towards a culture of

safer streets and being willing to testify. The clinic has also met with the prosecutor in the Navajo tribal courts and represented one victim from Navajo reservation.

The clinic's familiarity with Phoenix and federal court also helps tribal victims if the cases are pursued in federal court. The staff provides a constant to ease the transition between the tribal prosecutor and the Assistant U.S. Attorney. There is also substantial turnover in both local prosecutors assigned to tribal court and the assistant U.S. Attorneys that prosecute these cases. The clinic staff also felt that there was sometimes a reluctance to prosecute tribal cases in federal court and that some Assistant U.S. Attorneys see tribal victims as "uncooperative." Clinic staff can help educate prosecutors about cultural issues that may be at play for tribal victims and advocate for full prosecution of their cases. By being accessible to victims and reaching out to them, the clinic also ameliorates some of the suspicion of the federal government many tribal victims possess.

Clinic Work on the Appellate Level in State Court

The clinic has been very active in developing victims' rights case law in the state appellate courts, having been involved in more litigation than clinics in most other states.

In *P.M. v. Gould*, 136 P.3d 223 (Ct. of App. 2006), the clinic represented a victim with cerebral palsy who was retarded and had been molested by her father. The defense subpoenaed the victim's counseling records and the trial court had ordered an *in camera* review of these records. The clinic appealed with a special action to the Arizona Court of Appeals. That Court found that the defendant had to prove the records were essential to the case before permitting the trial court to examine the records.

They are not always successful. For example, the clinic was especially disappointed in *State v. Glassel*, 116 P.3d 1193 (Az. 2005) in which the Arizona Supreme Court rejected the argument that the victim had a right to inform the jury that he would prefer the defendant to be sentenced to life in prison rather than death. In this case, the victim was the widower of a homicide victim—his wife had been shot at a homeowner's association meeting by a disgruntled resident. The couple was two months short of their 50th wedding anniversary. The surviving victim had been in law enforcement his entire life and was aware that if the defendant was sentenced to death, the case would not be over in his lifetime. Therefore he wanted to ask for a sentence of life in prison during his victim impact statement, but he was not allowed by the court to make a specific sentencing recommendation. Nationwide courts are split on this issue and the clinic staff is hopeful that the issue will be resolved by the United States Supreme Court.

Clinic Work on the Appellate Level in Federal Court

In federal court, the clinic litigated *Kenna v. United States District Court for the Central District of California*, 435 F.3d 1011 (9th Cir. 2006). In this case, Moshe and Zvi Leichner, father and son, defrauded numerous victims out of nearly \$100 million. After each defendant pleaded guilty, more than sixty victims submitted written impact statements, and at Moshe's sentencing, several victims, including Mr. Kenna, delivered an oral impact statement. *Id.* at 1013. At Zvi's sentencing, which was three months later, Mr. Kenna was present again to verbally allocute, but the district court denied him the opportunity, stating that after reviewing all the victims' written statements and listening to the victims at the prior sentencing, "I don't think there's anything that

any victim could say that would have any impact whatsoever." *Id.* Kenna filed a petition for writ of mandamus with the Ninth Circuit. Noting that the CVRA sought to change the criminal justice system's assumption "that crime victims should behave like good Victorian children -- seen but not heard," the court framed the issue presented as the proper scope of the right to be reasonably heard. Turning to the legislative history of the CVRA, the court determined that the law disclosed "a clear congressional intent to give crime victims the right to speak at proceedings covered by the CVRA." *Id.* at 1016. The court then concluded that under the CVRA, "[v]ictims now have an indefeasible right to speak, similar to that of the defendant," and found that Mr. Kenna's statutory right was violated when the district court denied him the right to speak at Zvi's sentencing. *Id.*

The clinic was also involved in a second case involving victim's rights and Mr. Kenna: *In re Kenna*, 453 F.3d 1136 (9th Cir. 2006). In that case, the victim also petitioned for a writ of mandamus to order the district court to release the presentence report to the victims. The U.S. Court of Appeals for the 9th Circuit denied the petition holding that the U.S. District Court for the Central District of California did not abuse its discretion or commit legal error when it found that the Crime Victims' Rights Act does not confer a general right for crime victims to obtain disclosure of a defendant's presentence report.

The clinic also received special permission to represent some victims in the Enron-related proceedings. The clinic required special permission because it was in a different federal court. Because the defendant, Ken Lay, died during the pendency of his federal direct appeal, restitution orders were voided. The clinic argued (unsuccessfully) that the victims should receive restitution from his estate, despite his death in *U.S. v. Lay*, 456 F.Supp.2d 869, *mand. denied*, (06-20848) (5th Cir. 2006).

Legislative Efforts

Each year, the the clinic's founder asks clinic staff if they encountered particular problems that might be remedied by legislative action. Since the founder receives no money from the grant funds, he is able to lobby the legislature on matters that concern victims that arise during the clinic's work. Other clinic staff can do so on their own time (for example, if they take a vacation day).

Arizona Voice for Crime Victims has been successful in the legislature and the clinic founder obviously wields considerable influence in the body. To give one telling example, he hopes to change the scope of the spousal privilege to allow the state to prosecute one particular defendant whose wife initially reported the defendant's confession but then indicated that she would execute the privilege and not testify against him. While this change might affect a small number of other cases that might arise in the future, it would primarily affect one particular case in which the victim is represented by the clinic.

In 2003, AVCV was influential in eliminating the exception to rape that immunized husbands from being prosecuted for the rape of their wives. Prior to this change, spousal rape was a minor felony that did not carry much punishment.

The main victims' rights enforcement statute, Ariz. Rev. § 13-4437, was amended in 2005 to provide: "On the filing of a notice of appearance and if present, counsel for the victim shall be included in all bench conferences and in chambers meetings and sessions with the trial court that directly involve a victim's right enumerated in article II, section 2.1, Constitution of Arizona." The 2005 amendment also gave victims standing to file a notice of appearance in an appellate proceeding seeking to enforce any right or challenge an order denying a victim's right. The same changes were made to the juvenile victims' bill of rights, § 8-416.

Also in 2005 Arizona expanded the victim's right to be notified and heard regarding any proposed modification of probation. The right used to be limited to modifications that would affect the offender's contact with or safety of the victim, or restitution or incarceration status. Now it includes any modification.

In 2006 the procedures to enforce victims' rights were amended, to provide that failure to comply with a victim's constitutional or statutory right is a ground for the victim to request a reexamination proceeding within 10 days of the violation -- or with leave of the court for good cause shown. The court shall reconsider any decision that arises from a proceeding in which the victim's right was not protected (but is not cause to seek to set aside a conviction after trial or provide grounds for a new trial). In some situations the victim may move to reopen the plea or sentence if the victim was not given the right to be heard, and the defendant didn't plead to the highest offense charged. The statute states this statute does not affect the victim's right to restitution, which the victim can enforce at any time.

In 2006, the legislature restricted defense counsel's use of blank subpoenas. According to clinic staff, the clinic was aware of defense counsel using these subpoenas to obtain sensitive information about victims, and brought the problem to the attention of the clinic founder for his legislative advocacy agenda.

In 2006, victims received the right to get a copy of the police report at no charge, and in 2007 the right to the "minute entry" or portion of the record of any proceeding in a case that arises out of the offense committed against the victim that is reasonable necessary for the purpose of pursuing a claimed victim's right. (§39-127).

In 2007, Arizona expanded the victims' right to speedy trial to include requests for continuances. The amendment states that the prosecutor must notify the victim of any request for a continuance or if the victim is represented by counsel who has filed a notice of appearance, the court must make reasonable efforts to notify counsel of the request for continuance. The court must then consider the victim's views on the request and the victim's right to speedy trial before ruling on the request. (§13-4435) Similarly, as of 2005, if a victim files a notice of appearance in an appellate proceeding in a capital case then the victim has the right to respond to a request for an extension of time to file a brief in that case.

In 2007, Arizona amended victims' right to be notified of any post-conviction or appellate proceeding and related decisions to require that notice be given "immediately." Also the court must send the victim a copy of the court's decision or opinion at the same time it is sent to the parties. If the victim is represented by counsel, notice shall be provided to counsel.

