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Victim Appearances at Sentencing Under California's Victims' Bill of Rights

Edwin Villmoare and Virginia V. Neto

Should the victim of a crime be given the right to initiate or intervene in a criminal prosecution? According to Professor Abraham S. Goldstein of Yale Law School:

> [T]he victim deserves a voice in our criminal justice system, not only in hearings on the amount of restitution to be paid him but also on the offenses to be used as the basis for such restitution....[T]he victim should have a right to participate in hearings before the court on dismissals, guilty pleas, and sentences....[1]

1. "Defining the Role of the Victim in Criminal Prosecution," 52 *Mississippi Law Journal* 515, 518 (1982).

The December 1982 Report of the President's Task Force on Victims of Crime encouraged victim participation but recommended a more limited approach:

> Judges should allow for, and give appropriate weight to, input at sentencing for victims of violent crime....[E]very victim must be allowed to speak at the time of sentencing. The victim, no less than the defendant, comes to court seeking justice....Defendants speak and are spoken for often at great length, before sentence is imposed. It is outrageous that the system should contend it is too busy to hear from the victim.

By the time the Task Force report was published, the voters of California had already enacted legislation giving victims the right to allocution at felony sentencing hearings, i.e., the right to speak. Proposition 8, California's Victims' Bill of Rights, includes Penal Code Section 1191.1, which specifies the following:

> The victim of any crime, or the next of kin of the victim if the victim has died, has the right to attend all sentencing proceedings under this chapter and shall be given adequate notice by the probation officer of all sentencing proceedings concerning the person who committed the crime.

From the Director

The past decade has seen a dramatic rekindling of public concern for the needs of the victims of crime, a concern richly supported by continuing research into the questions of what those needs are and how they can best be met.

When California voters in 1982 enacted Proposition 8, called the Victims' Bill of Rights, that new law included a provision that the victim or the victim's surviving kin would be permitted to address the court before any felony sentencing.

The National Institute of Justice then sponsored research by the McGeorge School of Law at the University of the Pacific to study the implementation of this "right to allocution." If we learned how allocution worked in the early days of its implementation in California, other States considering victim legislation would benefit from the California experience.

This *Research in Brief* gives the results of that investigation. Although few victims availed themselves of this right and some judges were skeptical of its value, an overwhelming four-fifths of the victims and two-thirds of the prosecuting attorneys thought the victim's right to allocution was a proper and necessary contribution to justice.

Like other National Institute research into victim problems, this study's findings again stress the victim's need and desire to know what is going on in the case against his or her criminal assailant, and how important it is for the victim to be a full partner with the criminal justice system from the very start of that case. Thus the study recommends that procedures for notifying victims of the progress of a case and their allocution right be improved, and that victim participation in the case be encouraged at an earlier stage than sentencing. Thoughtful legislative draftsmanship, supported by sound research and experience, can continue to ease the traumas of the victims of crime and hasten achievement of our ideals of justice.

James K. Stewart
Director
National Institute of Justice

> The victim or next of kin has the right to appear, personally or by counsel, at the sentencing proceeding and to reasonably express his or her views concerning the crime, the person responsible, and the need for restitution. The court in imposing sentence shall consider the statements of victims and next of kin made pursuant to this section and shall state on the record its conclusion concerning whether the person would pose a threat to public safety if granted probation....

To study California's implementation of the new right to allocution at felony sentencing, the National Institute of Justice sponsored an exploratory study by the Center for Research, McGeorge School of Law, University of the Pacific. This *Research in Brief* highlights the study's findings.

Major findings

Effects. In California, victim appearances seem to have had little effect on the criminal justice system or on sentencing. The vast majority of victims surveyed for this project did not use the allocution right. In fact, in less than 3 percent of the cases did the victim appear. The possible impact of the victim allocution right is severely limited by the high percentage of cases plea bargained, by California's determinate sentencing law, and by victims' lack of awareness of the right.

Victim desire for information. In general, victims are more interested in information about their cases than they are in the right to participate. Some victims, in fact, exercised the allocution right at sentencing primarily to find out what was going on in their cases.

However, 80 percent of the victims interviewed indicated existence of the right was important. Many victims showed limited understanding of the criminal justice system and had trouble ascertaining what stage a case had reached or why a particular action had been taken.

Notice problems. Form letters sent by probation departments are an inadequate means of communicating the existence of the allocution right. More personal and direct communication is required if victims are to learn about and understand the right.

Victim impact statements. Victim impact statements included in the presentence reports prepared by the local probation departments provide many victims with a satisfactory opportunity to express their views. An informal interview with a sympathetic probation officer is often preferable to a recitation in open court.

Scope and methods

The project had two major objectives: to study the implementation of the allocution right by State and local agencies, and to assess the extent of victims' awareness of the right and their use and reaction to it.

Agency survey. In the fall of 1982, the project surveyed agencies statewide to learn about the activities and attitudes of officials related to the allocution right. Questionnaires were sent to probation departments, district attorneys, and Superior Court presiding judges in all of California's 58 counties and to all 35 victim-witness programs operating in mid-1983.

The questionnaires covered four major issues:

- victim notification of the allocution right,
- assistance to victims by the criminal justice system in the exercise of the right,
- the extent of victim appearances, and
- perceptions by officials of the new right and its implementation.

Forms were returned by 33 probation departments (57 percent), 25 district attorneys (43 percent), 33 Superior Courts (57 percent), and 22 victim-witness programs (63 percent). According to the survey results, 3 percent or fewer of felony crime victims make statements at sentencing hearings.

Case surveys. To assess victim response statewide, the project sought to identify and interview two groups of victims: Those who exercised the right and those who were entitled to but did not. There were major obstacles in locating victims: County agencies did not maintain systematic data, such as victim names and addresses, and many district attorneys and police tended to "protect" victims and inhibit researchers' access to them.

To overcome these difficulties, the project surveyed victims in three cooperating counties with computerized recordkeeping systems: Alameda, Fresno, and Sacramento. The computerized systems enabled project staff to review large numbers of files and extract victim data that were otherwise inaccessible or unavailable.

At the project's request, the district attorney's offices and the Superior Court clerks in each of the three counties generated a list of felony cases resulting in conviction and sentencing for a year and a half that overlapped to some extent the statewide agency survey.

There was a total of 1,293 cases generated by the 3 counties that contained the information needed to identify and contact victims. The data included the names and addresses of the victims. Next of kin were identified primarily by searching district attorney and coroner files. The felonies were principally burglary, robbery, assault, rape, child molestation, kidnapping, and homicide. Burglary was included to compare responses to property and personal injury crimes.

The project analysis identified 59 cases in which victims (or next of kin) made statements at sentencing. The percentage of victims identified as exercising their allocution right in the cas surveys compared to the total number of sentencings in the three counties is similar to the 3 percent appearance finding of the statewide agency survey.

Victim interviews. Project staff succeeded in locating and interviewing 171 victims. The district attorneys' case survey accounted for 147 of the 171 victims, and the sentencing orders sent by the Superior Court clerks accounted for the remaining 24.

Each of the 171 victims was interviewed by telephone. The interviewers asked about details of the crime and characteristics of the victim; the source and degree of the victim's knowledge of the appearance right; and the de-

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The Assistant Attorney General, Office of Justice Programs, coordinates the criminal and juvenile justice activities of the following program Offices and Bureaus: National Institute of Justice, Bureau of Justice Statistics, Bureau of Justice Assistance, Office of Juvenile Justice and Delinquency Prevention, and Office for Victims of Crime.

gree, kind and circumstances of victim participation. The effects of participation and nonparticipation on the victims were part of the interview.

Interviews were conducted with both victims who appeared at sentencing (29 of 171 victims) and those who did not. Their responses were then compared. Besides the 29 victims who actually appeared at sentencing, only 47 of the remaining 142 indicated they knew of the allocution right. (It should be noted that the 171 victims interviewed were not necessarily typical victims. Hence, their responses may not be representative.)

Legal framework

The victim's opportunity to exercise the allocution right is constrained by legal factors. Penal Code Section 1191.1 confines the right to allocution to felony sentencing in Superior Court. There is no right to allocution in Municipal Court, where almost all misdemeanor cases are tried. California operates under a determinate sentencing law that limits sentencing choices. Further, in cases involving a plea, the sentencing judge considers only the crime(s) that the defendant pleads to.

Thus, the only real opportunity for the victim to affect the sentence by allocution is in a case that reaches Superior Court, and only to the extent permitted by determinate sentencing and plea bargaining. In instances where crimes are not charged, or charged but later dismissed or dropped, victims have no allocution right.

It should be noted that allocution is not a victim's only way to communicate with the sentencing judge. Since the 1920's, presentence reports prepared by probation departments have included victim impact statements. These statements became mandatory in 1978. Victims may also write the court directly.

Agency implementation

Probation departments. Nearly all departments appeared to be sending notification announcements to victims of the allocution right as required by the Code. The departments reported only a minimal increase in their workloads.

Notification almost always consisted of form letters. Contents of the notice were not uniform among the probation departments due to the vagueness of Section 1191.1, the lack of central administrative or legislative guidelines, and the need to implement notification procedures quickly.

Despite differences in the style of notification letters, victim appearance rates at sentencing did not differ noticeably from one county to another. Some form letters were less personal than the letters and phone calls used to solicit victim impact statements.

Probation departments reported difficulty in locating some victims because of incorrect names or addresses provided by other law enforcement agencies. No followup notices were sent. Eighty-five of 149 victims (57 percent) who responded to the question in the victim survey about the notice did not remember receiving one.

Superior Court. In the statewide agency survey, some judges expressed concern about possible lack of due process in the allocution process. The statute does not address the procedures under which victims are to be heard. Consequently, judges' practices differ.

Of the judges responding, nearly half indicated they allow cross-examination of the victim by the defense. One-fifth of the judges also require the victim to speak under oath, especially when facts of the case or details of the crime are discussed. Some judges accept comments from victims without an oath unless facts of the case or details of the crime are raised. Two-fifths of the district attorneys said that, in their experience, victims spoke under oath. No systematic records of the procedures used in victim allocution are maintained.

District attorneys. District attorneys, who have the most contact with victims after an arrest and often consider themselves victim advocates, were not mandated to inform or assist victims regarding allocution. Nevertheless, according to the victim interviews, the district attorney was the most common source of information on the allocution right.

Victim-witness programs. While less than one-third of the victims interviewed remembered any contact with a victim-witness program, over half of the victims knew about the victim-witness program. Relatively few victims recalled learning about the right to allocution from victim-witness programs.

Victims and allocution

Despite the great amount of publicity about the Victims' Bill of Rights, mandatory notification of victims, and victims' contact with various agency personnel, only 44 percent of the 171 victims interviewed were aware of the right to appear at sentencing. (What the actual level of knowledge was among all victims in the three counties can only be estimated, but it probably was much lower, considering that the 171 victims interviewed were a more economically stable and highly educated sample than is typical of felony victims.)

Approximately half of the victims who were aware of the right first learned about it from district attorneys, 21 percent from the probation officer, 15 percent from victim-witness programs, and 10 percent from other criminal justice personnel such as police. Only a few mentioned the Victims' Bill of Rights as their source of information.

Although probation departments in California are legally responsible for notifying victims of their allocution right, the sequence of events in criminal proceedings may account for the higher proportion of victims who recalled being informed of the right by district attorneys' offices. When someone is charged with a crime, the victim may begin a series of meetings, phone calls, and correspondence with the district attorney. Not until there has been a conviction does probation prepare a presentence report and send notification of the right to allocution and the schedule of the sentencing hearing.

Reasons for not exercising the right. Of the 47 victims interviewed who knew of the right but did not exercise it, 43 explained their reasons for not doing so. Thirty-seven percent were satisfied with the criminal justice system's response. This was especially true in burglaries. Some of these victims were satisfied by district attorney's assurances that the criminal would receive the maximum sentence possible. Thirty percent believed that their appearance before the judge would make no difference.

For 28 percent the reasons for not appearing were more personal: they were either too upset, afraid of retaliation, or confused. One victim, who was also a witness in the case, thought that being barred from the courtroom during the trial precluded her involvement at the sentencing hearing.

Some were discouraged by a district attorney or probation officer, only to regret later that they had not expressed their views. (In the statewide agency survey, some officials indicated concern that an oral statement might be counterproductive, fearing, for example, that a victim might become hysterical.) For another 5 percent, an appearance was considered too costly in lost wages, child care, or travel expenses.

Victims often presented themselves to project interviewers in a passive mode, explaining that "no one told me I should," or "they don't seem to care," or "I was busy."

Reasons for exercising the right. Of the victims interviewed who made a written or oral statement, 34 percent said their primary reason was a desire to express their feelings to the judge, 32 percent to perform their "duty," and 26 percent to achieve a sense of justice or to influence the sentence.

One victim of a terrifying armed robbery wanted to show the criminals that the victims could make life miserable for them. Another man, whose brother was unable to care for himself after a severe assault, said, "I needed to say something because my brother is unable to speak for himself."

Several victims who knew their attackers personally asked the court to provide psychological help for the offenders, usually for the good of the offenders as well as the safety of others. A man assaulted by a friend advocated probation and restitution because he knew the high costs of incarceration and the undesirable conditions in prison.

Bound up with victims' *reasons* for making a statement at sentencing were the *results* they sought: 56 percent sought a long or maximum sentence; 15 percent emotional relief; 12 percent financial restitution; and 17 percent a variety of other objectives, including a light sentence.

Content of victims' statements. Of all the points raised in victims' statements, the most common (made by 47 percent of victims interviewed) was that the perpetrator should be punished or locked up. Twenty-five percent stressed one or more of the following: the effects of the crime, qualities of the criminal (usually highly negative ones), good qualities of the victim, or details of the crime. A few mentioned the need to protect society; others suggested alternative sentences, such as probation and restitution.

Nearly half the persons preparing statements received some help, most frequently from family members or friends, sometimes from a victim support group such as Mothers Against Drunk Drivers, and occasionally from a private attorney or the district attorney.

Was Section 1191.1 necessary or effective?

Victims' perspectives. The victims interviewed indicated that making a statement at sentencing had two main potential effects—an emotional effect on the victim and a perceived effect on the sentence. Over half the appearing victims (54 percent) reported they felt different after making their statement to the judge. Of these, 59 percent expressed positive feelings of satisfaction or relief, 25 percent felt angry, fearful or helpless, and 10 percent felt dissatisfied.

Less than half (45 percent) of those victims who spoke at sentencing felt their participation affected the sentence. Even those who felt they had an effect were inclined to view the sentence as too lenient. In fact, they held this view in the same proportion as persons who had no involvement in sentencing at all. Most discouraged were those who made statements but felt they were not heeded: 82 percent of these victims thought the sentence was too light. Victims who spoke at sentencing were often the victims of serious crimes, yet as a group they reported a higher frequency of probation sentences in their cases than those who did not appear. (It should be noted that victims seeking restitution in California are forced to request a sentence that excludes a prison term. Direct restitution to the victim is available only when probation is granted.)

Despite infrequent use of the allocution right and mixed reactions to it, over 80 percent of all victims interviewed indicated that the existence of the right was important. Victims also expressed a strong desire for more information about the right and the progress and dispositions of their cases.

Officials' perspective. Two-thirds of the judges saw no need for the allocution right. An equally large majority of district attorneys thought it was needed. Judges pointed out that the presentence report provides all the necessary information. One judge wrote:

> Any review of the impact of victim's statements should not fail to take into account the rules of court sentencing criteria. By the time that the victim comes to court, a well-prepared probation report having been reviewed by a well-prepared judge leaves little room for modification of an intended decision. A victim's emotional appeal to the court cannot carry more weight in place of the facts and criteria.

When asked whether the right was "effective," 81 percent of probation officers answered "minimally or not at all" (often because of the role of victim impact statements) compared with 69 percent of judges and 48 percent of prosecutors; less than 2 percent indicated that the right had been very successful. Sixty-six percent of district attorneys, compared with 40 percent of judges, thought that victim appearances increased the amount (as opposed to the frequency) of restitution awarded.

Judges indicated that, while the actual appearances had little overall impact on the sentences, they believed the right had benefits:

- It does allow victims to air their grievances or "get it off their chest." To this extent they may feel the system is paying more attention to them.
- Prop. 8 has been a real significant step toward victim recognition and awareness. It is as important as a public statement as it is as a court tool.

Prosecutors wrote:

- — Judges are constrained by law, logic, and justice. In a majority of cases nothing the victim says is really going to impact.
- — Members of the judiciary who were responsive to victims' rights before, continue to be so, and others who place defendant's rights paramount...also continue.

Conclusion

Allocution at sentencing will be a modest right wherever it is established because plea bargaining effectively resolves the vast majority of all sentences before the victim can have a say. In fact, since plea bargaining may result in the dismissal of criminal charges, plea bargaining deprives some victims of the right to allocution altogether. If the intent behind the allocution right is to give victims an opportunity to comment on and influence the sentences for the crimes committed against them, victim participation must exist at earlier stages in the prosecution of cases. This is particularly true within a determinate sentencing system.

There is no doubt that victims deserve much greater attention and assistance than they have received in the past or are currently receiving. Victim participation in the prosecution of crimes raises complex legal and social issues. If victim participation is to be more than symbolic, additional resources will have to be invested in the criminal justice system and a number of existing procedures changed. Victims' rights cannot be grafted onto the existing system without generally remaining simply cosmetic, nor can they be made potent without creating profound changes throughout the entire system.

The question remains as to whether society is prepared to embark upon a process so potentially complex, expensive, and unpredictable.

Edwin Villmoare served as project director and Virginia V. Neto as project coordinator for Victim Appearances at Sentencing Hearings Under the California Victims' Bill of Rights. *The full report of this study, prepared under a grant to the McGeorge School of Law, University of the Pacific, can be purchased from the Superintendent of Documents, U.S. Government Printing Office (stock number 027–000–02171–01), and is available in free microfiche (NCJ 104915) from the National Institute of Justice/NCJRS (phone 800–851–3420 or, from Maryland, Alaska, and the Metropolitan Washington, D.C., area, 301–251–5500).*

Previous studies

Recent literature on victims has focused on the importance of victim involvement and satisfaction with the criminal justice system. For some victims, appearing at sentencing hearings is the culmination of a series of actions after the crime. Their participation may stem from satisfaction or displeasure with prior criminal justice contacts. Similarly, their appearance at sentencing may leave them with positive or negative feelings about the system.

A study of victim involvement in communities near Toronto (Hagen, 1982) analyzed various activities—contact with police and prosecutor, knowledge of the case outcome—in terms of their relationship to victims' attitudes toward the disposition. The findings indicated that victims who attend court are more likely to reduce their demands for severe sentences, suggesting a link between involvement and acceptance of case disposition.

A survey conducted of New York victims by Lou Harris and Associates (Bucuvalas, 1984) reported that overall victim satisfaction with the police and the district attorney is enhanced if the victim receives victim services. Victim-witness agencies, however, have continued to be concerned about the lack of witness cooperation. In evaluating this "persistent phenomenon," Davis (1983) suggested that victims might be more cooperative if they were given a chance to have their opinions heard in court.

A National Institute of Justice study, *The Criminal Justice Response to Victim Harm* (Forst and Hernon, 1984), found that victims expressed more satisfaction with the system if they had knowledge of the case outcome and if they felt they had influenced the disposition of the case. In general, victims placed more emphasis on being informed than on participating in the process. The same study reported that judges consider the presentence investigation report useful information about victim harm: however, much of the presentence investigation report is based on information obtained from second-hand sources, not from the victim. Thus, even from the judicial perspective, it may not be a true alternative to the right of allocution at sentencing.

An NIJ experiment, Structured Plea Negotiation (Clark et al. 1984) called for victim participation in plea bargaining. Evaluation of the research indicated that most victims tended to be satisfied with their attendance, but believed their presence, statement, or both at the plea negotiation conference had no impact on case disposition. These findings echo the results reported (Heinz and Kerstetter 1980) on a similar experiment in Dade County, Florida, in 1977.