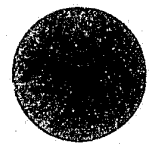

Victim Response to Newly Awarded Rights:

The Implementation of Proposition 8 in California

Submitted by

Virginia V. Neto
Center for Research
McGeorge School of Law 3200 5th Ave.
University of the Pacific
Sacramento, California
95817

March, 1985

One of the most interesting and highly publicized developments of this decade is the movement to give victims rights in the legal system. Although this movement is international in scope, we will concentrate on its manifestation in the United States and in California, in particular. As is often the case, California is seen as a forerunner in the victims' movement. A brief chronology of key events, followed by a discussion of the evolution of Proposition 8, the Victims' Bill of Rights, and finally, a report on a study of victims' rights funded by the National Institute of Justice will be presented.

For many years, there was little or no focus on victims' rights. In the mid-50's, Margery Fry, in her book Arms of the Law, made cogent arguments for victims' compensation. This work led to the first such legislation in the British Commonwealth. In 1965, California was the first state to pass a victims' compensation law for serious bodily injury. For some time the California law was little known and underfunded.

In the early 1970's, under a grant from the Law Enforcement Assistance Administration, several district attorney offices established the first victim/witness programs. These programs now exist in 36 counties and have become key units in administering victim compensation funds and providing other services to victims.

In 1973, the Fresno County Probation Department under

James Rowland (who is now Director of the California Youth Authority) instituted the Victim Impact Statement as a required element in pre-sentence reports. Such statements had been permitted under law since 1920, but not mandated, state-wide, until 1977. Probation officers are required to contact victims by mail or telephone to elicit information on the personal consequences of the crimes on their lives. These Victim Impact Statements were intended as a means to supply additional information to the judge, not as an exercise in victims' rights.

Several themes, however, were developing in the late 1960's and the 1970's, which in retrospect seem to converge to cultivate if not produce the victims' movement.

First, the law and order theme: Crime rates were rising; the public and officials were irritated with pro-defendant rulings of the Supreme Court. Retreat from the concepts of rehabilitation in favor of "just desserts" resulted in determinate sentencing laws (California's was passed in 1977), and harsher penalties for many crimes.

Second, the women's movement resulted in increased prosecution of rape and domestic violence cases and provision of services to the female victims of these crimes. Aided by media publicity, women were successful in modifying the behavior of police, prosecutors, and judges who for years had avoided imposing penalties on certain private offenses, usually committed by men against women.

This conjunction of the traditionally conservative

agenda -- law and order -- with the liberal women's civil rights issue brought together some strange bedfellows in the victims' movement.

In the 1980's who is the victim? Grass roots organizations such as MADD (Mothers Against Drunk Driving), Parents of Murdered Children, or the star-rooted Victims for Victims, which was founded by the actress, Teresa Saldano, portray victims as white, middle, or upper class persons who radiate innocence and vulnerability. It is interesting that young persons, whether teenagers killed by a drunk driver, or a child murdered or abused by a stranger, are the hallmark images of victims in the 80's. Their innocence is beyond question.

In truth, these victims comprise only a small percentage of crime victims, but the majority of voters can empathize and identify strongly with, and respond favorably to these images while in the voting booth. This is exactly what happened in California in June, 1982, when the voters by a 56 percent majority passed Proposition 8, the Victims' Bill of Rights. The name itself is misleading, since it encompassed other issues in addition to the victims' right to allocution at sentencing and parole hearings and increased access to restitution. Other provisions of Proposition 8 were designed to curtail plea bargaining in felony cases, to relax the rules of evidence, and to eliminate the defense of diminished capacity. One can argue that these benefit victims indirectly but it is the state's interest that

is directly affected by presumably more effective prosecution.

How did Proposition 8 get on the ballot? Ostensibly sponsored by Paul Gann of Proposition 13 fame, this ballot measure, in our opinion, was very much a political move by a group of Republicians -- in part because of frustration with the Democratic dominated Criminal Justice Committee -- primarily as a means to win voters to a cause. The ballot measure had minimal support from district attorneys, even those who were prime movers in the area of victims' services. In the Voters' Pamphlet, arguments for Proposition 8 were signed by Gann, by the Lieutenant Governor, and Attorney General George Deukmejian who was elected Governor the following year. Anti-Proposition 8 statements were signed by two district attorneys and the Chairman of the Assembly Criminal Justice Committee.

The victims' rights provisions which we are studing had been unsuccessfully introduced into the Legislature over a period of years. Our data may help explain the lack of enthusiasm for these measures.

The section under study provides that victims of felony crimes, or their next of kin if the victim has died, have the right to appear, either personally or through counsel, at the sentencing proceeding and to reasonably express their views concerning the crime, the person responsible, and the need for restitution. A similar provision applies to parole hearings.

We shall attempt to answer the following questions:

Are these rights, in fact, new?

Are they, in fact, rights?

To what extent are these rights being exercised?

What difference have they made, if any?

What implications does the California experience have for other states and other countries interested in victims' rights legislation?

Research on Victims

The status of research on victims will be briefly reviewed before the results of the study itself are presented. Research on victims' issues has been minimal, compared with research on other players in the criminal justice system, in particular, the convicted defendants. As it is much easier to study captive populations; the study of deviance has a long history in the social sciences; and as long as rehabilitation of an indiviudual was a societal goal, research on criminals had a social justification.

Except for VonHentig and a few others in the 1940's, the criminal justice literature rarely refers to victims at all until the late 1960's. The crime itself, the accused, the convicted, the official players -- police, district attorneys, defense attorneys, and judges were studied as the only players on the crime-ridden streets. The unstated assumption was that the victim was the unfortunate object of an action, but society through the criminal justice structure would right or sometimes fail to right the wrong. Historically, public prosecution had developed from a time

when each man, at considerable risk to himself, took justice into his own hands to a period when only established social institutions could mete out sanctions for offensive behavior. Consequently, these institutions were often the object of study to assess the manner, efficiency, and fairness of their actions.

In the VonHentig tradition, most of the research on victims in the 1960's was conducted from the perspective of victimology -- an examination of the personal and social characteristics that distinguish victims as a separate type from the rest of the population -- the victim as deviant. For certain kinds of persons, victimization was a predictable outcome. Victimization was also viewed as part of a social interaction, often with emphasis on the willing participation of the victim or the victim's contribution to his or her own loss, injury, or demise.

In the late 1960's and early 1970's public and political concern with riots, rising crime rates, and rumors of grossly under-reported crime led to victimization surveys conducted by the Bureau of the Census. As Hindelang, Gottfredson, and others have analyzed the data, these surveys verified that many minor crimes are not reported by victims. They also showed that victims are disproportionately young, male, unemployed city dwellers -- not unlike the offenders themselves. It may be that life style issues bridge the gap between the victimology perspective and the victimization studies.

Recently, victims have been studied as participants in the ciminal justice process. Hagan's study in Toronto, Davis and others with the Victim Involvement Project in Brooklyn, the Hernon and Forst study of victim needs, and the University of Chicago study of victim participation in plea bargaining are some examples.

The study of victim allocution follows in this tradition of evaluating victim response to the opportunity for active participation in the sentencing and parole process.

METHODOLOGY

In order to assess implementation, the project surveyed presiding court judges, district attorneys, chief probation officers and victim/witness program directors throughout the state. Of the 58 counties in California, sixty percent returned the judicial and the probation questionnaires (not necessarily the same counties returned both), while forty percent of the district attorneys responded to the inquiry. Sixty percent of the 35 victim/witness programs contacted also responded. [We should note that 20 of the victim/witness programs are units within the District Attorney's Office, 12 of them are in the local probation department, and 3 are private, non-profit agencies.]

The most difficult task was to identify and locate victims of felony offenses who exercised the right to appear, or who could have appeared. The district attorneys were in control of this information.

Only ten district attorney's offices in the state

had computerized records. From these we selected three counties -- one large urban, one agribusiness county that incudes a large rural population, and one diverse county with a large government and military sector. The agribusiness county, a growing community with a relatively young bureauracy, had the only complete file of victim information. In the other two counties the victim information files were only one-third to one-half as large as the number of felony cases disposed of in a given year. The main reason given for the incompleteness of the files was inadequate record keeping on the part of individual district attorneys. The second reason which we would offer is the apparently low priority given to maintaining victim information.

Agency officials estimated that less than three percent of felony victims actually exercised the right. Since no records are maintained, it was necessary to identify allocutors in a prospective manner. Superior court clerks in two of three selected counties provided sentencing orders on those cases in which it was noted that victims actually appeared; in the third county the clerk was able to provide the names of persons who had made written or oral statement concerning sentencing. Through this indentification process, we could increase the number of victims who appeared beyond the three percent mark.

One of the main problems encountered in conducting research in conjunction with district attorneys, is the highly protective stance which district attorneys take

toward their files and "their" victims. The district attorneys insisted that their office -- not the law school -- send the letters requesting victims' participation in the study, and in rewriting the letter, they stressed the "voluntary" nature of the participation. One office would not even allow us to see the computer print-out of crimes and victims' names. As a result we were somewhat compromised from the outset, but such is often the lot of the researcher who studies real life phenomena. Despite the reduced number of cases with victim data, the distribution of crime categories resembled the overall distribution of felony convictions in the subject counties. The crimes studied were felony burglary, robbery, assault, rape, child molestation, and homicide.

Of 1,005 letters that were mailed, 17 percent were known to have been returned by the post office as not deliverable. Of the remaining 835 victims, 20 percent returned a signed post card indicating their willingness to be interviewed. Of these, 86 percent or 146 victims were actually interviewed. The Superior Court sample resulted in identification of 54 persons in three counties over a six month period; addresses were found for 49 of these, 10 percent of the letters were returned by the post office, and 26 victims were interviewed.

Some of the problems which prevented a random sampling technique were the voluntary nature of the request, the method of contact which interfered with our reaching transient persons, and the lack of response from English speaking

victims (we did interview two such victims with the help of a translator).

How have Allocution Rights been Implemented

One of the least commendable aspects of Proposition 8 is the continued fragmentation of victim related activities across various sectors of criminal justice. Proposition 8 failed to specify the means by which victims would be integrated into the system. In general, the roles and responsibilities of various agencies are unclear to the public; when one adds to this lack of clarity, the impact of being victimized and the need to deal with numerous agencies, the individual may become confused and frustrated. As a result, exercise of rights as a victim may be needlessly impaired.

The victim related components of Proposition 8 were implemented by many different agencies over a period of one and a half years. After Proposition 8 was passed, each probation department in 58 counties developed its own methods of notification regarding sentencing; the Judicial Council of California, which was charged with developing information on the state-wide Crime Victims' Compensation Program, produced a brochure to be mailed by the probation departments; and the California Legislature had to devise means to implement the restoration provisions of the state-wide initiative. The latter resulted in the Crime Victim Restitution Program, enacted in 1983 and effective January 1, 1984, which required the courts and the probation departments

to establish, impose, and collect restitution in the form of fines and assessments.

The probation departments were given the majority of tasks to benefit victims; yet they were not funded to do so and have been rarely, if ever, recognized for their role. In fact, probation departments were severely cut back as a result of Proposition 13. The victim/witness programs, on the other hand (the majority of which are located in the district attorney's office, although some are in probation and a few are non-profit) have expanded considerably and have become, in effect, the local arms of the State Board of Control, which administers the victim compensation funds. The district attorney's office per se received no direct mandates from Proposition 8 with respect to victims, although that office has the primary interactive role with victims after an arrest has taken place. Furthermore, as our data collection problems demonstrate, the district attorney perceives himself as the prime representative of and the protector of victims.

Several devices were already available for victims to present their views. First, through the victim impact statement in the pre-sentence report prepared by the probation officer who is required by law since 1977 to contact the victim by mail or phone to elicit a statement. Our perusal of pre-sentence reports in the course of other data collection revealed organized, sometimes very extensive victim impact statements. Second, victims had the right to appear at

1204 hearings which are held to present aggravating or mitigating circumstances to the judge prior to the sentencing hearing. Several of the allocutors in our study, in fact, actually appeared at 1204 hearings.

Because of the existence of these devices, two-thirds of the presiding judges of the Superior Court and two-thirds of the chief probation officers view the Proposition 8 appearance right as unnecessary. Most judges state that the judiciary has already had access to the victims' viewpoint and consequently the actual appearance has little impact on the outcome. To quote one respondent,

> Any review of the impact of victims' 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.

Some judges express concern about the lack of due process in the procedure. In 1204 hearings, according to the Sentencing Rules in the Superior Court, "Assertions of fact in a statement of aggravation or mitigation shall be disregarded unless they are supported by the record in the case, the probation officer's report or other reports properly filed in the case, or other competent evidence." No such provisions were written into Proposition 8.

Only about one-fifth of the presiding judges, but 40 percent of the district attorneys indicated that victims are usually under oath when they speak at the sentencing

hearing. Half of the jurisdictions allow cross-examination of the victim by the defense; on this item, judges and district attorneys agree. It is expected that cases will be appealed on the basis that, without sworn statements and cross-examination, the court is accepting hearsay evidence. The issue of evidence and the defense versus prosecution perspectives are already influencing the manner in which victims are allowed to exercise the allocution right. Defense attorneys are raising objections, and several cases have been appealed.

In People v. Zikorus, the California Supreme Court held that the allocution right is not restricted to the victim but may be exercised by others when the court deems it appropriate. This appears to be an expansive, pro-victim decision. On the other side of the issue, in People v. Thompson, the State Supreme Court ruled that lack of notification of a sentencing hearing which deprives the victim of making a statement does not void the sentence imposed. In light of this ruling, the victim's right looks more like a permissive activity than a legal right. The courts acknowledge the need to pay attention to victims but at this point victims have limimted legal standing in California.

Criminal justice officials perceive the impact of allocution rights as minimal to modest, primarily as a means of emotional release for the victim. Occasionally, an appearance may increase the amount of court ordered restitution, but rarely does it result in a longer sentence.

Some increased use of the right is anticipated, but most officials believe the system adequately represents victims; victims are not motivated and may be actually disinclined to devote time and effort to participating in sentencing hearings.

Victim Response

Interviews with victims support the offficial viewpoint. As the Harris poll and other studies have demonstrated, victims are not as disenchanted with the system as we have in the past been led to believe. Approximately 7 or 8 out of 10 victims think that officials -- from the police to the district attorney and the judge -- are doing a good job. It should be noted that the victims in this study might be expected to be satisfied because the guilty party was apprehended and convicted. We realize we are describing those victims for whom the system worked.

The victim sample was 56 percent female and 44 percent male; 49 percent were married, 24 percent single, 16 percent divorced or separated, and eight percent widowed. Seventy-three percent of the victims were white, 10 percent black, and 12 percent Hispanic. Two-thirds of the victims had some college education or better; 70 percent worked in white collar occupations.

Over half of the victims surveyed were not aware of the allocution right, even though they had been notified by mail; they were more apt to remember a restitution form which was mailed in the same envelope. Most of those who

were aware of but did not exercise the allocution right did not do so for one of two reasons -- they were satisfied with the input they had already had into the system --or they felt that their appearance would not make any difference in the outcome.

During the study it became clear that victim participation in the sentencing hearing is not limited to allocution. The majority of victims (70 percent) had no involvement, six percent attended the hearing only , nine percent sent written statements, and 15 percent made oral statements. From the viewpoint of some officials and some victims, written statements can be as effective as oral ones. In fact, these two groups of participants are very similar to each other but significantly different in some ways from victims who do not make statements.

In terms of demographics the active participants do not differ significantly from other victims. However, they do differ in the seriousness of the crime and in their response to the criminal event.

Participants have significantly higher mean scores on the Victim Harm Scale; in particular, they are more likely to have suffered serious bodily injury -- either themselves or the deceased victim whom they represent. Victims of burglary and robbery were the least likely to be participating in sentencing.

We suspected that persons who are active at sentencing differ from others in terms of their level of involvement

with the system and their level of satisfaction. We developed an index to measure each of these dimensions. At this point in the analysis, the degree of a victim's involvement with the system -- from initial charging of the crime through prosecution and conviction -- is strongy related to the victim's participation in sentencing at a high level of significance. Active victims are much more likely to have frequent contact with the district attorney, to have received services from a victims' service program, to remember receiving notifications, to have applied for restitution or compensation, to have talked with the district attorney about the sentence, to have been encouraged to make a statement, and to have attended the court proceedings. A picture emerges of a person playing an active role in the prosecutorial and judicial phases, which culminated with a victim impact statement either written or delivered orally in the courtroom.

Victim satisfaction is less easily assessed. It appears that some victims may take part in sentencing because they are dissatisfied with the actions or manner of the district attorney, while other victims may become involved because they have had positive experiences with probation and the court and want to participate in a positive, pro-active way. By making a statement, the majority of victims (six out of ten) hope to bring about a longer sentence for the convicted criminal. Although this is difficult to accomplish in the face of determinate sentences, complex sentencing guidelines, and already stiff penalties, nearly half of

the victims believe that they affected the sentence. Slightly more than half experienced feelings of relief or satisfaction after having their say. For these victims, participation may provide a re-integrating experience after the dislocation of serious victimization. For about 40 percent, however, the experience of making a statement left them emotionally upset -- angry, fearful, depressed, or ambivalent. These victims apparently need additional services or other methods to become "whole" again.

Summary

Ambivalence strikes an appropriate closing note. Victims' rights provided by Proposition 8 are new in the sense that the state statute clearly gives permission for victims to speak at sentencing and parole hearings. In California, however, previous law provided for victim input through victim impact statements in pre-sentence reports and personal appearance at aggravation or mitigation hearings. Letters to judges and parole boards have been accepted for years. Whether victims' rights are more than privileges is still unclear. The few cases that have come to higher courts have elicited mixed rulings. The State Supreme Court appears to be interpreting the right in the light of past rulings and existing practices.

The impact of victim allocution is even harder to assess. Although less than three percent of felony victims have exercised the right, it may be possible to increase the level of participation through more affirmative action

programs of an informative and supportive nature. On the other hand, one might question the need for stimulating victim activity. Perhaps the opportunity is sufficient, regardless of the extent of use. Our study suggests that, from the victim's perspective, written impact statements may serve as well as actual appearances. It may be important to assure that the victim be directly involved in preparing the statement. In one of the counties in our study, the victim services unit worked closely with victims who wanted to submit written statements and, as a result, had a higher incidence of such involvement.

The group most responsive to participating at sentencing are victims of serious crimes involving bodily injury. Burglary victims are rarely active at the time of sentencing. Finally, participation does not occur suddenly but develops over the course of the criminal proceedings. The more interaction allowed by the system, the more victims will want to express their views. A case can easily be made for systematically involving the victim much earlier in the process, for example, at the time of charging or plea negotiation. However, the number of interested victims may still be very limited.

At this time, most California victims are not asserting their newly awarded rights. For the majority, the system is working sufficiently well; for some, however, the opportunity to express their feelings to the judge helps to reset the balance which has been upset by a serious crimial violation.

Bibliography

Bucuvalas, Michael, J. 1984. Victims of Crime: A Research Report of Experiencing Victimization. New York: Garland Publishing, Inc.

Friedman, Kenneth, Helen Bischoff, Robert Davis, and Andrea Person. 1982. Victims and Helpers: Reactions to Crime. New York City Victim Services Agency.

Fry, Margery. 1951. Arms of the Law. London: Victor Gollancz.

Hagan, John: "Victims before the Law: A Study of Victim Involvement in the Criminal Justice Process," Journal of Criminal Law and Criminology 73, No. 1 (1982).

Heinz, Anne M., and Wayne A. Kerstetter. 1980. "Victim Participation in Plea-Bargaining: A Field Experiment." In McDonald, William F., and James A. Cramer, ed. Plea Bargaining. Lexington: D.C. Heath and Company.

Henderson, Joel, and G. Thomas Gitchoff. "Using Experts and Victims in the Sentencing Process, Criminal Law Bulletin. 1981.

Hernon, Jolene C., and Brian Frost. 1984. The Criminal Justice Response to Victim Harm. National Institute of Justice.

Hindeland, Michael J., Michael R. Golffredson, and James Garfalo. 1977. Victims of Personal Crime: An Empirical Foundation for a Theory of Personal Victimization. Cambridge, MA: Ballinger Publishing Co.

McDonald, William F., ed. 1976. Criminal Justice and the Victim. Beverly Hills, CA: Sage Publications.

Skogan, Wesley G. 1976. Sample Surveys of the Victims of Crime. Cambridge, MA: Ballinger Publishing Co.

Sparks, Richard F., Hazel G. Glenn, and David J. Dodd. 1977. Surveying Victims. Chichester England: John Wiley & Sons.

VonHentig, Hans. 1948. The Criminal and His Victim: Studies in the Sociobiology of Crime. New Haven: Yale University Press.

Ziegenhagen, Edward A. 1977. Victims, Crime, and Social Control. New York: Praeger Publishers.