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Executive Summary

Victim Appearances at Sentencing Hearings Under the California Victims' Bill of Rights

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James K. Stewart

Director

U.S. Department of Justice
National Institute of Justice

Victim Appearances at Sentencing Hearings Under the California Victims' Bill of Rights

by

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and
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TABLE OF CONTENTS

LIST OF TABLES

LIST OF APPENDICES

Copies of the Appendices may be obtained from the National Institute of Justice/National Criminal Justice Reference Service at Box 6000, Rockville, Maryland 20850 or by calling NCJRS at 301-251-5500.

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ABSTRACT

California's Proposition 8, the Victims' Bill of Rights, gives victims of crime the right to appear and be heard at felony sentencing hearings (the right of allocution). McGeorge School of Law conducted a study of the implementation of this right by state and local agencies, the extent of use of the right by victims, and victims' knowledge of and reaction to the right.

The project surveyed presiding judges, probation departments, district attorneys, and victim/witness programs on a statewide basis and interviewed a sample of felony victims. The major findings and conclusions include: 1) inadequate notification procedures are a major problem in the implementation of the allocution right with the result that less than half of the victims sampled were aware of the right; 2) less than three percent of the eligible victims appeared at sentencing hearings; 3) most victims interviewed regarded the right of allocution as important and indicated the need for more information and more support to help them exercise it; 4) victims wanted information about criminal proceedings as much as they desired the legal right to participate in cases; and 5) the majority of presiding judges and chief probation officers viewed allocution at sentencing as unnecessary while the majority of district attorneys viewed allocution at sentencing favorably and were more confident than judges that it affected sentencing.

The authors recommend experiments that explore the benefits of giving victims comprehensive information at key stages of case dispositions and that permit victims to participate in these stages.

The authors also propose procedures for other jurisdictions interested in expanding or establishing victim participation in criminal prosecution.

The Victims' Bill of Rights also gives victims the right to speak at parole eligibility hearings. The results of the authors' study of this right are contained in the Addendum to the report.

I. INTRODUCTION TO THE STUDY

A. Purpose and Scope of the Study

In 1982 the voters of California adopted Proposition 8, entitled "The Victims' Bill of Rights." Proposition 8 contains provisions giving victims of crime rights to appear and express their views at felony sentencing hearings and at adult and youthful offender parole hearings.[1] These rights of allocution are similar to rights called for in the Final Report of the President's Task Force on Victims of Crime, released in December of 1982.

In view of the recommendations of the Task Force Report and the increasing interest in rights for crime victims, other states are looking to California's Victims' Bill of Rights as a model.[2] This study was designed in part to provide legislators and citizens in those states with useful information on the impact of victim allocution in California. Although the study examined allocution rights at both sentencing and parole hearings, this report focuses on the right to allocution at sentencing. Results of the study of the rights of allocution at parole hearings are reported in the Addendum.

The exploratory study of the implementation and utilization of the right of crime victims to speak at sentencing hearings was undertaken by the Center for Research, McGeorge School of Law, University of the Pacific, with the cooperation and support of the National Institute of Justice, U.S. Department of Justice, in the fall of 1983. The sentencing phase of the project had three major research objectives:

1. To study the implementation by state and local agencies of the victims' right to allocution at sentencing;

2. To assess the extent of use by victims of the right; and

3. To study victims' knowledge of and reactions to the right.

Specifically, this report examines the operational implementation of the right, the perceptions of the professionals most directly involved with implementation, the extent to which victims exercise the right, the reasons victims do and do not exercise the right, and the attitudes of victims toward the right.

The hope of the authors is that the data and their analysis will provide guidance to those considering the enactment of comparable legislation in their states. The hope is also that we have identified and explored some of the implications of victim participation in the traditional two-party criminal justice

system of prosecutor and defendant.

The study was not designed to address the issues of the actual impact of victim appearances on sentences imposed, the impact of victim participation on the decisions of attorneys and probation officers during case dispositions, or the long-range costs and other effects of victim appearances. While research should be done on these important topics, they were beyond the scope and financial resources of this exploratory study.

In the fall of 1982, the authors communicated with various criminal justice system agencies to gain a preliminary understanding of the extent of victim participation and agency implementation. The results indicated that less than three percent of eligible victims were making oral statements at sentencing hearings. The staff also reviewed victims literature and other research into victim participation in sentencing proceedings. The staff then proceeded with a statewide agency survey. (See Chapter III B., Agency Survey, and Chapter IV, Agency Implementation.)

During the survey it became very clear that no agency kept complete or easily accessible data on victims. Because police and prosecutorial agencies were protective of their records, particularly of the names and addresses of victims, the authors revised the original research plan of collecting victim data from case files. Instead, it was decided to conduct a survey of victims in three counties, each county having a computerized criminal justice record keeping system.

A victim survey was designed to compare victims who participated with those who did not. The survey interviews focused on the nature of the criminal victimization; the characteristics of the victim; the source and degree of the victim's knowledge of the appearance right; the degree, kind and circumstances of victim participation in case disposition; and the effects of participation or non-participation on the victims. By agreement with the district attorneys who provided us with access to some of their records and out of consideration for victims' privacy, we have limited the description of individual cases. (See Chapter III C., Survey of Victims, and Chapters V, VI, & VII.)

The scope of this research project was shaped by the limited resources of an exploratory study, the minimal exercise of the allocution right, and the limited nature and accessibility of victim data. Nevertheless, the authors believe the study sheds substantial light on important aspects of victim allocution at sentencing.

Definition of "Allocution Rights." Throughout this report, we use the term "victims' right of allocution" or "victims' allocution right" (often shortened to "allocution right") to refer generally to the right of victims to speak at sentencing

hearings. "Allocution" means a formal address, from the Latin "alloqui," "to speak to."

In the law, "allocution" originally referred to the common law right of the defendant convicted in a criminal case to be asked by the trial judge whether there was any reason final judgment (usually imposing the death penalty) should not be pronounced. Later, the term encompassed questioning the defendant as to any reason he might offer for a reduced sentence. The term, but not the procedures it refers to, has generally fallen into disuse.

Very recently, "allocution" has been revived and applied to the rights of victims to speak at sentencing and parole hearings. We follow this usage not only because it is rapidly becoming accepted but also because it reminds us that rights of victims to address sentencing courts and parole boards are similar to rights that offenders have traditionally possessed and that we have long taken for granted as matters of common sense and common decency.

Contents of the Report.

The background of victims' rights is discusssed in Sections B and C of this Chapter and Chapter II. The methods used to meet the objectives of the study are detailed in Chapter III. Agency implementation is described in Chapter IV; the use and the effect of appearances by victims in Chapters V and VI; and some of the actual and perceived effects of allocution in Chapter VII. The findings, conclusions and recommendations are presented in Chapter VIII. A discussion of victim appearances at parole and youthful offender hearings is included as an addendum.

For the benefit of the general audience, only essential statistics are included in this report. Those interested in further detail may consult the Appendices, available through the National Criminal Justice Reference Service, Washington, D.C.

B. Background on Victims' Rights

Historical studies establish that the victim was once a key actor in a criminal prosecution, often the de facto prosecutor.[3] Some commentators purport to have found that such victim participation and influence culminated in a golden age of criminal prosecutions by victims in the United States that preceded the rise to power of the public prosecutor in the nineteenth century.[4] While the existence of a golden age is debatable, scholars generally agree that shifting philosophies of crime and punishment and the emergence of the public prosecutor reduced the victim to an almost inconsequential figure: the mere witness at the beck and call of the all-powerful prosecutor.[5] As one writer points out, "the victim has been so much separated from the crime against him that the crime is no longer 'his.'"[6]

The contemporary victims' rights movement arose after World War II, when society focused on domestic problems of crime and civil disorder. The initial interest in victims, sometimes termed "victimology," was confined primarily to studying the role victims played in crime and to differentiating innocent victims from those who had "caused" the crime. Some criminologists applied to victims theories of social deviance developed originally to explain criminal behavior.[7]

In the 1960's and 1970's, as crime soared and became a potent political issue, a number of victim studies emphasized the extent to which victims were not reporting crimes.[8] One of the primary reasons given for this failure to report was disenchantment with the criminal justice system; for example, some victims were not cooperating because they did not believe the system would treat them sympathetically.[9] There followed increased concern for victims, much of which reflected primarily a desire to persuade the victim to participate actively in identification and prosecution of suspected criminals.[10] For example, many states set up victim/witness assistance units. The National District Attorneys' Association took the lead in recommending that prosecutors set up such programs to attend to victim needs, particularly needs involving the logistics of making court appearances and protection from intimidation.[11]

In contrast to the victimology and prosecutorial perspectives was the view of a number of social reformers who emphasized that most victims were ordinary citizens unfortunate enough to suffer the consequences of crimes which society seemed unable to prevent.[12] Society, these reformers believed, had a responsibility to victims. Margery Fry in England established that many victims faced financial need as a result of crime.[13] Largely through Fry's efforts, legislation to provide victims with compensation was enacted throughout the British Commonwealth from 1963 to 1965.

In 1965 California became the first jurisdiction in the United States to provide compensation for victims of violent crime, although the program was inadequately funded and little publicized.[14] New York (1966) and Hawaii (1967) soon passed victim compensation statutes as well. By 1983, 38 states had victim compensation statutes specifying varying eligibility requirements.[15]

Direct restitution to victims, a traditional remedy fallen into disuse, has also been revived in many jurisdictions. In some, the offender pays restitution to the probation department or to the court and the money is forwarded to the victim. In a few jurisdictions, offenders make direct payments to their victims. Sometimes an offender performs specific tasks for the victim in lieu of cash payments.[16]

C. Participation: The Central Issue of Victims' Rights

In the past decade, as victims have organized into advocacy groups to gain media attention and pursue legislative agendas, there has been a dramatic shift in the public perception of victims. Various women's groups have pressed successfully for new approaches to rape cases and for greater understanding of the victim's trauma. In California and elsewhere, Mothers Against Drunk Drivers has become a powerful force demanding more severe sentences for intoxicated drivers.

Decisions by prosecutors, especially in plea bargaining, have been increasingly called into question by victims and victims' rights groups. From these developments, there has emerged the clear concept of the victim as a person with perspectives and interests separate from those of the prosecutor.

The growing perception of the victim as a potential third party in the two-party system of prosecution has led to a number of concrete recommendations by victim advocate groups and commentators. For example, Professor Abraham S. Goldstein of Yale Law School has written:

> The 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. I shall also urge, on broader grounds unrelated to restitution, that the victim should have a right to participate in hearings before the court on dismissals, guilty pleas, and sentences; this will lead to an exploration of the common assertion that the victim has no 'standing' in criminal cases. Finally, I shall suggest that the victim should sometimes be permitted to proceed on his own through private prosecution.[17]

Until recently such recommendations would have been given little attention. Now they produce serious debate. Thus, the central issue of victims' rights has become whether or not the victim should be given rights to initiate or intervene in criminal prosecution.

Those opposed to various rights of victim intervention argue that victim vindictiveness may override the public interest in certain cases, that victims' interests are usually well enough represented by prosecutors and victim impact statements, and that victim intervention would add little that is useful to most cases and would impose upon an already overburdened system irrelevant information and requests.[18]

Those who advocate for victim intervention or for major experimentation with intervention assert that victim interests are not always identical with those of the prosecutor and deserve independent recognition, that prosecutors as politicians and

administrators do not always concentrate on the effective prosecution of each case, and that the danger of victim participation swamping busy courts is grossly exaggerated.[19]

Experimentation with victims' rights in the 80's has been cautious. In contrast to the response to the major social and legal issues of the 60's and 70's, experimentation with victims' rights has clearly lagged behind the debate on this issue. Perhaps some caution is justified, given the complexity of the criminal justice system and the inescapable fact that granting a victim the right to participate in criminal prosecution can often be achieved only by diminishing defendants' rights and prosecutorial power. Nevertheless, the limited experiments to date have produced promising results. Two examples will help to illustrate.

A 1977 research experiment sponsored by the National Institute of Justice in Dade County, Florida, involved victims in the plea bargaining process.[20] Later field tests in Detroit, Louisville, and Clearwater permitted victims to attend and speak at plea conferences presided over by judges.[21] The data indicate that eligible victims participated over 50% of the time, that victim participation consumed less than 10% of the speaking time, and, that, while the majority of participating victims did not believe their presence affected the outcome of the plea bargain, they were more satisfied with the pleas and the idea of plea bargaining than victims who did not participate.[22]

A number of other jurisdictions have increased victim participation in the prosecution process in a variety of other ways. Sentencing panels including persons who have been victims have been tried in Suffolk County, Massachusetts. Pima County (Tuscon) and Multonomah County (Portland) have also tried programs involving victims at the sentencing stage.[23] The Minnesota Restitution Center has set up procedures to assist victims in negotiating restitution contracts with offenders.[24] A New Mexico statute provides a hearing for the victim not satisfied with a restitution order.[25]

In December 1982, the President's Task Force on Victims of Crime issued its Final Report, which included a broad range of specific recommendations aimed at improving the status and the treatment of victims of crime. While skirting the issue of whether the victim should have rights to initiate criminal actions or contest prosecutorial decisions, the Task Force specifically recommended greater participation for victims in sentencing:

> Judges should allow for, and give appropriate weight to, input at sentencing for victims of violent crime.[26]

The accompanying commentary suggested that victims should be permitted to speak at sentencing hearings:

> Every victim must be allowed to speak at the time of sentencing. The victim, no less than the defendant, comes to court seeking justice. When the court hears, as it may, from the defendant, his lawyer, his family and friends, his minister, and others, simple fairness dictates that the person who has borne the brunt of the defendant's crime be allowed to speak . . . . 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.[27]

By the time those recommendations were published, the voters of California had enacted the Victims Bill of Rights, giving victims the right to speak at felony sentencing hearings in Superior Court. A major experiment with victim allocution at sentencing was underway.

NOTES

1. State of California, Secretary of State, Voter Ballot Pamphlet - June 8, 1982 - Primary Election (1982); reproduced in Brosnahan v. Brown, 32 Cal. 3d 236, 300-306, 186 Cal.Rptr. 30, 70-76, 651 P.2d 274, 314-20 (1982).

2. U.S. President's Task Force on Victims of Crime, The Final Report (Washington, D.C.: Government Printing Office, 1982). For a comprehensive survey of recent victims' organizations, activities and legislation, see National Organization for Victim Assistance (NOVA), Victim Rights and Services: A Legislative Directory (Washington, D.C.: Government Printing Office, 1984); P. Woodward and J. Anderson, SEARCH Group, Inc., Victim Witness Legislation: An Overview (Washington, D.C., Government Printing Office, 1984); F. Carrington and G. Nicholson, "The Victims' Movement: An Idea Whose Time Has Come," 11 Pepperdine Law Review 1 (special edidition, 1984).

3. M. Fry, Arms of the Law (London: Victor Gollanez, 1953); A. Steinberg, "From Private Prosecution to Plea Bargaining: Criminal Prosecution, the District Attorney and American Legal History," 30 Crime and Delinquency 568; J. Jacoby, The American Prosecutor: A Search for Identity (Lexington, Mass.: D.C. Heath and Co., 1980); J. Kress, "Progress and Prosecution," 423 Annals of the American Society of Political and Social Science 99 (1976); J. Langbein, "The Origins of Public Prosecution at Common Law," 17 American Journal of Legal History 313 (1973); G. Newman, ed., "Crime and Justice in America 1776 - 1976," 423 Annals of the American Academy of Political and Social Science (special edition, 1976).

4. S. Schafer, Restitution to Victims of Crime (N.Y.: Quadrangle Books, 1960); S. Schafer, Victimology: The Victim and His Criminal (Reston, Va.: Reston Publishing Co., 1977) particularly Chapter 1, "The History of the Victim"; W. McDonald, "Towards A Bicentennial Revolution in Criminal Justice: The Return of the Victim," 13 American Criminal Law 649 (1976).

5. J. Gittler, "Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems," 11 Pepperdine Law Review 117 (special edition, 1984).

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

7. H. von Hentig, The Criminal and His Victim: Studies in the Sociobiology of Crime (New Haven: Yale, 1967); M. Wolfgang, "Victim-Precipitated Criminal Homicide," 48 Journal of Criminal Law, Criminology and Police Science 1 (1957); E.

Viano, "Victimology and Its Pioneers," 1 Victimology 189 (1976).

8. Early studies pointed out the extent of victim non-participation. Programs were initiated to improve the relations between the "forgotten victim" and the criminal justice system. See President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: Crime and Its Impact - An Assessment (Washington, D.C.: Government Printing Office, 1967); J. Campbell, et al., Law and Order Reconsidered: Report of the Task Force on Law and Law Enforcement to the National Commission on the Causes and Prevention of Violence (N.Y.: Praeger, 1971); National Advisory Commission on Criminal Justice Standards and Goals, Report on the Criminal Justice System (Washington, D.C.: Government Printing Office, 1973).

9. R. Davis, "Victim Witness Non-cooperation: A Second Look at a Persistent Phenomenon," 11 Journal of Criminal Justice 287 (1983); D. Kelly, "Victims' Perceptions of Criminal Justice," 11 Pepperdine Law Review 15 (special edition, 1984); F. Cannavale and W. Falcon, Witness Cooperation (Lexington Mass.: D.C. Heath and Co., 1976); M. McCleod, "Victim Non-cooperation in the Prosecution of Domestic Assault," 21 Criminology 395 (1983).

10. National District Attorneys Association, National Prosecution Standards 441-42, Standard 27.3: Victim/Witness Relations (Chicago: NDAA, 1977), Commission on Victim Witness Assistance of the National District Attorneys Association, Year-End Report (1976).

11. The early victim/witness programs are described in R. McKenr.., "The National District Attorneys Association Commission on Victim Witness Assistance," 1 Victimology 321 (1976).

12. There is now a significant body of literature which speaks directly from and addresses itself to the victims' viewpoints and needs in their own right. A few examples are American Bar Association, "Victims of Crime: Giving Them Their Day in Court," 23 The Judges Journal (special issue, 1984); ABA and NIJ, "Victims' Rights: A Symposium," 11 Pepperdine Law Review (special edition, 1984); National Judicial College, National Conference of the Judiciary on the Rights of Victims of Crime and a Statement of Recommended Judicial Practices (Reno, Nev.: Judicial College, 1983); J. Barkas, Victims (N.Y.: Scribners, 1978); F. Carrington, The Victims (New Rochelle, N.Y.: Arlington House, 1975); R. Elias, Victims of the System (New Brunswick, N.J.: Transaction Books, 1983); H. Brownell, The Forgotten Victims of Crime (N.Y.: N.Y. Bar Assoc., 1976); D. Hall, "The Role of the Victim in the Prosecution and Disposition of a Criminal Case," 28 Vanderbilt Law Review

931 (1975); J. Stark and H. Goldstein, The Rights of Crime Victims (N.Y.: Bantam, 1985);

13. M. Fry, Arms of the Law (London: Victor Gollanez, 1953).

14. S. Schafer, Compensation and Restitution to Victims of Crime (Montclair, N.J.: Patterson Smith, 1970). See California Welfare and Institutions Code Sections 1500.02, 11211.

15. U.S. Bureau of Justice Statistics, "An Overview: Aid for Victim/Witnesses," 4 Justice Assistance News 5 (1983).

16. Some of the selected literature on restitution that is relevant to the present study of victim participation in criminal justice processes that has not already been cited includes: D. McGillis and P. Smith, Compensating Victims of Crime: An Analysis of American Programs (Washington, D.C.: NIJ, 1983); A. Mead and M. Knudten, et al., "Discovery of a Forgotten Party: Trends in American Victim Compensation Legislation," 1 Victimology 421 (1976); L. Fletcher, "Note: Restitution in the Criminal Process: Procedures for Fixing the Offender's Liability," 93 Yale Law Journal 505 (1984); "Note: Victim Restitution in the Criminal Process," 97 Harvard Law Review 931 (1984); A. Harland, "Monetary Remedies for the Victims of Crime," 30 UCLA Law Review 52 (1982); J. Hudson and B. Galaway, Restitution in Criminal Justice: A Critical Assessment of Sanctions (Lexington, Mass.: D.C. Heath and Co., 1975).

17. A. Goldstein, "Defining the Role of the Victim in Criminal Prosecution," 52 Mississippi Law Journal 515, 547 (1982). The President's Task Force on Victims of Crime has recommended a constitutional amendment providing for victim participation as a matter of right. See The Final Report 114 (Washington, D.C.: Government Printing Office, 1982).

18. California Assembly Committee on Criminal Justice, Analysis of Proposition 8 - The Criminal Justice Initiative - Majority Report (Sacramento, Calif.: California State Assembly, 1982). Cf. S. Mosk, "The Mask of Reform," 10 Southwestern University Law Review 885 (1978) and F. Carrington and E. Younger, "Victims of Crime Deserve More Than Pity," 8 Human Rights 10 (1979).

19. California Assembly Committee on Criminal Justice, In Defense of the Victims of Crime: An Analysis of Proposition 8 - The Criminal Justice Initiative - Minority Report (Sacramento: California State Assembly, 1982); See the discussion of the small number of victim appearances after Proposition 8, Chapter III. C. For articles in support of increasing the quantity, quality and scope of victim rights litigation, see F. Carrington, "Victims' Rights Litigation: A Wave of the Future?" 11 University of Richmond Law Review 447.

20. A. Heinz and W. Kerstetter, "Victim Participation in Plea-Bargaining: A Field Experiment," in W. McDonald and J. Kramer, eds., Plea Bargaining (Lexington, Mass.: D.C. Heath and Co., 1980).

21. D. Buchner, et al., INSLAW, Evaluation of the Structured Plea Negotiation Project: Executive Summary (Washington, D.C.: INSLAW, 1984).

22. Id. at 23; J. Hernon and B. Forst, The Criminal Justice Response to Victim Harm (Washington, D.C.: NIJ, 1984); Lou Harris and Associates, Victims of Crime: A Research Report of Experiencing Victimization (N.Y.: Garland, 1984); J. Hagan, "Victims Before the Law: A Study of Victim Involvement in the Criminal Justice Process," 73 Journal of Criminal Law and Criminology 317 (1982).

23. W. McDonald, ed., Criminal Justice and the Victim 39-40 (Beverly Hills: Sage, 1976); E. Ziegenhagen, Victims, Crime, and Social Control 100 (N.Y.: Praeger, 1977).

24. B. Galaway, "Toward the Rational Development of Restitution" in J. Hudson and B. Galaway, Restitution in Criminal Justice, 39-40, 83 (Lexington, Mass.: D.C. Heath and Co., 1975).

25. New Mexico Statutes Annotated § 31-17-1F (1978).

26. U.S. President's Task Force on Victims of Crime, "Recommendations for the Judiciary," The Final Report 72, f.n. 2.

27. U.S. President's Task Force on Victims of Crime, "Commentary," The Final Report 73. The Task Force's Report proposed a constitutional amendment that would add the following to the Sixth Amendment: "Likewise, the victim, in every criminal prosecution shall have the right to be present and to be heard at all critical stages of judicial proceedings."

II. PROPOSITION 8: THE VICTIMS' BILL OF RIGHTS

A. The History of Proposition 8

The history of Proposition 8, in part, is the history of thwarted legislation. The provisions of Proposition 8 were culled from a vast number of bills that were put forward in the California Legislature in the 1981 and 1982 legislative sessions but failed to gain passage.[1] Many of these bills were scuttled as part of an ongoing struggle between liberal Democrats and conservative Republicans on the then Assembly Committee on Criminal Justice.

The Republicans, frustrated by the Democratic majority, called a press conference in which they denounced the Democrats, singling out Committee Chairman Terry Goggin, and announced that they were taking their agenda to the people of California in the form of a "Victims' Bill of Rights." The Republicans had decided to use California's initiative process, which empowers voters to enact statutes and adopt constitutional amendments. To aid their cause, the Republicans obtained the sponsorship of then Attorney General George Deukmejian, Lieutenant Governor Mike Curb, and Paul Gann, one of the authors of Proposition 13, the revolutionary property tax measure.

The composition of Proposition 8 suggests strongly that its drafters were determined to obtain everything the minority on the Assembly Criminal Justice Committee wanted. Hence, Proposition 8, with its eleven provisions, covers a wide array of disparate issues: restitution; the "right to safe schools;" admissibility of evidence; bail; use of prior convictions in impeachment and sentence enhancement; the abolition of the diminished capacity defense and a narrowing of the insanity defense; sentencing enhancements for habitual offenders; victims statements at sentencing and parole eligibility hearings; prohibition against plea bargaining in Superior Court; limitations on commitments tc the California Youth Authority; and the repeal of provisions establishing special procedures for mentally disoriented sex offenders.

Given the scope of Proposition 8, the number of statutes and judicial decisions its provisions alter, and the speed with which it was drafted, it is not surprising that neither its proponents nor opponents fully understood it. Paul Gann believed that the provision on plea bargaining would eliminate all plea bargaining.[2] In fact, the effects of the provision on plea bargaining were merely to move plea bargaining from Superior to Municipal Court and to engender new "plea inducing" strategies in Superior Court. The staff analysis by the Committee on Criminal Justice declared that allowing victims to speak at sentencing would disrupt the flow of "countless misdemeanor cases which are currently being handled in a summary fashion."[3] This result, the report went on "could have devastating results . . . and be one of the most costly aspects of the initiative."[4] In fact, the

Proposition 8 provision on the right to appear at sentencing hearings does not apply to Municipal Court, where almost all misdemeanor sentencing occurs.

The intense political nature of the struggle over Proposition 8 is captured in the arguments advanced for and against its adoption in the official voters' Ballot Pamphlet. The argument in favor of Proposition 8 signed by Lieutenant Governor Mike Curb begins as follows:[5]

> It is time for the people to take decisive action against violent crime. For too long our courts and the professional politicians in Sacramento have demonstrated more concern with the rights of criminals than with the rights of innocent victims. This trend must be reversed. By voting "yes" on the Victims Bill of Rights you will restore balance to the rules governing the use of evidence against criminals, you will limit the ability of violent criminals to hide behind the insanity defense, and you will give us a tool to stop extremely dangerous offenders from being released on bail to commit more violent crimes . . . .

In his argument in favor of Proposition 8, then Attorney General George Deukmejian declared:

> Crime has increased to an absolute intolerable level . . . . . THERE'S ABSOLUTELY NO QUESTION THAT THE PASSAGE OF THIS PROPOSITION WILL RESULT IN MORE CRIMINAL CONVICTIONS, MORE CRIMINALS BEING SENTENCED TO STATE PRISON, AND MORE PROTECTION FOR THE LAW ABIDING CITIZENRY. (Emphasis in original.)

The rebuttal argument, signed by two district attorneys and Chairman Terry Goggin, responded:

> Every responsible citizen opposes crime, but we should also be very HESITANT to make RADICAL changes in our Constitution.
>
> Yet Proposition 8 does just that . . . . [It] needlessly reduces your personal liberties . . . and clearly harms true efforts to fight crime . . . . (Emphasis in original.)

The rhetoric surrounding Proposition 8, as well as its actual contents, was directed primarily at changing rules of evidence, repealing certain defenses, and increasing sentences. Clearly, the fight was not over enforceable rights and benefits for victims but rather over procedures making it easier to convict and impose long prison terms on criminals. In this sense, the term "Victims' Bill of Rights," conjuring up major constitutional reforms directly benefiting victims, was misleading. Empowering victims and punishing criminals are not

mutually exclusive; however, Proposition 8 focused heavily on the latter. In fact, during the campaign surrounding Proposition 8, almost no attention was paid to those provisions that granted legal rights to individual victims.

Proposition 8 was one of twelve initiative and referendum items placed on the primary election ballot of June 8, 1982. Voter turnout for the election was light, 52.7% of registered voters, the lowest turnout rate since June, 1946. The voters adopted eight of the initiative and referendum items. The separate initiative on bail reform received the most support with 82.8% of the vote. An initiative changing gift and inheritance taxes received 64.4%. Proposition 8 received 56.4%, next to the lowest percentage of those items adopted.[6]

B. The Legal Framework of the Victims' Allocution Right at Sentencing

What follows is an overview of the allocution provision governing sentencing hearings. Addressed also is the way in which the impact of the allocution provision is limited by related statutes, pre-existing procedures and subsequent judicial interpretations. This overview is intended to provide an understanding of the exact nature of the right studied in this project.

Only two of the eleven provisions in Proposition 8, those addressing restitution and victims' allocution, give individual victims specific rights. Section 6 ("Victims' Statements; Public Safety Determination") creates the victims' rights to allocution. This section does not amend the California Constitution; instead, it amends sections of the Penal Code and the Welfare and Institutions Code. Thus, the allocution rights are statutory and belong to statutory schemes that control their meaning and effect.[7]

The Proposition 8 provision governing the right to appear at sentencing hearings, California Penal Code Section 1191.1, 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.
>
> 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 . . . .

The chapter referred to in the first paragraph of Section 1191.1 governs sentencing in Superior Court only.[8] Thus, the allocution right at sentencing exists only in Superior Court and, under statutes governing the jurisdiction of criminal cases, is confined primarily to felony sentencing proceedings.[9] The right does not extend to cases heard in Juvenile or Municipal Courts, where the vast majority of cases are disposed of.[10]

Since 1977, California has operated under a determinate sentencing law for felony convictions. In general, the statutes specify three potential terms.[11] The judge usually imposes the middle term unless specific circumstances justify the upper or lower term, or the judge decides to grant probation.[12] In cases involving a plea bargain, the sentencing judge is generally limited to considering only the crime(s) that the defendant pleads to and, if the plea specifies a sentence, may not be able to impose a sentence more severe than the one specified in the plea.[13]

Thus, because of the scope of Penal Code Section 1191.1 and its relationship to pre-existing law, the only time the victim can affect a sentence is in a case that reaches Superior Court and then only to the extent determinate sentencing and plea bargaining permit. In instances where crimes are not charged, or charged but later dismissed or dropped, victims have no allocution right.

Victim Impact Statements. Allocution is not the only means by which a victim in California may communicate views to the sentencing court. Since the 1920's, the courts have considered victim impact statements recorded by probation workers.[14] Since 1978, such statements have been required in the mandatory pre-sentence reports prepared for sentencing hearings in Superior Court.[15] Usually the local probation department contacts the victim by phone or in person and records what the victim has to say about the impact of the crime.[16]

Thus, before the sentencing hearing, the victim has an opportunity to speak on the crime in the less intimidating location of his or her own home or the probation worker's office. While, theoretically, the victim's statement is confined to the impact of the specific crime on the victim, probation workers generally record information and victim opinions about the offender that exceed the immediate scope of the crime, and the courts generally accept such statements.[17]

Notice. Section 1191.1 imposes on the individual county probation department the duty to give the victim "adequate notice" of sentencing proceedings. Notice generally consists of a first-class letter that contains, in addition to information on allocution, information on several other subjects, such as the

availability of compensation from the state. Although Section 1191.1 requires the probation department to give notice of "all sentencing proceedings," the victim is usually notified by a probation department only once.[18]

The notification letter provides the date, time, and place the court will initially consider sentencing. In a complex case the court may convene a number of times to consider various aspects of sentencing. After the initial proceeding, the victim must assume responsibility for finding out the date, time, and location of subsequent proceedings and must show up each time to make certain he or she is present when the judge is prepared to listen. In some cases the District Attorney provides supplemental notice informally and either requests or encourages the victim to appear and speak.

The Restitution Factor. Prior to the passage of Proposition 8, restitution in Superior Court was generally confined by law to cases in which the defendant was placed on probation.[19] Proposition 8 appears to mandate a major change in restitution practice. Section 3, which amended the California Constitution, includes the following provision:

> It is the unequivocal intention of the people of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to restitution from the persons convicted of the crimes for losses they suffer.
>
> Restitution shall be ordered from the convicted persons in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss, unless compelling and extraordinary reasons exist to the contrary. The Legislature shall adopt provisions to implement this section during the calendar year following adoption of this section.[20]

The Legislature responded by enacting an elaborate package of legislation creating a "restitution fine."[21] Although ordered in every case, the fine is not paid to the specific victim. Instead, the fine is paid into the Restitution Fund, formerly the Victims of Violent Crime Compensation Fund, which compensates only some victims of violent crime for wage losses and medical, vocational rehabilitation, and funeral expenses.[22] Victims seeking compensation from the Restitution Fund must apply to the State Board of Control. This application process is part of an administrative procedure unrelated to sentencing.

Clearly, the legislation implementing the restitution provisions of Proposition 8 does not follow the letter of Proposition 8, which calls for restitution for "all persons who suffer losses . . . from the persons convicted of the crimes for losses they suffer." Informal legislative history reveals that the legislators were fearful that restitution collected for the

specific victim from the specific criminal would create an overwhelming administrative burden.[23] Instead, they opted for the restitution fine. Just as before Proposition 8, in almost all cases, a victim can receive restitution from the criminal only when probation is granted. Thus, allocution offers limited possibilities for those seeking restitution and, as a practical matter, may force a victim to choose between requesting restitution and recommending a prison sentence.

Judicial Interpretations. In the case of People v. Zikorus, the Second Appellate District of the California Court of Appeal (California's initial level of appellate courts) faced the issue of whether the Section 1191.1 requirement that judges consider the statements of victims in sentencing deprives judges of their traditional authority to hear from other witnesses as well.[24] In this case the defendant pleaded guilty to lewd and lascivious conduct, and the sentencing judge invited comments by the victim and the victim's mother. The victim, a twelve year old girl, said nothing, although she nodded in the affirmative to questions about receiving psychotherapy. The mother offered a number of comments on the defendant's character, family, financial situation, and drug usage. In holding that Section 1191.1 does not prohibit sentencing judges from considering statements from persons other than the victims, the Court of Appeal in dicta observed that "The clear purpose of Proposition 8, as declared by its title (The Victims Bill of Rights), was to mandate a previously optional procedure: to require the judge to listen and consider the views of the victim."[25]

This language appears to recognize that Section 1191.1 creates an enforceable, mandatory right. However, the Zikorus court was not confronted with the question of what happens when a court inadvertently or intentionally denies the victim an opportunity to exercise the right of allocution.

The subsequent case of People v. Thompson[26] addressed this issue. The victim requested but was not given notice of the sentencing hearing. The victim missed the hearing, and the judge sentenced the defendant to probation for five years with various conditions. The victim moved to vacate the judgement and set aside the order granting probation. The judge denied the motion. The victim (along with the district attorney) appealed. The Second Appellate District of the Court of Appeal declined to order the sentencing hearing reopened:

> It appears that the provisions of . . . Penal Code Section 1191.1 are directory as distinguished from mandatory in their effect . . . . No procedures to enforce the duty of notification or remedies for the failure to do so are provided by the Constitutional provision in Article 1, Section 28, as reflected in Penal Code Section 1191.1 or by the Legislature in Penal Code Section 1191.2. Unless and until the Legislature establishes appropriate guidelines to

> accomplish the purpose of Penal Code Section 1191.1, this court has no authority to afford any relief.[27]

In other words, confronted with the case of a victim seeking to enforce the allocution right, the court concluded that victim allocution is not a right after all, but a matter of judicial discretion, just as it was before the passage of Proposition 8.

The California Supreme Court denied the petition to review Thompson, leaving the nature and existence of the victim's right of allocution at sentencing in doubt.[28] Nevertheless, the Supreme Court's denial of the petition and the Thompson decision have had little immediate effect. Implementation of Section 1191.1 generally continues as prior to Thompson.[29]

NOTES

1. For example, Assembly Bill No. 3015 introduced by Assemblyman Mori, March 6, 1980 (1979-1980 Regular Session): "The victim of any crime shall have the right to attend and testify at all sentencing proceedings. In the alternative, the victim may send a written statement to the probation officer." And, Assembly Bill No. 1532 introduced by Assemblyman Johnson, March 29, 1979 (1979-1980 Regular Session) ". . . a victim shall have the right to appear and to give testimony concerning the merits of the plea bargain or sentence bargain, or to submit to the court a letter which shall be read in open court at such hearing."

2. Conversation with George Nicholson, a principal drafter of Proposition 8.

3. California Assembly Committee on Criminal Justice, Analysis of Proposition 8 - The Criminal Justice Initiative - Majority Report 48 (Sacramento: California State Assembly, 1982).

4. Id.

5. California Secretary of State, Voter Ballot Pamphlet - June 8, 1982 - Primary Election 34 (Sacramento: Secretary of State, 1982).

6. California Secretary of State, Statement of Vote Primary Election - June 8, 1982, ix and Supplement of Statement of Vote Primary Election - June 8, 1982 (Sacramento: Secretary of State, 1982).

7. The section of Proposition 8 providing for victim allocution rights is part of Chapter 1 "The Judgment" which is part of Title 8 "Judgment and Execution" of the California Penal Code. This Chapter and Title of the Penal Code and the State Constitution provide the legal context in which the allocution statutes must be interpreted and applied. While statutes must be interpreted so as to give effect to their purpose, they must also be interpreted in light of pre-existing statutory and constitutional law. The California Judicial Council has also been empowered by the legislature to develop "rules of government" governing the operation of the courts, including sentencing proceedings. California Penal Code §§ 1170(2) and 1170.3. The California Rules of Court § 433 sets forth the possible matters to be heard at the sentencing hearing, and requires that they "be heard and determined at a single hearing unless the sentencing judge otherwise orders in the interests of justice." California Center for Judicial Education and Research (CJER), 1984, "California Judges Benchguide: Felony Sentencing," CJER Journal (1984) (prepared under the auspices of the Judicial Council of California).

8. Id., Chapter 1, California Penal Code § 1191.

9. The Superior Courts are courts of general jurisdiction. California Constitution Article VI §§ 4, 10. The Municipal Courts are courts of limited jurisdiction whose authority depends on express legislative provision. California Constitution Article VI § 5(a). The Legislature has not empowered municipal courts to hear felony cases. Consequently the disposition of felonies is confined to the Superior Courts. See California Penal Code §§ 17 (felony defined), 1170(2) ("In sentencing the convicted person, the court shall apply the sentencing rules of the Judicial Council"), 1170.3 (the Judicial Council is empowered to create rules for sentencing) and 1462 (Municipal Courts have jurisdiction of misdemeanors); California Rules of Court sections 403 et seq. (these rules apply only to criminal cases in superior courts in which the defendant is to be sentenced for a felony) and 501 et seq. (rules for municipal courts).

10. Title 8, Chapter 1, California Penal Code § 1191.

11. California Center for Judicial Education and Research, "California Judges Benchguide: Felony Sentencing," CJER Journal.

12. Id., sections 11, 21, 44 and 27; California Penal Code §§ 1170(b) (reasons for imposing the upper or lower term), 1170(c) (reasons for imprisonment as the sentence choice), and 1204 (evidence in aggravation or mitigation of punishment). See also California Rules of Court sections 405(b) (base term defined), 414 and 416 (criteria affecting discretion to grant probation), 421 (a list of recommended criteria used to determine whether the upper term should be imposed), 423 (recommended criteria in imposing lower term), 425 (criteria in imposing concurrent or consecutive sentences), 439 (selections of a base term), 439(c) ("The facts and reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected.") For a comprehensive digest of cases annotated to the California Rules of Court, see The Felony Sentencing Manual, supra 10.

13. People v. Harvey 25 Cal. 3d 754, 758, 159 Cal. Rptr. 696, 698-699, 602 P2d 396, 398 (1979) (cannot use underlying facts in a count dismissed to increase the sentence); People v. Jones 108 Cal. App. 3d 9, 17, 166 Cal. Rptr. 131, 135, (1980) (cannot use underlying facts in a count dismissed to deny probation). But see People v. Guevara 88 Cal. App. 3d 86, 92, 93, 151 Cal. Rptr. 511, 516 (1979) (underlying facts may be used where they are related). See CJER Journal, supra note 7.

14. California Penal Code section 1203, enacted in 1872, provided for judicial discretion in hearing aggravating or mitigating circumstances in sentencing. It was amended in 1903 to provide for probation as an alternative sentence. (Stat. 1903, ch. 34 § 1, at 34). In 1905 a written report by the probation officer was mandated: Stat. 1905, ch. 166 § 1, at 162. In 1927 the law was amended to expressly include in the scope of the probation report ". . . the circumstances surrounding the crime." Stat. 1927, ch. 770, § 1, at 1493. The victim's statement was often used in describing those circumstances. The present California Rules of Court § 418 provides that a presentence report should be ordered even though probation is not being considered as a sentence.

    See also California Penal Code § 1203(d) (availability to the victim of the probation report ordered pursuant to section 1203.10).

15. California Penal Code § 1203(h). The report is not mandatory when the victim testifies: "The court may direct the probation officer not to obtain such a statement in any case where the victim has in fact testified at any of the court proceedings concerning the offense."

16. See discussion of survey of probation departments, Chapter IV. B. The survey included a question asking each department how it contacted victims.

17. California Penal Code §§ 1203 et seq. (probation and the presentence investigation); California Rules of Court § 419 (describes the contents of the minimum presentence report); People v. Valdivia 182 Cal. App. 2d 145, 148, 5 Cal. Rptr. 832, 834 (1960); People v. Lockwood 253 Cal. App. 2d 75, 81-82, 61 Cal.Rptr. 131, 135 (1967) (hearsay is admissible in the probation report and a victim's statement is proper when it includes a description of the desired sentence). See also People v. Axtell 118 Cal. App. 3d 246, 258, 173 Cal. Rptr. 360, 367-368 (1981).

18. Researchers found a diversity of practices in the various probation departments. See the discussion in Chapter IV. B.

19. California Penal Code § 1203 (probation). See also People v. Lippner 219 Cal. 395, 26 P.2d 457 (1933) (reimbursement may be the sole condition of probation).

    California Board of Prison Terms, Report on Victims of Offenders Received in Prison With Determinate Sentences: February 1, 1979, through December 31, 1982, 50-51 (Sacramento: Board, 1984). "During the four-year period from 1979 through 1982, 19,289 persons entered prison who had caused known amounts of financial loss to their victims. One-half of one percent, or 103 of these persons also paid

restitution." Id. In a recent case the judge ruled that restitution may not be ordered when the criminal is given a prison sentence. People v. Downing, 174 Cal. App. 3d 667, 670, 220 Cal. Rptr. 225, 227 (1985).

20. California Secretary of State, "Proposition 8: The Victims' Bill of Rights," Voter Ballot Pamphlet - June 8, 1982 - Primary Election 33 (Sacramento: Secretary of State, 1982); California Constitution Article I, § 28 (mandated procedures to provide restitution).

21. California Government Code §§ 76000 and 13967 (Restitution Fund); California Penal Code § 1464 (distribution to Restitution Fund). 15 Pacific Law Journal 559-69. William Romaine, a supervising victims' counselor at the McGeorge School of Law Victims of Crime Resource Center, has pointed out that by labeling this compensation fund a "restitution fund" the Legislature was arguably able to meet the constitutional provisions of Proposition 8. There is no restitution or compensation from the fund for those victims who suffer property loss without personal physical injury.

22. California Government Code §§ 76000, 13967; California Penal Code § 1464.

23. Research staff met with various legislative aides and criminal justice system personnel during the course of the study who described the problems of creating and administering a state-wide, universal restitution collection system. "Annual Review of California Legislation," 15 Pacific Law Journal 559-69 (1983); McGillis, D. and P. Smith, Compensating Victims of Crime: An Analysis of American Programs (Washington, D.C.: Government Printing Office, 1983).

24. People v. Zikorus (1983) 150 Cal. App. 3d 324, 331, 197 Cal. Rptr. 509, 513. "Prior to the enactment of Proposition 8, judges had the power to listen to victims, but had no duty to do so." Id. See also People v. Sweeney (1984) 150 Cal. App. 3d 553, 198 Cal. Rptr. 182, 193.

25. Zikorus 150 Cal. App. 3d at 331; 197 Cal. Rptr. at 513.

26. People v. Thompson 154 Cal. App. 3d 319, 202 Cal. Rptr. 585 (1984).

27. Id., 154 Cal. App. 3d at 321; 202 Cal. Rptr. at 586.

28. Because Zikorus and Thompson indicate conflicting understandings of Proposition 8, there is uncertainty as to the rule of law which an appeals court will use in deciding future cases. The Los Angeles District Attorney in a brief argued that the Supreme Court's refusal to clarify the issue would leave the Court's rulings in conflict and the law

uncertain.

29. Many issues collateral to the appearance and the allocution rights remain to be resolved by the courts. Initial indications are that the victim's access to court documents and case records will be restricted. While the issue has not been adjudicated, the courts generally withhold the pre-sentence report on the grounds that section 1191.1 does not create a right in the victim to receive the report prior to the sentencing and that other provisions of the Penal Code limit distribution of the report.

    Researchers found that there are no uniform policies within any given jurisdiction, regarding the time during a hearing when the victim is to speak. Judges establish their own procedures.

    The research data indicate that many judges place the victim under oath and permit cross-examination; other judges do neither. Some judges distinguish between evidentiary testimony and opinion or argumentation, requiring the victim to proceed under oath only when giving evidence.

    The permissible scope of the victims' statement is partially addressed by the statute and is subject to the general limitation that it must be relevant to the sentencing hearing. It remains for the courts, Legislature and Judical Council to define the permissible bounds of the victim statement.

III. RESEARCH METHODS

A. Major Areas of Focus

The project focused on three major aspects of allocution at sentencing: agency implementation of the allocution right, the utilization of the right by victims, and victims' knowledge of and reactions to the right. In order to obtain the views of both agency officials and crime victims, project staff conducted two surveys. One was a statewide agency survey of probation departments, district attorneys, victim/witness assistance programs, and presiding judges of the Superior Courts. The other was a survey of victims in felony cases that had resulted in conviction and sentencing. The victim survey was conducted in three counties: Alameda, Fresno, and Sacramento. The sample included both victims who had appeared at sentencing hearings and those who had not.

Early in the project it became clear that no local agency maintained records which provided information on the extent of use of the allocution right. Consequently, in the agency surveys, presiding judges and district attorneys were asked to estimate both the number and percentage of 1983 felony cases in which victims exercised the right of allocution at sentencing. Results of the victim survey were used to help substantiate official estimates of the incidence of victim allocution.

B. Survey of Agencies

To assess the manner in which local agencies responded to the new responsibilities associated with the victim allocution right, the project sent questionnaires to the probation departments, district attorneys, and presiding judges of the Superior Courts in all of California's 58 counties and to all 35 victim/witness programs in operation in mid-1983. The survey addressed actual activities of officials related to the right as well as their attitudes toward the right.

The questionnaires were designed to elicit information on four major issues: how notice was given to victims about the new right; what assistance, if any, the criminal justice system gave victims in the exercise of this right; the extent to which the officials estimated that victims were exercising the right; and how the officials themselves perceived the new right and its implementation. Directors of probation departments were asked for copies of allocution notice forms sent to victims. To determine the extent to which the notice forms encouraged or discouraged victim appearances, project staff analyzed the forms for format, choice of words, and offers of assistance to victims. Results of the agency survey are presented in Chapters IV and VII.

Completed forms were returned by 33 probation departments, 25 district attorneys, 33 superior courts, and 22 victim/witness

programs. The response rate constituted nearly 60 percent for all agencies except the district attorneys' offices, whose response rate was about 40 percent. Counties with the most Superior Court activity were most likely to respond. A special effort was made to collect data from the high volume counties through follow-up mailing and phone contacts. In the nine counties with more than 1,000 felony convictions, 67 percent to 89 percent of the agencies responded.

C. Survey of Victims

To what extent were victims aware of the allocution right? How did they learn about it? Were they encouraged to participate? How many exercised the right? Were they active in the case before sentencing? What motivated victims to participate--the seriousness of the crime, lack of confidence in the system, or a sense of duty? Were some types of persons more likely to participate than others?

To answer these questions, the project sought to identify and survey by telephone interview two groups of victims: 1) those who appeared at sentencing hearings and exercised their allocution rights, and 2) those who did not. Cases used to identify victims for the survey had to meet the following criteria:

1. The crime had to have been committed on or after June 9, 1982, when Section 1191.1 became effective;

2. The crime had to have resulted in a conviction in Superior Court; and

3. Sentencing had to have taken place.

RESEARCH PROBLEMS. The most difficult problem encountered in performing the research was gaining access to victims. Major obstacles included the following:

1. Data on victims are not systematically maintained by any county agency, such as the district attorney's office, the county clerk's office or the probation department.

2. Many district attorneys tend to be protective of victims and discourage researchers' access to them (although most victims contacted were extremely cooperative).

3. No systematic records are maintained on allocution or other victim participation in the adjudication process.

Since agency files were not geared toward victims, and access to files was extremely limited and usually unproductive, project staff decided that a computerized case management system in the district attorney's office was a prerequisite for a

county's inclusion in the study. A computerized data base, including data such as crime, sentence, victim's name and address, would enable project staff to select a sample of victims of serious felonies who had been eligible to appear at sentencing hearings. Only 10 out of 58 counties maintained computerized records in the district attorney's office. Several of these purged their files of victim information so quickly that they could not provide an adequate data base for study purposes. Others contained names and addresses of fewer than one out of five felony crime victims.

Selection of Counties for Victim Sample. The three counties that were selected had to meet the following criteria:

1. Possessed a computerized data base containing victim names and addresses for the one-year study period and were willing to cooperate with the project;

2. Had a fairly high incidence of felony case dispositions;

3. Had, in combination, a range of urban to rural populations, representing the major ethnic groups--white, black, Hispanic, and Asian.

4. Were located within 200 miles of Sacramento to limit travel time and telephone and travel costs.

The project staff selected Alameda, Fresno, and Sacramento Counties after considerable exploration. Alameda represents a large urban-suburban county with a large black population; Fresno is an agricultural-agribusiness community with a large immigrant Hispanic population; and Sacramento is a moderate-sized county with a central city and a diverse ethnic population. (See Appendix Tables 1 - 3 for demographics of the selected counties.)

The Victim Sample. Since so few victims exercised the right of allocution and the computer data did not indicate whether a victim had appeared at the sentencing hearing, the victims contacted from the district attorneys' lists produced only five interviews with victims who appeared. Thus, with the five exceptions, the victims contacted through this approach became the de facto control sample of victims who did not appear. Faced with the general absence of any available records on allocution, the project arranged for the Superior Court clerks in the three counties to record information on current victim appearances in the minute orders for sentencing and to forward copies of those orders to the project. Thus, the total victim sample was obtained from two sources: the data in the computers of the district attorneys and the minute orders of the clerks of the Superior Courts.

Identification of Victims Who Spoke at Sentencing. The Superior Court clerks sent minute orders in 54 cases in which

victims exercised allocution at sentencing. Time periods for collecting victim names varied among the counties because of the logistics required to implement the referral process. Sacramento referred 28 cases from February to October, 1984; Fresno referred 11 cases from March to September; and Alameda referred 15 cases from May through November. Victim addresses were obtained from the prosecutor's office or, if necessary, from the coroner's office.

Identification of Control Sample of Victims Who Did Not Appear at Sentencing. The district attorney's office in each of the three counties generated for the project a computer list of selected felony cases: burglary, robbery, assault, rape, child molestation, kidnapping, manslaughter, attempted murder, and first and second degree murder.[1] Except for burglary, the crimes chosen were those which, it was assumed, were most likely to result in allocution by the victims themselves or by their next of kin. Burglary was included to enable the researchers to compare victim response to property crime with victim response to crimes against persons. These are also commonly studied crimes for which comparative statistical data are readily available.

From 1981 distributions of felony dispositions in the three counties, project staff estimated the expected number of cases by major crime type for 1983 and established sampling ratios. (Appendix Table 4.) However, the ratios were used only in Fresno. In the other two counties, the amount of missing data on the names and addresses of victims was so great that a 100 percent sample of all victims identified was used.

Table 3.1 contrasts the actual number of victims contacted for the control sample with the estimated total number of felony victims entitled to exercise allocution.

Table 3.1

Number of Felony Victims Identified by District Attorneys and Contacted by Project

	Alameda County	Sacramento County	Fresno County
Estimated Number of Victims*	1620	810	421
Actual Number Identified	440	350	449
Number Successfully Contacted by Mail	298	298	239

*Estimates were based on 1981 data from the Bureau of Criminal Justice Statistics, California Department of Justice, Profile Series.

According to staff in the district attorneys' offices, the missing data resulted mainly from the manner in which the attorneys complete forms that are fed into the computer file. Victim information is not a top priority, so the completion of those sections of the forms is done hastily and haphazardly. In some offices, there were problems in gearing up to a full utilization of data processing capability.

In murder cases, next of kin were not included in the computer data. To identify next of kin, the project staff had to search both district attorney and coroner files.

The time period for data varied slightly, depending upon negotiations with each district attorney and the purge dates of computer files. The dates of felony dispositions were as follows: Alameda County, July, 1983-1984; Sacramento County, October, 1983-1984; Fresno County, June, 1983-1984.

Contacting Victims and Sampling Results. All identified victims or their next of kin were sent letters on the appropriate district attorney letterhead requesting their cooperation in the study. (Appendix D, Letter to Victims.) A return postcard addressed to the project was enclosed. The victim was asked to sign it, to record a phone number, and to indicate the days and times most convenient for an interview.

Project staff succeeded in interviewing 171 victims, 147 located through district attorney computer data and 24 from Superior Court minute orders. Twenty-nine of the 171 victims (5 from the district attorney data and 24 from the Superior Court

minute orders) spoke at sentencing. Table 3.2 summarizes the total number of victims contacted by mail, the number returning cards, and the number actually interviewed by phone.

Table 3.2

Number of Victims Contacted, Returning Card and Interviewed*

	Alameda	Sacto	Fresno	Total
Victims Contacted				
District Attorney Referrals	298	298	239	835
Superior Court Referrals	14	25	10	49
Total Contacted	312	323	249	884
Victims Returning Card				
District Attorney Referrals	57	54	59	170
Superior Court Referrals	9	6	10	25
Total Returning Calls	66	60	69	195
Victims Interviewed				
District Attorney Referrals	52	49	46	147
Superior Court Referrals	9	6	9	24
Total Interviewed	61	55	55	171
Percent of Contacts Resulting in Interview	19.6	17.0	22.0	19.3

*For more detail see Appendix Tables 5 and 6.

Victims referred through the Superior Court minute orders (those initially known by the project to have spoken at sentencing) were more likely to respond to the survey than the general sample of victims referred by the district attorney's office (those who, with the five exceptions, did not exercise the right of allocution). The higher response rate of victims who exercised the right of allocution is attributed in part to a greater level of effort by project staff in obtaining accurate address information on those victims (they were so rare) and in part to the fact that these victims were more interested in cooperating with the project than victims who had not exercised the right.

The sample loss between postcard return and telephone interview was due mainly to technical problems. Some victims did not record phone numbers or did not have telephones; others had disconnected numbers; and still others did not answer after many efforts to telephone them. Only six of the 177 victims reached by phone actually changed their minds about being interviewed.

Representativeness of the Total Sample. Two problems were encountered in sampling victims:

1. Large amounts of missing data prevented the generation of a complete list of felony victims in each county from which a systematic sample could be drawn;

2. Participation by the victims was voluntary and dependent upon their written consent, as required by the district attorneys.

In order to assess the impact of these limitations, project staff compared the victims interviewed with all victims who were identified and with total felony convictions in the three study counties. Comparable data were available only on the selected crimes as shown in Table 3.3.

Table 3.3

Comparison of Felony Convictions in Study Counties With Identified Sample and Interviewed Sample by Selected Crimes in Percent

		Crime Category				
	Total (N)	Burglary	Robbery	Assault	Rape	Homicide
Felony Convictions '83*	(2394)	45.4	26.4	13.7	6.0	8.5
Identified Sample**	(1043)	43.3	24.5	17.5	7.2	7.4
Interviewed Sample***	(140)	40.0	25.0	21.4	6.4	7.1

*Source: Bureau of Criminal Statistics, California Department of Justice, Profile Series, 1983.

**Identified sample consists of all victims with addresses.

***The other 31 were victims of crimes not covered by these categories.

Within each crime category, the percentages show only slight variation, generally two percent or less, indicating that, in terms of crimes, the total sample of those interviewed resembled total convicted felonies.

In terms of demographic variables, the sample has a higher percentage of females than the overall population (58 vs. 51

percent) and a slightly higher proportion of whites (73.5 vs. 68 percent in the total population). Blacks and Hispanics are about evenly represented, while other ethnic groups, such as Asians, are somewhat under-represented. However, as most victimization surveys indicate, Blacks and Hispanics are much more likely to be victimized than other groups. From that perspective, these groups are under-represented in the sample. Staff attribute this under-representation to difficulty in locating these victims and their reluctance to become involved with criminal justice agencies.

Victim Interview and Analysis of Results. The structured telephone interview of victims was designed to elicit factual and attitudinal information to study differences between those who exercised the right of allocution and those who did not. Approximately 100 questions covered the following areas: details of the crime; prior victimization; victim involvement with the district attorney, the probation officer, victim/witness program, and private attorneys; restitution and compensation; the court process; victim awareness of the right to allocution; reasons for exercising the right or not doing so; feelings related to the experience; impressions of the criminal justice system; suggestions for victim involvement; and demographic information. Many of the items were selected to permit comparison with findings from other studies. (See VI A., pp. 55-56)

The interviews usually lasted from forty-five minutes to an hour, although some took as long as an hour and a half because some victims desired to talk at great length about their experiences.

Most of the questions were precoded; however, codes were developed for open-ended items. A team of coders prepared the data for computer input. The data were analyzed using the Statistical Package for the Social Sciences. Detailed statistical information is contained in Appendices A and B.

NOTES

1. The following California penal codes were used to define the types of crime: 187, 192, 207, 211, 217, 210, 245, 261, 288 and 459.

IV. AGENCY IMPLEMENTATION OF VICTIM ALLOCUTION RIGHTS

A. Background

Several county agencies are in a position to assist in implementation of the allocution right. After the Victims' Bill of Rights was passed in June, 1982, each probation department developed its own methods of notifying victims of the right as required by Section 1191.1. Although district attorneys have not been given any mandates regarding victim allocution, they are in a position to influence victims in exercising the right. Victim/witness programs might be expected to inform victims of the right or to assist them in exercising it. Finally, the sentencing judge is required to consider the statements of the victim or next of kin in imposing sentence.

This section discusses the findings of the agency surveys. The surveys were designed to evaluate both the extent to which agencies have complied with the letter of the law and the extent to which they have voluntarily assisted or encouraged victims to play a greater role in sentencing procedure.

B. Notification by the Probation Department

For many years probation officers have interviewed victims and presented their views to the judge in the form of the victim impact statement contained in the presentence report. The primary additional duty imposed on probation officers by the allocution right is notifiying the victim of the new right. Approximately one-half of the probation departments surveyed had amended their operating manuals to include references to notice requirements, and nearly all of the departments appeared to be meeting this requirement of Section 1191.1. (Nonetheless, as discussed below, only 64 of 149 persons who responded to the question about the notice remembered receiving one.)

Content and Style of Notices. All responding probation departments except one reported complying with Section 1191.1 by mailing form notices. The exception was a small rural county where the victim was advised during the victim impact interview. Thirty counties submitted sample notice letters to the project. (Appendix B)

The style of notification varied considerably. Some notices resembled official court documents, beginning with "People of the State of California v. John Doe," and the file case number; others were in a letter or memo format. All notices were written on the letterhead of the county probation department. There was usually space for a personalized name and address, although some letters began with the words "Dear Victim."

The tone of these communications also varied widely. The majority were businesslike in their approach, either paraphrasing or actually quoting Section 1191.1. Because of the legal

language, some letters would have to be read carefully, probably more than once by the layman, to be understood.

Perhaps the most confusing letters were those that discussed one or more topics in addition to the right to appear. Of the 30 counties which submitted letters to the project, 13 had devised one letter for allocution notification and another for restitution matters. They were usually mailed together. The other 17 counties used one letter to cover both subjects. In 10 instances, sentencing rights were mentioned first; in 7, restitution rights received first mention.

The lack of uniformity in notification procedures appears strongly related to the vagueness of the notice provision in Section 1191.1, the lack of legislative guidelines, and the need to implement notification procedures quickly. Existing forms were sometimes carelessly amended.

One county (which has since revised its form) obfuscated the existence of the right by giving the date of the sentencing hearing and stating the following:

> You may provide us with either a written or oral statement which we will present to the court. If you feel this is insufficient, you may contact your own attorney.

In another county a full-page letter was devoted to restitution issues and added a postscript:

> P.S. You have a right to appear and address the court at the time of the sentencing.

Almost all letters were signed by a probation officer and included a phone number to call if the victim had questions. Only 4 notifications out of the 30 expressed regrets or concern about the victim's experience. One of these included a very strong statement of encouragement:

> The probation officer and the judge are interested in your views of the defendant, the crime, including how your life has been affected, and any opinions you have about sentencing.

Another letter began as follows:

> As a department, we sincerely regret that you were the victim of a criminal offense.

It ended:

> Thank you for your cooperation in this matter. It is our desire to serve you and make your community a safer place to live.

The form letters were generally less personal than the phone calls and individualized letters used to solicit victim impact statements. Phone calls and individualized letters are still often used to inform victims of the allocution right in cases involving serious injury, sex offenses, or death.

Problems Encountered. The most common problems reported by the probation departments were the inability to locate victims because of incorrect or incomplete names and/or addresses provided by law enforcement, and the lack of response from some victims who were contacted. Probation officers also reported a great need on the part of victims to talk about their concerns and to receive clarification of the notice. Sometimes a victim thought he had to attend when he preferred not to do so. Thirty-five percent of victims remembered speaking to a probation officer.

Follow-up Activities. The probation departments do not view themselves as responsible for any follow-up on the notice. However, if the letter triggers questions, staff usually provide answers. As one probation officer reported, "As a rule, it is one of the more enjoyable aspects of presentence work to have direct victim contact. We find in such instances victims are commonly confused about proceedings to date and lack understanding of sentencing procedures."

The probation officer may become a referral source or may be called after sentencing to give the victim the case disposition, although, by law, notifying the victim of the case disposition is the district attorney's responsibility. If the probation department has a victim services unit, victims will be referred there. Because the probation departments collect restitution, they also maintain contacts with those victims who receive restitution.

Record Keeping. Few probation departments have devised any methods for tracking activity related to notification, except for retaining a copy of the form letter in the case file. However, Imperial County has implemented a unique approach which provides information useful for management and follow-up purposes. The Imperial County Probation Department devised a victim's form to be attached to all presentence reports. It includes names, addresses, and phone numbers of victims, dates of contact and result, amounts of restitution, and result of notification. It provides a clear track of victim-related activity in each case folder.

There is no evidence that any probation department is maintaining aggregate records or statistics on victim notification.

C. Implementation in the Superior Court

Under Section 1191.1, the Superior Court "in imposing sentence shall consider the statements of victims and next of kin . . . and shall state on the record its conclusion concerning whether the person would pose a threat to public safety if granted probation." Like other findings at sentencing, conclusions regarding public safety may be determined by factors in addition to the victim's oral statement.

Some judges expressed concern about a possible lack of due process in the allocution process. The statute does not address the conditions under which victims are to be heard. It is unclear if and when victim statements become evidence rather than opinion. Consequently, practices of judges differ. Nearly half of the judges responding allow cross-examination of the victim by the defense; about one-fifth may require the victim to speak while under oath. District attorneys made an even higher estimate of sworn statements; 40 percent indicated that victims were sworn in before allocution. Some judges accept comments from victims without an oath unless facts of the case or details of the crime are raised. In such instances, the judge may then require that the victim be sworn in.

Record Keeping. No cumulative records are maintained by local courts on victim appearances. The California Judicial Council, which is the administrative agency for the courts, has not undertaken to collect or maintain such records either.

D. The Role of the District Attorney

Although the district attorney's office has the primary contacts with victims after an arrest has been made, that office received no mandates to inform or assist victims regarding allocution. Nonetheless, according to the victims surveyed, the district attorney is the most common source of information on allocution. In addition, the victim/witness units, which are often under district attorney supervision, sometimes have a great deal of contact with victims, especially those who file for compensation in cases involving bodily injury or death.

E. The Role of Victim/Witness Programs

Although not specifically charged with implementation of the allocution right, victim/witness programs might be expected to play a role in encouraging or aiding victims at sentencing. When asked about specific services related to victim appearances, about one-third of the victim/witness programs reported that they "always" inform victims of their right to appear at sentencing hearings; half of the programs report they "often" provide this information. Other victim/witness activities -- helping a victim prepare a statement and accompanying a victim to sentencing -- are reportedly done on an "occasional" and sometimes on a "frequent" basis. Victim/witness programs sometimes notify

victims when hearing dates are scheduled and, as they have for some years, may communicate results of the sentencing hearing. (However, according to victims interviewed, less than one out of three had any contact with these programs and only 15 percent of the victims aware of allocution learned of the right from a victim/witness program.)

Half of the programs reported that some specific aspect of their services to victims was developed in response to the allocution right. The following examples were given: preparation of the victim impact statement for the probation report, revision of the letter notifying victims of the status of their case, development of new form letters, revision of a program brochure, phone calls and other activities encouraging victims to appear at sentencing. The diversity of these activities, many of which are not directly related to allocution, and the overlap with pre-existing agency responsibilities (e.g., it was already the practice of victim/witness programs to notify some victims of case dispositions), suggest that, in general, victim/witness programs have not played a prominent role in allocution. The observations of project staff at statewide meetings and its working contacts with these programs further supported this view.

A clear-cut example of the failure of victim/witness to focus on the allocution right is the letter from the California Victim-Witness Coordinating Council sent to many governmental and private agencies, announcing Victims Rights Week, April 14-20, 1985. The letter reads in relevant part:

> The fair administration of justice demands that citizens and public officials recognize and affirm the rights or crime victims, among which are the right to state compensation for certain personal injuries, the right to restitution from offenders, the right to be dealt with sensitively and courteously by criminal justice officers, the right as a witness to be protected from harrassment or retribution from criminals, and the right to receive meaningful and timely information about the progress of criminal cases within the justice system.

Notably absent is any reference to the right of victims to appear and make a statement at sentencing. Victim/witness program brochures also rarely mentioned the right to appear. Only one pamphlet came to the researchers' attention that clearly and concisely informs victims of the allocution right and the appropriate offices to contact. It is published by Victims for Victims, a private organization. While lack of funds may deter victim/witness programs from revising their brochures, the lack of information on allocution rights in their brochures is a notable gap in allocution implementation.

F. Response to the Question -- Was Section 1191.1 Necessary?

Two-thirds of the judges saw no need for the allocution statute, but an equally large majority of district attorneys thought it was needed. Judges repeatedly pointed out that the presentence report provides all the information necessary to pass sentence. In the words of one judge:

> 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.

Judges were especially critical of the political origins of Proposition 8:

-- What was the intent? to influence the court? to allow victims opportunity to express their views of courts and procedures and sentences?

-- It is good that the victims have a forum. I don't know the intent of the law. I thought it was a law and order legislative act to give legislators an image rather than change sentences. It changes few judges' approach.

-- 'Victims' Rights' is a political issue and gets a lot of good press for 'Law and Order' candidates.

When asked whether the statute was fulfilling its intended purpose, officials differed in the expected direction: 81 percent of probation officers checked "minimally or not at all," compared with 69 percent of judges and 48 percent of prosecutors. Only 2 persons in any of these groups indicated that the statute had been very successful.

V. VICTIM RESPONSE TO ALLOCUTION RIGHTS

The major issues addressed by the victim survey were (1) whether victims were aware of the right to appear and make a statement at sentencing, (2) if so, why they chose or declined to exercise the right, and (3) if they spoke, what benefits they derived from the experience.

A. Characteristics of the Victim Sample

Demographics. The 171 victims interviewed were not notably different from other Californians. (Table 5.1) Women were slightly over-represented (58 percent to 51 percent), partly because of the number of women who played roles in cases involving their children. The average age of 42 years was older than might be expected from prior victimization surveys. Ethnically, Asians were under-represented in the sample. Two-thirds of the victims had some college education or better; 70 percent worked in white collar occupations -- a higher proportion than in the population as a whole -- however, median household income was similar to the 1983 statewide median of $22,700.

Experiences with Crime. All of the respondents were felony victims or next of kin of felony victims. A small number were victimized while at work, for example, while cashiering at the time of a robbery. Business entities as victims, such as banks and supermarkets, were not included in the study.

One-third of the respondents were victims of burglary; one-fifth of robbery; 18 percent of assault; and 13 percent of sex crimes--rape or child molestation. (Table 5.2) Fourteen percent were victims or next of kin of victims of major violent crimes--kidnapping or homicide. Of dispositions known, 58 percent were prison sentences from 2 to 43 years, with an average of 5 years. In 60 percent of the cases, the criminal was a stranger about whom the victim knew very little. Six out of 10 victims had never been victimized before.

In general, the information supplied by these victims was statistically comparable to the overall crime and sentencing statistics in the study counties.

Table 5.1

Demographic Characteristics of Victims in Sample
(n=171)

	Percent
1. Sex	
Male	42.1
Female	57.9
2. Age	
Years	
29 or less	21.6
30 - 39	29.8
40 - 54	26.9
55 or more	21.6
3. Ethnicity	
White	73.5
Black	10.6
Hispanic	11.8
Asian	2.9
Other	1.2
4. Marital Status	
Single	23.1
Married	48.5
Separated/ Divorced	16.0
Widowed	9.0
Other	3.6
5. Educational Level	
Not High School Graduate	13.5
High School Graduate	18.7
Some College	35.7
College Graduate or Higher	32.2
6. Employment Status	
Employed	69.6
Unemployed	8.8
Homemaker	11.7
Retired	6.4
Disabled	3.5
7. Occupational Group	
Professional	24.0
Owner/Manager	22.2
Technical/ Clerical	22.8
Blue Collar	19.1
Service	12.0
8. Annual Family Income	
Less than $12,000	25.7
$12,000 - $20,999	21.1
$21,000 - $34,999	22.2
$35,000 or More	24.0
Unknown	7.0

Table 5.2

Characteristics of Victimization Experience in Percent*

1. Type of Crime (n=171)

Burglary	32.7
Robbery	20.5
Assault	17.5
Child Molestation	7.6
Rape	5.3
Murder	8.2
Other Violent	5.8
Other*	2.3

*Arson, Fraud, and drunk driving

2. Type of Sentence (n=124)

Prison	58.0
Jail	25.0
Probation	13.7
Other	3.2

3. Victim Relationship to Criminal (n=169)

Stranger	64.5
Acquaintance	19.5
Friend	8.9
Relative	7.1

4. Victim Knowledge of Criminal (n=164)

Little/Nothing	43.3
Criminal Record Only	20.7
A Lot of Information	9.8
Personal Familiarity	26.2

5. Prior Victimization (n-159)

None	62.9
One	16.4
Two	9.4
Three or More	11.3

6. Most Helpful After Crime (n=167)

Police	31.1
Family	26.3
Friends	16.2
District Attorney/ Victim/Witness	11.4
Other	15.0

* Number of cases (n) may vary because of missing data.

Response to Victimization. After a crime has been reported to the police, what action does the victim take? Immediately after the crime, victims (43 percent) most often turned to relatives and friends for assistance and saw them as the most helpful persons. Thirty-one percent saw law enforcement officials as the most helpful persons, and another 11 percent named district attorneys or staff of victim services as the most helpful.

In the case of burglaries, the most common victim activity after reporting the crime is assessing the amount of loss and reporting it to the police and the insurance carrier. Slightly over 34 percent of the victims interviewed reported a loss to their insurance agent; 19 percent reported a property loss to the probation department for purposes of court-ordered restitution. Only 19 percent of the total victim sample (33 victims) applied for compensation under the statewide compensation program, which is restricted to victims of personal injury crime. However, most of these sought compensation for several types of losses. Of this group of 33 victims, 73 percent filed for medical expenses due to injuries, 33 percent filed for loss of income due to injury, 30 percent claimed counseling fees, and 27 percent claimed funeral expenses.

Slightly over half of the victims knew about the victim/witness program in their counties; 87 percent of these learned about it after the crime. The primary source of this knowledge was the district attorney (42 percent), followed by the police (11 percent), other criminal justice contacts (9 percent), family and friends (8 percent), and the media (7 percent). Women were approximately twice as likely as men to know about the local victim/witness program and were also more likely than men to receive services (53 percent compared with 47 percent). However, men who knew that victim services existed had a much higher usage rate than women who knew (85 percent compared with 51 percent).

Nearly one in five victims consulted a private attorney regarding the crime. The predominant reason was to explore the possibility of filing a civil suit for damages. In the few cases where civil litigation was pending and the attorney had appeared in court as the victim's counsel at sentencing, the attorney refused to be interviewed for the study.

Impacts of Victimization. The impact of crime upon the victim varied from the minor inconvenience of reporting a crime and contacting the insurance company to feelings of insecurity of variable duration and intensity, financial loss, physical injury, or death of a loved one. By far, the most frequently reported impact was "emotional," experienced by over half of the victims. Emotional effects ranged from irritation to profound

preoccupation with the criminal incident or its results. Nearly 4 out of 10 persons felt a sense of insecurity, which sometimes pervaded the victim's consciousness for a long time and prompted the victim to take specific actions, such as moving, improving household safety, or taking martial arts. Nearly 25 percent of the victims reported being most affected by financial loss; 14 percent by physical injury; and 12 percent by the loss of a relative.

Reported crime impact was related to the type of crime, as might be expected. Rape, assault, and other violent crimes were most likely to have an emotional impact. Burglary was associated with a feeling of vulnerability. Financial loss was not limited to property crimes. Crimes involving physical injury or death resulted in major expenses and/or loss of wages.

B. Response to Allocution Rights

As indicated above, officials estimated that less than 3 percent of felony victims exercised the allocution right at sentencing hearings. (See Chapter VII for further discussion of extent of victim utilization.)

Victim Awareness of the Right. 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. Approximately 50 percent of these victims first learned about the right from the district attorney, 21 percent from the probation officer, 15 percent from victim/witness programs, and 10 percent from other criminal justice persons such as police. Only a few victims mentioned the Victims' Bill of Rights itself as their source of information.

Although the probation departments 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 the district attorneys' offices. From the time that someone is charged with a given crime, the victim may begin a series of meetings, phone calls, and correspondence with the district attorney, but not until there has been a conviction does probation prepare a presentence report and send notification of a scheduled sentencing hearing.

Reasons for not Exercising the Right. Of the 43 persons who knew their rights but did not exercise them, 37 percent were satisfied with the response of the criminal justice system (especially true in burglaries), while 30 percent believed that their appearance before the judge would make no difference. For 28 percent, the reasons were more personal: they were either too upset, afraid of retaliation, confused, or discouraged. Another five percent of the victims said an appearance would have been

too costly in terms of lost wages, child care, or travel expenses.

Those victims who indicated that appearing would make no difference did not all reflect a negative attitude. Some were satisfied by assurances from the district attorney that the criminal would receive the maximum sentence possible; some even attended the hearing prepared to make a statement but then decided their comments would be superfluous. Others, however, were discouraged by the district attorney or the probation officer, only to regret later that they had not expressed their feelings. Some victims indicated that officials sometimes expressed concern that an oral statement might be counterp oductive, if, for example, the victim became hysterical.

It was not uncommon for victims to present themselves in a passive mode, explaining that "no one told me I should," or "they don't seem to care," or "I was busy." 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.

Reasons for Exercising the Right. Of 38 victims exercising the allocution right by written or oral statement to the court, 34.2 percent indicated their primary reason for addressing the court was the desire to express their feelings to the judge; 31.5 percent indicated they wanted to perform what they perceived as their duty; and 26.3 percent indicated the desire to achieve a sense of justice, or to influence the sentence. One victim of a terrifying armed robbery wanted to show the criminals that victims could make life miserable for them. Another, angry at a plea bargain to second degree murder in his son's death, wanted to see the young man responsible sent to prison, not the Youth Authority. "Adult crime--adult time," he said. Still 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," and he meant it literally. Several victims who knew their attackers personally wanted to ask the court to provide psychological help for the offender, usually for the good of the offenders as well as the safety of others. A man who was assaulted by an acquaintance indicated he wanted to speak because he knew both the high costs of incarceration and the undesirable conditions in prison; he advocated probation and restitution.

Intricately bound up with their reasons for making a statement at sentencing were the end results which the victims hoped to gain. From four options victims were asked to choose the primary result they hoped to accomplish. Fifty-six percent hoped for a long or maximum sentence; 15 percent sought emotional relief by having their say or by representing a murdered family member; 12 percent sought financial restitution. The remaining 17 percent of the victims had a variety of other objectives, including requests for a "lighter sentence."

Content of Victims' Statements. On the average, victims reported that they made two main points in their statements to the sentencing judge. The most common point made by nearly half (47 percent) of the victims was that the perpetrator should be punished or, more specifically, locked up. Slightly more than 25 percent of the persons stressed one or more of the following: the effects of the crime on the family, qualities of the criminal (usually highly negative ones), the good qualities of the victim, or the nature of the crime itself. A few persons mentioned the need to protect society by keeping the criminals incarcerated; still others suggested alternative sentences, restitution in particular.

Nearly half of 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.

Benefits of Allocution. The survey indicated that making a statement at sentencing had potentially two main effects -- an emotional effect on the victim and a perceived effect on the sentence. Over half of the victims speaking (54 percent) reported that indeed they felt different after making their statement to the judge, and 59 percent expressed positive feelings of satisfaction or relief. On the negative side, 25 percent of the victims felt angry, fearful or helpless, and 10 percent felt dissatisfied.

Less than half (45 percent) of the allocutors felt that their involvement affected the sentence. Even those who felt they had an effect were still inclined to view the sentence as too easy; 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 given was too light.

VI. FACTORS INFLUENCING USE OF THE ALLOCUTION RIGHT

Given that allocution is a rare event, to what extent does the victim's own reaction to the crime and to the criminal justice system influence his decision to participate at sentencing? What are the variables which distinguish those who speak at sentencing from other felony victims?

A. Previous Studies

Recent literature on victims has focused on the importance of victim involvement and victim satisfaction with the criminal justice system. For some victims appearing at sentencing hearings is the culmination of a series of actions after the crime. Participation may arise from feelings of satisfaction or displeasure with prior contacts with the system. Participation may also result in such feelings.

Hagen (1982), in a study of victim involvement in communities near Toronto, analyzed various victim activities, e.g., contact with police, prosecutor, and knowledge of disposition -- and the relationship of these activities to victims' attitudes toward disposition. Hagen's findings, which were suggestive rather than conclusive, indicated that victims who attend court are more likely to reduce their demands for severity in sentencing. Thus, Hagen postulated a linkage between involvement and the acceptance of the case disposition.

In a survey conducted by Lou Harris and Associates for the New York State Crime Victims Compensation Board (1984), Bucuvalas 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.

In another recent study, System Response to Victim Harm by Hernon and Forst (1984), approximately 80 percent of 249 respondents expressed satisfaction with the police, 67 percent with the prosecutor, 54 percent with the judge, and 49 percent with the disposition. After reporting that 21 percent of victims interviewed wanted greater opportunity to express their opinions, the authors concluded that "there is a high correlation between satisfaction and the victim's perception that he or she influenced the outcome. . . . Victims are generally more satisfied with the way their case is handled when they are informed and have access to someone in the criminal justice system who listens to and appears to care about their opinions."[1]

In their evaluation of the Structured Plea Negotiation experiment, discussed earlier, Clark et al. (1984) reported that most victims tended to be satisfied with their attendance, but that they also realized that their presence and/or statement at the plea negotiation conference had no impact on the case disposition. These findings echo the results reported by Heinz and Kerstetter (1980) on a similar field experiment in Dade County, Florida in 1977.

With this background of tentative findings in mind, the project's research on victim response and participation was undertaken.

B. Defining Victim Participation at Sentencing

During the course of data collection and analysis, it became evident that speaking at sentencing was the most active choice from a number of options that victims or their next of kin might undertake as a result of their concerns regarding sentencing. Some of these concerns may have already been expressed to the probation officer for use in a victim impact statement.

The researchers found that victims at the sentencing hearing might act in one of four ways: victims might have no involvement at the hearings; they might attend the sentencing hearing as observers; they might send written statements to the judge; or they might make an oral statement at the sentencing hearing.[2] Thus, victims can be classified by the quality and intensity of their personal involvement at sentencing, ranging from inaction to passive observation to assertion in written or oral form.

In the analysis which follows, victim participation is a discrete variable, ranging from no participation to allocution.[3] Bearing in mind that a special effort was made to identify those who spoke at sentencing hearings, one can see in Table 6.1 the distribution of types of victim participation within the sample.[4]

Table 6.1

Types of Victim Participation at Sentencing*

	N	Percent
Did not participate	117	68.4
Observed the hearing	10	5.8
Sent written statement	15	8.8
Made oral statement	29	17.0

*If the victim was active in more than one way, the code reflecting the highest level of activity was used.

C. Factors Related to Victim Participation

The following analysis examines the extent to which victim participation was influenced by the demographic characteristics of the victim, the type of crime, and the victim's level of involvement and satisfaction with the criminal justice system. Table 6.2 shows the relationship of selected items to victim participation, listed in order of statistical significance.

Table 6.2

Relationships of Selected Items to Victim Participation in the Sentencing Process

	Significance Level*			
Item	N.S.	p.< .05	p.< .01	p.< .001
County of Conviction	X			
Sex of Respondent	X			
Educational Level	X			
Employment Status	X			
Marital Status	X			
Ethnicity	X			
Prior Victimization	X			
Criminal Justice Satisfaction (grouped scores)	X			
Occupational Group		X		
Relationship of Respondent to Victim		X		
Type of Sentence		X		
Filing Civil Suit		X		
Victim Harm Scale (r=.174)		X		
Contact with Victims' Group			X	
Contact with Private Attorney			X	
Receiving Victim Services			X	
Type of Crime				X
Knowledge of Allocution Right				X
Criminal Justice Involvement (grouped scores)				X

*Based on Chi square unless otherwise noted.

No significant differences in participation at sentencing were found in relation to gender, ethnicity, marital status, or educational level. Because of their active role as mothers in cases involving child abuse and drunk driving, women were somewhat more likely to have contact with victim support groups, which encourage participation. For these same reasons, women were somewhat more likely to be involved with more serious crimes; parents, in general, were more likely to be active

participants than other relatives and more likely to be involved with the most harmful crimes. Occupational differences were significant. Professionals were more likely to speak at the sentencing hearing; technical and clerical workers tended to send written statements.

As expected, crimes resulting in serious personal injury generated higher levels of overall participation than property crimes. In child molestation and homicide cases, it was not victims themselves but the next of kin who were most likely to participate. As a group, victims of burglary and assault were least likely to expend the extra time and effort to make presentations to the court. They usually relied on their insurance company, if they had one, to ameliorate the loss and on the criminal justice system to prescribe the appropriate sentence. No rape victims in the sample spoke at sentencing hearings.

There is evidence that participants in sentencing remembered learning about the right to appear more often from a personal contact with an official than from notice by mail. The personal nature of the communication may have encouraged these victims to participate at sentencing.

D. Involvement and Satisfaction

It was anticipated that certain experiences with the criminal justice system would increase the victim's motivation to appear at sentencing, namely, the victim's level of involvement with the criminal justice system and his or her level of satisfaction with the system.

To assess factors in the criminal justice process that might contribute to allocution, the project staff developed a series of specific questions that measured the extent of a victim's involvement and satisfaction with law enforcement, the courts, the prosecutor, and other agencies. From these items, two measures were developed--the Criminal Justice Involvement Index and the Criminal Justice Satisfaction Index. Both indices were developed based on variables from by other studies as well as on the researchers' hypotheses. (See Appendix C for detailed information on these indices and the statistical analyses used.)

The major components which measured victims' Criminal Justice Involvement were the following:

1. Victim interaction with the district attorney;
2. Amount of court activity on the part of the victim; and
3. Victim knowledge of allocution rights.

The major components measuring Criminal Justice Satisfaction were the following:

1. Victim's satisfaction with law enforcement;
2. Victim's satisfaction with the district attorney; and
3. Victim's opinion of the judicial process.

The Involvement and Satisfaction Indices were significantly interrelated, (r=.418), suggesting that persons actively involved with the adjudicative process--those with direct experience with officials and the court--were more satisfied with the criminal justice system than those who had little or no involvement. However, several factors, such as the nature of the crime tended to disrupt the relationship between involvement and satisfaction. The greater harm done to the victim the less likely the victim or next of kin was to feel that the case was handled well or to be content with the outcome. Relatives of murder victims were significantly more likely to be dissatisfied; to a lesser degree so were those victims who felt a chronic sense of insecurity after the crime.

The personal impact of the crime, as reported by victims, did not appear to be directly related to their level of involvement. Although reporting similar types of losses (whether loss of loved one or an emotional or financial loss), people did not react in a similar manner. This finding provides further evidence that victims become involved for a number of reasons. Being involved in the court process presents opportunities for negative as well as positive experiences.

Persons who received services from victim/witness programs and had extensive involvement in the criminal justice system were no more likely to feel satisfied than those who received no services. Those who received help in completing forms for compensation from the state were more often dissatisfied. These persons, of course, were often the next of kin of murder victims. Again, the severity of the crime may provoke such intense feelings of anger, depression, or unhappiness that positive interventions have little impact on the victim's overall assessment of the criminal justice system.

Some victims also reported frustration encountered in dealing with the complex, slow process of collecting funds to pay medical or funeral expenses, which at the time of the study often took as long as 18 months. Any rights granted victims or efforts to improve services to them may be undone by bureaucratic inefficiency or thoughtless treatment by an official. If a victim experiences a single unhappy incident between the time of the crime and sentencing, it often negates a number of positive encounters with the criminal justice system and result in an overall negative assessment.

Relationship to Victim Participation. The Criminal Justice Involvement Index is strongly related to victim participation at sentencing (which includes observing the hearing, sending written statements and making oral statements) (r=.489). Most victims did not suddenly become interested in allocution when the

sentencing date neared and they received a letter notifying them of the right and the hearing. Victims who submitted statements or spoke at sentencing were much more likely to have had frequent contact with the district attorney, to have received services from a victims' services program, to remember having received 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 other court proceedings.

Other activities significantly related to participation were the following: having contact with a victims' support group, retaining a private attorney, filing a civil suit, and receiving media publicity. A picture emerges of a person playing an active role in the prosecution that culminates in the victim either submitting a written statement or delivering an oral statement in the courtroom.

The Criminal Justice Satisfaction Index, however, was not related to victim participation at sentencing. ($r=.065$). It appears that while some victims participated because of satisfactory contacts with officials, others took part in sentencing because they were dissatisfied with the actions or manner of the district attorney or the probation officer. The Satisfaction Index was negatively correlated with the degree of injury suffered by the victim ($r=-.204$ $p<.01$). For some next of kin experiencing the highest level of victim harm -- homicide or manslaughter of a family member -- it appears that no process or outcome (short of the death penalty, perhaps) would be sufficient to produce a satisfactory result.

Comparative Findings. The statistical findings of this study support the finding of Harris (1984) and Hernon and Forst (1984) that greater involvement with the system throughout the proceedings resulted in higher levels of overall satisfaction with the criminal justice system.

However, the findings provide limits to the supposition that participation would lead victims to accept the case disposition (Hagen, 1982). In the most serious cases, which often involved participation by the next of kin, no disposition appeared harsh enough to balance the scales of justice. Nor did victim compensation enhance satisfaction.

NOTES

1. J. Hernon, and B. Forst, 1984, The Criminal Justice Response to Victim Harm, (Washington, D.C.: NIJ): p. 50.

2. During the interviewing and coding phases of the project, data indicated that in terms of motivation and personal involvement victims who wrote to the judge regarding sentencing were similar to those who spoke at hearings and that both of these groups were significantly different from other groups of victims. (Appendix Table 17) Those who spoke or wrote to the judge wanted to have impact on the sentencing process, but their means of communication differed. The decision to present a written rather than oral statement was sometimes a matter of personal preference. Not everyone is comfortable at center stage or able psychologically to withstand the stress of a personal appearance, which involves confronting the convicted criminal. Actual confrontation with the convicted criminal requires a higher degree of risk taking and personal public disclosure. Logistics related to time, distance, and expenses made a personal appearance difficult or impossible for some victims or their next of kin.

3. Based on responses to three questions on participation at sentencing, each respondent received a score from 0 to 4. Weights were assigned to reflect the quality and intensity of the victim's involvement at sentencing, as follows:

   0 -- Victim was not active regarding sentencing.
   1 -- Victim only attended sentencing hearing.
   2 -- Victim sent written statement to judge.
   3 -- Victim's counsel or relative made an oral statement
   4 -- Victim made an oral statement at sentencing hearing.

   Since only three cases fell into category 3, the cases were examined individually. Because of the high level of victim participation found in each case, they were scored as 4's.

4. It is important to keep in mind that 17 percent of the total sample spoke at sentencing. In the three counties studied, there are over 2,000 felony convictions in a six-month period; during a similar time period the courts identified 54 persons as exercising the right of allocution. Thus, roughly 2.5 percent of sentencing hearings resulted in a victim appearance. The percentage would drop if multiple convictions, multiple victims were taken into account. (See Tables 3.1 and 3.2, pp. 33-34 for sampling statistics.) In order to have a viable comparison group, the project deliberately identified and interviewed a much higher proportion of victims who spoke at sentencing than would be found at random.

VII. EFFECTS OF ALLOCUTION

The project staff selected three areas of research to assess the effects of the new victim allocution right: (1) the extent of the use, (2) the perceived effect on procedures and decision making in the court (measuring actual effect was beyond the purpose and scope of the study), and (3) the increase in agency workload.

A. Victim Utilization

According to 72 percent of the judges and 95 percent of the prosecutors, 3 percent or less of felony crime victims make statements at sentencing hearings. The victim survey supports these estimates. In the three counties studied, over 2,000 felony convictions occurred in a six-month period; during a similar time period, 54 persons were identified as making statements at sentencing; thus 2.5 percent of sentencing hearings resulted in a victim appearance.

Despite differences in the style of notification letters, participation rates statewide did not appear to differ noticeably from one county to another. When asked why the proportion of victims exercising the right to appear at sentencing is not greater, agency officials responded as shown in Table 5.1. Included for comparison are the reasons given by victims who knew about the right but did not use it.

Table 7.1

Perceived Reasons for Low Appearance Rates at Sentencing

Reasons	Respondents		
	Judges	District Attorneys	Victims
	(n=48)*	(n=47)*	(n=43)
Victim had satisfactory input	48%	34%	37%
Victim feels he can have little impact	22%	30%	30%
Victim trusts the decision of the Court	22%	15%	NA
Victim is often fearful	8%	17%	9%
Victim is not adequately informed of right	0%	4%	NA

* Number of responses; multiple responses were possible.

Although the pattern of response was similar among the groups, judges were more likely to place their confidence in the procedures in place before the passage of the Victims' Bill of Rights, which, they believed, provided the victim with satisfactory input through the victim impact statement and the district attorney. Comments from both judges and district attorneys were similar. The following are typical statements:

> Most victims want a forum but are satisfied in talking to the probation officer or the district attorney and having them make the presentation . . . Testifying in court is an intimidating experience and except for egregious cases, most victim/family members don't want to do it. In aggravated cases . . . a forum has always been available. . . .
>
> Despite the formal notice, no more victims have addressed the court directly than in the past.
>
> Very few people seek revenge. Most are content to let government handle crime so few appear unless required by subpoena. Prop. 8 has only provided a forum which few take advantage of.

> Most victims are passive or content to let the matter be handled by the Court. A lot don't care or don't want to be bothered anymore (over and above police interrogations, District Attorney interrogations and court appearances).

District attorneys more often mentioned victims' feelings of impotence or fear as deterrents to involvement; judges stressed the diffidence and timidity of victims, typically unfamiliar with the courts and intimidated by the process:

> It takes a given personality to speak up; further only in certain cases are victims so aroused and exercised as to overcome their natural trepidation.

> The whole judicial process is designed to wear out the victim or witness. All prelims are continued at the request of defense on and on . . . . Each time the witness or victim loses time at work, etc. Eventually, the witness or victim refuses to come in because it is costing him too much.

> The victim is of the view that the system sets its own limits and personal presentation would be of little impact.

A number of comments also referred to general apathy and to the victim's desire to forget the experience. The reasons given by victims support the officials' views, especially those of district attorneys. However, all officials seemed to underestimate greatly the extent to which victims have been uninformed -- judges and district attorneys rarely cited a lack of information as a reason for low appearance rates, while 56 percent of victims interviewed stated they did not know about the allocution right.

It was noted by some officials that the nature of the crime is strongly related to victim allocution at sentencing. As the victim data indicate, sex offenses against children and violent crimes are more likely to elicit victim allocution than are property crimes. Other factors such as geography and demographics may also influence allocution. As reported by the district attorney in one small county:

> [We have] very few felony crimes to begin with. Because of our small size we are able to deal with our victims on a personal basis and usually get a good understanding of their feelings about the crime and punishment involved. Our procedures, though informal, allow a great deal of input by victims. Because most victims, and criminals for that matter, are visitors to our area, actual appearances at sentencing by victims are seldom.

B. Perceived Effects on Judicial Decision-Making

Although most probation officers thought that the victim impact statement had as much effect as allocution, a few believed that allocution had greater influence:

> Judges are very susceptible to what they perceive as a general change in attitude of the community, e.g., MADD organization's advocacy for stricter drunk driver penalties. These activist groups, coupled with the appearance of an incensed yet articulate victim produces great pressure on the court.

According to probation officers, the contents of allocution statements and their impact are not always as expected:

-- The impact is directly dependent upon the impression victim makes on the Court. This is very unpredictable.

-- We have experienced victim pleas for lenience--and the court was lenient. We have also had victims . . . change statements in court. We've had a teenage rape victim state she more or less consented.

-- Post-conviction admissions may create difficulties for judges and prosecutors alike.

Most judges indicated that at the time of sentencing they already had been informed of the victims' viewpoint through the victim impact statement, and consequently, the actual appearance had little effect.

-- In each case the probation officer interviews the victim (unless the victim declines or refuses) and the victim's views on an appropriate sentence are included in the written sentencing report and may strongly influence the probation officer's recommendation to the judge. Thus, the victim who does not appear in court at sentencing may nevertheless have a strong impact on the sentence imposed, and the victim's feelings are known by the judge at that time.

-- Judges . . . are generally aware of what [the] victim says re restitution/sentencing, and appearance of [the] victim probably has little impact on outcome.

-- Superficial cosmetic P.R. value. Adds nothing. No impact. Pertinent info communication before 1191.1 (P.C.).

-- 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.

District attorneys were much more likely than judges to think that allocution affected sentencing. Seventy percent of the district attorneys, compared to 19 percent of the judges, indicated that a victim's appearance often or sometimes increased the severity of the sentence.

Of the victims appearing, 45 percent felt that their involvement affected the sentence. Although persons who spoke at sentencing were often the victims of serious crimes, they reported a higher frequency of non-jail sentences than those who did not appear.[1] (Table 7.2) Individual case analyses indicated that some victims who spoke were primarily interested in receiving restitution or in "getting help"--such as drug or alcohol treatment--for the criminal because he was a relative or friend.[2]

Table 7.2

Victims' Reports of Type of Sentence
by Type of Victim Participation in Percent

		Type of Sentence			
Type of Participation	(N)	Prison	Jail	Non-Jail*	Total
No Participation	(75)	57.3	26.7	16.0	100.0
Attendance Only	(9)	55.6	44.4	0.0	100.0
Letter to Judge	(14)	78.6	14.3	7.1	100.0
Oral Statement	(26)	46.2	7.7	46.2	100.0
Total	(124)	57.3	22.5	20.2	100.0

*Primarily probation, probation with restitution, and drug or alcohol treatment.

With respect to restitution, 66 percent of district attorneys (compared with 40 percent of the judges) thought that victim appearances increased the amount of restitution awarded. In general district attorneys display a positive attitude toward allocution.

-- From a prosecutor's standpoint, I feel that the victim's presence in court aids the Judge in passing an equitable sentence. All too

often the only person present in court who will be directly affected by the sentence passed, is the defendant himself and as a consequence the Judge's sense of sympathy would naturally be drawn to that only 'warm body' present. The presence of a victim and particularly one who voices an opinion or recommendation regarding sentencing serves to counter-balance the above tendency.

-- 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, however, added that:

-- Judges are constrained by law, logic, and justice. In a majority of cases nothing the victim says is really going to impact.

-- Little impact . . . other than as a statutory reference to accomplish what we have been doing for years.

-- 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.

C. Increase in Workload

Most probation departments have experienced a minimal increase in workload related to notification, which basically involves mailing a form letter. It is unclear whether district attorneys have any more contact with victims as a result of the allocution right.

The impression of project staff, based on the agency surveys and on informal interviews with personnel in the various agencies, is that combined victim assistance efforts by relevant agencies are characterized by disorganization and by duplication of some services and omission of others.

D. Expectations for the Future

While 44 percent of district attorneys anticipated that victim allocution would increase, 75 percent of the judges expected the level of allocution to remain about the same. A majority of victims (71 percent) anticipated increased participation in the future. Directors of victim/witness programs were almost unanimous in their belief that victim participation at sentencing would increase and that the system itself would become more responsive to such participation.

Reasons for the expected increase included better information for victims, and, consequently, greater awareness of the right to appear, as well as a wider interest in victims in general. Some respondents from victim/witness programs recommended additional resources and services to encourage allocution:

> I strongly feel more victims would appear and would address the court if they were personally escorted by someone familiar with the system and to whom they could turn for help. There is an aversion to public speaking, enhanced by awe of addressing a court.

Victims also saw the need for more information on rights, more support from the district attorney, and more legal assistance. Although victim/witness programs are able to provide some of these services, the programs appear at this time to be responding to requests regarding appearance rights but not reaching out to increase awareness or to support allocution in a systematic manner.

NOTES

1. Cross checks of victims' reports with court orders revealed a high level of accuracy in victims' reports of the sentences imposed. However, because of the small numbers involved and the multiplicity of factors affecting sentences, the data should be viewed with caution.

2. See the general discussion in Section V B. Response to Allocution Rights, pp. 50-54.

VIII. FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

A. Findings

The major findings of the study are grouped into four general categories: (1) the limited scope of the allocution rights, (2) impact on the criminal justice system, (3) impact on victims, and (4) factors associated with victim exercise of allocution rights.

Limited Scope of the Rights

- Plea bargaining and California's determinate sentencing law together severely limit the possible impact of victim allocution on sentencing results. Simply stated, in most cases the right is of marginal or no utility to a victim seeking to influence a sentence.

Effects on the Criminal Justice System

- The vast majority of the presiding judges of criminal courts in California were convinced that victim impact statements, which are part of the probation report considered by the judge prior to sentencing, provide victims an adequate opportunity to express views on sentencing. In the opinion of the presiding judges, the allocution right at sentencing is unnecessary. Chief probation officers shared this perspective.

- Although district attorneys were more confident than judges that victim allocution might influence sentencing, according to victim interviews district attorneys frequently advised victims that an appearance was unnecessary and would add nothing to the sentencing decision, especially where plea bargaining had occurred.

- Giving victims the right of allocution at sentencing hearings has not resulted in any noteworthy change in the workload of either the courts, probation departments, district attorneys' offices or victim/witness programs. Although agencies have generally complied with the statute, the effect of the workload on the system has been minimal.

Impact on Victims

- Although probation departments sent letters notifying victims of the right to appear at sentencing hearings, less than half of the victims sampled were aware of the right.

- Some of the notices sent by probation departments to victims were returned undelivered because addresses had been inaccurately recorded or the victim had moved

between the time of the crime and the conviction.

- Less than three percent of felony victims actually appeared at sentencing hearings.

- Victims who knew about the allocution right but did not appear often indicated that they had been satisfied with the system's response and felt confident that the court would impose the appropriate sentence. Some victims had a more fatalistic view, believing that the system would proceed on its own course regardless of victim comments or viewpoint.

- Six out of 10 victims who expressed their opinions to the sentencing court, either in writing or by allocution, had positive feelings afterwards. However, these participants were no more likely to feel satisfied than victims who took little or no action.

- Victims who sent written statements to the court were similar in attitude and involvement to those who appeared and made oral statements; the method of communication used was a matter of preference or convenience.

- More than half of the victims who participated, whether by written or oral statement, hoped to influence the court to impose a long sentence, but their underlying motivation also included a desire to express their feelings and a sense of duty to contribute their views.

- Despite the limited use of allocution, most victims interviewed regarded the right as important and thought that victim allocution would increase in the future. However, most victims also indicated that more information, more support, and some legal assistance for victims would be necessary to achieve that increase.

- Most victims, regardless of their level of participation, would like to have been informed of the outcome of the case. The fact that the district attorney was obliged to provide such information, if requested, was not common knowledge.

Factors Associated with Victim Participation

- Demographically, those who participated in sentencing hearings, either by written statement or allocution, were similar to nonparticipants in terms of gender, age, ethnic group, and marital status.

- Parents of victims participated at a higher rate than victims themselves. Parental participation was related to the type of crime. Murder, manslaughter, and child

molesting were associated with the greatest participation.

- Victims of burglary participated in sentencing at a very low rate. In general, those who had insurance appeared to be satisfied with reimbursement from their carrier.

- Victims of crime involving a substantial monetary loss not covered by insurance, such as fraud, generally participated in sentencing to seek restitution. Since direct restitution to the victim is generally available only when probation is granted, these victims were forced to seek a sentence that did not include a prison term.

- Participation in sentencing was associated with a high level of activity through various phases of the case, particularly activity involving contacts with the district attorney. In general, victims who decided to participate in sentencing had exhibited a pattern of involvement in the case soon after the crime was committed.

- Participation in sentencing was not related to satisfaction, in part because of the severity of many crimes. For example, a parent who had lost a child in a drunk driving incident was not made "happy" by a brief appearance in court. In addition, a single negative encounter with one official sometimes outweighed a number of other positive experiences.

B. Conclusions

Effect of Allocution at Sentencing

The right to allocution at sentencing has had little net effect on the operation of the California criminal justice system or on sentences in general. Some of this lack of effect can be attributed to a variety of extrinsic factors not inherent in the concept of allocution: determinate sentencing, victim impact statements taken prior to sentencing hearings, restrictions on the availability of restitution, compensation for victims of violent crime provided by an agency outside of the criminal justice system, and inadequate notice.

Victim Response to Allocution

While the study shows that victims desire the right to participate in sentencing, few victims show any great predisposition to exercise the right. The interviews indicated that some victims view the rights from a purely practical perspective and decide against appearing because they have concluded, probably correctly, that they cannot affect the sentence.

Benefits of Allocution

Despite the limitations of allocution in general, and California allocution in particular, there is reason to believe allocution benefits some victims of crime. Despite the finding that those who participated were "no more likely to feel satisfied than victims who took little or no action," the study did interview a number of individuals who indicated they had benefited from the allocution rights. Some victims reported receiving enhanced restitution, persuading judges to impose longer sentences, or experiencing a sense of recognition and participation.

Victim Desire for Information

The interviews indicate that victims want information about the case against the defendant as much as they desire the legal right to participate. A sizable percentage of victims felt ignored, had a limited understanding of the criminal justice system, or had trouble ascertaining what stage a case had reached or why a particular action had been taken. In fact, there is evidence that some of the victims exercised the right of allocution at sentencing primarily to find out what was going on in their case.

Notice Problems

Inadequate notification procedures has proved to be a major problem in the implementing of the allocution right. The form letters sent by the probation departments are an inadequate means of communication.

Limited Scope of Allocution

Regardless of the unique factors that might limit the scope of the allocution right at sentencing hearings in California, 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 his say. Indeed, plea bargaining may result in the dismissal of some criminal charges, thereby depriving some victims of the right to allocution.

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. These earlier stages, such as charging and plea bargaining, control to a substantial extent the outcome of the case and the sentence a judge may impose. The right to allocution without rights at earlier stages will be little more than a useless appendage, a tail that cannot wag the dog. This is particularly true within a determinate sentencing system.

Role of Victim Impact Statements

California's victim impact statements, taken by probation officers and included in presentence reports, provide many victims with a satisfactory and adequate opportunity to express their views. An informal face-to-face interview or conversation with a generally sympathetic probation officer appears to be, for many victims, a more comfortable and emotionally satisfying experience than a recitation in open court. Moreover, given the thoroughness of victim impact statements, only rarely will an allocution appearance accomplish more than a victim impact statement.

The Drafting of the Allocution Provisions

The allocution provisions of Proposition 8 were poorly drafted. They failed to identify and provide solutions to a number of problems. For example, Section 1191.1 does not indicate when the victim is permitted to speak or whether the victim must speak under oath and be subject to cross-examination. In addition, Section 1191.1 does not give the victim the right to receive the presentence report prior to the sentencing hearing. This report usually provides the bulk of the background on the offender and the evidence to be considered at the sentencing hearing. Without access to this report, the victim sits in the hearing with little understanding of what the attorneys and the judge are discussing.

The California Legislature has responded to the defects of Section 1191.1, but only in a piecemeal fashion. Under legislation that took effect January 1, 1986, the victim is now entitled to the sentencing recommendation contained in the presentence report. While this legislation constitutes an improvement, the victim is still denied information on the rationale of the proposed sentence and on the offender's background and criminal history. Ironically, the victim (and the public) is legally permitted to see the report immediately after sentencing.

C. Recommendations

Research and Experimentation

The project staff proposes the following research to help resolve major unanswered questions about victims' rights. Whenever possible, actual effects on sentences should be studied.

1. An experiment giving victims the right to be comprehensively informed.

California's minimal efforts to educate the public about the allocution right and the limited efforts of probation departments to notify victims and to explain the nature of the right raises

the question as to what increased utilization and benefits might occur if victims were notified and educated in an affirmative and personal manner.

In addition, the desire of victims for specific information about the case in which they are involved suggests that a right to be informed may be as important, or potentially more important, to victims than the right to participate.

The experiment should include a comprehensive victims' communication model. The right to be informed should require that the system affirmatively seek out and communicate with the victim, unless the victim indicates a desire not to receive information. The right to be informed might require that police, district attorneys, judges, and probation officers develop systematic ways of communicating and explaining decisions. Communications should be coordinated or conveyed through a single agency. Such a right to be informed need not necessarily encompass every plea bargain in every burglary case. However, victim inquiries should be solicited.

Information and explanation should be provided in a sympathetic and informative manner. Written communication may be adequate in some circumstances, but most victims seem to prefer to receive their information in person or by phone. Perhaps, like non-victims, they merely want to be reassured that real people staff and operate our public institutions.

2. An experiment permitting victims to participate at a series of critical stages in prosecution, such as charging, bail hearings, preliminary hearings, plea bargaining, and sentencing.

With such expanded rights of participation, would victims significantly affect the outcomes of cases? Would they benefit in financial, psychological, or moral ways? Would victim participation increase dramatically, and would more victims use private attorneys to advise them or to argue their position in open court? How would the prosecutor's role be affected? Given extensive rights of participation, would certain victims second guess the prosecutor at each stage of the case and, in effect, attempt to conduct a private prosecution of the defendant? Only a carefully thought out experiment can provide answers to these questions.

3. A study comparing allocution in a state without determinate sentencing with allocution in California.

Determinate sentencing severely limits the results a victim can achieve at sentencing. Without this limitation, victims may be more likely to participate and feel satisfaction. A comparative study would provide data on this important issue.

4. A study of the short- and long-term psychological effects of allocution and other forms of victim participation.

If most victims do not choose to exercise allocution rights, and if most of those who do choose to exercise the rights cannot affect the outcome, there is a question as to whether allocution rights have value. To answer this question, we might consider the right of allocution in the light of the general right of free speech.

The right to free speech is justified on a number of grounds, many of them based on arguments of democratic values and political process. There is also a generally recognized psychological value to the right of free speech. Many of us feel better if we have the opportunity to express our views, to some extent regardless of whether our views prevail. Why we feel better under such circumstances is a complex issue. Nevertheless, such psychological/therapeutic benefits may constitute one of the important arguments for allocution at sentencing as well as for other forms of victim participation in criminal prosecution.

Establishing Victims' Rights

For those committed to expanded victim participation in criminal prosecution, the project staff developed the following suggested procedures:*

1. Assess the interest in participation of the population at large and of victims of various types of crime.

2. Analyze the criminal justice system in order to determine what efforts will be necessary to produce receptivity to victim participation and identify the appropriate agencies to manage notification and provide assistance to victims.

3. Examine the statutory and institutional barriers that might impede the exercise of victim participation.

4. Draft victim participation legislation carefully, preferably an omnibus victims' rights bill that takes a comprehensive approach to defining the victim's role in the criminal justice process.

This fourth suggestion may involve altering a number of existing statutes and procedures. In the case of allocution, such legislation should address issues that include: notice, victim access to pre-sentence reports, the exact time and proceedings at which the victim may speak, any limitations on the permissible scope of victim statements, and the circumstances under which the

*Project staff takes no position on the desirability of broad victim participation in criminal prosecution, believing more research is needed before any major conclusions on its social value can be reached.

victim might be subject to oath or cross-examination.

In addition, procedures and remedies should be established to ensure that victims who are denied the opportunity to speak at one or more stages have an opportunity to seek redress. Setting aside a plea bargain because a victim was denied the opportunity to speak might be unreasonable or unconstitutional. Reopening a sentencing hearing long after the sentence has been imposed might prove impractical and unfair. However, reopening a sentencing hearing for a victim who did not receive notice for a period of up to 90 days does not appear overly burdensome. In any case, appellate courts should be given clear authority to review and, if necessary, correct the actions of lower courts with regard to victim participation.

5. Develop specific procedures that will organize the flow of information and services to victims.

To the extent practical, activities that affect victims should be concentrated in one agency. For example, it may be best if all information and notices provided victims come from a central office instead of a combination of agencies such as the courts, the district attorney, the probation department, and victim/witness programs.

6. Design a communication system that will satisfy the victims' need for adequate notice, information, and explanation.

Communication between officials and victims appears to be one of the greatest weaknesses of the existing criminal justice system, with or without participation rights. An effective model should consider the flow of information and the roles and relationships among police, district attorneys, probation departments, judges and victim services. The victim should receive information on compensation, restitution, hearing dates, and decisions involving the prosecution and sentencing. Written notification might take the form of an invitation to participate and that invitation might be followed by a phone call or other personal contact.

7. Develop an educational campaign to inform the public at large of victims' rights.

Public awareness of rights will provide a base of community knowledge and support for those who become victims.

8. Develop a means to evaluate use and impact.

Install the necessary mechanisms for collecting data on victim participation before implementing any victim participation rights. Without such a mechanism, it will be impossible to make even the most rudimentary evaluation of the impact of these rights.

9. Appropriate funds to implement victims' rights.

Hire staff whose primary role is implementation. Without funding, victims' rights are likely to be implemented in a superficial and haphazard manner.

Final Comments

Victim participation in the prosecution of crimes is a complex legal and social issue. If the rights of participation are to be more than symbolic, additional resources will have to be invested in the criminal justice system, a number of existing procedures changed, and some attitudes modified on the part of judges, district attorneys, and other criminal justice system personnel. Although often sympathetic to victims, many judges and some district attorneys do not see the value of rights that have little or no impact on the outcome of a case. Some judges and district attorneys express concern about possible inequities and inefficiencies if victims could regularly affect the outcome of cases. In any case, victims' rights cannot be grafted on to the existing system without generally remaining cosmetic, nor can they be made potent without effecting profound changes throughout the entire system.

The desire of victims to participate in criminal litigation, if only by offering comments at certain stages of the case, may be something of an acquired taste. Does society want to foster that taste for participation? Or will victims acquire that taste on their own? Do the benefits of participation, whatever they might be, outweigh the detriments and expenses?

Inevitably, some victims' rights will be enacted and there is no doubt victims deserve much greater attention and assistance than they have received in the past or are currently receiving. How much of that attention and assistance should take the form of rights to participate in the prosecution? The California experience suggests that the answer to that question will require a great deal more thought and experimentation than the subject has received to date.

If the pressure to develop rights of victim participation continues, we may be in for a protracted period of reform. A two-party system developed over a period of two-hundred years, will not easily yield a place to victims. In the long run what may be required is a complete restructuring of the system. The question remains as to whether society is prepared to embark upon a process so potentially complex, expensive, and unpredictable.

ADDENDUM: VICTIM ALLOCUTION AT PAROLE HEARINGS

A. Adult Parole Eligibility Hearings

The California Victims' Bill of Rights provision governing the right of victims to speak at parole eligibility hearings, Penal Code Section 3043, provides that "upon request" notice of a parole eligibility hearing shall be mailed to the victim or to the next of kin if the victim is deceased, and that "[t]he victim or next of kin has the right to appear, personally or by counsel, at the hearing and to adequately and reasonably express his or her views concerning the crime and the person responsible . . . ."

Section 3043, like its companion Section 1191.1, is limited in its effect by California's determinate sentencing law and other statutes. Setting the release date of the vast majority of prisoners is a matter of making the required calculations under the determinate sentencing law. In these cases, victims can have no impact on release dates.

Parole eligibility hearings are confined to cases of life imprisonment. A life sentence may be imposed only upon those convicted either under provisions of the habitual offender statute or for certain specific and extremely serious felonies. A parole hearing is held only after the life prisoner has served a minimum term, which ranges from seven years up. In 1983, when California's prison population exceeded 39,000, there were 4,208 inmates serving life terms. Only 818 of these inmates received parole eligibility hearings in that year. Only 36 of these hearings resulted in the setting of parole release dates. Thus, allocution is available only to a very few victims, usually next of kin in murder cases, and the statistics on release dates suggest that parole is not a serious possibility in most hearings.

Agency Implementation. All adult parole activities are centralized in the California Board of Prison Terms. Although Section 3043 applies only in cases of crimes committed after the enactment of the Victims' Bill of Rights, less than one month after its enactment the Board issued an administrative directive providing immediate opportunity for victims to appear at parole eligibility hearings and establishing that they were to deliver their statements prior to closing arguments by the district attorney and prisoner's counsel.

Unlike its companion Section 1191.1, Section 3043 does not require notification of all victims but only of those victims who request notice. The Board maintains the names of all persons requesting notice. Next of kin must file with the Board a declaration indicating their relationship to the victim. By earlier statute, the Board also notifies the district attorney's office in the county in which the offender committed the crime; a representative from that office usually takes a very active role

in the parole eligibility hearing.

During the calendar year 1983 a total of 69 persons interested in their right to allocution at parole eligibility hearings got in contact with the Board. Thus, a victim or next of kin expressed the intent to appear in only 1 to 2 percent of 4,208 potential parole eligibility hearings. Allocution at parole eligibility hearings has not resulted in any noteworthy change in the workload of the Board of Prison Terms.

All hearings are held under tight security within the walls of a medium or maximum security prison. Conditions are, at best, barely comfortable; by contrast, most courtrooms are luxurious. The victim must undergo a clearance procedure, including the removal of jewelry and shoes. While waiting for the hearing, the victim is often seated within view of the inmate, who is secured in a nearby holding cell. Most cases are heard before a three-member panel. Hearings are conducted in a formal manner,and most last two to three hours.

Interviews with the Board of Prison Terms revealed that members were generally supportive of victims' rights. Some were concerned that the tone of the hearing might become too emotional with the victim present, that many victims must travel hundreds of miles to attend a hearing, and that there might be legal problems associated with the presence of the victim throughout the entire proceeding. Some Board members strongly supported the practice of victims submitting statements in the form of tape recordings.

Victim Survey. On behalf of the project, the Board of Prison Terms sent letters to the 69 persons interested in receiving notice of hearings. Of these 69, 52 persons, or 75 percent, responded to the letter, and 41 were interviewed. At the time of the interviews, approximately half of these victims had already appeared before the Board, about one-third were waiting to appear, and the rest had sent written statements in lieu of personal appearances.

Only one of the respondents was the direct victim of a crime. The others were the next of kin of first and second degree murder victims. Of these, 19 were parents, 8 were the children, 7 were spouses, and 5 were siblings of victims. Women made up 60 percent of the group. The crimes that concerned this group occurred from 3 months to 20 years before the interviews.

The 41 respondents ranged in age from 27 to 82 years. Thirty-three were white, 4 were Hispanic, 2 were black and 1 was Native American. The ethnicity of one was unknown.

At the time of the interviews, 28 were married, 4 were widowed as a result of the crime, 5 were single and 2 were divorced. The educational level of the group was high, with 23 of 41 having attended college; nearly half of those who attended

college had done post-graduate work. Twelve had completed high school only, and 5 had less than a high school education.

Economically, the respondents had higher than average incomes: ten $50,000 or more annually, eight between $35,000 and $49,000, and twenty-four $26,000 or more. Of the six victims who made less than $12,000, five were retired or disabled, including the two oldest.

In contrast to victims who participated at sentencing hearings, these victims were disproportionately white persons in middle to upper income brackets.

The respondents were generally satisfied with their contacts with the criminal justice system. A solid majority of victims felt they had been well served by the justice agencies. Such satisfaction might be expected since the offenders not only had been arrested but had been convicted and given life terms. However, slightly more than half regarded the sentence as too easy.

Two-thirds were familiar with the Victims' Bill of Rights, and some had actually campaigned for its passage, although many were not aware of the specific allocution rights that it established. One-fifth of the 41 respondents indicated that the Victims' Bill of Rights was their main source of information; 20 percent learned about the right from the local district attorney; and another 20 percent learned of it from other contacts with the criminal justice system. Several victims who advocated longer sentences and the death penalty became politically active and communicated with state officials, such as the Attorney General, the Governor and members of the Assembly Criminal Justice Committee.

Most of the victims reported that they hoped to keep the criminal in prison by pointing out the horror of the crime, the good qualities of the victim, or the effects of the crime on the family. As a result of speaking at a parole eligibility hearing, some victims reported a sense of emotional release and others a sense of satisfaction at fulfilling what they perceived to be their duty to the deceased. These responses suggest that allocution at parole eligibility hearings did benefit some victims. The next of kin of victims of violent crime advocated longer and harsher penalties, more efficient and protective court procedures, and improved assistance to victims in general.

For more detailed discussion on allocution at adult parole eligibility hearings, see Appendix E in the full report.)

B. Youthful Offender Parole Board Hearings

The Victims' Bill of Rights' provision creating the right of allocution before the Youthful Offender Parole Board, Section 1767 of the Welfare and Institutions Code, is almost identical to

Penal Code Section 3043. However, as a matter of practice, the Youthful Offender Parole Board does not allow the victim to attend the entire parole eligibility hearing. Instead, the victim is called into the hearing, permitted to make a statement and then immediately dismissed. This procedure is the most restrictive of those adopted to implement allocution under of the Victims Bill of Rights.

The California Youth Authority uses a decentralized approach to implement allocution rights; it processes victims' allocution requests through each of its eight institutions and six camps. Over a period of six months, California Youth Authority institutions reported 16 inquiries from victims or next of kin regarding parole hearings. Since the Youth Authority housed approximately 6,000 juveniles on any given day, the incidence of inquiry was less than one percent. Half of the victims were interviewed, but the sample of eight was far too small to serve as the basis for findings.

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