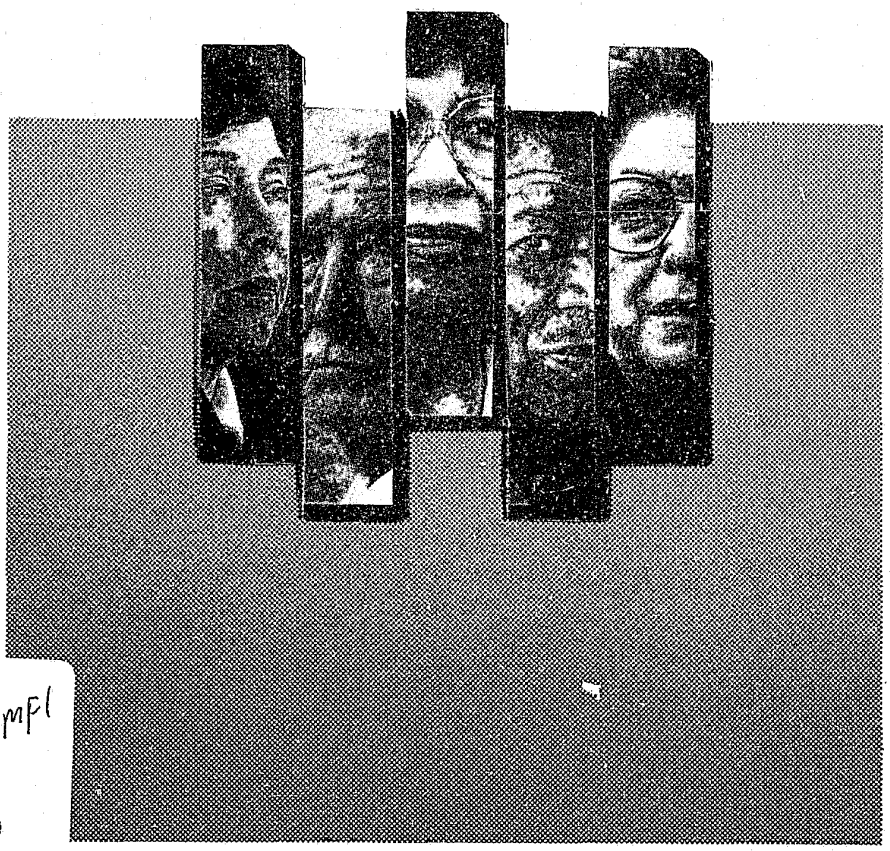
Issues Affecting CRIME VICTIMS



Background, Current Status, and Implications for OLDER PERSONS

AARP
American Association of Retired Persons

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Background, Current Status, and Implications for OLDER PERSONS

Prepared by
Criminal Justice Services
Program Department

AARP

American Association of Retired Persons

The American Association of Retired Persons (AARP) is the nation's largest and oldest organization of Americans age 50 and older, retired or employed. A nonprofit, non-partisan organization with more than 30 million members, AARP serves its members through legislative representation at both federal and state levels, educational and community service programs, and direct membership benefits.

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INTRODUCTION

This packet contains summaries of issues, identified by AARP's Criminal Justice Services (CJS) in 1989, concerning provisions of law affecting victims and their involvement in the criminal justice system.

Victim testimony and cooperation in criminal justice processes are vital to the proper administration of justice in this country. Unless victims and witnesses come forward and report criminal activity to law enforcement authorities and are subsequently willing to testify and endure cross-examination in court, the criminal justice system cannot function.

As the law evolved, however, criminal justice authorities unintentionally began to place emphasis on offenders with the result that victims were underserved. At times, victims were considered only as sources of testimony, and as challenges to be confronted and even outwitted, rather than as individuals who had been mistreated in some manner and needed assistance. Commendable efforts to ensure that reasonable steps were taken to protect defendants were offset by an attitude of complacency toward victims. Criminal justice practitioners lost sight of the fact that, while there can be **no presumption** of guilt in regard to defendants, there is usually **no question** that victims have endured injuries or losses of some type. In addition to the harm of the crime; victims reported instances of insensitivity by police, prosecutors, defense attorneys, judges, and parole board officials. They were forced to relive their victimization at preliminary hearings, grand jury proceedings, trials and even retrials. During these processes, some were subject to intimidation by defendants and their relatives and friends and were offered few support services from officials representing the prosecuting jurisdiction.

In 1982, the President's Task Force on Victims of Crime examined and documented not only the concerns of victims but their outrage at having been relegated to the status of "appendages of a system appallingly out of balance." The Task Force Chairman in her introductory remarks stated that victims had often been treated with "institutionalized disinterest" by a system that had lost track of, "the simple truth that it is supposed to be fair and to protect those who obey the law while punishing those who break it."

The Task Force Report articulated issues, exposed problems, recommended solutions, and served as a source document for those seeking to restore balance to the criminal justice system. Within the ensuing four years, every state had taken some steps in response to victims' needs and concerns. Federal laws were enacted to resolve some victims' problems within the jurisdiction of federal courts and provided

a funding mechanism to support and encourage development of state victim assistance and compensation programs. In addition, victim advocacy groups and state and federal agencies monitored progress, recommended refinements, evaluated the effectiveness of victim service and treatment programs and took action to institutionalize the progress that had occurred. As victims' rights came to be recognized and expanded, those working on these issues continuously stressed that their motivation was not to deprive defendants of any procedural safeguards, rather the focus was directed exclusively toward recognizing the proper status and rights that should be afforded to victims and witnesses.

With this as background, it can be concluded that there has been some restoration of balance and fairness to the justice system in the United States. This trend is emphasized in the statement of the Chief Justice of the United States, the Honorable Warren Burger, as follows:

> "Of course, inconvenience and embarrassment to witnesses cannot justify failing to enforce constitutional rights of an accused ... But, in the administration of criminal justice, courts may not ignore the concerns of victims. Apart from all other factors, such a course would hardly encourage victims to report violations to the proper authorities; this is especially so when the crime is one calling for public testimony about a humiliating and degrading experience." (Chief Justice Warren Burger, **Morris** v. **Slappy**, 1983)

Although numerous issues are identified in this packet, there may be others that could be addressed. In addition, each issue summary may not contain all relevant information. In the aggregate, however, as of mid-1989, the summaries reflect the status of federal and state efforts to respond to the needs of victims.

AARP's Criminal Justice Services will continue to monitor developments in the field of victimization and provide additional information as it becomes available.

BILL OF RIGHTS

ISSUE: While every citizen accused of a crime is entitled to certain procedural safeguards, the system of justice should also afford protections and some considerations to those victimized by criminal activity.

BACKGROUND:

1. Until the early 1980s, there was little recognition among some criminal justice practitioners of the necessity to acknowledge that victims should be afforded certain rights during adjudication processes.

2. Part of the problem was that the status of victims, and any rights they might be entitled to, were not clearly defined. Although it could be assumed that law enforcement professionals would treat victims with compassion and respond to their needs, in many cases the reality was different. In practice, attention was focused primarily upon the rights of the accused, while victims were viewed as sources of information with less regard for the impact of the crime upon them as individuals. This was viewed by some as an unacceptable situation, but little change occurred until the early 1980s.

   - In 1931, the Wickersham Commission, a national study group appointed by the President to review the administration of justice in America, stated that, "Hardships suffered by victims may affect, in some cases, the victim's attitude toward the administration of public justice."

   - In 1934, Supreme Court Chief Justice Cordozo stated that, "Justice, though due to the accused, is due the accuser also. The concept of fairness must not be strained till it is a filament. We are to keep the balance true."

   - In 1951, the Michigan Governor's study commission reported that, "The inept handling which victims often receive following a sex crime is at the root of much of the reluctance of parents to file complaints; the experience at this stage can be worse than the experience of the crime itself."

- In 1980, the state of Wisconsin enacted a victims' Bill of Rights and the states of Washington, Oklahoma, and Nebraska soon followed.

- In 1981, the U.S. Attorney General's Task Force on Violent Crime recommended that the Attorney General "...should take a leadership role in ensuring that the victims of crime are accorded proper status by the criminal justice system."

3. In 1982, several important activities, which contributed to further development of victims' rights, occurred at the federal level.

   - During its hearings in consideration of the Victim and Witness Protection Act, the Senate Judiciary Committee heard testimony from victims who reported severe "disillusionment with the judicial system" following crimes of personal violence. One victim described this process as "hellish" due to insensitive treatment, numerous trial postponements with no prior notice or consideration for her situation, and having her feelings discounted by the sentencing judge.

   - The subsequent Senate Judiciary Committee's report (No. 97-532), providing the Legislative History of the federal Victim and Witness Protection Act of 1982 (S.2420) stated that there were (as of 1982) no provisions in federal law for the development of "comprehensive guidelines for fair treatment of crime victims and witnesses." The History also reflected a statement of Chief Justice Warren Burger that the "rights of crime victims should be given equal time with the rights of the accused and convicted criminals."

   - In August, 1982, the Senate Committee issued its final report and referred the Bill under consideration (Victim and Witness Protection Act of 1982, S. 2420) to the Senate with a recommendation that it be enacted.

4. The federal Victim and Witness Protection Act was subsequently passed. It addressed many of the concerns expressed to the Senate Judiciary Committee. As reflected in Section 2 of the Bill, its purposes were to:

   - enhance and protect the necessary role of crime victims and witnesses in the criminal justice process,

   - ensure that the federal government does all that is possible within limits of available resources to assist victims and witnesses of crime without infringing upon the constitutional rights of the defendant, and

   - provide model legislation for state and local governments.

5. The Victim and Witness Protection Act contained provisions to protect victims and witnesses from intimidation, mandated that pre-sentence reports include victim impact statements, and required federal courts to order payment of restitution to victims, or state on the record reasons for not doing so. In addition, Section 6 of the Act directed that the U.S. Attorney General develop and implement federal guidelines for the Department of Justice to respond to the needs of crime victims and witnesses in federal courts. All federal law enforcement agencies outside the Justice Department (U.S. Postal Inspection Service, for example) were also required to adopt consistent guidelines.

6. The Victim and Witness Protection Act was also intended to serve as a model to encourage state legislation in the area of rights and protections for victims and witnesses.

7. On April 23, 1982, the President's Task Force on Victims of Crime was established. It was directed to determine the manner of treatment afforded victims in the criminal justice system and recommend actions to resolve problems of inequity.

   - The Task Force found "that the U.S. criminal justice system now operates in a manner that does not extend that requisite equity to all . . . when victims come forward . . . they find little protection. They discover instead that they will be treated as appendages of a system appallingly out of balance . . . the system has come to serve judges and lawyers while treating victims with institutionalized disinterest."

   - A total of 68 recommendations for change encompassing police, prosecutors, judges, courts and parole systems were presented.

   - Among its recommendations, the Task Force called for the development of guidelines for "the fair treatment of crime victims and witnesses."

CURRENT STATUS:

1. As a result of the above, both the federal and several state governments developed guidelines or objectives to reaffirm and more clearly define the rights of victims and witnesses. Various listings and recommendations concerning the scope of such rights can be found in Section 6 of the 1982 federal Victim and Witness Protection Act and in the Legislative History of this Act, in the U.S. Attorney General's Guidelines published subsequent

to and in compliance with this Act, in the President's Task Force Report on Victims of Crime under the heading, "Recommendations for Federal and State Action," and in various Bills of Rights developed by state legislatures.

2. The rights contained in these documents are summarized below. It is important to note that the term "rights" does not imply that legal sanctions exist to enforce them or that these rights are to be provided by specific agencies. Note also that repetitive reference to rights of victims and witnesses would be stylistically cumbersome; in general, references to victims should be assumed to include witnesses:

   - **Referral.** These services provide victims with information about emergency medical aid, financial assistance and social services available in the community, and assistance to contact such providers.

   - **Information.** This extends beyond referral in light of the fact that most victims are not familiar with the processes of the criminal justice system and many are intimidated by the thought of testimony and cross-examination. Victims' rights concerning information include:

     - availability of financial assistance and procedures for applying for victims' compensation and witness fees,

     - steps that law enforcement authorities may take to protect victims and witnesses,

     - the status of the accused from arrest through plea bargaining and charging decisions to final disposition (release or confinement),

     - scheduling changes and continuances, and

     - scheduling parole hearings and parole decisions.

   - Protection from intimidation.

   - Participation in the adjudication process by submission of a victim impact statement or testimony that includes the opportunity to express an opinion as to sentencing.

   - Expeditious return of property.

   - Provision of a secure waiting area, prior to testimony, that is separated from that provided to the accused and his or her associates.

- Intercession with employers and creditors of victims and witnesses.

- Restitution by offenders.

- Compensation by the state if an offender is not identified and convicted.

- Protection from disclosure of victims' personal information such as their addresses and phone numbers.

- Assistance to victims and witnesses with respect to transportation, parking and translator services.

3. By 1987, 44 states had either enacted legislation to statutorily restore certain rights to victims and witnesses or had passed resolutions urging that victims and witnesses be afforded some or all of the "rights" listed above.

STAFF COMMENT:

1. **Implications for Older Victims.** Bills of Rights do not usually specify victims or witnesses by age group.

2. A key weakness in much state legislation concerns the lack of enforcement mechanisms in Bills of Rights. Some states, such as Michigan, allow recourse by giving certain public agencies very specific responsibilities for each right listed in the state's Bill of Rights for victims. Utah explicitly authorizes injunctive relief to enforce its enumerated rights for victims. The trend continues to be toward definition of more comprehensive rights for crime victims and enforcement of these rights through legislation.

3. Many of the Bills of Rights, federal legislation, and state and federal reports on this subject specifically stress that victims' rights efforts are not seeking to undermine safeguards for defendants. The intent is to provide equal protection for both victims and defendants and thereby ensure that the criminal justice process is conducted in as fair a manner as possible.

FUNDING TO SUPPORT VICTIM ASSISTANCE PROGRAMS

ISSUE: Many victims need assistance to recover from their injuries and cope with the processes of the criminal justice system.

BACKGROUND:

1. Many victims of crime are shocked, surprised, and angered by their experiences. Physical injuries occur in nearly one-third of all violent crimes. Financial losses, emotional distress, and uncertainty characterize reactions of many crime victims. Property must be replaced, many face a loss of income and others must pay for medical treatment and undergo lengthy recovery periods.

2. The majority of people who face these problems as victims of crime do so for the first time. Many are confused by the terminology and procedures of the criminal justice system, do not know what is expected of them, and are unfamiliar with the types of assistance available. If victims are treated indifferently, believe their cooperation is not acknowledged as important, and discover they will receive no help to recover if injured, they may conclude that they are "victimized" a second time.

3. In 1974, the Department of Justice's Law Enforcement Assistance Administration (LEAA) funded eight victim-witness assistance programs. Subsequent federal action to provide assistance to victims occurred in 1982 when the President's Task Force on Victims of Crime concluded that the services offered to victims were inadequate and submitted 68 recommendations to improve the system. In that year, the federal Victim and Witness Protection Act enhanced the roles of victims and protections available in the federal system and directed the U.S. Attorney General to develop and implement guidelines stipulating the manner in which victims are treated by all Justice Department officials. The Senate Judiciary Committee, in its report following review of this legislation, stated that it expected the Act would also "...serve as a model to encourage further state legislation in this area."

4. In 1984, the federal Victims of Crime Act established a funding mechanism (Crime Victims' Fund) to encourage and support state victim assistance programs. In FY '88, $93.5 million was deposited in this fund for distribu-

tion to the states - 49.5% of this money was earmarked for compensation programs and 45% was identified for victim assistance programs. Note that all funds deposited to the Crime Victims' Fund derive from fines and other collections assessed against those convicted in federal courts. No federal government general revenues are involved.

CURRENT STATUS:

1. As of 1987, 35 states had passed legislation that provided some funding, from state resources, to victim assistance programs.

2. States fund their victim assistance programs from either general revenues or from fines assessed against offenders convicted in state courts. These funds are then augmented by federal grants from the Crime Victims' Fund (referred to as VOCA money) on the basis of each state's population in relation to the population of all states.

3. Victim and witness assistance programs generally perform a dual function. In addition to the services they provide to victims and witnesses, they assist the criminal justice system by encouraging victim-witness cooperation. These programs are either police, prosecutor, or community based. Services commonly offered are:

   - **Referral.** Identification of victim needs and information of available services.

   - **Orientation.** Information about court procedures and the victim's role in the adjudication process.

   - **Accompaniment.** Escort to court which may also include remaining with the victim/witness in the waiting room and throughout the trial.

   - **Transportation.** Provided to/from court, shelters, and service agencies as needed. This service is particularly useful for the elderly and handicapped.

   - **Advocacy.** Intercession by victim advocates with employers and creditors and, if necessary, with police, prosecutors, and social service agencies.

- **Information.** Notification that is provided to the victim: case status, continuances, and final disposition; charging and release decisions; status of property seized as evidence; and victims' rights and protections available to them.

- **Other Services.** Assistance to complete victim compensation forms; replacement of locks, windows, and doors; cleaning of a crime scene; home security surveys; and assistance in preparing victim impact statements.

4. The 1988 amendments to the Victims of Crime Act retained an earlier mandate that the states **give priority** to programs serving victims of sexual assault, spouse abuse, and child abuse and added a requirement that state administrators also fund assistance programs aiding "underserved victims of violent crime." In addition, the minimum assistance grant per state was raised from $100,000 a year to $150,000 for three years (1989-1991) then further increased to $200,000 to cover the final three years of the current authorization.

5. Maintenance of continued funding was assured as the Victims of Crime Act was reauthorized for six years subsequent to September 1988. The funding cap (which limited the amount of funds which could be deposited in the Crime Victims' Fund) was raised from the 1988 level of $110 million a year to $125 million for each of the next three years, and to $150 million a year for the subsequent three years. Although collections from offenders and deposits to the Crime Victims' Fund have never exceeded the funding caps, they have increased in almost every year since the beginning of this program. For example, FY '87 collections were $77.4 million and FY '88 collections were $93.5 million - with almost half available for victim assistance programs.

6. The National Organization For Victim Assistance (NOVA) estimates that there are approximately 6000 victim assistance programs in the United States.

STAFF COMMENT:

Implications for Older Victims. No provisions in the legislation single out older victims for special treatment. Older persons who become victims are grouped with other victims in categories based upon the types of crime committed.

VICTIM COMPENSATION

ISSUE: Compensation programs are intended to provide funds to assist victims in their recovery. Funding through compensation programs is most important when restitution is not available.

BACKGROUND:

1. Victim compensation programs reimburse victims, or their survivors, for some expenses they incur as a result of the crime. Compensation is based on the theory that governments should assist victims to recover from the impacts of crimes when law enforcement agencies have been unable to protect them.

2. In 1964, federal legislation was introduced by Senator Ralph Yarborough (D. Texas) to support compensation programs on the federal level. The first enactment, however, was in 1965 when California developed its crime victim compensation program.

3. In 1982, the President's Task Force on Victims of Crime brought the issue of victim compensation to national attention through its finding that victims clearly need "at least minimal financial relief from the most immediate cost" of the crimes committed against them.

4. The 1984 federal Victims of Crime Act (VOCA) established the Crime Victims' Fund to receive fines and assessments collected from persons convicted of federal offenses. Currently, 49.5% of the money collected through VOCA is available on a matching basis to states for compensation programs. The purposes of the compensation portion of this Act are to:

   - Encourage at least a minimal amount of crime victim compensation nationwide.

   - Increase utilization of victims programs through referrals from victim assistance agencies.

   - Enhance the level of benefits available to victims.

   - Utilize state compensation programs to assist victims of federal offenses in each state. This is considered a more rational approach than creating a separate and overlapping federal program for compensating victims of federal crimes in each state.

5. Rationale for Compensation Programs:

   - Citizens have a right to compensation if their government fails to protect them.

   - Funds to assist victims are appropriate if it is also considered necessary to allocate money to defend those accused of crime who are indigent.

   - Compensation encourages increased citizen cooperation with law enforcement officials.

   - Compensation expands government response options by allowing officials to direct resources toward restoration of the victim even in circumstances in which offenders are not identified and prosecuted.

CURRENT STATUS:

1. As of 1987, 45 states had developed compensation programs of some type and 38 received supplemental federal funding through the federal Victims of Crime Act (VOCA).

2. Section 1403 of VOCA provides that the Attorney General "shall make an annual grant from the Fund to an eligible crime victim compensation program of 35 percent (amended in 1988 to 40 percent) of the amounts awarded during the preceding fiscal year, other than amounts awarded for property damage." As an example of the functioning of the program, in FY '85 certified compensation awards from eligible state compensation programs totaled $80.4 million; thus the total amount of VOCA money available to states with eligible compensation programs in FY '87 was $28.2 million.

3. In addition to VOCA grants, states fund their programs through a variety of funding sources such as general revenues, income from various fees, and fines and penalties assessed on those convicted in state courts. State compensation programs vary in their coverage. In general, funds are provided (within specific limits) to victims for otherwise unreimbursed medical expenses, rehabilitation, occupational training, loss of earnings, support of dependants of deceased victims, and funeral expenses incurred by next of kin.

4. In keeping with the philosophy of the Victims of Crime Act, there are only a few eligibility criteria that states must meet to qualify for VOCA grants. State programs must:

- compensate victims for medical expenses attributable to a physical injury, including mental health counseling, loss of wages and funeral expenses,

- promote cooperation with the reasonable requests of law enforcement authorities,

- provide certification that federal VOCA grants will not be used to supplant state funds otherwise available for crime victim compensation,

- compensate victims who are non-residents of the state in which the crime occurs on the same basis as awards to victims who are residents,

- compensate victims of crime subject to federal jurisdiction occurring within the state on the same basis used to determine awards to victims of state crimes, and (as of 1990)

- provide compensation to victims of drunk drivers, to domestic violence victims, and to "follow" (apply equally to) victims whose states have a compensation program when crimes occur in states without a compensation program.

5. During FY '86, the most predominant crimes for which states awarded compensation were assaults (22,071), murder (5,047), sexual offenses (4,692), and child sexual abuse (4,434). The average crime victim compensation award was $1,864. Over 60 percent of compensation awards were used to pay for victims' medical expenses and 27 percent of the awards went to pay for lost wages, loss of support and disability.

6. State funding sources for compensation programs, in addition to VOCA, are general revenues (39%), fines and penalties (36%), and a combination of the two previous categories (24%).

7. Implementation problems have occurred in the following areas:

   - **Lack of public awareness of victim compensation.** Many such programs are not widely advertised due to a concern that funds would not be available to pay all eligible victims if the programs were well publicized. Many states have found this to be the case as claims for compensation have increased out of proportion to any increases in crime rates when programs have become better known.

- **Claims processing.** In many states this spans from one to nine months. Delays lead to dissatisfaction and reduce the value of the program, as victims must endure further uncertainty and possibly even pressure from creditors, in addition to those of the court process. To deal with this problem, many states have established emergency award procedures which provide victims with some interim financial help to obtain food, shelter, and medical assistance.

- **Inadequate funding.** This has become a problem because claims have tended to increase when programs became better known. States are continuing to seek additional revenue sources. Many have increased penalty assessments against offenders in state courts. There have been challenges to this procedure based upon the contention that offenders have no greater obligation to pay for compensation programs than other citizens. For example, some traffic offenders could believe they are unjustly treated if forced to fund such programs.

- **Minimum loss policies.** Some states require victims to have suffered a minimum loss of $100 or two continuous weeks of earnings before they can receive compensation. In other states, victims must be below certain income levels to receive compensation. Many states are considering eliminating these "means tests." This is due to the delays and costs involved in conducting investigations, and inequities; for example, denying compensation to elderly people on fixed incomes. Since 1984, 11 states have eliminated or modified their minimum loss, deductible, or financial means tests in response to these concerns.

- **Property loss provisions.** Property losses are not typically covered by victim compensation programs. The rationale is that such losses are less devastating than a physical injury and coverage would be too expensive since a large proportion of crime in the U.S. involves damage to or theft of personal property. Some states allow reimbursement for replacement of certain types of medically related property such as eyeglasses and hearing aids.

8. Many states have added provisions that require a certain level of victim cooperation with law enforcement officials before their compensation claims will be considered. These usually include prompt reporting of the crime (within 48 to 72 hours), cooperation in giving testimony, and absence of contributory conduct or any participation in the crime. In addition, prison inmates are excluded from compensation programs and they may not file

for claims if attacked in state prisons or jails.

9. Each state has developed its own procedures for processing compensation claims. Typically, claims are first submitted to a compensation board. This may be followed by some type of investigation, and then a claims award or denial with concurrent appeal rights.

STAFF COMMENT:

1. **Implications for Older Victims.** Some state compensation programs authorize higher compensation payments to older victims. Other states make special provisions for victims of certain crimes (such as rape or assault) if they are elderly. As an example of these special provisions, some states do not require a financial means test if the victim has reached a certain age, usually 60 or 65.

2. The prospects appear very favorable for continued and increased federal support, through VOCA, to state compensation programs. As deposits to the Crime Victims' Fund in FY '88 totaled $93.5 million, $46.3 million will be available for grants to states that compensate their victims in compliance with VOCA eligibility criteria. Because of ever increasing collections, the Office for Victims of Crime estimates that there will be sufficient VOCA money available to award states the full 40% of their certified (state-dollar) payouts in FY '87. This is in contrast to the previous year in which VOCA funds could cover only 34% of state-dollar payouts, although 35% was authorized by the legislation in effect at that time.

RESTITUTION

ISSUE: The criminal justice system is reinstituting a procedure in which those convicted of crimes are held financially responsible, to the degree possible, for assisting their victims to recover from the harm they cause.

BACKGROUND:

1. Restitution is a form of victim assistance in which those convicted of crimes are required, as a portion of their sentence, to forfeit a certain sum of money to aid the recovery of their victims.

2. Prior to 1982, federal courts could not order restitution as a part of any sentence other than probation.

3. In its consideration of the 1982 Victim and Witness Protection Act, the Senate Subcommittee on the Judiciary concluded that the principle of restitution should be better recognized in the federal judicial system. It viewed restitution as a principle that "is an integral part of virtually every formal system of criminal justice, of every culture and every time. It holds that, whatever else the sanctioning power of society does to punish its wrongdoers, it should also insure that the wrongdoer is required, to the degree possible, to restore the victim to his or her prior state of well-being."

4. The Senate Subcommittee found, however, that restitution had "lost its priority status in sentencing procedures of our federal courts long ago" and that the discretionary use of restitution as a part of a sentence of probation is "infrequently used and indifferently enforced."

5. The committee also found that state courts, in general, paralleled federal courts and had allowed restitution to be reduced from "being an inevitable, if not exclusive, sanction to being an occasional afterthought."

6. The President's Task Force on Victims of Crime also addressed the issue of restitution and came to the same conclusion as the Senate Subcommittee on the Judiciary. In their report, published in 1982, the Task Force stated that it was "unjust" for victims, rather than offenders, to shoulder the economic burdens resulting from crimes against them. "The concept of personal accountability for the consequences of one's conduct,

and the allied notion that the person who causes the damage should bear the cost, are at the heart of civil law. It should be no less true in criminal law." The Task Force urged that courts accept responsibility for enforcing their restitution orders and that such orders should be issued as a part of every sentence in which victims have suffered financial losses of some type:

- Victims should not have to liquidate their assets, mortgage homes or sacrifice their health as a result of financial impacts of crimes.

- If either the victim or offender must suffer financial hardship, "the offender should do so."

CURRENT STATUS:

1. The 1982 federal Victim and Witness Protection Act, among other provisions, greatly expands the concept and role of restitution in the federal judicial system. Section 5 of the Act authorizes the courts to order a defendant convicted of any offense under Title 18 U.S.C. (other than those cases under the antitrust laws and securities laws) which caused injury or death, or loss, damage or destruction of property, to make restitution directly to the victim or to a person or organization designated by the victim. Further, if the court does not so order, the Act requires that the judge state reasons that restitution was not included in the sentence. The three pertinent subsections of the Act are summarized below:

   - **Subsection a.** Authorizes restitution for lost income and necessary medical expenses to include physical, psychological and vocational rehabilitation, funeral and burial expenses, and property loss, damage or destruction. In this latter situation, the defendant must either return the property in comparable condition, or restore it, or pay the victim to compensate for the loss.

   - **Subsection b.** Prohibits victims from receiving restitution through both criminal and civil proceedings. This is accompanied by an "offset" provision to deduct any amounts paid, via restitution orders, from later orders of compensation for damages in a civil court. It also prohibits defendants from denying the "essential allegations" of the criminal offense in subsequent civil proceedings brought by the victim.

- **Subsection c.** Mandates compliance with restitution orders as a condition of probation or parole. Failure to pay victims is cause for revocation hearings and probation/parole will be revoked if the defendant is found to be financially capable of compliance with the restitution order.

2. The legislation places the burden on defendants to demonstrate their lack of financial resources should they fail to make restitution as ordered in the sentence. A court finding of failure to make restitution could result in revocation of probation/parole or, in some situations, assignment to a period of community service. Wages defendants might earn in the future could also be subject to garnishment.

3. The Victim and Witness Protection Act also directed the U.S. Attorney General, within 170 days from enactment, to "develop and implement guidelines for the Department of Justice, consistent with the purposes of this Act." Section IV of these guidelines, published in July, 1983, required that federal prosecutors seek restitution, "consistent with available resources and their other responsibilities" and "should advocate fully the rights of victims on the issue of restitution unless such advocacy would unduly prolong or complicate the sentencing proceeding."

4. Prior to passage of the 1982 Victim and Witness Protection Act, eight states required that restitution be included in sentencing. As of 1986, 21 additional states required restitution. In 1987, The National Organization For Victim Assistance reported that all 50 states had restitution provisions in their laws. Of these, 45 required restitution as a condition of probation, parole, or work release and 27 required that restitution be considered during sentencing.

STAFF COMMENT:

1. **Implications for Older Victims.** Some states authorize special considerations for payment of restitution to older victims. For example, elderly victims of certain types of crimes (rape, bodily injury) may be eligible for restitution to pay for counseling services, in addition to payments for medical treatment.

2. Restitution offers advantages in addition to the issue of justice to the victim. It requires that offenders take an active and personal role in directly assisting victims' recovery from the effects of criminal acts. In addition, because restitution money is in direct payments from offenders to victims, the

need to make use of compensation funds is obviated. Thus, offenders are assisting state governments to help additional victims by conserving available state compensation funds.

VICTIM IMPACT STATEMENTS

ISSUE: Pre-sentence reports which only contain information about defendants are incomplete unless information is also provided to inform courts of the impact of crimes upon victims.

BACKGROUND:

1. Victim Impact Statements (VIS) normally refer to statements provided by victims to courts prior to sentencing decisions.

2. Victim Impact Statements were first used in California, in 1974, by a state probation officer to supplement information provided to judges in pre-sentence reports. Until the use of VIS, pre-sentence reports only contained information about defendants.

3. The intent was to establish a better balance to the system by adding comparable information regarding victims, such as their backgrounds and how their lives and their family situations had been changed by their victimization. To ensure fairness, VIS were not prepared by the same probation officer who completed the pre-sentence report on the defendant. Moreover, the information in the VIS was limited to objective statements of the physical, economic, psychological and social harm suffered by the victim.

4. Although no state explicitly denied the right of victims to submit information for inclusion in pre-sentence reports, as of 1981, only the states of Indiana, Connecticut, Illinois and Kansas had enacted statutes that required such statements to be included with other information provided to courts prior to sentencing.

5. The situation was similar in the federal courts. Rule 32 of the Federal Rules of Criminal Procedure only required that pre-sentence reports include information concerning defendants: their criminal history, financial condition, and circumstances affecting their behavior. Victims were considered only as sources of testimony.

6. The first use of Victim Impact Statements in federal courts occurred in 1979 "as a way of providing the sentencing judge with information on the victim that might not otherwise be brought to his attention."

7. The appropriateness of including in pre-sentence reports some type of information concerning victims was demonstrated clearly to the Senate Judiciary Committee during hearings in 1982 in consideration of Bill S.2420, later titled "The Victim and Witness Protection Act." The sense of the testimony is provided by the following quote from the Legislative History of the Act based upon testimony from the Chief U.S. Probation Officer for the district of Maryland, Paul R. Falconer, and the Senior Judge for the same district, the Honorable Edward S. Northrop:

> "The victim of an offense has no standing in the court beyond the status of a mere witness — he has no right of allocution [oral statement] and is often overlooked in the process of plea negotiation. Our position is that we should not prosecute, try, and sentence any defendant without at least listening to the victim's offense-related needs. It is essential that a victim impact statement be factual and confirmed; it must be non-inflammatory and non-argumentative. We never want to be guilty of waving the bloody shirt; neither are we to bury the bloody shirt with the victim still in it."

8. Other information provided to the Senate Committee concerning VIS was that they should:

   - contain information that is relevant to the sentencing process and readily verified,

   - not add significantly to the task of probation officers; it was estimated by witnesses that VIS should require no more than an additional hour of preparation to interview the victim and assess the impact of the crime, and

   - include information such as a list of specific economic losses to the victim, identification of physical or psychological injuries and their seriousness, and changes in the victim's work or family status resulting from the offense.

9. After considering all testimony, the Senate Committee added a provision that VIS should also address any need of the victim for restitution. The intent was to clear the way for the sentencing judge to decide the amount of restitution to order. In this context, the Committee stated in the record of the Legislative History that it did not intend to limit restitution to victims who were financially needy or encourage the judge to order restitution only in those cases in which the victim was destitute.

10. In October, 1982, Congress enacted the Victim and Witness Protection Act. Section 3 of this Act required that any pre-sentence report prepared for federal district judges include "information concerning any harm, including financial, social, psychological, and physical harm, done to or loss suffered by any victim of the offense and any other information that may aid the court in sentencing, including the restitution needs of any victim of the offense."

11. In that same year, the President's Task Force on Victims of Crime stressed the importance of sentencing decisions in the trial process and gave equal importance to participation of the victim with respect to sentencing decisions. The following summarizes Task Force positions on this subject:

    - Sentencing is a barometer of the seriousness of the offense. It is a warning to others and a statement of concern for the victim.

    - Victims, as well as defendants, should have their day in court. This is only simple fairness, for the defendant, his lawyer, friends, etc., have presented their side.

    - The seriousness of the defendant's conduct cannot be evaluated unless the judge knows how the crime burdened the victim.

    - In the face of the defendant's remorse, only the victim can tell about the defendant's actions when he or she asked for mercy or to be left alone.

    - Prosecutors cannot truly present the side of the victim, they were not at the scene of the crime.

CURRENT STATUS:

1. Prior to passage of the 1982 Victim and Witness Protection Act, only eight states required Victim Impact Statements. As of 1987, information available to CJS is that 47 states admit such statements should victims desire to provide them.

2. Specific procedures vary from state to state; however, VIS are usually prepared by a probation officer and submitted to courts prior to sentencing.

3. A U.S. Supreme Court ruling in 1987 (Booth v. Maryland) found Victim Impact Statements unconstitutional in capital murder cases, as these were considered potentially inflammatory and could prejudice the sentence. This ruling was challenged and upheld in a subsequent case.

STAFF COMMENT:

1. **Implications for Older Victims.** Provisions to require or permit impact statements from victims have not specified any age considerations.

2. Although most Victim Impact Statements are prepared for court consideration prior to sentencing, there are other stages in the criminal justice process at which Victim Impact Statements/information can be helpful. Examples are information for:

   - courts prior to bail release determinations,

   - prosecutors prior to reaching dismissal decisions,

   - prosecutors during plea bargaining proceedings, and

   - parole boards prior to hearings.

VICTIM PARTICIPATION AT KEY POINTS OF JUDICIAL PROCESSES

ISSUE: Victims possess important information that, if considered, can influence bail decisions, continuances, plea bargains and charging decisions, and sentencing.

BACKGROUND:

1. If prosecutors look upon victims only as sources of testimony, much valuable information may be lost. If victims are permitted to become involved in the criminal justice system, the information they possess can have a direct bearing upon bail decisions, plea bargains, and other steps in the judicial process that occur prior to trial and testimony.

2. In 1982, The President's Task Force on Victims of Crime received a massive volume of testimony from victims, during hearings conducted throughout the country. Victims expressed much frustration and anger when testifying before the Task Force. They reported that they were not kept informed of critical decisions reached by prosecutors prior to trial. Many stated they possessed information that they believed would have been useful and should have been considered by prosecutors and judges in reaching decisions concerning bail, continuances, charging, and sentencing.

3. The Task Force recommended that prosecutors assume the "ultimate responsibility for informing victims of case status from the time of the initial charging decision to determinations of parole." Victims were viewed by the Task Force as having an "unquestionably valid interest" in the case because they are the only persons who can explain to the prosecutor and the court/jury the true impact of the crime and what it would be like for others to live through it.

CURRENT STATUS:

1. **Victim Notification.** Victim participation in decisions made prior to trial cannot occur if notification procedures are not in place and implemented. Information available as of 1987 is that many states have recognized the necessity for victim notification and have implemented these procedures either through Bills of Rights or enactment of specific legislation. Forty-one states notify victims of court schedule changes, 22 notify victims of bail hearings, 28 states have enacted some statutory requirements to notify victims in advance of plea bargaining agreements, and 35 states have procedures to notify victims when sentencing hearings will occur.

2. **Victim Statement of Opinion.** In 25 states, victims are permitted to provide statements of their opinions concerning appropriate sentences to courts/juries. Laws vary from state to state concerning details. Some states permit victims to write statements or letters to the judge, others require that prosecutors or victim advocate groups assist victims to prepare these statements. In Minnesota, victims are to be notified by prosecutors of their right to object, in writing, to the **proposed** disposition of offenders prior to actual sentencing. In some states, this information may be included in Victim Impact Statements.

3. **Plea Bargain Participation/Consultation.** In 28 states, legislation requires some form of victim participation in the plea bargaining process. The issue of plea bargaining is one requiring great care owing to court calendars and case management implications. The President's Task Force on Victims of Crime recognized this by stating, "although lawyers and judges rely on plea bargaining as a tool of calendar management, victims legitimately view the resolution of and sentencing in a case as an evaluation of the harm done to them." An additional factor is that participation of victims in plea bargains may help them to understand the basis for certain decisions and that these were arrived at only after all factors, including concerns of the victims, were addressed.

4. **Victim Oral Statement at Sentencing.** In 28 states, victims are permitted to stand before sentencing courts and orally present certain facts, such as the impact of the crime upon them, and their opinion as to appropriate sentences. This is often referred to as allocution. The intent is for the judge/jury to receive information relating to the criminal act and its impact directly from those injured by the crime.

STAFF COMMENT:

1. **Implications for Older Victims.** None of the legislation discussed above specifically includes provisions affecting older victims.

2. In 1982, the American Bar Association conducted a study of California's implementation of the right to allocution at felony sentencing. Interviews were conducted with 171 victims in three California counties. Major findings are provided below:

- Of the 171 victims interviewed, 76 knew of their allocution right.

- Of these 76, only 29 actually appeared at sentencing.

- Factors which "appeared" to limit allocution included extensive plea bargaining and the state's determinate sentencing law.

- Victims were more interested in information about case disposition than their personal appearances, although most (80%) stated that the right to appear was important to them.

- Because the governing statute did not specify implementation procedures, some judges required victims to speak under oath, and some allowed cross-examination of the victim by the defense.

- Of the 47 victims who knew of the right but did not exercise it:

  - 37% were satisfied with the response of the justice system and prosecutors' assurances that maximum sentences were sought.

  - 30% believed their appearances would make no difference.

  - 28% had personal reasons (mostly fear and confusion) for not appearing,

- Of the 29 victims who exercised the right (written or oral statement):

  - 34% wanted to express their feelings to the judge.

  - 32% wanted to perform their "duty."

  - 26% sought to achieve "justice" or influence the sentence.

- Less than half (45%) of the victims who spoke at sentencing believed their participation affected the sentences.

- Those victims who believed they had some influence still viewed the sentences as too lenient.

- Two-thirds of the judges saw no need for the allocution right. They stated that all the information they needed was in pre-sentence reports. An equal number of prosecutors believed, however, that the allocution right was needed.

PROTECTION FROM INTIMIDATION

ISSUE: Harassment and intimidation of victims and witnesses confirms in their minds that the system does not protect them.

BACKGROUND:

1. In 1979, the American Bar Association Criminal Justice Section's Victims Committee conducted public hearings on the subject of victim and witness intimidation. Testimony of some 80 witnesses showed intimidation to be a "widespread and pervasive problem which inherently thwarts the administration of criminal justice."

2. In 1982, the Victim Services Agency in New York City reported that intimidation occurs in at least 10 percent of criminal cases and usually takes the form of direct verbal confrontation but can also occur as vandalism, threats with a weapon, or actual physical attack.

3. In the same year (1982) the Federal Victim and Witness Protection Act was passed by the U.S. Congress. Among other provisions, this enactment increased protections available to victims and witnesses in the federal system. The Senate (Judiciary) Committee reporting this Bill found numerous problems with the current law to protect victims and witnesses. The law then in effect:

   - was unclear as to the precise definition of persons to be protected. Reliance on "court decisions" would restrict protections to individuals who were expected to testify rather than those who possessed information but might not be heard in court due to hearsay or privileged communication considerations,

   - did not offer any protection to someone who wished to report a parole or probation violation,

   - required a relatively high threshold of seriousness, such as actual threats or force against a witness, before a violation occurred and did not prohibit malicious hindering, delaying or dissuading witnesses,

- applied only to witnesses under subpoena in cases that were active,

- did not include third parties, such as friends and relatives of victims and witnesses, as individuals to be protected, and

- did not address what the Committee considered the most common form of intimidation, verbal harassment.

4. The 1982 federal Victim and Witness Protection Act addressed these shortcomings. Although this legislation protected only federal victims and witnesses, the research revealing the need for such legislation was intended, according to the Legislative History of the Act, to be useful for evaluation of similar enactments at the state level. In brief, the Act broadened protections for victims and witnesses and provided penalties for violations that were potentially more severe than previous legislation. Specifically, the Act:

   - broadens the definition of a witness to include any person aware of a crime, even if not under subpoena,

   - expands prohibitions to include acts that hinder, delay, prevent or dissuade testimony. The key word used is "influence" which the Committee intended to "receive an expanded interpretation." Examples of additional acts prohibited are calling on the telephone to harass or intimidate the victim or witness or driving by the home of a victim or witness,

   - includes attempts to intimidate witnesses even if their testimony would not be admissible,

   - establishes the defense to a charge of intimidation as an affirmative defense in that, "the defendant has the burden of proving the defense by a preponderance of evidence."

   - directs that unsuccessful attempts at intimidation are to be punished as if the offense had been completed, and

   - specifies that any successful prosecution for the offense of intimidation, if committed by an individual while on pre-trial release (bail), will be punished **consecutively** with any sentence imposed for the offense for which the defendant was on bail. If such crimes are not punished consecutively, criminals will be encouraged to believe that intimidation is worth the risk as no additional punishment will be ordered in a concurrent sentence.

5. In that same year (1982) the President's Task Force on Victims of Crime reported that intimidation of victims and witnesses was a key weakness in the criminal justice system throughout the country. Task Force members considered intimidation a continuation of the victimization process and believe it confirms to victims that they are on their own, that the system does not help them, and that their only safety lies in refusal to cooperate with law enforcement authorities.

STAFF COMMENT:

Implications for Older Victims. Enactments in this area do not make any special provisions concerning the age of the victim.

AMENDMENTS TO BAIL LAWS

ISSUE: The adequacy of bail laws and the behavior of defendants while on bail have been matters of concern to victims and their advocates.

BACKGROUND:

1. The President's Task Force on Victims of Crime reported that a "substantial proportion" of crimes committed throughout the country are committed by defendants on bail. It concluded that the bail system is in need of reform since it addresses only defendants and "completely ignores" victims. The Task Force heard testimony from victims who could not understand how they could have been victimized by persons "who were released on bail while facing serious charges and possessing a prior record of violence."

2. As a solution, the Task Force proposed expansion of the current authority of courts to make bail determinations. Courts would be allowed to, "balance the defendant's interest in remaining free on a charge of which he is presumed innocent, with the reality that many defendants have proven, by their conviction records, that they have committed ... crimes while at large."

3. The Task Force recommended the following modifications be made to bail laws:

   - Expedite appeals of adverse bail determinations.

   - Codify existing practices in many jurisdictions to provide for consideration of such factors as a defendant's ties to the community in terms of family, housing, employment, and other responsibilities.

   - Revise standards that would presumptively favor release of persons convicted of serious crimes who are awaiting sentence or appealing their convictions.

   - Provide penalties for failing to appear while on bail that closely approximate penalties for offenses with which defendants were originally charged.

CURRENT STATUS:

1. The Bail Reform Act of 1984 (included in the Comprehensive Crime Control Act of 1984) changed many bail provisions in federal proceedings. Among others, it:

   - added to other considerations, in release determinations, "the safety of any other person and the community" prior to granting bail, and

   - provided that those convicted of an offense while on bail be sentenced, in addition to the sentence imposed for the offense while on bail, to an additional minimum term of imprisonment to be served consecutively.

2. The U.S. Office for Victims of Crime and the Crime Victims Advisory Committee of the National Association of Attorneys General have prepared background information on bail reform to accompany the language of the above federal statute. This information has been made available to the states to encourage appropriate amendments to their laws that would reflect the findings and implement the solutions proposed by the President's Task Force.

STAFF COMMENT:

Implications for Older Victims. Older victims were not identified for special consideration in any of the legislation reviewed.

RESTRICTION OF VICTIMS' ADDRESS INFORMATION

ISSUE: Public release of the addresses and phone numbers of victims can cause embarrassment and subject the victims to acts of harassment and intimidation from defendants.

BACKGROUND:

1. The President's Task Force on Victims of Crime reported that victims faced numerous problems following public release of their names and addresses:

   - Victims and witnesses feared that defendants who discovered their names and addresses would harass and intimidate them. In the words of the Task Force, "Victims and witnesses have seen personally what the defendant is capable of doing."

   - Fear of reprisal (made more likely if addresses are known) was also found to be a factor that could influence decisions of victims and witnesses not to report criminal activity in the future.

2. The Task Force recognized that victims'/witnesses' fears could not be entirely eliminated but could be mitigated. It recommended that:

   - Police and prosecutors not disclose victim addresses and phone numbers to the media. This would include actions to modify police report forms to protect such information if these reports were otherwise made available to the public.

   - Defense counsels should not be provided victim home address information, "in the absence of judicial determination of a need that overrides the victim's need for security."

3. Another issue discussed in the Task Force report concerned defense requests for victims' home addresses to permit counsel to interview them during pre-trial discovery. The Task Force concluded that, "in jurisdictions where defense counsel has the right to contact prosecution witnesses before trial, prosecutors should arrange for contact in government offices . . . Current legislation that requires release of addresses should be amended."

4. A final recommendation from the Task Force was that, during victim/witness testimony, measures should also be taken to restrict home address information. The Task Force stated that prosecutors should not solicit this information during testimony and should object when the defense attempts to obtain it.

CURRENT STATUS:

1. The Victim and Witness Protection Act of 1982 requires that U.S. attorneys and federal law enforcement officers prevent disclosure of victims' addresses in federal cases.

2. A 1986 follow-up report to the President's Task Force Report on Victims of Crime disclosed that since 1982 five states had adopted measures to restrict release of victim address information.

3. The National Organization for Victim Assistance reported in 1987 that 22 states had adopted some type of "victim privacy protections." The term "privacy protections" was not further defined but it is reasonable to assume that it would include some provisions to restrict disclosure of victim/witness address information.

STAFF COMMENT:

1. **Implications for Older Victims.** Older victims were not identified for special consideration in any of the legislation or information reviewed.

2. Legislation to restrict information concerning victims/witnesses can sometimes be found in other enactments dealing with intimidation.

CONFIDENTIALITY OF VICTIM COUNSELING

ISSUE: Some victims are embarrassed and could be intimidated if details of psychological crisis counseling they receive, to assist them to cope with the aftereffects of a crime, are released to defense attorneys.

BACKGROUND:

1. The President's Task Force on Victims of Crime reported that the "vast majority" of crisis counseling available to victims, to include those dealing with sexual assault and domestic violence, were provided by "social workers, nurses, or by people who have been victims themselves." As these individuals are not normally psychiatrists or psychologists, records of the counseling they provide are not always protected by confidentiality statutes.

2. Victims testified before the Task Force that the possibility of defense subpoena of their counseling records left them with feelings of isolation and betrayal "when thoughts and feelings they considered private were opened to public scrutiny in the courtroom."

3. The Task Force stated that counseling for victims was essential to their recovery from the impact of crime. The Task Force added that failure to protect the confidentiality of such counseling undermined its effectiveness and could cause victims who need counseling to avoid seeking it.

4. At the time the President's Task Force Report was written (1982), one state, Pennsylvania, had enacted a statute establishing rape victims' communications to counselors as legally privileged.

CURRENT STATUS:

1. As of 1987, available information is that states are expanding their counselor confidentiality provisions to include victim service providers other than psychiatrists or psychologists. Twenty states now provide for counselor confidentiality for victims of sexual assault, 24 for victims of domestic violence, and 5 states provide for "general" confidentiality.

2. Note that these confidentiality provisions are afforded to victims in statutes rather than as resolutions or included in Bills of Rights.

STAFF COMMENT:

1. **Implications for Older Victims.** Older victims were not identified for special consideration in any of the legislation reviewed.

2. Increases in confidentiality provisions to protect victims' counseling records do not imply any past disregard for the rights of victims to privacy in this area. Most confidentiality statutes were passed before social workers and volunteers became active in victims' assistance and counseling.

3. An interesting perspective on this issue is contained in a publication titled, "The Attorneys' Victim Assistance Manual." This was produced by the Attorneys' Victim Assistance Project of the American Bar Association's Criminal Justice Section. When discussing the possible impact upon victims, if information of their counseling sessions was discoverable, the following was offered to illustrate a warning that might be given by counselors to victims:

> "I realize you are the victim of a sexual assault and that both physically and psychologically you have been abused in a terrifying way. I want to serve as your counselor in this matter because all studies have shown, and normative wisdom tells us, that if you talk about this matter with someone who has been trained to counsel, you will be better off not only psychologically, but also physically. However, before we speak, there is something you should know: anything you say to me may have to be repeated to the attorney for your assailant, and under some circumstance, it may have to be repeated to the assailant. In addition, I may have to repeat in an open courtroom, in the presence of many other people including the media, everything you say to me in connection with this sexual assault. Furthermore, everything I write down when you talk to me may likewise have to be produced to the same people. Now that you understand that, tell me everything that happened."

FUNDING FOR TREATMENT OF VICTIMS OF SEXUAL ASSAULT

ISSUE: Victims of sexual assaults should not have to pay the cost of medical examinations and materials used to gather evidence.

BACKGROUND:

1. The President's Task Force on Victims of Crime reported that many victims of sexual assault were required to bear the expense of medical examinations and other materials used to gather evidence subsequent to the crime. The Task Force concluded that this requirement was "tantamount to charging burglary victims for collecting fingerprints."

2. The 1984 Victims of Crime Act (VOCA) identified sexual assault as one of three priorities for victim assistance funding. The other two programs are child and spouse abuse. In 1986, 82% of all VOCA victim assistance funds went to these three programs with 35% of the priority funding directed to programs for sexual assault victims.

3. In addition to victims' assistance funding through VOCA, funds for sexual assault examinations may be available through victim compensation programs.

CURRENT STATUS:

1. The National Organization For Victim Assistance reports that as of 1987, 26 states have established programs for providing funds to victims of sexual assault.

2. In some states, victim compensation programs have been recently changed to include new provisions that compensate victims for expenses associated with medical examinations and treatment of physical and psychological injuries following sexual assault.

STAFF COMMENT:

Implications for Older Victims. Legislation does not focus attention on any particular age group.

ADMISSIBILITY OF HEARSAY TESTIMONY AT PRELIMINARY HEARINGS

ISSUE: Appearances at preliminary hearings cause unnecessary hardships to some victims who may not have recovered from their victimization.

BACKGROUND:

1. The President's Task Force on Victims of Crime urged that legislation be enacted to permit hearsay testimony at preliminary hearings. In effect, this would permit law enforcement officers or detectives to testify to the facts of a case at a preliminary hearing even though they did not witness the crime and all the information they provided had been made known to them by the victim. This would be regarded as an exception to the hearsay rule requiring that information received in court be provided from the "best source" available.

2. The Task Force based its recommendation upon the following:

   - The preliminary hearing is not a mini-trial. Its only purpose is to provide for a judicial examination of the facts and circumstances of the case to determine if there is sufficient evidence for prosecution.

   - Because a preliminary hearing is not a trial, there is no Constitutional right of confrontation; that is, a defense right to insist upon cross-examination of those who can provide firsthand information.

   - If confrontation were not necessary, hearsay testimony could be received from law enforcement officers who had interviewed the victim/witness. The Task Force also recognized that the official who provided hearsay testimony could be cross-examined by the defense.

   - As preliminary hearings usually occur within a few days of an arrest, there is sometimes insufficient time for some victims to recover to the point where they can testify effectively and withstand the rigors of defense cross-examination.

3. The Task Force also pointed out that preliminary hearings can potentially be more difficult experiences for victims than the trial itself. The Task Force stated that at such a proceeding, the "defense's questioning is not restrained by a desire not to alienate the jury."

CURRENT STATUS:

1. A model statute, provided by the Crime Victims Advisory Committee and the Office for Victims of Crime of the Department of Justice, stipulates that no victims must appear at preliminary hearings "unless his or her testimony may lead to a finding that there is no probable cause for prosecution."

2. As of 1986, the above model constituted the law in the federal system and in 26 states.

STAFF COMMENT:

1. **Implications for Older Victims.** Older victims were not identified for special consideration in any of the information reviewed.

2. The Task Force stated that of the many demands made upon victims by the criminal justice system, reliving the event during testimony can be among the most difficult. The Task Force urged that this should be required only when absolutely necessary — not during preliminary hearings when victims are most vulnerable and defense counsel are potentially the most hostile.

3. The Task Force concluded that the testimony of sworn law enforcement officers, who are trained to acquire information and recall facts, would normally be sufficient for the purpose of a preliminary hearing if hearsay were permitted. As these officers would be subject to cross-examination, defense rights could be protected sufficiently.

SPEEDY DISPOSITION/TRIAL

ISSUE: In the interest of fairness, a trial process may have to be lengthened. However, victims also have valid interests in resolving the issues within reasonable time periods.

BACKGROUND:

1. Criminal proceedings can become very involved and may require months before decisions are reached. Lengthy trials can affect victims in many ways. Their work and vacation schedules may be disrupted if they must remain available to testify. Further, the psychological impact of the experience can remain more intense in the minds of many victims until the case is finally resolved beyond all appeals.

2. There are legitimate reasons for judges to grant continuances; for example, to allow time for attorneys to obtain additional witnesses or to conduct an inquiry to develop new leads. There are also improper reasons to delay a case if the intent is for witnesses to lose interest or memory or to accommodate the personal schedules of court officials.

3. The President's Task Force on Victims of Crime found that multiple continuances and repeated court appearances were particularly bothersome to victims. It urged prosecutors, the judiciary, and bar associations to manage court time and continuances carefully and reasonably with a view to victim impact. The Task Force also stated that:

   - Extension of the trial was considered another burden for the victim as such delays tended to prolong and intensify the victimization. In addition, the Report stated that victims incur the cost of child care, lost wages/vacation time, and other inconveniences that should be avoided or minimized as much as possible.

   - If continuances are necessary, prosecutors should take the time to explain the reasons to victims. When possible, they should consider victims' schedules before determining specific dates for the next process.

   - Judges' rulings on continuances were also addressed in the Task Force report. Judges were urged to consider the needs of victims as well as defendants in considering if continuances should be granted. In addition, the need for proper use of court time was stressed.

CURRENT STATUS:

1. In February 1986, the American Bar Association House of Delegates ratified guidelines for criminal justice professionals, particularly prosecutors, to reduce case continuances. It recommended that the impact of trial delays on victims be considered if continuances are requested.

2. Eighteen states have made some provisions to encourage proper use of court time and consider victims' needs in determining if continuances should be granted. The majority of such actions, however, are contained in Bills of Rights and these attach no enforcement capability.

STAFF COMMENT:

Implications for Older Victims. Requirements for speedy disposition of cases do not normally include any reference to older victims. In one state, Nevada, a bill was enacted which provided for the preferential setting of a date for a trial of, "certain civil actions upon the motion of a party to the action who is 70 years of age or older."

NOTIFICATION TO VICTIMS OF COURT SCHEDULE CHANGES

ISSUE: Some victims of crime are severely inconvenienced and frustrated if they are not notified in advance when court schedules are changed or trials are continued.

BACKGROUND:

1. Section 6 of the Federal Victim and Witness Protection Act (1982) directed the U.S. Attorney General to develop and implement guidelines for Department of Justice response to the numerous problems of victims. The Attorney General was to consider several objectives. One of these was notification to victims and witnesses of scheduling changes that would affect their appearances at court.

2. The guidelines were published on August 3, 1983. Para B, Section II, discusses information that is to be provided to victims and witnesses and states that federal "victims and witnesses of serious crime who provide a current address or telephone number should be advised of . . . scheduling changes and/or continuances affecting their appearance or attendance at judicial proceedings."

3. The President's Task Force on Victims of Crime also addressed the issue of victim notification in chapters dealing with both prosecutors and courts. The Task Force called for advance planning by prosecutors and courts and urged consideration of the impact that delays and last minute changes have upon victims.

CURRENT STATUS:

1. Information available to CJS is that, as of 1987, 41 states provide for procedures of some type to notify victims of changes in court schedules.

2. The vast majority of state legislation concerning notification to victims of court schedule changes is contained in Bills of Rights.

STAFF COMMENT:

1. **Implications for Older Victims.** Older victims were not identified for special consideration in the legislation reviewed.

2. Although continuances and unnecessary scheduling changes may be minimized to some extent, owing to concern for victims, the imperatives of legal sufficiency and worries over potential problems of reversal on appeal will necessitate that some trials be delayed — perhaps repeatedly. In

these situations, the adverse impact on victims can be minimized by prompt notifications, made in advance, and explanations for the necessity of the delay.

SECURE WAITING AREAS IN COURT SETTINGS

ISSUE: Victims and those who are to testify on their behalf should be provided waiting areas that are separate from that provided to defendants.

BACKGROUND:

1. Court procedures may require long waiting periods before testimony.

2. Victims can feel intimidated if they must wait to testify in the same room with the person accused of injuring them and with others who are to testify for the defendant.

3. Police routinely separate victims/witnesses from those accused of crimes when these parties are waiting at police stations to be interviewed.

4. The terms "secure" and "separate" are often used to mean the same thing. The point is made that victims/witnesses should not be subject to any contact or opportunity for confrontation with an accused at any time after the crime. Some contend that society/government has failed to protect the victim before the crime, and that this failure should not be continued after the crime by forcing the victim to stand alone and face the defendant before trial.

CURRENT STATUS:

According to information received by CJS, (1987), 31 states have made some provisions for secure waiting areas. Implementation is usually through Bills of Rights. Only two states provide this protection in specific legislation.

STAFF COMMENT:

1. **Implications for Older Victims.** Enactments in this area do not specifically address age.

2. Although states recognize the need to have separate waiting areas, their statutes may only encourage this practice. Words such as "whenever possible" allow flexibility that could be harmful to victims/witnesses.

VICTIM ATTENDANCE AT TRIAL

ISSUE: Victims and their families are sometimes subpoenaed by defense counsel to testify as a means to exclude them from attending the entire trial.

BACKGROUND:

1. The presence of a victim and his or her family during a trial can cause some jury members to sympathize with them. Defense counsels can counter this possibility by excluding the victim/ family from attending a trial by subpoenaing their testimony as defense witnesses.

2. If subpoenaed to testify, victims and family members are considered as witnesses and excluded from attendance at all parts of the trial except that portion in which they appear to testify. This exclusion is intended to prevent those testifying from being influenced by their observation of the testimony of others.

3. The President's Task Force on Victims of Crime reported that, "Time and time again we heard from victims or their families that they were unreasonably excluded from the trial at which responsibility for their victimization was assigned. This is especially difficult for the families of murder victims and for witnesses who are denied the supportive presence of parents or spouses during their testimony."

4. The Task Force recommended that rules providing for the exclusion of witnesses from all but that portion of the trial in which they are called upon to testify be modified to permit victim/family presence during the entire trial. The Task Force acknowledged that sometimes there is good cause for victims/ families to be subpoenaed. This is abused, however, if the subpoena serves only to exclude victims and their families from trial attendance.

5. The Task Force recommended a procedure to provide fairness to both witnesses and defendants. Essentially, in those situations where victims/ family members are required to testify, and are present for any other portions of the trial, this fact "is a valid subject for comment by the opposition and may be a subject that the court addresses during jury instructions."

CURRENT STATUS:

The National Organization For Victim Assistance (NOVA) reports that, as of 1987, 15 states had enacted legislation to facilitate victim presence in court during the trial.

STAFF COMMENT:

1. **Implications for Older Victims.** Older people were not mentioned for special consideration in any of the legislation reviewed.

2. Some proposed legislation in this area is being defeated. During the most recent Maryland legislative assembly, a bill was defeated which would have created a presumption of the right of certain crime victims or their representatives to be present at criminal trials (Senate Bill 545).

3. Many Victims are uninformed and overwhelmed by the requirements and processes of the court system. Often, this is because they have had no reason to be involved in the criminal justice system prior to their victimization. Testimony is a frightening experience for some that could be mitigated if they attended the entire trial and received support from the presence of family members or other supporters. There is no attempt here to diminish guarantees to the accused; fairness is the only issue. Relevant also is the fact that, while there are no career victims, there are career criminals who are not in the least intimidated by the criminal justice system. Many criminals have learned to manipulate the system and often do so through their ability to testify which, because of their experience and confidence, can be more convincing than that of some victims.

EMPLOYER/CREDITOR INTERCESSION

ISSUE: Victims may need assistance from court officials to obtain time off from work to testify. They may also require some assistance to deal with creditors if the crime has had an economic impact upon them.

BACKGROUND:

1. Crimes may cause victims physical or psychological harm, economic losses, or combinations of these. In addition, victims have certain responsibilities to cooperate with law enforcement officials during investigations and with the courts should a subject be identified and brought to trial.

2. Victims who work may find that they must take either unpaid leave or vacation time off from their jobs to fulfill the above requirements. Employer intercession services assist victims by intervening with employers to explain the need of the criminal justice system for the time and cooperation of the victim and how this will affect their presence at work and, possibly, their work performance.

3. The same concept applies to intercession with the victim's creditors. Crime can result in loss of wages because of temporary inability to work.

CURRENT STATUS:

1. Information available to CJS indicates that 35 states have some type of employer intercession and ten provide for creditor intercession. These enactments, however, are found only in Bills of Rights in most states.

2. In general, employer/creditor intercession is provided by paid staff/ volunteers assigned to prosecutors' offices.

3. In one state, legislation has been proposed to provide victims the same job protection as those serving on jury duty.

STAFF COMMENT:

1. **Implications for Older Victims.** Legislation in this area contains no special provisions for older victims.

2. There are some implications for older people concerning creditor intercession, as many older people are on fixed incomes and the financial impact of the crime may seriously interfere with their ability to meet credit obligations.

RETURN OF PROPERTY

ISSUE: Stolen property is not always promptly returned to victims when it is no longer needed as evidence.

BACKGROUND:

1. The President's Task Force on Victims of Crime reported in 1982 that many victims who had lost property to theft were not informed when it was recovered and were not told when they could expect its return.

2. The Task Force stated that the property stolen from victims belongs to them and not to the "system" and that victims should not have to "do battle" to recover what belongs to them.

CURRENT STATUS:

1. Forty-three states have made arrangements to return stolen property to victims as quickly as possible.

2. Procedures to return stolen property can include:

   - information provided to victims concerning the person to contact to recover their property,

   - determination by prosecutors of those items having particular evidentiary significance because of their character or condition,

   - allowance for the substitution of photographs (TV sets and silver services for example) to permit victims to use their property prior to trial, and

   - establishment of a system to inform victims when their property is recovered, where it is being held, when and how it can be reclaimed, and what documents are needed.

STAFF COMMENT:

1. **Implications for Older Victims.** Enactments do not provide for any property return priority because of the age of the victim.

2. Failure to return property quickly to victims after its recovery by law enforcement can exacerbate the process of victimization.

3. When property cannot be returned promptly, victim advocates urge that

victims be provided explanations for the delay.

4. If victims are kept properly informed of case progress, they may be able to anticipate when their property can be returned.

5. Victims' confidence in the system can be enhanced if information is provided to them without their having to repeatedly ask for it.

6. Prompt return of property saves storage costs at public expense and reduces risk of liability for deterioration/loss while in storage.

VICTIM PARTICIPATION IN PAROLE HEARINGS

ISSUE: Parole board decisions to release prisoners may not take into account the impact of the crime on the victim, as well as the victim's fears if the prisoner is released.

BACKGROUND:

1. The President's Task Force on Victims of Crime recommended that parole boards be abolished because, "they operate in secret and without accountability; they release the dangerous who prey upon the innocent." This recommendation concerned both federal and state parole boards.

2. Task Force members realized, however, that their recommendations would not be immediately adopted. Until this occurred, the Task Force recommended several procedural changes to balance the system toward protection of victims. Among these was the recommendation that victims, their families, or representatives be permitted to attend parole hearings to make known the effects of offenders' crimes upon them.

3. The Task Force also found that parole board decisions are often based only upon information received from the prisoner and testimony from prison officials as to his or her conduct while in custody. The Task Force agreed this was relevant information but could lead to improper release decisions unless the nature of the prisoner's conduct in society was also made known. The following conclusion from the Task Force would have particular application to violent criminals, "Although a prisoner's behavior while incarcerated should be considered in parole decisions, the nature of his conduct while at large is vital. No one knows better than the victim how dangerous and ruthless the candidate was before he was subjected to the scrutiny of the parole board."

CURRENT STATUS:

1. There are a variety of means/procedures by which victims may participate in parole board hearings. Victim advocate groups and legislative enactments concentrate attention in three areas: victim impact statements to parole boards, victim oral statements to parole boards, and victim notification of parole board final determinations:

- Victim Impact Statements to Parole Boards. Information available to CJS, as of 1987, is that 34 states permitted victims to present impact statements to parole boards prior to release determinations.

- Victim Oral Statements to Parole Boards. CJS information indicates that, as of 1987, 31 states provided victims the opportunity to appear personally before parole boards and submit oral statements. The parole board is able to view the victim as an individual, rather than a number or merely a name. Personal appearances of both victims and defendants are intended to add fairness to the process.

- Victim Notification of Parole Board Final Determination. As of 1987, there were 44 states that made some type of provision to notify victims of parole board final (release) decisions. The basis for this action is that victims may have been threatened with retaliation before, during or after the crime and/or criminals may view the victim's cooperation with law enforcement as the reason for their incarceration. Notice of prisoner release is intended to permit victims of violent crimes to take precautions and mentally prepare themselves.

2. The Comprehensive Crime Control Act of 1984 eliminated parole from the federal system. Eight states have also removed it from their systems.

3. Federal parole policies (covering those eligible for parole before the 1984 Act) have also changed. In 1984, the U.S. Parole Commission began permitting victims to attend parole hearings and established a means to notify victims of their opportunity to testify.

STAFF COMMENT:

1. **Implications for Older Victims.** No legislation has been identified which provides special considerations to older victims in this area.

2. Some states have enacted legislation to mandate victim participation in parole hearings; others permit victim participation in their Bills of Rights but include no enforcement provisions.

3. A related issue is that of conducting parole hearings in private. Proposals have been made to mandate that these be held in public to serve as an additional reminder to parole board members of their public responsibility. As of 1986, information available to CJS (President's Task Force on Victims of Crime, Four Years Later) is that 19 states have opened parole board hearings to the public.

PROHIBITIONS ON PROFITS FROM CRIMINAL ACTIVITY

ISSUE: There have been situations in which those convicted of crimes have been able to earn profits by selling the story of their offenses to various media enterprises.

BACKGROUND:

1. Laws have been enacted to prohibit criminals from profiting from their crimes.

2. Legislation in this area resulted from public outrage following revelations that the "Son-of-Sam" killer had received almost $200,000 for the sale of the literary rights to his story.

3. The President's Task Force on Victims of Crime recommended Federal legislation to, "prohibit a criminal from making any profit from the sale of the story of his crime." The purpose was to ensure "that no felon profits financially as the result of publicity resulting from his criminal conduct."

CURRENT STATUS:

1. The 1984 Federal Victims of Crime Act established procedures to recover proceeds received by defendants "from a contract relating to a depiction of such crime in a movie, book, newspaper, magazine, radio or television production, or live entertainment of any kind, or an expression of that defendant's thoughts, opinions, or emotions regarding such crime." Note, however, that this applies to federal crimes only.

2. Recovery procedures can be initiated upon court order after, "motion from the U.S. attorney at any time after conviction of a defendant for an offense against the United States (federal offense) resulting in physical harm to an individual."

3. If ordered by the federal court, any person with whom a federal defendant contracted will be required to pay any proceeds due the defendant to the U.S. Attorney General. These funds will then be retained in escrow in the Crime Victim's Fund and disposed of by the court.

4. When the President's Task Force on Victims of Crime began its deliberations, 14 states had already enacted laws to prohibit criminals under state jurisdiction from making money from the sale of their stories. Information available to CJS, as of 1987, is that 42 states have now enacted such legislation.

STAFF COMMENT:

1. **Implications for Older Victims.** Older victims were not identified for special consideration in any of the legislation reviewed.

2. An interesting aspect of the federal statute is its tie-in to recovery provisions in the various states. The law allows claims to be made against the defendant's funds in escrow to "satisfy a money judgment rendered in any court in favor of a victim of any offense for which such defendant has been convicted." The Legislative History of the Federal Victims of Crime Act reveals that the intent was for the federal government to have concurrent jurisdiction with regard to claims against defendant's funds but not preemptive authority over state recovery actions. This would permit state courts to have access to portions of forfeited funds of a federally convicted defendant who was also convicted of a crime under state jurisdiction.

3. Also interesting is the provision in the law that permits payments for the defendant's legal representation to be made from up to 20 percent of the escrow funds.

4. The Legislative History also included a statement that the framers intended for the enactment to make it clear that criminals should not be permitted to "glorify in their misdeeds" and also to send a message that crime does not pay.

APPENDIX

Sources of Information

1. Attorney's Victim Assistance Manual: A Guide to the Legal Issues Confronting Victims of Crime and Victim Service Providers. The Sunny Von Bulow National Victim Advocacy Center, The Attorneys' Victim Assistance Project of the American Bar Association, Criminal Justice Section, December 1987.

2. National Organization for Victim Assistance, Legislative Directory, Chart 1, 1987.

3. President's Task Force on Victims of Crime, Final Report, December 1982. Available from the National Institute of Justice/NCJRS, P.O. Box 6000 Rockville, Maryland 20850.

4. President's Task Force on Victims of Crime, Four Years Later, May 1986. Available from the National Institute of Justice, Rockville, Maryland 20850, Inventory No. DD 102834-00.

5. Report of the Virginia State Crime Commission, Victims and Witnesses of Crime, 1988.

6. Sentencing Reform Act of 1984, Public Law 98-473, Oct. 12, 1984.

7. Testimony for Hearings Before the Subcommittee on Aging of the U.S. Senate Committee on Labor and Human Resources, Compensating Victims of Crime: An Analysis of American Programs, Daniel McGillis, Center for Criminal Justice, Harvard Law School, June 1983.

8. U.S. Attorney General's Guidelines for Victim and Witness Assistance, July 1983.

9. Victim Appearance at Sentencing Under California's Victims' Bill of Rights, National Institute of Justice, August 1987.

10. Victim and Witness Protection Act, (Federal) Public Law 97-291, Oct. 12, 1982.

11. Victims of Crime Act of 1984, Public Law 98-473, Oct. 12, 1984.

12. Victims of Crime, An Overview, National Victims Resource Center, U.S. Department of Justice, Office of Justice Programs, Office for Victims of Crime.

13. Crime Victim Compensation Report, National Association of Crime Victim Compensation Boards, November/December 1988.