Allocation and the Purposes of Victim Participation under the CVRA

The recent history of criminal procedure is one of invoking rights-based solutions to what are sometimes institutional or structural problems. The even more recent history of the fledgling Crime Victims’ Rights Act of 2004 (“CVRA”), 18 U.S.C. § 3771, is no different. The CVRA amends the federal criminal code to give victims of federal crimes a range of judicially enforceable rights, including rights to confer with prosecutors, to receive timely notice of and attend public proceedings, to be heard on issues of release, plea, and sentencing, and to receive full and timely restitution. Many of these protections are long overdue and address what were (and still remain) clear deficiencies in the way the criminal justice system treats victims. In that sense, the CVRA is an important milestone in what has been a lengthy struggle for victims’ rights advocates.

In another sense, it is just the beginning. The CVRA’s provisions raise a number of difficult interpretive questions that are rapidly emerging in litigation. Those questions stem in part from the usual ambiguities and problems of draftsmanship that accompany virtually every new piece of legislation. But they also stem from a more basic failure of policy makers to articulate with much clarity the deeper values at which the participatory rights of the CVRA aim. This failure is unfortunate, because it is difficult to understand the contours of those rights, and what legal and institutional structures can best promote them, without a clear understanding of the considerations that motivate them to begin with. Section 3771(a)(4) of the CVRA is a case in point.

I. Section 3771(a)(4) and Victim Allocation at Sentencing

A. Emerging Controversy

Section 3771(a)(4) affords crime victims the “right to be reasonably heard at any public proceeding in district court involving release, plea, sentencing, or any parole proceeding.” Controversy already is brewing over the scope of this right and the extent to which it ensures victims an opportunity to allocate at sentencing. Last January, in Kenna v. District Court, the Ninth Circuit interpreted the provision robustly in the sentencing context, holding that it confers upon crime victims an “indefeasible right to speak.” Three months after speaking at the sentencing of the first of two codefendants who had pleaded guilty to the same crimes, the complaining victim in Kenna requested permission to speak at the sentencing of the second codefendant. The district court denied it. The court concluded that the term “reasonably heard” in § 3771(a)(4) grants judges discretion over how to receive victims’ views at sentencing, including discretion to limit victims to earlier statements when further allocution would provide no new information. In rejecting that reading, the Ninth Circuit took a much broader view of the goals behind the provision: “Speaking at a co-defendant’s sentencing,” the appellate court observed, “does not vindicate the right of victims to look this defendant in the eye and let him know the suffering his misconduct has caused.” The District of Utah adopted the same reading in United States v. Degenhardt, and two other courts have endorsed it in dicta. Meanwhile, in United States v. Marcello, another district court sided with the district court in Kenna, albeit in the context of bail hearings.

B. Textual Ambiguity

As a textual matter, neither reading is clearly correct. The phrase “right to be reasonably heard” is readily susceptible to two equally plausible readings: (1) an unqualified right to address the court orally on par with the defense and prosecution, limited only by reasonable constraints on duration and content; or (2) a right to present one’s views to the court by whatever means the court deems reasonable. The provision’s remaining text does little to clarify things. The reference to a “public proceeding,” for example, might be read as contemplating oral hearings in open court. Release, plea, and sentencing proceedings almost always involve such hearings, and the immediately preceding provision in the CVRA uses a similar term in just that way. Then again, “public proceeding” could just as easily mean proceedings that have not been sealed (a rare but not unheard-of occurrence in criminal cases) or are otherwise open. Even if it does connote oral hearings, moreover, the reference does not settle the limits of a victim’s right to weigh in at them. In the past, when Congress has specifically intended to confer unqualified speaking rights, it has done so through more pointed lan-
guage. Federal Rule of Criminal Procedure 32(i) clearly requires a sentencing court “to permit the defendant to speak or present any information” in mitigation. When Congress later conferred equal speaking rights on prosecutors and then on a limited class of victims, it did so explicitly: the 1975 amendments to Rule 32 provided federal prosecutors with “an opportunity to speak equivalent to that” of defense counsel; the 1994 amendments required that, where “any victim of a crime of violence or sexual abuse . . . is present at sentencing,” the district court “must permit the victim to speak” before imposing sentence. By contrast, the law is replete with examples of rights to be “reasonably heard” that are routinely deemed satisfied by “paper hearings.”

C. History and Purpose
The ambivalence of § 3771(a)(4)’s language has driven most of the action in the opinions interpreting it toward other sources of meaning, particularly its history and purpose. The former, while sparse, provides at least some evidence that some members of the Senate understood § 3771(a)(4) to confer a strong speaking right. The bill sailed through both houses with no debate and only the slightest discussion. The bill’s primary Senate sponsors, however, did make brief statements on the Senate floor, including statements that § 3771(a)(4) was intended “to allow the victim to appear personally and directly address the court.” No committee reports address this aspect of the CVRA, but an earlier Senate Judiciary Committee Report similarly interpreted nearly identical language in the proposed constitutional amendment that served as its template. Whether this history is enough to resolve the ambiguities in § 3771(a)(4) ultimately turns on one’s interpretive philosophy. Many judges with a decidedly textualist or purposivist bent would be uncomfortable allowing it to bear too much interpretive weight, as was the court in *Marcello.*

What, then, of the purposes behind the provision? Almost all rights exist in the service of deeper goals, values, or interests. Ideally, a court confronted with an ambiguous new “right” could find some guidance by looking to the goals and values that animate the right in the first place. In this case, however, that’s not so easy. The CVRA provides surprisingly little insight into the substantive goals at which its drafters aimed in crafting the participatory rights of victims as they did. Was § 3771(a)(4)’s “right to be reasonably heard” intended to ensure that courts have full information in making certain major decisions? To help impress upon defendants the seriousness of their wrongdoing? To make victims feel better by allowing them to publicly vent their sorrows and overcome feelings of powerlessness? To give victims procedural equality with defendants and prosecutors, regardless of the consequences? Scholars and victims’ rights advocates often cite these and other goals in support of arguments for victim allocation rights at sentencing. Only the first and the last received any mention in legislators’ limited discussion of the CVRA, although both *Kenna* and *Degenhardt* invoked all four to buttress their holdings.

II. Why Allocate?
This Section briefly examines these four purposes. My aim is twofold: (1) to unpack the implications of each purpose for the competing interpretations of § 3771(a)(4); and (2) to suggest more generally how other participatory mechanisms, both within and outside of the CVRA framework, might also serve those purposes.

A. Information
One aim of an expansive speaking right might be conveying full and accurate information. The Ninth Circuit believed that allocation furthers this goal in the sentencing context by helping to “ensure that the district court doesn’t discount the impact of the crime on the victims.” The legislative history, such as it is, supports an informational take on § 3771(a)(4)’s possible aims. Not much, however, supports the idea that allocation is a sensible means for furthering informational goals when it comes to sentencing. The heavy lifting in determining a sentence occurs well before the actual sentencing hearing itself, with the preparation of the presentence report, the raising of objections and the resolution of challenges thereto, and the parties’ submission of sentencing memoranda and other papers. In the vast majority of cases, district judges already have decided upon a sentence by the time of the hearing. The hearing thus functions more in the nature of a public ritual than it does as an opportunity for either side to influence the disposition. In light of this, the most expansive form of an information-oriented right “to be reasonably heard” would place less emphasis on unqualified allocation rights than it would on access to and opportunities to participate in the various inputs that go into the sentencing process before the hearing itself. This view of the right implies that district courts should have both less and more discretion than they otherwise might under *Kenna* and *Degenhardt.* They should have less in that courts should be prohibited from routinely restricting victim access to or filings concerning the substance of the presentence report, defendant sentencing memoranda, or other sentencing inputs, which is largely the current practice. They should have more in that they should be free to restrict victims’ speaking rights in individual instances in which courts reasonably conclude that oral statements can present no new or relevant information, as did the district courts in *Kenna* and *Marcello.*

B. Moral Education
In addition to the usual aims of deterrence, retribution, incapacitation, and rehabilitation, one oft-articulated aim of the criminal justice system is “moral education”—impressing upon criminals the harms from their misdeeds, causing them to reflect upon their behavior, and inculcating in them some appreciation of society’s
norms which ideally will guide their conduct in the future. A strong allocation right for victims contributes to this goal by “forc[ing] the defendant to confront the human cost of his crime.” As things stand now, sentencing is one of the few opportunities in an overwhelmingly professionalized process in which a victim can—and, in many cases, is expected to—directly express to an offender the suffering he has caused. If this is the aim, Kenna is surely correct that neither victim impact statements nor allocations at the sentencing of a codefendant are a sufficient reason to deny a victim speaking rights in a separate sentencing proceeding.

Having said this, if the goal is to enable victims to truly impress upon defendants the consequences of their actions, allocation is a second-best measure for accomplishing it. As currently implemented, victim allocation does not mean dialogue. It is not structured to allow any relational, interactive process of give-and-take between the victim and the defendant. Instead, victims face defendants across an open courtroom, surrounded by attorneys, court personnel, members of the public, and (often) both sides’ families and friends. The contextual and cognitive barriers to empathy, understanding, and acceptability of responsibility on the part of defendants in such an environment are enormous.

A more effective approach to making a lasting impression would be to involve (willing) victims in sentencing not through allocation, but through some form of victim-offender mediation, loosely defined. While the specifics of victim-offender mediation programs vary widely, nearly all involve some opportunity for a more extended, face-to-face interaction between victims and defendants in which victims can explain directly to defendants how crimes affected them, ask questions, develop restitution plans, and air their feelings and fears. By humanizing crimes and their consequences, these programs can go far toward breaking down pride, anger, pain, denial, and other barriers to moral reform. Although the programs have grown rapidly in recent years at the state level, federal judges and prosecutors have yet to make significant use of them as part of sentencing. But there is no legal reason why they couldn’t. This is especially true now that, post–United States v. Booker, federal judges have much greater flexibility in crafting sentences than they have had for quite some time.

C. Restoration

Many commentators have argued that standing up and speaking at sentencing serves goals of victim restoration and healing by allowing victims “to regain a sense of dignity and respect rather than feeling powerless and ashamed.” Victimization can undermine dignity and respect in at least two ways. First, the crime itself can cause significant psychological harm in the form of feelings of powerlessness, fear, anxiety, and belittlement. Call these “primary harms.” Second, the exclusion of victims from the processes of investigation, prosecution, and punishment can exacerbate those harms by making victims feel as if society doesn’t value them enough to take their views and concerns into account. Call these “secondary harms.”

The importance of allocation to repairing the harms of victimization depends to at least some degree on which category of harms one has in mind. Allocation is probably most important for secondary harms, which flow from procedural mistreatment (actual or perceived) by the justice system itself. The moment of sentencing is among the most public, formalized, and ritualistic parts of a criminal case. By giving victims a clear and uninterrupted voice at this moment on par with that of defendants and prosecutors, a right to allocate signals both society’s recognition of victims’ suffering and their importance to the criminal process.

Allocation also has value for primary harms. Confronting defendants in open court undoubtedly helps some victims overcome feelings of weakness and loss of status. If that is taken as a statutory aim of § 3771(a)(4), this effect likely justifies the broad readings of Kenna and Degenhardt. As with moral education, however, allocation’s model of an adversarial, one-shot approach to participation in sentencing tends to obscure other and better participatory methods for alleviating the psychological fallout from crime. Empirical studies overwhelmingly suggest that participatory mechanisms that allow victims to discuss their feelings with defendants, understand the what and why of the crime, and humanize defendants go significantly further toward relieving the mental and emotional burden of victimization than do courtroom exchanges.

D. Full Participation

Kenna and Degenhardt repeatedly noted that the CVRA “was enacted to make crime victims full participants in the criminal justice system,” a goal reflected in floor statements of the CVRA’s Senate sponsors. My sense is that if one were to probe the issue, the notion of full participation likely would collapse in some contexts into other consequentialist goals: making victims feel better, providing more complete information, monitoring prosecutors, reaching better decisions, or the like. But one also could understand full participation as an end in itself, perhaps one that discharges some moral obligation of society to treat victims as equals with the other main players in the criminal process, whatever the precise source of that demand. That seems to be the way in which Kenna, Degenhardt, and the CVRA’s sponsors viewed the concept. If full participation per se, understood as participation on par with that of defendants and prosecutors, is a goal of § 3771(a)(4), an unqualified right to allocate at sentencing ought to be a part of it. But so should many other rights, including equal oral argument rights at bail hearings, equal veto rights in plea proceedings, and equal rights to move for departures at sentencing. It is doubtful that the “reasonably heard” language of § 3771(a)(4) can be stretched that far. If it cannot, we are back to where we
started. If a “right to be reasonably heard” does not guarantee parity of participation, what does it guarantee? And, more important, to what values and interests should we look for guidance in answering that question?

III. Conclusion

Where does this leave things? In the end, I am less concerned with teasing out the correct interpretation of § 3771(a)(4) than I am with what that Section suggests about how policy makers should approach issues of victim participation in the future. One apparent problem with § 3771(a)(4) is that its ambiguity of purpose allows too many aims to be read into it at once. While moral education and restoration might make sense in the context of sentencing, for instance, they are far less appropriate considerations in the context of a bail hearing, where innocence is presumed and the only concern is the possibility of and conditions for release. Articulating and disaggregating potential goals, where feasible, will yield clearer and more effective mechanisms for integration of victims into the process.

It also will force us to confront some of the hard questions about victim participation that are too easy to gloss over through appeals to the general language of rights. Focusing on informational goals, for example, might prompt us to reflect upon the types of information that we expect victims to provide and the way in which we expect courts to use it. Is our assumption that most victims will offer information to the court with an eye toward advocating for a harsher disposition? An interesting aspect of Kenna, Degenhardt, and the CVRA itself is that all appear to embrace to some degree the classic vision of the victim-defendant relationship as one of unmitigated adversaries. Victims appear at sentencing to “look the defendant in the eye,” condemn him, and explain to the court the suffering he has caused, presumably with the goal of securing a more severe sentence. Section 3771(d)(5) of the CVRA effectuates that notion with a special provision authorizing a victim to move to reopen a sentence following a plea

None of this is to question the CVRA’s core notion that victims merit far greater attention from and integration into the criminal justice system than they currently receive. It is rather to sound a simple note of caution: the language of rights can be seductive, so seductive that it can sometimes impair the exploration of issues and perspectives that could contribute to the most effective solutions in the long term. Criminal procedure has not been immune from this dynamic in the past. With some effort, victim participation in the federal system can avoid it in the future.

Notes

2. 18 U.S.C. § 3771(a)-(b).
3. As of October 1, 2006, the CVRA had appeared twenty-nine times in the opinions of federal courts—eight times in those of federal appellate courts and twenty-one times in those of federal district courts. These numbers are sure to increase significantly as CVRA litigation percolates through the system. See, e.g., United States v. Guevara-Toloso, 2005 WL 1210982, at *1 (E.D.N.Y. May 23, 2005) (“The [CVRA’s] provisions have far-reaching effects on routine criminal proceedings that courts are only beginning to confront.”).
4. 435 F.3d 1011, 1016 (9th Cir. 2006).
5. The court noted that it already had heard from the victims at the earlier sentencing, that it had re-reviewed all of the victim impact statements (over sixty of which had been submitted at the first sentencing), and that nothing any victim could say could have any additional impact whatsoever. Id. at 1013.
6. Id. at 1017.
8. 370 F. Supp. 2d 745, 749 (N.D. Ill. 2005) (holding that “in detention hearings, the victim’s right to be reasonably heard does not mandate oral statements, particularly when the [victim] has no personal knowledge of the guilt of the defendant(s) and offers an opinion only on a matter that is not in dispute.”).
11. 150 Cong. Rec. S4,268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl); see also id. (statement of Sen. Feinstein) (“That is my understanding as well.”); 150 Cong. Rec. S10,911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyi) (“I think the purpose of this section is to allow the victim to appear personally and directly address the court. This section would fail in its intent if courts determined that written, rather than oral communication, could generally satisfy this right.”).
14. See Kenna, 435 F.3d at 1016-17; Degenhardt, 405 F. Supp. 2d at 1344, 1347-48. The remaining two goals were drawn from an article by Professor Jayne Barnard on the benefits of victim allocation in cases of financial crime. See Jayne W.
26 Federal judges have long had the power to utilize victim-

See, e.g., United States v. De Alba Pagan, 33 F.3d 125, 129
(1st Cir. 1994) (observing that “allocation is both a rite and a
right”).

In recent testimony before the U.S. Sentencing Commission,
Judge Paul Cassell offered detailed and thoughtful proposals
for better integrating victims into the prehearing sentencing
process. See Testimony of Paul G. Cassell, Professor of Law
at the S.J. Quinney College of Law at the University of Utah,
Before the United States Sentencing Commission, on Protec-
15, 2006). As Judge Cassell noted, nothing in current law
prohibits disclosure of most sentencing materials to victims,
and there are several plausible ways in which a better disclo-
sure regime might be implemented. See id. at 9-13.

See, e.g., Jean Hampton, The Moral Education Theory of Pun-
ishment, in Punishment: A Philosophy & Public Affairs Reader
112 (A. John Simmons et al. eds., 1995); Stephen P. Garvey,
Can Shaming Punishments Educate?, 65 U. CHI. L. REV. 733,

See, e.g., 150 CONG. REC. S4,260 (daily ed. Apr. 22, 2004)
(statement of Sen. Feinstein) (stating that the rights pro-
tected in the CVRA include “the simple right . . . to par-
ticipate in the process where the information that victims
and their families can provide may be material and rele-
vant”).

See, e.g., 18 U.S.C. § 3771(e).

Stuntz, supra note 1.