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How Victim Impact Statements Promote Justice: Evidence from the Content of Statements Delivered in Larry Nassar's Sentencing

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HOW VICTIM IMPACT STATEMENTS PROMOTE JUSTICE: EVIDENCE FROM THE CONTENT OF STATEMENTS DELIVERED IN LARRY NASSAR'S SENTENCING

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Whether crime victims should present victim impact statements (VISs) at sentencing remains a subject of controversy in criminal justice literature. But relatively little is known about the content of VISs and how victims use them. This Article provides a content analysis of the 168 VISs presented in a Michigan court sentencing of Larry Nassar, who pleaded guilty to decades of sexual abuse of young athletes while he was treating them for various sports injuries. Nassar committed similar crimes against each of his victims, allowing a robust research approach to answer questions about the content, motivations for, and benefits of submitting VISs. Specifically, it is possible to explore the question of whether (roughly) the same crimes produce (roughly) the same VISs. The VISs reveal the victims'/survivors' motive for presenting VISs, their manner of presenting the impact of sexual abuse, their interactions with the sentencing judge and the defendant, and other features of the VISs. Analyzing the VISs' contents confirms many of the arguments supporting VISs at sentencing and challenges lingering objections to them. The findings support using VISs for informational, therapeutic, and educational purposes in criminal sentencings.

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"Perhaps you have figured it out by now, but little girls don't stay little forever. They grow into strong women that return to destroy your world."

—Victim impact statement of Kyle Stephens

"But may the horror expressed in this courtroom over the last seven days be motivation for anyone and everyone no matter the context, to take responsibility if they have failed in protecting a child, to understand the incredible failures that led to this week and to do it better the next time."

—Victim impact statement of Rachel Denhollander

I. INTRODUCTION

Over the past several decades, crime victims' rights advocates have sought to amplify the victim's voice in the criminal justice process. A key part of that effort has been giving crime victims the right to deliver a victim impact statement (VIS) at sentencing before a sentence is imposed.[1] Today, the federal system and virtually all states allow VISs in the United States.[2]

While VISs are now firmly entrenched in the American criminal justice landscape, the wisdom of allowing such statements is sometimes disputed.[3] Yet many arguments for and against VISs rest not on empirical data but rather on theoretical speculation about what those statements might look like, what victims' motives are in delivering them, or what effects the statements produce at sentencing. This reliance on speculation stems from the fact that surprisingly little is known about VISs.[4] To be sure, anecdotal examples of particular

1. *See generally* Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611 (2009); Edna Erez & Linda Rogers, *Victim Impact Statements and Sentencing Outcomes and Processes: The Perspectives of Legal Professionals*, 39 BRIT. J. CRIMINOLOGY 216 (1999).

2. *See* DOUGLAS E. BELOOF, PAUL G. CASSELL, MEG GARVIN & STEVEN TWIST, VICTIMS IN CRIMINAL PROCEDURE 599 (4th ed. 2018); Paul G. Cassell & Edna Erez, *Victim Impact Statements and Ancillary Harm: The American Perspective*, 15 CANADIAN CRIM. L. REV. 149, 175–96 (2011) (discussing a fifty-state survey of laws relating to VISs).

3. *See, e.g.*, MICHAEL VITIELLO, THE VICTIMS' RIGHTS MOVEMENT: WHAT IT GETS RIGHT, WHAT IT GETS WRONG 82–121 (2023) (questioning the utility and desirability of VISs); Susan A. Bandes, *What are Victim Impact Statements For?*, 87 BROOK. L. REV. 1253, 1254 (2022) ("[T]he most basic normative and empirical questions about [VIS] goals, its efficacy, its fairness and its impact on the parties remain stubbornly unanswered."); *see also generally* Jill Lepore, *The Rise of the Victims'-Rights Movement*, NEW YORKER (May 14, 2018), https://www.newyorker.com/magazine/2018/05/21/the-rise-of-the-victims-rights-movement [https://perma.cc/56L8-UAYY] (discussing several victim impact cases).

4. *See infra* notes 38–40 and accompanying text.

statements have been cited by scholars, including by us.[5] And various scholars have theorized about what VISs might usually contain.[6] But, relatively little empirical work exists regarding VISs, either quantitative or qualitative.[7]

This dearth of empirical research is partially explained by the difficulty in studying a "typical" VIS. Different crimes perpetrated by different offenders in different ways cause different forms of victimization. And even when the victimization stems from the same legally defined crime, the crime may take varying forms or be perpetrated in different social contexts, with different offender-victim relationships producing variable harms.[8] Because each crime—and each victim—is unique, it is hard to determine whether victims' assertions in their VISs result from their unique circumstances. And that difficulty has left scholars wondering what factors might drive VISs and their content generally.

Recently, a unique data set of VISs developed. In January 2018, Michigan Judge Rosemarie Aquilina allowed 168 direct and indirect victims[9] of former

5. *See, e.g.*, Cassell, *supra* note 1, at 618–19 (quoting the VIS of a mother whose daughter was murdered); Cassell & Erez, *supra* note 2, at 165–66 **(**discussing the VISs presented by the victims of the Bernard Madoff Ponzi scheme).

6. *See, e.g.*, Chrisje Brants, *Comparing Criminal Process as Part of Legal Culture*, *in* COMPARATIVE CRIMINAL JUSTICE AND GLOBALIZATION 49 (David Nelken ed., 2011).

7. *See* Tracey Booth, Alice K. Bosma & Kim M.E. Lens, *Accommodating the Expressive Function of Victim Impact Statements: The Scope for Victims' Voices in Dutch Courtrooms*, 58 BRIT. J. CRIMINOLOGY 1480, 1482 (2018) (reviewing and commenting on the absence of developed academic literature in the field). One recent exception is an important study of VISs submitted to Israeli criminal courts. *See* Tali Gal & Ruthy Lowenstein Lazar, *Sounds of Silence: A Thematic Analysis of Victim Impact Statements*, 27 LEWIS & CLARK L. REV. 147 (2023). Several studies have also examined the VISs in the Nassar trial for specific purposes. *See infra* notes 41–49 and accompanying text.

8. *See* Booth, Bosma & Lens, *supra* note 7, at 1490–91 (noting differences in statements presented); *see also* Christine M. Englebrecht & Jorge M. Chavez, *Whose Statement Is It? An Examination of Victim Impact Statements Delivered in Court*, 9 VICTIMS & OFFENDERS 386, 393–99 (2014) (examining the VISs of criminal homicide survivors and finding varying subjects covered).

9. Many support organizations prefer the term "survivor" rather than "victim" to describe those recovering from sexual assault. *See, e.g.*, *Key Terms and Phrases*, RAINN, https://www.rainn.org/articles/key-terms-and-phrases [https://perma.cc/BCD3-6BP8]. In this Article, we use the term "victim," which is more common in legal writing and court decisions. *See* NAT'L CRIME VICTIM L. INST., *Use of the Term "Victim" In Criminal Proceedings* 1 (2009), https://law.lclark.edu/live/files/21940-use-of-the-term-victim-in-crim-proc11th-edpdf [https://perma.cc/V6TV-HTCT] (explaining why "victim" is a "legal status term" and a "legal term of art"); *see also* Inga N. Laurent, *Addressing the Toll of Truth Telling*, 88 BROOK. L. REV. 1073, 1076 n.23 (2023) (noting that the choice between "victim" and "survivor" is generally left to individual preference). *Cf.* Sentencing Transcript at 54, People v. Nassar, No. 17-526-FC (Mich. Cir. Ct. Jan. 16, 2018) [hereinafter Sentencing Transcript [date]] (Alexis Moore recounting in her impact statement that "I don't like the word victim. Being a victim implies the desire for pity. I am a survivor, but more so, I am me.").

USA Gymnastics team doctor Larry Nassar (or the victims' representatives) to all deliver VISs. The nation was riveted as Nassar's victims explained how Nassar had sexually abused them. The resulting set of VISs is rich in details about what kinds of assertions victims make in them. Nassar committed similar crimes against each of his victims, allowing a robust research approach to answer questions about the content, motivations for, and benefits to victims of submitting VISs. Specifically, it is possible to explore the question of whether (roughly) the same crimes produce (roughly) the same VISs. This data set also has the advantage of the absence of significant utilitarian motives for submitting the VISs, such as the desire to affect the sentence. When the victims prepared and delivered their VISs, they already knew that Nassar would spend essentially the rest of his life in prison.[10] Thus, the opportunity to present the VIS itself drove victim participation. Further, the victims essentially had broad freedom in what they discussed and to whom they addressed their statements; their statements were completed without any guidelines or control from criminal justice personnel, as has been the case in some other sentencing hearings.[11]

To explore issues surrounding the content of VISs, this Article relies on a thematic content analysis of the VISs presented at Nassar's sentencing. The analysis generates both quantitative and qualitative information, focusing on such questions as why a victim chose to present a VIS, which audiences the victim was addressing, the types of harms the victim suffered, and the meaning of the opportunity to present a VIS. With those findings in hand, this Article returns to the core question about VISs: Do they promote justice?

This Article proceeds in seven parts. Part I provides a brief overview of the conventional understanding of VISs. The existing literature provides a general understanding of what victims say at sentencing but does not sufficiently capture the variegated experiences of victims.

Part II turns to the victims who delivered the VISs analyzed here—specifically the 168 presenters (direct and indirect victims or victims' representatives) who made statements at the Nassar sentencing.

Part III describes the methodology used to review, code, and analyze the statements' content.

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10. Nassar had already been convicted of the federal crime of possessing 37,000 images and videos of child sex abuse and had already pleaded guilty to additional serious charges in another Michigan court. Press Release, U.S. Dep't of Just., U.S. Atty's Off., W.D. of Mich., Lawrence Nassar Sentenced to 60 Years in Federal Prison (Dec. 7, 2017), https://www.justice.gov/usao-wdmi/pr/2017_1207_Nassar [https://perma.cc/EU3H-DXTB].

11. *See, e.g.*, Booth, Bosma & Lens, *supra* note 7, at 1490; Englebrecht & Chavez, *supra* note 8, at 400–02.

Part IV presents the quantitative and qualitative findings of the content analysis. We explore issues surrounding the victims' reasons for delivering a VIS; the length, structure, and manner of their VISs; the victims' descriptions of Nassar's crimes; the apparent intended audience for the VISs; and the possible therapeutic benefits from delivering the VIS for victims.

After presenting the content analysis results, Part V explores the implications of our findings for the debate over VISs in the criminal justice process. Our findings suggest that VISs are a useful feature of criminal justice. Most of the information the victims provided went directly to relevant sentencing issues. In addition, delivering VISs appeared to produce useful therapeutic benefits for victims. The VISs also served educative and perceived fairness purposes without appearing to impair the sentencing proceedings.

Part VI summarizes some of the limitations of our study.

Part VII briefly concludes by suggesting that our findings support the conclusion that the role of crime victims in the criminal justice process should continue to expand.

II. AN OVERVIEW OF THE CONVENTIONAL UNDERSTANDING OF VICTIM IMPACT STATEMENTS

VISs developed along with the recent rise of the crime victims' rights movement. In the United States, that movement began to coalesce in the late 1970s as various groups became concerned about victims' treatment in criminal justice processes.[12] The general concern was that the system overlooked victims' interests, instead focusing myopically on the prosecution and the defense. Crime victims' advocates began to seek—and often obtain—legislation protecting victims' rights.

In 1982, the victims' rights movement took a major leap forward with President Reagan's appointment of a task force on victims of crime. After holding hearings around the country, the Task Force released an influential

12. *See generally* Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act*, 2005 BYU L. REV. 835, 840–50 (describing origins and impact of the movement); *see also* Shirley S. Abrahamson, *Redefining Roles: The Victims' Rights Movement*, 1985 UTAH L. REV. 517; William F. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AM. CRIM. L. REV. 649 (1976). According to one account, VISs were developed in 1976 by the probation office in Fresno County, California, although this early version provided only "an objective inventory of victim injuries and losses." 153 CONG. REC. E2227 (daily ed. Oct. 24, 2007) (statement of Rep. Jim Costa), 153 Cong Rec E 2227, at *2227 (LEXIS).

report.[13] The Task Force concluded that the criminal justice system had "lost the balance that had been the cornerstone of its wisdom" and advocated numerous reforms to improve the treatment of crime victims.[14]

One of the Task Force's proposals concerned VISs. The Task Force recommended that "[v]ictims, no less than defendants, are entitled to have their views considered" during sentencing.[15] The Task Force called for legislation requiring VISs at sentencing.[16] Such statements should contain information "concerning all financial, social, psychological, and medical effects [of the crime] on the crime victim."[17]

Since then, VISs have become a fixture in America's criminal justice system. In a VIS, a crime victim (or, in a homicide case, a survivor or victim's representative) will, as the term suggests, describe the crime's impact. Thus, a VIS allows a victim to go beyond recounting the immediately apparent aftereffects of a crime and explain all the physical, psychological, financial, and other harms that the victim suffered.[18] For example, a sexual assault victim might describe the ways in which the crime has changed her outlook on life, her approach to intimacy, or her daily activities.[19]

A VIS's role in a criminal case can be justified in various ways.[20] Perhaps most conventionally, criminal justice observers identify a VIS as serving instrumental and expressive purposes.[21] Understood as an instrumental device, a VIS provides information to the sentencer (a judge or jury) about a crime's

13. *See* PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT (1982).

14. *Id.* at 16.

15. *Id.* at 76.

16. *Id.* at 33, 77.

17. *Id.* at 33.

18. Chadley James, *Victim Impact Statements*, *in* THE CRIMINAL JUSTICE SYSTEM 825–26 (Michael K. Hooper & Ruth E. Masters eds., 2d ed. 2017); *see also* Chadley James, *Victim Impact Statements: Understanding and Improving Their Use*, *in* ROUTLEDGE HANDBOOK ON VICTIMS' ISSUES IN CRIMINAL JUSTICE 189 (Cliff Roberson ed., 2017).

19. *See* RHIANNON DAVIES & LORANA BARTELS, THE USE OF VICTIM IMPACT STATEMENTS IN SENTENCING FOR SEXUAL OFFENCES: STORIES OF STRENGTH 27–32 (2021); MARY ILIADIS, ADVERSARIAL JUSTICE AND VICTIMS' RIGHTS: RECONCEPTUALISING THE ROLE OF SEXUAL ASSAULT VICTIMS 48–50 (2020).

20. *See, e.g.*, Julian V. Roberts, *Victim Impact Statements and the Sentencing Process: Recent Developments and Research Findings*, 47 CRIM. L. Q. 365, 365 (2003).

21. *See generally* Julian V. Roberts & Edna Erez, *Communication at Sentencing: The Expressive Function of Victim Impact Statements*, *in* HEARING THE VICTIM: ADVERSARIAL JUSTICE, CRIME VICTIMS AND THE STATE 232 (Anthony Bottoms & Julian V. Roberts eds., Routledge 2011); *see also* Marie Manikis, *Victim Impact Statements at Sentencing: Towards a Clearer Understanding of Their Aims*, 65 U. TORONTO L.J. 85, 90–92 (2015).

harm[22] and thus may ultimately influence the sentence imposed. The VIS can also influence sentencing in other ways, such as by providing information about a victim's losses, which can assist the sentencer in awarding appropriate restitution.[23]

A VIS can also serve an expressive function, through which the victim communicates a message to the court, the offender, or the public.[24] This act of communication may be empowering for the victim. [25] The theory is that as a victim's voice is heard, that moment may provide some measure of healing.[26] The victim's voice may also explain the crime's harm to defendants, thereby potentially causing them to appreciate what they have done and contributing to their rehabilitation. And a VIS can also provide information to the public about a crime, which may lead to responses or reforms.[27]

VISs can also be justified in more conceptual ways. For Antony Pemberton and others with an interest in restorative justice, the criminal justice process can be seen as an arena for attempting to rebuild agency and communion.[28] Thus, the aims of submitting a VIS—and of victims telling their stories—can be

22. *See* Cassell, *supra* note 1, at 619–21; *see also* Erin Sheley, *Reverberations of the Victim's "Voice": Victim Impact Statements and the Cultural Project of Punishment*, 87 IND. L.J. 1247, 1285 (2012) ("[V]ictims . . . render their suffering 'present' as an object for the sentencing body to consider, in a manner otherwise impossible.").

23. *See, e.g.*, Cassell & Erez, *supra* note 2, at 165–66, 170 (discussing victims presenting restitution issues at the Bernard Madoff sentencing).

24. Roberts & Erez, *supra* note 21, at 233–45; Erin Sheley, *Victim Impact Statements and Expressive Punishment in the Age of Social Media*, 52 WAKE FOREST L. REV. 157, 165 (2017) (reviewing expressive functions of VISs); *see also* Mary Margaret Giannini, *Equal Rights for Equal Rites?: Victim Allocution, Defendant Allocution, and the Crime Victims' Rights Act*, 26 YALE L. & POL'Y REV. 431, 449–50 (2008).

25. *See* Cassell, *supra* note 1, at 621–23. *But cf.* Kim M.E. Lens, Antony Pemberton, Karen Brans, Johan Braeken, Stefan Bogaerts & Esmah Lahlah, *Heterogeneity in Victim Participation: A New Perspective on Delivering a Victim Impact* Statements, 10 EUR. J. CRIMINOLOGY 479, 479 (2013) (finding that anticipation of negative consequences from delivering the VIS was an important factor in whether a VIS was delivered).

26. *See* Edna Erez, Peter R. Ibarra & Daniel M. Downs, *Victim Participation Reforms in the United States and Victim Welfare: A Therapeutic Jurisprudence Perspective*, *in* THERAPEUTIC JURISPRUDENCE AND VICTIM PARTICIPATION IN JUSTICE 15 (Edna Erez, Michael Kilching & Jo-Anne Wemmers eds., 2011). *But cf.* Antony Pemberton & Sandra Reynaers, *The Controversial Nature of Victim Participation: Therapeutic Benefits in Victim Impact Statements*, *in* THERAPEUTIC JURISPRUDENCE AND VICTIM PARTICIPATION IN JUSTICE, *supra*, at 229 (critiquing this view).

27. *See, e.g.*, Bandes, *supra* note 3, at 1271–77.

28. *See* Antony Pemberton, Pauline G.M. Aarten & Eva Mulder, *Beyond Retribution, Restoration and Procedural Justice: The Big Two of Communion and Agency in Victims' Perspectives on Justice*, 23 PSYCH., CRIME & L., 682, 683 (2017).

understood in terms of psychological needs surrounding agency and communion and their rewards to the speaker and the public.

VISs have, to a degree, been controversial.[29] In the United States, the controversy traces back to several conflicting Supreme Court decisions regarding whether a VIS in a capital case is constitutionally permissible. In 1987, in *Booth v. Maryland*,[30] the Court held in a divided (5–4) decision that the Eighth Amendment's prohibition of cruel and unusual punishment blocked the use of such statements, at least in capital cases. Writing for the majority, Justice Powell concluded that "[t]he focus of a VIS . . . is not on the defendant, but on the character and reputation of the victim and the effect on his family. These factors may be wholly unrelated to the blameworthiness of a particular defendant."[31]

Four years later, however, in *Payne v. Tennessee*,[32] a (6–3) decision overruled *Booth* and allowed the use of VISs in capital cases. Chief Justice Rehnquist's opinion held that "[v]ictim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities."[33]

As a matter of federal constitutional law, on authority of *Payne*, VISs are now generally allowed in American sentencing proceedings, including both capital and non-capital cases.[34] Those statements, however, still can be restricted in some circumstances. For example, in a capital case, if the victim

29. *See generally* VITIELLO, *supra* note 3, at 82–121 (reviewing the debate); Bandes, *supra* note 3, at 1253–59 (same).

30. 482 U.S. 496 (1987).

31. *Id.* at 504.

32. 501 U.S. 808 (1991).

33. *Id.* at 825. *Payne* used the term "victim impact *evidence*," presumably because the case was a capital sentencing proceeding in which evidentiary rules apply. *Id.* (emphasis added). In non-capital cases, such as the Nassar case, the appropriate term is "victim impact statement," as evidentiary rules typically do not apply. *See infra* notes 273–279 and accompanying text (reflecting on the opportunity to provide a VIS).

34. *See* Cassell, *supra* note 1, at 616; PEGGY M. TOBOLOWSKY, DOUGLAS E. BELOOF, MARIO T. GABOURY, ARRICK L. JACKSON & ASHLEY G. BLACKBURN, CRIME VICTIM RIGHTS AND REMEDIES 102 (3d ed. 2016) ("Every state has statutory provisions authorizing some type of crime victim right to be heard by the court regarding sentencing either orally or in writing, or both."). In capital cases, by one tabulation, in the thirty-one states that allow capital sentencing, twenty-nine permit VISs. *See* Bryan Myers, Narina Nuñez, Benjamin Wilkowski, Andre Kehn & Katherine Dunn, *The Heterogeneity of Victim Impact Statements: A Content Analysis of Capital Trial Sentencing Penalty Phase Transcripts*, 24 PSYCH., PUB. POL'Y & L. 474, 474–75 (2018).

impact evidence is unfairly prejudicial in all the circumstances, then it can be limited to avoid that prejudice.[35] And in a capital case, the victim impact evidence must bear on the crime's impact; a family member's recommendation about the appropriate sentence is not allowed.[36] In contrast, in non-capital cases, many states allow victims to make sentencing recommendations.[37]

Against this backdrop, American criminal sentencings often feature VISs. But despite their prevalence, VISs remain a relatively unexplored area of criminal justice research.[38] Apart from anecdotal examples, the available literature contains little information about what victims (and family members) actually say when they deliver VISs.[39] As Professors Englebrecht and Chavez put it, "While the Supreme Court validated the importance of hearing victims' voices during the justice process, it remained unclear what those voices would sound like."[40]

While VISs are relatively under-analyzed, several other researchers have analyzed the VISs delivered by Larry Nassar's victims at his sentencing—albeit with a different focus than ours. Professors Jamie Abrams and Amanda Potts used "corpus-based discourse analysis [to examine] the complex strategies that the victims deployed to describe who Nassar was (a doctor, a monster, a friend),

35. *See, e.g.*, *Payne*, 501 U.S. at 825; State v. Ott, 2010 UT 1, ¶ 25–33, 247 P.3d 344 (finding parts of VIS unduly prejudicial and inadmissible). *Cf.* Laura Walker, Comment, *Victim Impact Evidence in Death Penalty Proceedings: Advocating for a Higher Relevancy Standard*, 22 GEO. MASON C.R.L.J. 89, 90–91 (2011) (arguing that boundary between relevant and prejudicial VISs needs to be more clearly defined in capital cases).

36. *See* Bosse v. Oklahoma, 580 U.S. 1, 2 (2016); *cf.* Commonwealth v. McGonagle, 88 N.E.3d 1128, 1229 (Mass. 2018) (holding that *Bosse*'s limitation on offering an opinion about the appropriate sentence applies only to capital cases). *But cf.* Elijah Lawrence, Note, *Victim Opinion Statements: Providing Justice for Grieving Families*, 12 J.L. & FAM. STUD. 511, 512–14 (2010) (criticizing exclusion of victim family opinion evidence in capital cases).

37. *See* TOBOLOWSKY, BELOOF, GABOURY, JACKSON & BLACKBURN, *supra* note 34, at 109 (citing, *e.g.*, People v. Jones, 14 Cal. Rptr. 2d 9, 10 (Ct. App. 1992); State v. Grant, 297 P.3d 244, 249 (Idaho 2013); Brown v. State, 875 S.W.2d 38, 40 (Tex. App. 1994)).

38. *See* DAVIES & BARTELS, *supra* note 19, at 5.

39. In one American study, researchers looked at 192 capital VIS transcripts, analyzing the transcript for content as well as emotionality. Myers, Nuñez, Wilkowski, Kehn & Dunn, *supra* note 34. In another study, researchers interviewed twenty-four jurors who had participated in capital cases in South Carolina about VISs. Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *Victim Characteristics and Victim Impact Evidence in South Carolina Capital Cases*, 88 CORNELL L. REV. 306, 309–14 (2003). Outside this country, a recent and interesting analysis was undertaken of twenty-five VISs submitted to the Israeli courts. *See generally* Gal & Lowenstein Lazar, *supra* note 7. This study, however, included VISs submitted in a variety of offenses and defendants, and not for the same law violation and offender as this Article addresses.

40. Englebrecht & Chavez, *supra* note 8, at 389.

what he did (abuse, assault, pedophilia, 'treatments'), and the harms that they suffered (pain, hurt, betrayal)."[41] The article concluded by "recommending more robust and holistic approaches to the framing of sexual assault, more proactive policy uses of VIS in shaping systemic reforms, and greater law reforms to prevent systemic institutional sexual assault."[42] The study explicitly disclaimed any effort to make a normative assessment of VISs.[43]

Professors Leah Kaylor, Terri L. Weaver, and Katherine Kelton also reviewed the Nassar sentencing, focusing not on the victims but rather on the judge. They attempted to better understand how therapeutic jurisprudence (TJ) took place,[44] examining Judge Aquilina's responses to the VISs with messages of victim empowerment.[45]

Professor Ashley Wellman and her colleagues also analyzed the Nassar victims' VISs, focusing on routine activities theory.[46] The goal was to identify measures to prevent such abuse of athletes in the future.[47] Similarly, Professor Margo Mountjoy analyzed the statements to determine what went wrong to allow the victims to be abused over such a long time.[48]

In two other studies, Professor Stenberg and Professor Gibson analyzed the Nassar VISs from a rhetorical point of view, attempting to draw conclusions about the victims' choice of language in their statements.[49]

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41. Jamie R. Abrams & Amanda Potts, *The Language of Harm: What the Nassar Victim Impact Statements Reveal About Abuse and Accountability*, 82 U. PITT. L. REV. 71, 71 (2020).

42. *Id.*

43. *Id.*

44. Leah Kaylor, Terri L. Weaver & Katherine Kelton, *"Leave Your Pain Here": An Illustration of Therapeutic Jurisprudence Through the Remark of Rosemarie Aquilina from The State of Michigan v. Lawrence Nassar*, 11 J. QUALITATIVE CRIM. JUST. & CRIMINOLOGY 166, 166 (2022).

45. *Id.* at 169–76. The authors concluded that the comments of Judge Aquilina following the presentation of the VISs converge with the TJ domains of validation, compassion, respect of survivor pain, empathy, and positive future focus. *Id.* at 176. They noted that these elements have translational implications for crafting judicial TJ informed responses and recommended that they should become part of judicial training. *Id.* at 176–77.

46. *See* Ashley Wellman, Michele Bisaccia Meitl, Patrick Kinkade & Amanda Huffman, *Routine Activities Theory as a Formula for Systematic Sexual Abuse: A Content Analysis of Survivors' Testimony Against Larry Nassar*, 46 AM. J. CRIM. JUST. 317, 317 (2021).

47. *Id.* at 321–23.

48. Margo Mountjoy, '*Only by Speaking Out Can We Create Lasting Change': What Can We Learn from the Dr. Larry Nassar Tragedy?*, 53 BRIT. J. SPORTS MED. 57, 57–58 (2019) (calling for a cultural change in sports that will make it a safe and empowering space for athletes).

49. Shari J. Stenberg, *Acknowledging Betrayal: The Rhetorical Power of Victim Impact Statements in the Nassar Hearing*, 41 RHETORIC REV. 45 (2022) (documenting how the VISs serve as

In this Article, we take a different approach to studying the Nassar victims' statements. We analyze the statements quantitatively and qualitatively, attempting first to understand what is in the statements and then to draw normative conclusions about whether VISs are appropriate for sentencing. Our ultimate focus is whether understanding what is in the statements can help us draw conclusions about recurring and important questions in the broader debate regarding VISs.

III. THE VICTIMS AT NASSAR'S SENTENCING

The data set here can provide answers to some lingering questions about using VISs in criminal proceedings. The data set comprises 168 VISs by direct and indirect sex abuse victims of Larry Nassar (or, in some cases, their representatives).[50] Our specific interest in the case is victim participation in the sentencing proceeding.

Some brief background about the case will provide helpful context.[51] From 1996 through 2016, Nassar served as the team doctor for the U.S. Women's National Gymnastics Team, as well as a physician at Michigan State University (MSU).[52] These roles gave him access to hundreds of girls and young women—

a collective testimony that highlights the ramifications of unacknowledged betrayal by adults and institutions that ignored the abuse); Katie L. Gibson, *A Rupture in the Courtroom: Collective Rhetoric, Survivor Speech, and the Subversive Limits of the Victim Impact Statement*, 44 WOMEN'S STUD. COMMC'N 518 (2021) (documenting how the Nassar's victims'/survivors' VISs helped disrupt courtroom norms, hegemonic scripts, and common expectations that often diminish testimony about sexual violence).

50. For a comprehensive and interesting overview of the case, see AMOS N. GUIORA, ARMIES OF ENABLERS 20–21, 31–32, 37, 57–59, 67–68 (2020), and, for a discussion of the Nassar case, see Abrams & Potts, *supra* note 41, at 82–86.

51. For more extended accounts of Nassar's crimes and the efforts to bring him to justice, see ABIGAIL PESTA, THE GIRLS: AN ALL-AMERICAN TOWN, A PREDATORY DOCTOR, AND THE UNTOLD STORY OF THE GYMNASTS WHO BROUGHT HIM DOWN (2019); RACHAEL DENHOLLANDER, WHAT IS A GIRL WORTH?: MY STORY OF BREAKING THE SILENCE AND EXPOSING THE TRUTH ABOUT LARRY NASSAR AND USA GYMNASTICS (2019); JOHN BARR & DAN MURPHY, START BY BELIEVING: LARRY NASSAR'S CRIMES, THE INSTITUTIONS THAT ENABLED HIM, AND THE BRAVE WOMEN WHO STOPPED A MONSTER (2020); RACHEL HAINES, ABUSED: SURVIVING SEXUAL ASSAULT AND A TOXIC GYMNASTICS CULTURE (2019). Netflix's documentary *Athlete A* is also interesting. *Athlete A* (Netflix 2020). For an interesting analysis of media coverage of the crimes, see Lauren Reichart Smith & Ann Pegoraro, *Media Framing of Larry Nassar and the USA Gymnastics Child Sex Abuse Scandal*, 29 J. CHILD SEXUAL ABUSE 373 (2020).

52. OFF. OF THE INSPECTOR GEN., INVESTIGATION AND REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S HANDLING OF ALLEGATIONS OF SEXUAL ABUSE BY FORMER USA GYMNASTICS PHYSICIAN LAWRENCE GERARD NASSAR 4 (2021), https://oig.justice.gov/sites/default/files/reports/21-093.pdf [https://perma.cc/DK82-EL7R].

dozens of whom he sexually abused over many years. And yet, even though multiple reports of Nassar's abuse reached authorities, the reports were not taken seriously.[53]

Eventually, on September 12, 2016, the *Indianapolis Star* published a bombshell article detailing Nassar's abuse of two athletes.[54] The article was followed by numerous other complaints of Nassar's sexual abuse, triggering multiple investigations and legal proceedings. For example, Nassar was charged with federal child pornography crimes[55] and received a federal sentence of sixty years in prison.[56]

Of particular interest here, Nassar was also charged with state law sex abuse crimes in Ingham County, Michigan.[57] Ultimately, in November 2017, Nassar pled guilty to seven counts of sexual misconduct,[58] meaning no criminal trial was held and the victims did not have to testify as part of the State's case to establish his guilt. Following his guilty pleas, in January 2018, Judge Rosemarie Aquilina held a sentencing hearing. The minimum sentence was twenty-five to forty years in prison. In addition, under Michigan law, the victims were entitled to present a VIS.[59] Judge Rosemarie Aquilina decided to allow every Nassar victim who wished to present a VIS to do so.

Initially, it was expected that about eighty individuals would speak. As the opportunity for presenting a VIS became known, more victims came forward.[60]

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53. *See* GUIORA, *supra* note 50, at 30–31, 44–45; *see also* OFF. OF THE INSPECTOR GEN., *supra* note 52.

54. Tim Evans, Mark Alesia & Marisa Kwiatkowski, *Former USA Gymnastics Doctor Accused of Abuse*, INDIANAPOLIS STAR, https://www.indystar.com/story/news/2016/09/12/former-usagymnastics-doctor-accused-abuse/89995734/ [https://perma.cc/P7M5-VJTV] (Jan. 24, 2018, 4:35 PM).

55. We use the term "child pornography" advisedly, as that is how the charges were described in federal courts. The charges are better described as involving child sex abuse materials or "CSAM."

56. *See* Brief of Appellant at 3–5, United States v. Lawrence Nassar, No. 17-2490, 2018 U.S. App. LEXIS 23808 (6th Cir. Aug. 22, 2018) (summarizing the federal and state charges and the pleas that Nassar entered).

57. People v. Nassar, No. 345699, 2020 WL 7636250, at *1–2 (Mich. Ct. App. Dec. 22, 2020).

58. *Id.* Nassar separately pleaded guilty to three further counts of first degree criminal sexual conduct in Eaton County, Michigan. For the Eaton County charges, Nassar ultimately received several concurrent terms of 40 to 125 years in prison. *Id.* This Article focuses on the Ingham County charges.

59. *See, e.g.*, MICH. CONST. art. I, § 24 (extending to crime victims the right "to make a statement to the court at sentencing").

60. *See* Scott Cacciola & Christine Houser, *One After Another, Athletes Face Larry Nassar and Recount Sexual Abuse*, N.Y. TIMES (Jan. 19, 2018), https://www.nytimes.com/2018/01/19/sports/larry-nassar-women.html [https://perma.cc/QWV6-Y6R8].

As one victim who did not want to reveal her identity (Victim 55) explained to the judge:

> Dear Judge Aquilina, until just a few short months ago, I vowed to myself at the beginning of this nightmare that I would never step foot into a courtroom with this man or any part of this awful circumstance. However, in November, when I sat at home with my hands shaking while watching the live feed in the first hearing you presided over, I heard the most interesting, powerful words come from your mouth. You said that you wanted every girl to heal and you would let us take as long as we needed to all come forward and speak out. That gave me the courage to face the fact that I was abused by Larry Nassar at the Michigan State University Sports Medicine Clinic for many years as I came to him for medical help for my gymnastics injuries. I decided I wanted to have the courage to step forward and fully have this experience today so that I could heal and gain freedom and have closure from this confusing chapter of my life. So, first of all, I want to thank you for having the foresight and the compassion to make this happen for all of us today.[61]

Other victims joined after the first victims began delivering their statements—which were nationally televised. Eventually, 168 victims came forward to provide a VIS, either in person or through other means, including two victims who were overseas (in Europe and Asia) and sent video VISs. To provide all those who wanted to speak an opportunity to be heard, Judge Aquilina set special sessions. Ultimately, over seven days, 106 primary victims, 23 indirect victims (e.g., parents, siblings, partners),[62] and 39 representatives of

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61. Sentencing Transcript (1-16-18), *supra* note 9, at 103–04; *see also* Sentencing Transcript (1-19-18), *supra* note 9, at 17 ("That was a very strong, brave voice, and I hope that now that you've spoken publicly you'll leave your pain here with him and you live a long, happy life.").

62. "Indirect" victims are persons who, by virtue of being connected to the primary victims through family or other ties, suffer from a crime committed directly against a victim. For example, Nassar's sex abuse of a girl might cause direct harm not only to the girl but also indirect harm to her parents. We use the term "indirect" victim rather than "secondary" victim because that seems to best capture the relationship involved and avoids the negative implication that "secondary" victimization would necessarily be insignificant. *Cf. Glossary for Model Standards for Service Victims and Survivors of Crime*, U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, OFF. FOR VICTIMS OF CRIME, https://ovc.ojp.gov/sites/g/files/xyckuh226/files/model-standards/6/glossary.html [https://perma.cc/AM49-FBNE] (defining meaning of "indirect or secondary victim"). This usage also avoids confusion that results from discussion of "secondary victimization" of a primary victim—i.e., the harm a primary victim suffers in the criminal justice process. *Cf.* Cassell & Erez, *supra* note 2 (using the term "ancillary harm").

victims (e.g., victim advocates and family members speaking for the victims) submitted statements conveying the harms they suffered.[63]

Remarkably, three days into the sentencing hearing, Nassar sent a letter to the judge complaining about *his* difficulty in being forced to listen to so many VISs.[64] In response, Judge Aquilina reminded him of his plea agreement, which included his agreement to what the Crime Victim's Act allowed—namely, victims presenting statements.[65] She added, "You may find it harsh that you are here listening [to the victims], but nothing is as harsh as what your victims endured for thousands of hours at your hands, collectively."[66]

About a quarter (24%) of the women who presented their VISs stated they reported suspected sexual abuse to USA Gymnastics (USAG) or MSU.[67] But their complaints were not taken seriously, and no follow-up was attempted. In a few cases, the victims complained to their parents, but they were also not believed. The VISs thus included descriptions of harm inflicted not only by Nassar but also by his enablers and those who questioned the victims' reports of abuse.

IV. THE METHODOLOGY FOR ANALYZING THE VICTIM IMPACT STATEMENTS

Having set the stage for analysis of the VISs, we turn now to describing this study's methodology. To better understand the 168 VISs, we performed content analysis of the statements, and included both quantitative and qualitative

63. Available studies that used the publicly available VISs report slightly varying numbers of VISs, ranging between 148 and 172. *See* Wellman, Meitl, Kinkade & Huffman, *supra* note 46, at 317 (analyzing 172 statements); Kaylor, Weaver & Kelton, *supra* note 44, at 167 (analyzing 156 statements); Mountjoy, *supra* note 48, at 57 (analyzing 156 statements); Stenberg, *supra* note 49, at 45 (analyzing 156 statements); Gibson, *supra* note 49, at 518 (analyzing 156 statements); Abrams & Potts, *supra* note 41, at 73 (analyzing 148 statements). Our study has identified and processed 168 VISs found in the court transcripts, letters, and videos of victims living in the USA or overseas. Judge Aquilina noted in her sentencing remarks to Nassar that his excuses were met with "168 buckets of water," referring to all the VISs that were presented in the case. *Read Judge Rosemarie Aquilina's Powerful Statement to Larry Nassar*, CNN, https://www.cnn.com/2018/01/24/us/judge-rosemarie-aquilina-full-statement/index.html [https://perma.cc/SEJ3-J96C] (Jan. 24, 2018, 8:37 PM).

64. Click on Detroit, *7 Powerful Moments from the Hearing That Sent Larry Nassar to Prison for Life*, YOUTUBE (Feb. 7, 2018), https://www.youtube.com/watch?v=oNK-wpyr_F0 [https://perma.cc/MT3R-5CZH]; *see also* Josh Hafner, *The Judge in the Larry Nassar Trial: Incredible Quotes to Victims and Their Abuser*, WFAA (Jan. 24, 2018), https://www.wfaa.com/article/news/nation-world/the-judge-in-the-larry-nassar-trial-incredible-quotes-to-victims-and-their-abuser/507-511208853 [https://perma.cc/E7AY-E6HX].

65. Click on Detroit, *supra* note 64.

66. *Id.*

67. *See generally* sources cited *supra* note 63.

analyses. Content analysis is a research tool used to identify and compress specific words, themes, or concepts within text (in our case, the VISs) into fewer content categories.[68] It allows identifying meanings and relationships of themes, concepts, or descriptive words for the purpose of drawing inferences about the phenomenon under study. Content analysis is a standard approach to reviewing databases containing communications that can be read as texts in the context of their social uses.[69] Content analysis is increasingly being used to analyze texts from legal proceedings[70] and has previously been used to analyze VISs.[71]

Here, we followed standard content analysis methodology. First, the research team read all the transcripts[72] of the VISs. Second, the team thematically coded the content of the 168 transcripts. Thematic coding is an initial step for qualitative analysis, in which a text's content is identified and recorded in an index of categories linked by a common theme.[73] Once no significant new themes are found in the analyzed texts, the coding has reached the point of saturation, and the resulting data codebook is complete. Third, the coded data were processed into an SPSS file, resulting in the quantitative data presented here.

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68. *See generally* KLAUS KRIPPENDORFF, CONTENT ANALYSIS: AN INTRODUCTION TO ITS METHODOLOGY (4th ed. 2018); Jan-Willem Strijbos, Rob L. Martens, Frans J. Prins & Wim M.G. Jochems, *Content Analysis: What Are They Talking About?*, 41 COMPUTS. & EDUC. 29 (2006).

69. *See* KRIPPENDORFF, *supra* note 68; Strijbos, Martens, Prins & Jochems, *supra* note 68.

70. *See generally* Shirin Bakhshay & Craig Haney, *The Media's Impact on the Right to a Fair Trial: A Content Analysis of Pretrial Publicity in Capital Cases*, 24 PSYCH. PUB. POL. & L. 326 (2018); Chad M. Oldfather, Joseph P. Bockhorst & Brian P. Dimmer, *Triangulating Judicial Responsiveness: Automated Content Analysis, Judicial Opinions, and the Methodology of Legal Scholarship*, 64 FLA. L. REV. 1189 (2012); Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CALIF. L. REV. 63 (2008); Maryam Salehijam, *The Value of Systematic Content Analysis in Legal Research*, 23 TILBURG L. REV. 34 (2018). For use of content analysis in the medical field, see *Content Analysis*, MAILMAN SCH. OF PUB. HEALTH, COLUM. UNIV. IRVING MED. CTR., https://www.publichealth.columbia.edu/research/population-health-methods/content-analysis [https://perma.cc/2VKG-5YUZ].

71. *See, e.g.*, Myers, Nuñez, Wilkowski, Kehn & Dunn, *supra* note 34 (analyzing 192 trial transcripts from death penalty and life sentence cases); Englebrecht & Chavez, *supra* note 8 (analyzing 60 VISs from trial transcripts); Emily M. Homer, Caroline I. Jalain & Kaitlyn B. Hoover, *Hearing from the Forgotten Victims: A Content Analysis of the Consequences of Bernard L. Madoff's Ponzi Scheme*, 18 VICTIMS & OFFENDERS 1335 (2023) (analyzing 130 victim impact statements from the Madoff fraud case); Gal & Lowenstein Lazar, *supra* note 7 (analyzing VISs in Israeli criminal cases).

72. We relied on transcripts from the court for our analyses. We only transcribed VISs of victims who were overseas or who chose to send their VISs via videos or other means.

73. *See generally* GRAHAM R. GIBBS, ANALYZING QUALITATIVE DATA (2d ed. 2018).

Our quantitative data indicated that the VIS presenters comprised both direct (N=106) and indirect (N=26) victims, as well as victims' representatives (N=36). The VISs were primarily presented in person, with a few via videos or letters shown or read at the sentencing hearings.

Qualitative examples of various themes were also recorded and analyzed. The results address questions such as the role of the presenter, whether the presenter self-identified, whom the victim addressed (the defendant, judge, enablers, or the general public), the kinds of harms described, views regarding punishment, and issues of forgiveness. These rich and textured qualitative data shed light on the victims' experiences, states of mind, and the reasons for their decisions.

V. QUANTITATIVE AND QUALITATIVE ANALYSIS OF THE VICTIM IMPACT STATEMENTS

We turn now to the results of content analysis, examining several areas of interest about VISs. But before diving into the details, an overarching point about the "heterogeneity of victim impact statements"[74] will be useful.

One might assume that, as the victims spoke, they would all say much the same thing. After all, the victims had all been subject (roughly speaking) to the same crime, in the same context, committed by the same perpetrator. Closely analyzing the statements, however, reveals that the harms that the victims suffered varied considerably. Previous research has shown that the harms crime victims endure—whether short- or long-term and physical, psychological, or social—depend on such varying factors as the victim's attributes, familial situation, social circumstances, resilience, social support, material resources, and even luck.[75] Our findings are consistent with that research on the variability of impacts from crime.

As the analysis presented below demonstrates, the personal, social, and situational considerations in each victim's life affected whether a victim chose to submit a statement and to disclose her identity. Those considerations also influenced the kinds of harm a victim described, her expectations about the court, her decision about forgiveness, and the therapeutic benefits from this court experience.

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74. We borrow this useful phrase from Myers, Nuñez, Wilkowski, Kehn & Dunn, *supra* note 34, at 476.

75. *See generally* VICTIMS OF CRIME (Robert C. Davis, Arthur J. Lurigio & Susan Herman eds., 4th ed. 2012) (describing varying ways crimes harm victims).

A. Reasons for Submitting a Victim Impact Statement and Disclosing Identity

One of the primary purposes for allowing VISs is to allow victims to speak and be heard about the harm they suffered from a defendant.[76] Judge Rosemarie Aquilina consistently confirmed these VIS purposes— to speak and be heard— in her comments to the victims, both before and after they delivered their VISs.[77]

We found that the majority (80%) of the women who presented a VIS decided to participate in Nassar's sentencing when they first learned about this opportunity. Others (20% of the presenters) initially did not plan to participate but changed their minds as the hearings unfolded.

Victims disclosed the reasons that prompted them to come forward and deliver a VIS (or the reasons that initially prevented them from doing so). Some victims spoke because they thought it would be healing for them. For these victims, speaking was important because it would help them regain agency by preventing the abuser from controlling them. For others, the decision whether to speak depended on how doing so would affect them or their personal or professional lives. Still others mentioned that they needed to deliver a VIS to speak on behalf of other women whom Nassar abused but who, for various reasons, chose not to speak.

Kyle Stephens was the first victim to speak at the sentencing. She said that "[t]his process has been horrific, but surprisingly therapeutic. I am addressing you [the judge] publicly today as a final step and statement to myself that I have nothing to be ashamed of."[78] The next victim who spoke (a seventeen-year-old who was assaulted at the age of nine) thanked the judge for the opportunity "to tell you how Larry Nassar has hurt me and the effect that this has had on my life."[79]

One woman described the complexity surrounding her decision to submit a VIS:

> When given the opportunity to speak in front of this courtroom, I was at first hesitant. I wondered how this might affect my future, my career, the loved ones in my life. I took a step back and realized that, once again, I was letting the fear, the shame,

76. *See supra* notes 18–21 and accompanying text.

77. Sentencing Transcript (1-19-18), *supra* note 9, at 17 ("That was a very strong, brave voice, and I hope that now that you've spoken publicly you'll leave your pain here with him and you live a long, happy life."). *See generally* Kaylor, Weaver & Kelton, *supra* note 44, at 169–74.

78. Sentencing Transcript (1-16-18), *supra* note 9, at 4.

79. *Id.* at 17.

> and the guilt own me. I decided it was time to stand up to Larry Nassar and to those that enabled him to continue down this ravaging path of sexual abuse. Today I am here for me and to be an advocate for the women and young girls whose voices have been silenced for so many years.[80]

The dilemmas associated with the decision to present a VIS were expressed by a victim's mother, who initially did not plan to give a VIS. The mother's last-minute decision to present one was facilitated by the judge's sensitive handling of the sentencing hearing, coupled with an opportunity to directly address the perpetrator:

> Thank you for doing this for all the girls. I'm sorry, I had not prepared to speak. I wasn't planning on doing it today. I came today to see where I'm supposed to bring my daughter tomorrow. I get very nervous, clearly, and I wanted to know I could get her here, but coming in here and seeing Larry sitting here, I wanted a chance to address him personally.[81]

The victims who changed their minds about presenting a VIS most often listed their reasons as being inspired by other victims, wishing to support other victims, or overcoming the shame of being a victim. Some women observed, either in court or on live stream, how the presiding judge interacted with the victims and decided to come forward based on the empowering atmosphere created by the judge and their "sister survivors."[82]

Over two-thirds (69%) of the presenters used their real name when delivering (or requesting to deliver) their VIS, while almost a quarter (23%) used a pseudonym. The remainder (8%) either used initials, an alphabetical letter, a number, or other pseudonymous forms of identification. Yet, when it came time to deliver the VIS, one-fifth (20%) of those who initially wished to remain anonymous decided to use their real name—feeling empowered by the positive atmosphere.[83]

Some victims, however, decided to remain anonymous for reasons such as preserving a favorable image**,** a desire not to be known as a Nassar victim, or other possible detrimental effects on their lives. As one woman explained:

> Your Honor, today I stand before you simply as victim D in the Ingham County case. I am a minor and presently have not come

80. *Id.* at 146.

81. Sentencing Transcript (1-22-18), *supra* note 9, at 164–65.

82. *See* Kaylor, Weaver & Kelton, *supra* note 44, at 170; Stenberg, *supra* note 49.

83. *See* Kaylor, Weaver & Kelton, *supra* note 44, at 171–73 (discussing the empowering atmosphere created by Judge Aquilina).

> forward with my identity. I am a sheltered Christian, home-schooled girl who is still in competitive gymnastics. . . . I do not want anyone to look at m[e] differently, especially when I walk out on the gymnastics floor. I want to be known for who I am and my gymnastics, not for being a victim of Larry Nassar.[84]

For others, the fear of being stigmatized and having the victimization interfere with their reputation or professional standing made them reluctant to reveal their identities:

> I was afraid if too many people discovered my secret, my job would be in jeopardy. I am a teacher of small, innocent, wonderful little people. Sadly, and furiously, there is a stigma attached to victims of sexual abuse. What would my students' parents think of me if they found out about this? Would my co-workers shame me or pity me?[85]

These examples suggest that the decision whether to submit and how to submit a VIS depends on various considerations and dilemmas that victims confront, many of which are not necessarily related to the defendant or a desire to achieve a particular sentence.

B. The Length, Structure, and Manner of Presenting the Victim Impact Statements

The primary and indirect victims (and their representatives) presented their VISs orally, commonly by reading a prepared written statement. Most presented in person, while a few presented via video. The VISs varied in length, ranging between 137 and 6,365 words, with a mean of 1,227 and a median of 969 words. As a result, the VISs did not take long to present. For example, if we assume that the victims spoke at a standard speed of about 130 words per minute, then the median time for presenting a VIS was around eight minutes.

Three-quarters (75%) of the presenters were accompanied by a support person, either a parent, sibling, intimate partner, or friend. In 14% of the cases, the direct victims were unable or unwilling to present the VIS in open court because it was too painful or difficult, leading to someone else presenting the VIS in their name. In a few cases, the victim stood by the presenting representative's side.

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84. Sentencing Transcript (1-16-18), *supra* note 9, at 25–27.

85. Sentencing Transcript (1-18-18), *supra* note 9, at 47.

Almost two-thirds (64%) of the primary victims and a third (32%) of the indirect victims began their presentations by showing their (or the direct victim's) image at the time they were victimized. Many employed more than one visual aid to allow the court and the audience to appreciate the young age at which they suffered sexual abuse. The victims (or their representatives) then went on to compare their lives before and after the abuse. They described how they met Nassar, their interactions with him, his sexual abuse, its impact on them, and (in some cases) their views about what punishment Nassar deserved. Several primary and indirect victims also expressed their frustration with and anger toward the institutions that enabled Nassar's sexual abuse. The victims sometimes specifically requested to address the defendant, the judge, or both.[86]

C. The Crimes and Their Harmful Effects

The overwhelming majority of the direct victims (89%) described different types of harm from Nassar's crimes, both short- and long-term, to them and (often) their families. In this Section, we look first at harm to direct victims and then harm to indirect victims.

i. Harm to Direct Victims

The VISs commonly described young, happy, and engaged girls who were trying their best to make it in the world of elite sports or gymnastics before they met Nassar.[87] And regardless of whether they described themselves as confident in their athletic ability or their insecurity about reaching the top, their VISs explained how meeting Nassar harmed them.

One victim described the first time Nassar sexually assaulted her: "It is not something easily forgotten, the intense sense of terror, anxiety, and disbelief came washing over me. I lay there in pain unable to speak, staring blankly at the wall, desperately searching for a way to escape."[88] Another victim explained, "Treatment after treatment with Nassar, I closed my eyes tight, I held my breath, and I wanted to puke. My stomach pierced me with pain. To this day, that pain and these feelings are still there."[89] Another victim explained:

86. We explore the audience to whom the victims were speaking at greater length below. *See infra* notes 129–61 and accompanying text.

87. *See, e.g.*, Sentencing Transcript (1-17-18), *supra* note 9, at 70 (describing a mother who once had a "happy, determined little girl" who became "depressed and disinterested"); Sentencing Transcript (1-16-18), *supra* note 9, at 19 (describing the first abuse by Nassar that ended "my dream of becoming a sports medicine doctor . . . along with my happy and trusting self").

88. Sentencing Transcript (1-16-18), *supra* note 9, at 147.

89. *Id.* at 186.

> This was such a dark period in my life that still today [it] is difficult for me to revisit. As I stand here, I still flashback to the feelings of fear laying frozen in his office, my sweating, shaking body, adrenalin pumping, painfully clutching the sides of the table waiting for this sick treatment to be over.[90]

Nassar's actions led to tears, stress, anxiety, panic attacks, sleepless nights, guilt, and, for some, self-harm.[91] Victims described the harm they sustained at Nassar's hands in various ways, such as damage that "diminished my self-esteem, increased feelings of shame, humiliation, embarrassment, powerlessness, guilt," including "guilt that I didn't prevent all the other girls who followed me from being abused by you" and anger that is still felt today.[92]

Others talked about "moment[s] of terror and confusion" during Nassar's "treatment."[93] One victim described that she "completely froze and disassociated from myself."[94] This led to "isolation and depression," and she developed "an eating disorder based on the belief that something was wrong with me . . . . I was so deathly thin at 16 that people stared and whispered behind their hands."[95] The abuse led to "years of sleepless nights, staring at a dark ceiling."[96] The pain of depression and the physical toll of the eating disorder "ruined my once promising gymnastics career, which had been everything to me."[97]

Most victims described their lives before and after the abuse, showing how Nassar's "medical procedures" (i.e., his sexual abuse) drastically changed their lives and caused long-term harm. Before the abuse, most victims were cheerful young girls with dreams and future aspirations, whether it be in sports, college studies, or professional careers. Following Nassar's abuse, they often became confused, upset, and depressed. They lost trust in people, often developing

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90. *Id.* at 187.

91. *See, e.g.*, *id.* at 47 (describing being "filled with error and panic as soon as the words Olympic gymnastics doctor filled the room"); *id.* at 148 (recounting that when "see[ing] someone that looks or sounds like him, my heart races, just like it does before I have one of my beloved panic attacks"); *id.* at 155 ("I want to be independent again, find a job, and not be afraid to go to that job by myself because of panic attacks."); *id.* at 27 (explaining that abuse "caused sleepless nights"); *id.* at 46 ("I got a moment to myself after the assault when I sat in the bathroom at the facility. I sat there in great disbelief, complete shock, and total humiliation.").

92. Sentencing Transcript (1-17-18), *supra* note 9, at 94.

93. Sentencing Transcript (1-18-18), *supra* note 9, at 146.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

anxieties or mental disorders that, in some cases, required specific mental health care.

At the hearings—several years after Nassar's attacks—one woman explained that:

> [T]o this day I still do not feel safe. The world feels unsafe. Men feel unsafe. I can't sleep without a night light. I'm paranoid when I walk anywhere alone, looking around every corner constantly believing I'm about to be attacked. If someone enters a room without announcing themselves I jump and border on the edge of a nervous breakdown.[98]

Another victim similarly recounted:

> It was almost four years ago now and I still have nightmares about that day . . . . What he did shows up in my daily life and affects me while I sleep . . . . Sometimes I call loved ones, but most of the time I'm too embarrassed to call so I spend another morning crying under the covers for hours before dragging myself out of bed and going to work where I spend the day nervous and restless and uneasy around everyone.[99]

One victim summarized Nassar's abuse as "too many girls losing something that should have never have been stolen: innocence, privacy, safety, and trust."[100] Another victim described the impact of the sexual abuse and related injustice as extending beyond the crime itself: "Sexual abuse is so much more than disturbing physical acts. It changes the trajectory of a victim's life, and that is something that no one has the right to do."[101]

Many victims described Nassar's grooming tactics that preceded the sexual abuse. They included feigning friendship, cultivating trust, and offering gifts. For instance:

> Larry was a craftsman of manipulation using his power and status to control and take advantage of children who he groomed to essentially worship his needs. He hugged me when I walked into the room, made jokes with me, asked me questions about my personal life, about my boyfriends. He established a relationship of trust with me. This went on for over six years of regular appointments . . . .[102]

98. Sentencing Transcript (1-16-18), *supra* note 9, at 189.

99. Sentencing Transcript (1-17-18), *supra* note 9, at 28–29.

100. Sentencing Transcript (1-16-18), *supra* note 9, at 46.

101. *Id.* at 9.

102. Sentencing Transcript (1-18-18), *supra* note 9, at 94–95.

Another victim reminded Nassar about how he used social media for grooming:

> I get on social media, the same social media that you followed me on and liked the pictures of me and my friends in swimsuits, leotards and any other posts. You were my friend, my doctor, someone I thought cared about me. You gave me nice presents that I still have.[103]

Victims detailed Nassar showing personal interest in them, using caring language, taking an interest in their lives and daily activities, and sending messages with compliments on social media. Nassar feigned closeness by asking victims to refer to him as "Larry," not "Dr. Nassar," pretending he was a trusted friend.[104] One victim who did not want to identify herself (Victim 55) described Nassar's "grooming" methods:

> Up until just a few years ago, you were a confidant. You were my close friend who always had my best interests in mind, whether it is about my injuries, my eating habits, my gymnastics practices, school choices, college decisions, career path, and all the way up to my family plans. I know now that this is one of the surefire signs of a friendly sexual predator. I know now that the word grooming is a bad word, a word that I should never have had to research as an adult woman.[105]

Victim 55 continued to describe her ordeal, while it happened and in retrospect:

> When I was young I did not recognize that the grooming you were up to for more than a decade . . . was to manipulate me to allow yourself further access to my body, to take advantage of me for your own selfish pleasure. Even though I tried to stop you many times, you continually established trust with me so you could continue to hurt me. I had no idea that you took my love for gymnastics and my desire to stay out of pain and you used it against me.[106]

Describing Nassar's manipulative techniques that tricked her into friendship with a doctor she trusted was also a disturbing wakeup call about the betrayal she experienced and the long-term impact she still battles:

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103. *Id.* at 87.

104. Sentencing Transcript (1-16-18), *supra* note 9, at 45.

105. *Id.* at 105.

106. *Id.*

> I completely trusted him 150 percent. I never questioned why he always asked the nurses or residents to leave the room even though he was known as a teaching doctor and it would have made much more sense for them to stay in the room to learn his techniques. But those techniques were a facade to feed his addiction, and because of that, I have dealt with questioning every person that I have ever met. I questioned that they had true intentions, and I never learned to really trust the actually trustworthy people in my life.[107]

The young recipients of the grooming at first welcomed Nassar's attention, identifying it as grooming only later. This is consistent with grooming patterns documented in research literature.[108]

Interestingly, some of Nassar's fellow physicians at MSU felt they were also victimized and even groomed by Nassar. Dr. Steven J. Karageanes, a colleague of Nassar's who worked closely with him for decades, requested to submit a VIS. The defense objected, but once the judge overruled the objection, Dr. Karageanes described his long history with Nassar, their academic and professional collaborations, and Nassar's manipulative techniques to enhance his own professional stature. He offered a retrospective interpretation of their relationship:

> Although I was not a patient of Nassar, I was his colleague. I was his friend, but the recent events have illustrated that these relationships were illusionary. I was a pawn. A means to his end. A victim of his devious, underhanded, and sickening [machinations] designed to fuel his sexual perfusions, to derive personal gain at whatever the cost. Although I am speaking for myself, many other physicians who knew Nassar share similar sentiments. As I watched Nassar admit to his crimes, I realized this changed the context of all of our encounters over the years. For as he was grooming his victims, he also groomed his environment. . . . He made us believe that he was ethical, compassionate, and caring for his patients without having to observe him being so. Nassar's admission made me realize that he groomed me for 28 years to help him commit sexual assault.[109]

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107. *Id.* at 106.

108. *See generally* Georgia M. Winters & Elizabeth L. Jeglic, *Stages of Sexual Grooming: Recognizing Potentially Predatory Behaviors of Child Molesters*, 38 DEVIANT BEHAV. 724 (2017).

109. Sentencing Transcript (1-17-18), *supra* note 9, at 159–60.

For more than two decades, Nassar's crimes went undetected because of his reputation as a gifted doctor and his sophisticated ability to cover up or explain away his abuse. For example, one victim who suspected that she was abused during her visit to Nassar shared her experience with her parents. They took their daughter to the police to file a complaint. The police then met with Nassar, who blithely explained that the girl was not a gymnast and, therefore, did not understand his treatment's purpose. In her VIS, this victim noted that Nassar's stature as a skilled sports doctor led others to believe him:

> [The] defendant became a good liar, and what happened, what I'm gathering from all these victims, is that because Meridian Township [Police], because universities, because parents, all unsuspecting, seemingly, defended him, he felt untouchable, so he continued to touch children for his own pleasure.[110]

One victim, who began her training (and her "treatment" by Nassar) at age six, discussed the long-term impact of the abuse, the questions that haunt her to this day, and the difficulty in explaining how the abuse could have lasted so long:

> Could I have prevented my heroes from his filthy hands? This is the guilt I bear each day. This is the shame I feel each moment of each day. Lying in my puddle of tears I often ask myself if I will ever feel happiness again. How could I? I am disgusting. To myself, to my husband, to anyone who looks at me they may ask, how could you not have known? Why didn't you tell your parents? Coach? Anybody? Any adult? If you were asking these questions, you truly do not comprehend the abusive power by this master manipulator.[111]

The harms the victims described included the physical pain that Nassar's "treatment" caused them. For example, one victim reported "seeking medical advice, treatment, and pain relief, but instead I was molested, shamed, and removed of my dignity. And I never got any relief for the pain in my back, hips, or ankles, the entire reason I came . . . in the first place."[112]

The victims also related the psychological discomfort, confusion, embarrassment, shame, and lasting trauma that his presumed medical treatment caused them. For example, one victim reported that, "When I was lying on that table and he began molesting me with an ungloved hand, despite feeling

110. Sentencing Transcript (1-16-18), *supra* note 9, at 205 (discussing the written VIS of Brianna Randall read into record).

111. Sentencing Transcript (1-17-18), *supra* note 9, at 169–70.

112. *Id.* at 89–90.

extreme discomfort, embarrassment, and confusion, I thought I had no right to speak up. . . . I walked away from that one appointment with a deeply ingrained sense of distrust, helplessness, shame, and worthlessness."[113] Another victim reported, years later, still "wak[ing] up in the middle of the night with panic attacks due to severe nightmares, and now that I'm in college, I wake my roommate up too."[114] And yet another victim testified to:

> Mental injuries as a result of coming to terms with the idea of being a victim of sexual assault as well as reliving the nightmares responsible for these feelings are rather exhaust[ing]. I alternate between feelings of overwhelming depression and hopelessness to painful anxiety attacks that debilitate me in my daily life.[115]

An important component of the harm the victims suffered was a strong sense of betrayal by Nassar and also by those who enabled his abuse.[116] For instance, Alexis Moore expressed how Nassar's abuse of his position of trust harmed her:

> For years Mr. Nassar convinced me that he was the only person who could help me recover from multiple serious injuries. To me, he was like a knight in shining armor. But, alas, that shine blinded me from the abuse. He betrayed my trust, took advantage of my youth, and sexually abused me hundreds of times.[117]

Another victim, who competed for the U.S. throughout the world, also talked about abuse of trust:

> When I first met Larry Nassar, he was the doctor for our national team and our Olympic team. I was told to trust him, that he would treat my injuries, and make it possible for me to achieve my Olympic dreams. Doctor Nassar told me that I was receiving, quote, medically necessary treatment that he had been performing on patients for over 30 years, end quote. As it turns out, much to my demise, Doctor Nassar was not a doctor. He, in fact, was and forever shall be a child molester. . . . He abused my trust. He abused my body, and he left scars on my

113. *Id.* at 142.

114. *Id.* at 76.

115. *Id.* at 177.

116. *See* Stenberg, *supra* note 49, at 46.

117. Sentencing Transcript (1-16-18), *supra* note 9, at 52.

> psyche that may never go away.[118]

The victims felt betrayed not only by Nassar but also by institutions who were supposed to protect them. This produced a much deeper sense of betrayal, as one victim explained:

> I went from once trusting full-heartedly to now not being able to trust at all. The hardest battle I will continue to face is even in the situations you feel most safe, you can never let your guard down. If you can't trust a world-renowned doctor, who in this world can you trust? These feelings don't just stop from the abuse of Larry Nassar. As if the struggle of what Larry Nassar did isn't bad enough, it's horrifying that MSU and USA Gymnastics are not stepping up to the plate to admit their wrongdoing. I have gone from a raving fan of MSU to now seeing green and white in the very same way as I do Larry Nassar.[119]

Like other victims of other criminals who used their VISs to address institutional enablers,[120] this victim went on to recount how Nassar's enablers avoided accountability, reprimanding them for their failures:

> I want MSU and USAG to know what they have done is on the very same level of accountability as the crime Nassar has committed. I strongly believe that MSU and USAG's inaction places an accountability on them for Nassar's access to minors which led to sexual abuse. MSU knew what was being done to these athletes and decided to turn a blind eye to keep their reputation strong and their pockets full. If they would have only taken action upon the reporting, they would have saved me and all of these other women standing before us today from an afterlife full of pain and agony. As to what we now know of USAG, paying out to keep quiet is beyond my wildest dreams of wrong. Shame on you for looking the other way when this was brought to your attention.[121]

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118. Sentencing Transcript (1-18-18), *supra* note 9, at 13.

119. Sentencing Transcript (1-16-18), *supra* note 9, at 61. Similar institutional betrayals have been reported in other articles. *See, e.g.*, Carly Parnitzke Smith & Jennifer J. Freyd, *Institutional Betrayal*, 69 AM. PSYCH. 575 (2014) (discussing broader applications of institutional betrayal); Carly P. Smith, Jennifer M. Gómez & Jennifer J. Freyd, *The Psychology of Judicial Betrayal*, 19 ROGER WILLIAMS U. L. REV. 451 (2014) (same).

120. *See, e.g.*, Cassell & Erez, *supra* note 2, at 165–66 (discussing victims of Bernard Madoff's Ponzi scheme).

121. Sentencing Transcript (1-16-18), *supra* note 9, at 61–62.

In addition to the harms from the sexual abuse, direct victims also described their "secondary victimization"—that is, the harm inflicted by the criminal justice system and other systems in place to respond to victimization.[122] In this case, the justice system's response to the primary victimization included law enforcement investigation and preparation for criminal prosecution—steps that can harm victims. As one woman explained:

> What many people referred to as the best years of their life might have been the worst years of my life. I can hardly explain what this past year-and-a-half was like. It was meetings and court appearances with attorneys, prosecutors, investigators, counselors. It felt like endless meetings going back over a story that was so personal to talk about. What 15-year-old girl wants to discuss their private parts with grown men or anyone for that matter? It was embarrassing. It was emotional, and I dreaded every meeting and court appearance I ever had to endure because it meant I was going to speak about the assault out loud for everyone in the room. Every time it forced me to relive the horrible experience again. That was overwhelming.[123]

ii. Harm to Indirect Victims

Many crimes leave in their wake not only primary victims but also indirect victims.[124] Indirect victims are those connected to the primary victims by family ties (e.g., parents, siblings, intimate partners) or by social connections (e.g., close friends), who are victimized by virtue of their connection to the direct victims.

One victim, Nicole Reeb, extensively traced out the ramifications that Nassar's sexual abuse of her had on many others:

> Since this is a victim impact statement, I need to point out that even though I was the one that was physically abused, there are important people in my life who are also victims. My friends are victims. They have cried with me, listened to me, and helped me bear this burden even though I am no longer ashamed. I still wonder if sexual abuse defines who I am to them.

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122. *See* BELOOF, CASSELL, GARVIN & TWIST, *supra* note 2, at 25 (discussing "secondary victimization" in criminal proceedings); *see also* Gal & Lowenstein Lazar, *supra* note 7, at 177–81, 190–92 (discussing "secondary victimization" in the context of Israeli VISs).

123. Sentencing Transcript (1-16-18), *supra* note 9, at 26–27.

124. *See, e.g.*, Rory Remer & Robert A. Ferguson, *Becoming a Secondary Survivor of Sexual Assault*, 73 J. COUNSELING & DEV. 407, 407 (1995).

. . . .

My parents, Chris and Marla, are victims. I cannot begin to comprehend how I would feel if one of my own children told me they were sexually abused. I wonder if it would be worse than having been abused myself?

Then since September 2016 my parents have both struggled with their physical health. [Recounting serious health problems developed after discovery of the abuse.]

My parents are both in their mid-60s, far too young to have such serious health complications. Of course, they adamantly refuse to admit that any of this has anything to do with the trauma of finding out that their daughter was molested. However, I think most of us would not hesitate to deny the connection between the mind and the body.

My brothers, Chad and Adam, are victims. My older brothers have always been fiercely protective of me. They are angry that they could not protect me from Larry Nassar's abuse and they carry that anger with them daily.

My sister, Brooke, is a victim. She has always been my best friend. I know she feels my anger, my sadness, my exhaustion from having to battle through this ordeal that was unfairly handed to me.

My husband, Scott, is a victim. I am no longer the person he married. I did not used to shy away from his touch. I feel broken and unlovable. It's laborious for him to love me. I think I make it difficult for him to love me for reasons I can't quite comprehend yet.

I don't recognize the person he has become either as he sometimes retreats into his own depression. Hearing that his wife has been sexually abused, seeing her suffer and being helpless to ease her pain has damaged his spirit. Because of my depression and anxiety, there are roles in our family that have been imposed on him. He is burdened with grief, anger, and resentment. He is tired.

My children, Miles, my bright, energetic, sassy seven-year-old, and Emmett, my gentle but fiercely loving four-year-old, they are victims too. Some days I have to remind myself I have two beautiful little humans to take care of, and although I take solace in loving them, sometimes I must force myself to make dinner, give them baths, read and sing with them, help with homework, put them to bed, or simply be with them. Hearing,

> mom, why are you so grouchy, or, mom, you've been really lazy this summer, it's hard, especially because I cannot explain to them why. They don't know what has happened to me, but I know that they can feel my hurt even if they may not realize it.[125]

Indirect victims, particularly parents, felt enormous guilt about not noticing the abuse. For example, some mothers and other indirect victims felt guilty about being in the room where Nassar was surreptitiously abusing their daughter and not realizing what was happening. As one mother described:

> I looked through a magazine while you treated her when I saw out of the corner of my eye that you had her in some positions that made me feel uneasy. I got up out of my chair and asked you what you were doing. You had a very long explanation that made me say to myself again, he's a doctor. He treats Olympians. He's helping your child.
>
> You repositioned yourself and continued treating her but more in a way that I was used to seeing so I sat back down. Little did I know that I was delivering my child to a pedophile that day and that I may have just been in the room with her when you assaulted her for the first time.
>
> And it wasn't your last, was it, Larry? You would go on to treat her from 2007 to 2015. You would go on to abuse her over a hundred times.
>
> When Rachael came out with her accusations against you, I got a sick feeling in the pit of my stomach. It brought me back to that first day we saw you at MSU. I knew Rachael was not lying. I thought, oh, my God, he did something to my daughter, too. I asked my daughter immediately if you ever touched her in the way you did Rachael. She paused and said, no, but the look in her eyes and my gut feeling told me differently. I had to be very careful talking to my daughter about it and I had to wait until she was ready.
>
> . . . .
>
> You took our beautiful, innocent child and hurt her for your own sexual pleasure. You abused your power as her physician. You manipulated her and us into thinking you were helping her. How dare you do this [to] our beautiful child. You are a disgrace to your profession and to humanity.[126]

125. Sentencing Transcript (1-18-18), *supra* note 9, at 49–53.

126. Sentencing Transcript (1-17-18), *supra* note 9, at 34–36.

Often parents were not allowed to visit their children while they were training—and being "treated" by Nassar. Excluded from the training locations, the parents later experienced debilitating self-blame for not preventing the abuse. And the parents' guilt, in turn, caused further pain to the direct victims. One victim explained, "Because the national team training camps did not allow parents to be present, my mom and dad were unable to observe what Nassar was doing, and this has imposed a terrible and undeserved burden of guilt on my loving family."[127]

Some parents whose children shared with them suspicions of abuse had difficulty believing their children's complaints or did not take them seriously. In both situations, the parents experienced enormous regret. Parents who were present in the room or its surrounding area felt enormous guilt about not noticing the abuse and not intervening, as one parent explained:

> We had multiple appointments with Nassar. I would have to leave work early, drive her [to] school, pick her up, and drive an hour to Michigan State. I can't imagine what my daughter must have felt sitting in the back seat of the car—yes, she wasn't even old enough to sit in the front seat—the anguish of knowing that your mother is driving to an appointment to get sexually assaulted, the anguish of being that mother who sat in a chair while her daughter was assaulted.[128]

To sum up, the VISs contained significant information about the harms (to both direct and indirect victims) caused by Nassar's crimes.

D. The Audience for the Victim Impact Statement

The sentencing hearings provided the victims, indirect victims, and victim representatives an opportunity to speak. But to whom were they speaking? This Section considers the intended audience for the VISs. The potential audience for a VIS included the judge, the defendant, his enablers, the general public, and others. Here again, the victims were not uniform in their approaches.

i. Addressing the Defendant

In delivering their VISs, the majority of the victims—three-quarters (76%) of the primary victims and about two-thirds (65%) of the indirect victims[129]—

127. Sentencing Transcript (1-18-18), *supra* note 9, at 14 (Ms. Povilaitis, for the prosecution, speaking on behalf of Ms. McKayla Maroney and her mother, Erin Maroney).

128. Sentencing Transcript (1-17-18), *supra* note 9, at 70.

129. Less than half of the representatives (43%) chose to directly address the defendant, reflecting the higher importance of addressing the defendant for direct and indirect victims.

chose to address Nassar directly. In some cases, the victims asked for and received permission from the judge to address him:

> KYLE STEPHENS [the first victim to speak]: Your Honor, with your permission, I would now like to address the defendant.
>
> THE COURT: You may.
>
> MS. STEPHENS: After my parents confronted you, they brought you back to my house to speak with me. Sitting on my living room couch I listened to you tell me no one should ever do that, and if they do, you should tell someone. Well, Larry, I'm here, not to tell someone, but to tell everyone.[130]

In other cases, after recounting abuse, the victim simply began speaking to Nassar:

> I would like to say something to my abuser, Larry Nassar.
>
> You took advantage of my innocence and trust. You were my doctor and I trusted you and you took complete advantage of that. Why? I used to ask myself that question all the time, especially while I was laying in bed crying myself to sleep. What you did to me was so twisted. You manipulated me and my entire family. How dare you. You had no right to do that, and because of your decision to molest me, you have caused so much pain in my life, and for the rest of my life I'm going to have to heal from what you did.[131]

So far as can be determined from the transcripts, the reasons the victims chose to address Nassar varied. Most wanted to convey to him their feelings about the abuse, frustration over the long time it took to bring him to justice, and relief that he was finally being held accountable for his crimes. The victims appeared to be proud of the individual and collective efforts they made to expose his abuse and obtain his conviction. They wanted to address him directly and bring to light what was previously hidden.

Many of those who asked to speak to Nassar raised the issue of forgiveness, emphasizing that the decision to forgive was made from an empowered position. Addressing Nassar was also an opportunity for victims to strengthen

130. Sentencing Transcript (1-16-18), *supra* note 9, at 9.

131. *Id.* at 21.

their own position while lowering his—a phenomenon that has been observed in other cases.[132]

One victim expressed pride in being the first to complain about Nassar's abuse, her tireless efforts to expose Nassar's crimes, and the power of victims to demand justice:

> You used my body for six years for your own sexual gratification. That is unforgivable. I have been coming for you for a long time. I've told counselors your name in hopes that they would report you. I have reported you to Child Protective Services twice. I gave a testament to get your medical license revoked. You were first arrested on my charges, and now as the only non-medical victim to come forward, I testify to let the world know that you are a repulsive liar and that those treatments were pathetically veiled sexual abuse.[133]

Then, in a haunting and poignant phrase that has been widely quoted, this victim said: "Perhaps you have figured it out by now, but little girls don't stay little forever. They grow into strong women that return to destroy your world."[134]

Another victim, confronting Nassar about how he manipulated her during a critical time in her life, highlighted the empowerment and healing victims experience by addressing their abuser. She also reminded the public of the brave victims' contribution to a better gymnastics sport:

> Larry, you made me believe that you were my friend. You deceived me. You manipulated me, and you abused me. I truly believe that you're a spawn of Satan. You used your hotel room as a personal playground to treat us. You used my innocent body as your sexual play toy. The biggest competition of my life that I trained years for, you stole that from me. . . . Those little girls that you took advantage of so easily have now come back to haunt you all of the days of your life. As you sit behind bars, I pray that you are tormented by the very memory of the words spoken to you by all of us brave women standing here today. . . . After this is said and done, you will be forgotten. But no one will forget how us women have gotten the strength

132. *See* Douglas E. Beloof & Paul G. Cassell, *The Crime Victim's Right to Attend the Trial: The Reascendant National Consensus*, 9 LEWIS & CLARK L. REV. 481, 536 (2005) (discussing "loss of control" that follows a crime and how court participation can help victims reassert control).

133. Sentencing Transcript (1-16-18), *supra* note 9, at 10.

134. *Id.*

to stand up and take you down.[135]

Many direct and indirect victims reminded Nassar that he was never "a real doctor."[136] The mother of one victim, after reading her daughter's letter to the court, went on to address Nassar and call him a disgrace:

> You disgraced yourself by calling yourself a doctor to the medical community. A real doctor never sees a child alone in a room and does procedures on them. A real doctor has an adult present when working with a child. A real doctor gets parental consent. A real doctor never, under any circumstances, were to touch a child in their genital or anal area. A real doctor, if he would need to be in private parts, would wear gloves. A real doctor would explain every single thing he is doing to the child with their—with the parent or an adult with them. . . . You actually are not a real doctor. You're not a doctor at all. You're a serial child molester, a pedophile.[137]

To many victims, Nassar's conviction and the sentencing session that followed his plea helped them sort out their experience, come to terms with the abuse, and become stronger as a result:

> When I look back now, I realize that my spirit was broken, lost, and confused, but then all I could think is that I needed to be there for those children in whatever way I could. It was not until I was 21 that I cut all ties with the Nassar family. The complex feelings of shame, disgust, and self-hatred brought me bouts of depression, anxiety, eating disorders, and other compulsive conditions. Sometimes I think it's hard for people to translate these generic terms into reality. For me, it was a girl crying on the floor for hours trying not to rip out too much of her hair. For me, it was a girl wanting the pain to stop so badly that she woke up for months to the thought, I want to die. For me, it was a girl getting out her gun and laying it on the bed just to remind herself that she has control over her own life. For me, it was a girl that spent so much time trying to fix herself that she forgot what she actually enjoys doing.[138]

Others, despite Nassar's heinous crimes against them, were unwilling to judge him and left it to higher powers. They commented, however, that in

135. Sentencing Transcript (1-17-18), *supra* note 9, at 20–21.

136. *See, e.g.*, Sentencing Transcript (1-19-18), *supra* note 9, at 218.

137. Sentencing Transcript (1-17-18), *supra* note 9, at 10.

138. Sentencing Transcript (1-16-18), *supra* note 9, at 8–9.

confronting Nassar, they regained their ability to function without having to conceal a shameful secret:

> Larry, I was one of your first patients you cared for who sustained a back injury. You learned and practiced on my time and my body. You and I both know what transpired over the ten years you were involved in my medical care; this despicable act. I am outraged that you used your profession and your status to systematically take advantage of me and the many, many young girls year after year. I am not here today to judge you. My God and your God will judge you at the end of your days, and he alone will decide your fate in the next world. I am here, however, to tell you that you no longer will hold any power over me. I am no longer imprisoned by this secret, and I am now free to take the next steps in my healing process.[139]

ii. Addressing the Defendant and the Role of Forgiveness

Some victims used the hearings as a way to heal themselves by offering forgiveness to Nassar.[140] Forgiveness in this context conveys a change in attitude where the person harmed no longer feels resentment and hatred towards the person who caused the harm.[141] An important reason for victims addressing Nassar was their desire to convey their decision whether to forgive him. About a quarter of the victims **(**24%) chose to discuss in their VIS their reasons for forgiving—or refusing to forgive. Forgiveness appeared to have significant meaning for victims, particularly for those whose actions were religiously motivated. Overall, the data show that more victims decided against forgiveness than in favor (57% compared to 43% respectively). Some of the forgiving victims, however, admitted they extended forgiveness reluctantly, while some of the unwilling group mentioned that they might do so if Nassar asked for it.

Those who stated they forgave Nassar explained that their motive was mostly to help themselves by closing a chapter in their lives or to help heal themselves by letting go of negative feelings:

> As for forgiveness, Doctor Nassar, I want you to know that I pray for you and I do forgive you. Is there still hurt? Absolutely. . . . What good would it be to hold on to bitterness and anger, especially in light of such great forgiveness that's

139. Sentencing Transcript (1-23-18), *supra* note 9, at 159–60.

140. Abrams & Potts, *supra* note 41, at 78–79.

141. J. Angelo Corlett, *Forgiveness, Apology, and Retributive Punishment*, 43 AM. PHIL. Q. 25, 27 (2006).

been granted to me that I should be called a child of God.[142]

Another victim refused to allow Nassar to "frame" her and her families' lives: "I also stand today extending my forgiveness to you, not because you deserve it, but because our family will . . . not allow this tragic event to frame our lives, so we release this poison by extending forgiveness."[143]

Finally, some victims who addressed Nassar recommended that he ask for God's forgiveness: "I believe my faith in God will help me heal, and I hope that you seek him in your life and ask for his forgiveness, because he is the ultimate judge."[144]

A common reason offered for not forgiving was Nassar's earlier, calculated in-court apology—which victims viewed as simply continuing his manipulative behavior. One insightful minor victim advised Nassar how to truly apologize if he was given another opportunity:

> Your apology/words at the hearing in November [were] not an apology. . . . You need to sincerely apologize, not for the crazy words you spoke before about why you took the guilty plea, for the community to heal, that you never intended for this forest fire to get out of control. . . . It was not an apology to any victim or their family, but the victims need to hear you say I am sorry, please forgive me. I made terrible decisions that were based on my own desires with no regard [for] how I was hurting you that day and forever. I manipulated so many people, all part of my scheme to be able to do what I ultimately wanted to do, and now I am begging, if you ever can, to forgive me for my disgusting actions. Those are the types of sentences you need to say.[145]

A victim's parent (an indirect victim) shared similar sentiments about refusing to forgive, citing Nassar's scheming tactics in claiming he prayed for the community to heal and taught scripture in jail:

> You are a wolf, Larry. Satan lives within you. You are an evil man pretending to be a man of God. Jesus calls us all to forgive people who hurt us. Forgiveness is for us, so you don't affect us for the rest of our lives. It's not for you. I am not at the forgiveness level yet. I could say the words but I won't mean them. I don't know about my husband, but I am not there yet.

142. Sentencing Transcript (1-16-18), *supra* note 9, at 142.

143. *Id.* at 30.

144. Sentencing Transcript (1-17-18), *supra* note 9, at 130.

145. Sentencing Transcript (1-16-18), *supra* note 9, at 29–30.

> I feel if I forgive you, it means I'm okay with what you did, and it's not okay. It will never be okay.[146]

One victim shared that she wished she could just forgive and get closure from Nassar's life sentence. But her memories of the abuse continue to haunt her and "you can battle memories, but you can't erase them."[147] Another victim told Nasser why she was refusing to forgive him because of the malice of his crime:

> [Y]ou deserve an eternity of suffering for the damage you have caused, and there is no bone of forgiveness in this body, for you robbed me of that when you put your filthy hands all over my body with malice, disrespect, and a sheer will to destroy me as a human being deserving of love, dignity, and the right to be happy in life.[148]

Another reason for victims' refusal to forgive was the severity of Nassar's crimes and their impact on the victims and the victims' loved ones. As one victim explained:

> Also, I as a Catholic, like you, believe in forgiveness, but you will be getting none from me at this time. A year of saying the rosary does not erase all the evil you have done in my eyes and I hope in the State's as well. This is between you and God. While you remain on this earth, I hope that you are continually reminded of the pain you caused all of us as we are constantly reminded in our daily interactions of our lives. We did not get to choose this trauma, but you did. My hope is that the women here like myself do continue to grow and heal and become stronger than ever before, but that will be because of our actions and our strength, not yours.[149]

iii. Addressing the Enablers and the Doubters

Nassar's victims also addressed their VISs to the institutions that enabled Nassar's crimes,[150] criticizing their failure to respond to reports of abuse. The first victim who provided her VIS criticized MSU: "[The Michigan State Police

146. Sentencing Transcript (1-17-18), *supra* note 9, at 39.

147. Sentencing Transcript (1-16-18), *supra* note 9, at 137.

148. Sentencing Transcript (1-17-18), *supra* note 9, at 173.

149. Sentencing Transcript (1-16-18), *supra* note 9, at 121–22.

150. VISs in other cases have also involved statements addressed to enablers. *See, e.g.*, Cassell & Erez, *supra* note 2, at 158 (discussing VIS about the role of the Securities and Exchange Commission in facilitating Bernard Madoff's financial crimes); *see also generally* GUIORA, *supra* note 50 (discussing the complicity of those who enable crimes).

Department] handled it beautifully, but MSU officials were a different story, because their response from Dean William Strampel was to send an e-mail to Larry that day [that] told him, quote, 'Good luck, I am on your side.'"[151]

Another victim recounted her betrayal by a fellow doctor of Nassar's:

> When Brooke Lemmen, one of the doctors Larry was allowed to handpick to clear himself in 2014, was interviewed for my investigation she said I hadn't really been penetrated. I only thought I had because, quote, when I am a 15-year-old girl I think everything between my legs is my vagina.[152]

Other victims considered the entire chain of command in the organizations involved to be responsible:

> All of you, Nassar, Michigan State University administration, coaches, trainers, deans, presidents, ADs, board of trustees, USA Gymnastics presidents, USA Gymnastics board members, and USA Gymnastics gyms that perpetuate a culture of abuse, you all, especially you, Larry Nassar—I hate saying your name—deserve a life filled with shame, humiliation, and disgrace, as we survivors strive to take back what you all stole from us. Never again.[153]

Some victims also addressed specific agents within these organizations, particularly trainers who failed to protect them:

> I figured John knew. We were his athletes in his gym. He was supposed to know what the defendant was doing for our treatment. He was supposed to discuss our treatments with him. Instead, he wasn't even there. He was on his way home while we stayed at his gym sometimes until 12 waiting to be molested one by one unknowingly. How irresponsible, selfish, and neglectful.[154]

Victims also expressed their anger, dismay, and frustration at those who questioned their silence regarding the abuse:

> Looking back now as a woman, I am appalled at what my child self went through. . . . I have had people close to me ask me why I never told anyone or act surprised or confused that no one ever spoke up. Do you know what that's like to be asked questions like this? To those people, I want to say how dare

151. Sentencing Transcript (1-24-18), *supra* note 9, at 48.

152. *Id.* at 48–49.

153. Sentencing Transcript (1-17-18), *supra* note 9, at 182.

154. Sentencing Transcript (1-22-18), *supra* note 9, at 14.

> you. How dare you have the audacity to ask anyone such a shaming question. No one ever has the right to ask a victim of sexual abuse why they never said anything. Unless it happened to you, you probably wouldn't understand anyways.[155]

Finally, Rachael Denhollander—the victim who successfully brought Nassar's crimes to light and was the last victim to speak at the sentencing—called for the public to "do better" the next time it confronts child sexual abuse.[156] As quoted at the beginning of this Article, Denhollander said:

> But may the horror expressed in this courtroom over the last seven days be motivation for anyone and everyone no matter the context to take responsibility if they have failed in protecting a child, to understand the incredible failures that led to this week and to do it better the next time.[157]

iv. Addressing the Judge

Over three-quarters of the direct victims (78%) addressed the judge in their VIS, compared to 52% of the indirect victims and 58% of the representatives. Less than a quarter of the issues that victims raised as they addressed the judge concerned the sentence—an unsurprising fact, as Nassar had already been effectively sentenced to life in prison.

Almost half of the victims (44%) expressed appreciation to the judge for the way she handled the hearing and her empowering words. Typical of these remarks is the expression of thanks from one victim:

> I would also like to thank you, Your Honor, for if it wasn't for you, your patience and willingness to let us as survivors come up here to talk, all of these girls would not have been able to use their voice and finally realize that they do indeed have one. You have provided so much comfort and love to us this week, and I personally can say that I am forever grateful for that.[158]

Most of the victims (92%) also acknowledged that the sisterhood[159] they experienced with fellow victims helped them in delivering their VIS. In one

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155. *Id.* at 13.

156. Sentencing Transcript (1-24-18), *supra* note 9, at 62.

157. *Id.*

158. Sentencing Transcript (1-18-18), *supra* note 9, at 20–21.

159. Sentencing Transcript (1-17-18), *supra* note 9, at 124 ("We may have been silenced for years, but it is this silence that will forever bond us in a sisterhood."); *see also* Sentencing Transcript (1-18-18), *supra* note 9, at 91 (remarks of Judge Aquilina) ("I am proud of you for finding your voice, strong, loud, adult in sisterhood with your survivors in taking away his.").

example, a victim and the judge commented on the power of the survivors as a group:

> MS. DANTZSCHER: I'm here today with all these other women, not victims, but survivors, to tell you face-to-face that your days of manipulation are over. We have a voice now. We have the power now.
>
> . . . .
>
> I will continue to heal and I will continue to stay strong knowing I have a bright future ahead of me. All your future holds, all you get to look forward to now is rotting in prison for the rest of your life. And all you will ever feel now, Larry, is forever powerless, and now I can finally say that I'm truly proud of myself for something I've done relating to my elite gymnastics career.
>
> . . . .
>
> THE COURT: Ma'am, I'm proud of you, too, and you should feel proud not just for your words but for your strong voice on behalf of your sister survivors and all other victims, because, as you know, sadly there are other pedophiles and this is hopefully a start in eroding the silence, which we need to do, and you've started that ripple effect along with your fellow survivors.[160]

Several other victims also referred to "an army of survivors," who helped to take down Nassar. For example, one victim explained to Nassar:

> Ultimately, Larry, you made a critical mistake. You underestimated the mind, power, and will of your victims; these amazing, accomplished athletes. While we were mentally strong enough to endure your countless hours of abuse, strong enough to endure the pain of keeping your secret, strong enough to be pushed down and repressed by MSU, USAG, and the USOC, we were ultimately strong enough to take you down. Not one by one but by an army of survivors.[161]

160. Sentencing Transcript (1-18-18), *supra* note 9, at 9–10.

161. Sentencing Transcript (1-24-18), *supra* note 9, at 31; *see also id.* at 17 (referring to "an army of warrior women dedicated to changing the world"); Sentencing Transcript (1-23-18), *supra* note 9, at 99 (referring to "an army of strong women").

E. Victim Impact Statement as an Empowering and Therapeutic Tool

Both primary and indirect victims felt that making a statement—and the judge's response—were empowering and provided them some healing. Compared to past complaints to authorities, which were ignored, this time the experience was different. The victims highly appreciated the opportunity to be heard and felt that they finally had a voice. As one victim said, "I do want to thank you first, Judge Aquilina, for giving all of us the chance to reclaim our voices. Our voices were taken from us for so long, and I am grateful beyond what I can express that you have given us a chance to restore them."[162] And another victim noted the ability to protect others: "I have come to the realization that my voice now can be heard and have influence over the manner in which our USA athletes are treated."[163] And still another victim said (to Nassar), "I have decided to start living again. Your actions have had me by the throat for years, and I am ready to be released [from] your clench. I will no longer fear speaking up for myself."[164]

Identifying and demanding justice from Nassar's enablers was also part of the healing process. As one victim stated to the judge:

> This justice includes answering the questions of who allowed this to happen and why, and that is including Michigan State University, USAG, and Twistars enablers who we will be holding them accountable, and I can assure people that I'm not going anywhere. I know that the court is setting a significant precedence with your ruling, and it is critical in my healing process.[165]

Almost half of the victims (42%) specifically mentioned the therapeutic or healing value of delivering the VIS. For example, one victim thanked the court "for allowing me an opportunity to speak my thoughts and heal my heart."[166] Another victim said, "While I came to the stand as a victim, I leave as a victor because you do not have the authority anymore and because I am one of the many women who are helping to put you behind bars for the countless crimes that you've committed."[167] Another victim began her statement by saying: "Today I close this chapter in my book and hope to reopen it one day to help

162. Sentencing Transcript (1-24-18), *supra* note 9, at 35.

163. Sentencing Transcript (1-17-18), *supra* note 9, at 9.

164. *Id.* at 15.

165. Sentencing Transcript (1-18-18), *supra* note 9, at 80.

166. Sentencing Transcript (1-17-18), *supra* note 9, at 16.

167. *Id.* at 130.

other survivors that have been sexually assaulted and molested, both men and women. I will not allow myself to be affected another minute by you after tomorrow's sentencing."[168]

And yet another (minor) victim also acknowledged healing in the process:

> To start off, I want to thank all of the other brave women that have come forward and told their stories, both publicly and anonymously. I would not have the strength to be here today if it wasn't for your fearlessness. Thank you for helping me process what has happened to us through your bravery and willingness to share your stories. Thank you for helping me and all of us sufferers begin to heal. And thank you, Judge Aquilina, for allowing all of us women the opportunity to speak.[169]

Some victims spoke directly about the "empowering" opportunity to speak. As one victim said: "The opportunity to face my perpetrator is terrifying but undeniably empowering."[170] Other victims referred to having the opportunity to help other sex abuse victims by speaking out. As one victim explained:

> I did not write this statement telling my secret so that people could feel bad for me. I did this so that the world knows, so that every other girl or boy whose sparkle has been stolen feels empowered. So that they know speaking out is not a bad thing. It is not something we should be afraid of. We all deserve to sparkle. I can't change what happened to myself nor anyone else, but if my story encourages just one individual to speak out, I will truly be able to say I made the best of a horrible situation and did all I could do.[171]

Several of the victims were minors at the time of the sentencing hearing. In order for them to speak publicly, the judge required that their guardian or parent state specifically, under oath, that speaking was in the best interest of their child. Typical of this process for the guardians was the following exchange:

> THE COURT: Thank you. Mom, please come forward. Raise your right hand. Do you swear or affirm the testimony you are about to give will be the truth, the whole truth, and nothing but the truth under penalty of perjury?
> MRS. SWINEHART: I do.

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168. Sentencing Transcript (1-18-18), *supra* note 9, at 73.

169. Sentencing Transcript (1-23-18), *supra* note 9, at 119.

170. Sentencing Transcript (1-18-18), *supra* note 9, at 34.

171. Sentencing Transcript (1-23-18), *supra* note 9, at 53–54.

> THE COURT: Thank you. You may put your hand down. Thank you for being here. Please state and spell your name for the record.
> MRS. SWINEHART: Anne Swinehart, A-n-n-e, S-w-i-n-e-h-a-r-t.
> THE COURT: Thank you. And your daughter is 15 years old?
> MRS. SWINEHART: She is.
> THE COURT: And you've discussed talking publicly about what's occurred with her; is that correct?
> MRS. SWINEHART: We have.
> THE COURT: And you're allowing her to be public?
> MRS. SWINEHART: Yes.
> THE COURT: Do you believe it's in her best interest?
> MRS. SWINEHART: I do.
> THE COURT: And she's nodding behind you. I think she also feels that way; is that correct?
> MRS. SWINEHART: Yes.
> THE COURT: Okay. And no one has forced, threatened, or promised you anything or paid you anything for this testimony; is that correct?
> MRS. SWINEHART: That is correct.
> THE COURT: Thank you. I will allow her to testify finding it's in her best interest.[172]

The empowering responses of the judge were a factor in victim satisfaction and healing.[173] One typical acknowledgement from Judge Aquilina expressed her appreciation for a victim's VIS:

> THE COURT: Thank you. That was wonderful. You are a survivor. Your scars are healing. Your voice is no longer silent. I have heard it. The world has heard it, and you are not alone. You not only have other survivors, but you have a world who is in support of all of you.
> This cannot happen. You are ensuring that others will not be violated, not just by this defendant but by other predators. Things are going to change. You've been heard.
> The system clearly failed you, and I'm sorry about that. It's not the first time. I suspect it won't be the last time, but you are

172. *Id.* at 39–40.

173. For a detailed analysis of the judge's responses to the victims, see Kaylor, Weaver & Kelton, *supra* note 44; Stenberg, *supra* note 49.

> part of making that system better.
>
> I applaud you for when the very incident happened for speaking up. It's interesting to me this morning, I heard from three, I know I will hear from many more today and the days coming, but I also heard the same yesterday, this defendant could also have been charged with unlawful imprisonment. It sounds to me like the number of crimes that could have been charged and weren't is almost endless, and they are all vile acts, and you were right in pursuing what you did, and I want you to know that I'm taking all of this into consideration at sentencing. He will never be free. The next judge he faces will be God.[174]

A powerful example of the judge working to help a victim is the following exchange. This victim's report about Nassar's sexual abuse was not believed by the authorities, and as a result she considered suicide:

> THE COURT: I'm really saddened each time I hear that people didn't believe you, whether you reported it to someone or whether it's your own friend or family member. People need to learn that your message has been heard by me. I'm hoping that the public hears it, that children need to be believed and supported by everybody around them. And, ma'am, you know that suicide lets him win. Don't let him win.
>
> MS. DANTZSCHER: No.
>
> THE COURT: Never.
>
> MS. DANTZSCHER: Never.
>
> THE COURT: That's what I want to hear. And that's a great smile. I'm sure it took you a long time to be able to smile again, but I'm very happy to see that. I care about your healing. That's why I address each victim individually.[175]

Judge Aquilina's response to an indirect victim—the mother of one of Nassar's victims—is another example of the empowering effect that speaking in court had:

> THE COURT: Thank you so much. You are a pillar of strength, and facing him now means that you are healing, and your children can have a whole parent back, and that's more important than anything, isn't it?
>
> MS. ANTOLIN: Yeah.[176]

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174. Sentencing Transcript (1-17-18), *supra* note 9, at 30–31.

175. Sentencing Transcript (1-18-18), *supra* note 9, at 10.

176. Sentencing Transcript (1-17-18), *supra* note 9, at 23.

And one last response, to an indirect victim (a parent, Mrs. Nichols, who was the mother of a primary victim, Maggie) underscored that the judge was listening to the victims:

> THE COURT: Ma'am, I want you to know that you have been heard. By being in this court it's not just that your words are forever on this record and in front of me in consideration for sentencing but really the world is watching. You have been heard. I want Maggie to know that you represented her very, very well here. I also want her to know that Maggie represented the USA very well today with her words, and for all other athletes, because we cannot undo what happened. We can't make it better, but we can have a better future for our children, and your voices are so important in that.[177]

To sum up, the multiple VISs contained repeated references to the healing power of delivering a VIS.

VI. OUR FINDINGS AND THE DESIRABILITY OF VICTIM IMPACT STATEMENTS

Having set out our findings about VISs in a real-world criminal case, this Part turns to what these findings tell us about the desirability of VISs. The VISs delivered by Nassar's victims provided compelling information about the multifaceted harm that sexual abuse entails. Because such facts are directly relevant to sentencing, the Nassar case supports the proposition that VISs serve instrumental and informational purposes at sentencing and thus should be allowed.

The Nassar VISs also appear to have served important expressive and communicative purposes that animated the original calls to allow VISs at sentencing.[178] Many of the victims referenced the therapeutic aspects of speaking in court, while others communicated with various audiences, addressing their remarks to Nassar, his enablers, or the broader public. These are legitimate purposes for a VIS. Thus, our findings support the expressive arguments for VISs—and help to answer some of the lingering concerns that critics of VISs have raised.

In considering issues about the desirability of VISs, we benefit from two recent and important critiques. The first is Professor Susan Bandes's significant article, *What Are Victim Impact Statements For?*[179] The second is Professor

177. *Id.* at 12–13.

178. *See* Julian V. Roberts & Edna Erez, *Communication in Sentencing: Exploring the Expressive Function of Victim Impact Statements*, 10 INT'L REV. VICTIMOLOGY 223, 224–25 (2004).

179. Bandes, *supra* note 3.

Michael Vitiello's engaging book, *The Victims' Rights Movement: What It Gets Right, What It Gets Wrong*.[180] Taken together, these two works make the current academic case for restricting—or even preventing—victims from speaking at sentencing. And taken together, those two works fall well short of making a convincing challenge to VISs (at least in non-capital cases), as we explore in the Sections that follow.[181]

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180. VITIELLO, *supra* note 3.

181. We confine our analysis to non-capital cases such as Nassar's because they are typical of American criminal justice. Given the hundreds of thousands of violent crimes and even more property crimes that are prosecuted in America each year, victim impact evidence and statements are likely present in tens of thousands (and perhaps hundreds of thousands) of criminal cases annually. In contrast, the number of death penalty cases is tiny—with only about twenty new death sentences imposed throughout the U.S. in 2022. *See* DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2022: YEAR END REPORT 2 (2022), https://dpic-cdn.org/production/documents/reports/year-end/Year-End-Report-2022.pdf?dm=1711557240 [https://perma.cc/H3BW-4FZS]. In addition, capital cases involve special considerations. *See* Mitchell J. Frank, *From Simple Statements to Heartbreaking Photographs and Videos: An Interdisciplinary Examination of Victim Impact Evidence in Criminal Cases*, 45 STETSON L. REV. 203, 206 (2016) ("VISs in capital cases are fundamentally different [than non-capital cases] because the statements conveying victim information are not directed to the court post-plea or post-conviction."); *see also* DAVIES & BARTELS, *supra* note 19, at 33 (studying VISs in Australia and finding U.S. literature on VISs in capital cases to be of "lesser relevance" than other research). On the other hand, Professor Vitiello often focuses his arguments on atypical capital cases, claiming that "[o]utside the context of the death penalty, relatively few victims present victim impact statements." VITIELLO, *supra* note 3, at 191 (citing Julian V. Roberts, *Listening to the Crime Victim: Evaluating Victim Input at Sentencing and Parole*, 38 CRIME & JUST. 347, 362 (2009)). But Roberts found that victims submitted a VIS or participated in a significant fraction of cases, ranging from 15% to 42%. Roberts, *supra*, at 362. And other surveys have found that victims often seek to make VISs, particularly in serious cases. *See, e.g.*, Erez, Ibarra & Downs, *supra* note 26, at 27 (noting that a survey of American criminal justice professionals found that "most victims are interested in submitting a VIS and that few victims reject an opportunity for input at sentencing"); Gena Castro Rodriguez, *2020 Victim Impact Survey Report*, S.F. DIST. ATT'Y'S OFF., VICTIM SERVS. DIV., 2020 VICTIM IMPACT SURVEY REPORT 16 (Apr. 2021), https://sfdistrictattorney.org/wp-content/uploads/2021/04/4.19.21-Victim-Impact-Survey-Report.pdf [https://perma.cc/Y835-3RJN] (noting that in a survey of 516 victims, 39.3% reported that they made a VIS in court or at sentencing); *see also* DAVIES & BARTELS, *supra* note 19, at 40 (noting that in South Australia, VISs were presented in 80% of Supreme Court matters and 60% to 90% of district court matters); JULIAN V. ROBERTS & MARIE MANIKIS, VICTIM PERSONAL STATEMENTS: A REVIEW OF EMPIRICAL RESEARCH, REPORT FOR THE COMMISSIONER FOR VICTIMS AND WITNESSES IN ENGLAND AND WALES 17 (2011) (reporting that from 2007–2009 in an England and Wales survey, 55% of those offered a chance to make a victim personal statement did so); *see also generally* Dean G. Kilpatrick, David Beatty & Susan Smith Howley, *The Rights of Crime Victims—Does Legal Protection Make a Difference?*, U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, NAT'L INS'T OF JUST. 4 (Dec. 1998), https://www.ojp.gov/pdffiles/173839.pdf [https://perma.cc/S9WT-EMHZ] (finding that more than 75% of victims surveyed considered it very important to be heard or involved in charge dismissals, plea negotiations, sentencings, and parole proceedings).

A. Providing Information to the Sentencer

i. Victim Impact Statements Provide Relevant Information to Sentencers

As noted earlier,[182] a key question about VISs is their purpose. And, as also discussed earlier,[183] one of the important rationales for allowing VISs is to provide information to the sentencer, typically (as in the Nassar case) to a judge. This has often been described as the "informational rationale" for VISs.[184] Under Michigan case law, for example, "[t]he impact of a crime on a victim is a valid sentencing consideration."[185]

Our analysis of the Nassar VISs supports the conclusion that VISs provide useful information to the sentencer. As discussed above,[186] most of the VISs described Nassar's sexual abuse, his grooming of the victims, and the manipulative and calculated tactics Nassar employed to conceal his abuse. Almost all of the victims (89%) described how Nassar had harmed them.[187] Many of the victims discussed his sophisticated approach to concealing his crimes. Many others discussed the sense of betrayal that Nassar caused. Still others discussed the "secondary victimization" that they suffered from being caught up in the criminal justice process.[188]

This information would be helpful to a sentencer, as it described the harm from Nassar's crime—a relevant factor at sentencing. This information also showed Nassar's premeditation and sophistication in perpetrating and concealing his crimes. And it revealed how Nassar abused his position of trust and took advantage of vulnerable victims, as well as unsuspecting fellow physicians. Here again, these factors are relevant to sentencing. A defendant's abuse of a position of trust in carrying out a crime is commonly considered

182. *See supra* notes 20–28 and accompanying text.

183. *See supra* notes 21–23 and accompanying text.

184. *See, e.g.*, Bandes, *supra* note 3, at 1254; *see also* VITIELLO, *supra* note 3, at 89–90.

185. People v. Jones, 445 N.W.2d 518, 520 (Mich. Ct. App. 1989) (rejecting claim that the judge's consideration "of the impact of the crime on the victim" amounted to prejudice or bias).

186. *See supra* notes 77–181 and accompanying text.

187. *See supra* notes 87–123 and accompanying text.

188. *See supra* notes 87–123 and accompanying text.

relevant to sentencing.[189] And the vulnerability of a defendant's victims is likewise relevant.[190]

Our finding that the Nassar VISs provided important sentencing information fits comfortably within the existing research.[191] Surveying the literature on the topic, a recent study found that the research "indicates that impact statements are not considered superfluous by the judicial officers who receive them."[192] For example, a 2016 survey of judges in Florida (with a limited sample size) found that some judges who were surveyed gained new information from the VIS.[193] One judge explained that a VIS "[h]elps [me] to understand the personal impact of the crime and helps me to fashion an appropriate sentence."[194] Another judge believed that a VIS "[a]llows judges to see how crimes have affected victims."[195] And still another judge thought that VISs "present a more complete picture of the impact of the crime."[196] The same study also surveyed prosecutors and found that they had a similar experience—i.e., that a VIS "helps the judge understand the gravity of the case better."[197]

189. *See, e.g.*, U.S. SENT'G GUIDELINES MANUAL § 3B1.3 (U.S. SENT'G COMM'N 2023) (allowing upward departure for "abuse of a position of trust"); ALA. PRESUMPTIVE AND VOLUNTARY SENT'G STANDARDS MANUAL 32 (ALA. SENT'G COMM'N 2019) (increasing guideline range if offense involved "a fiduciary relationship, including a domestic relationship, which existed between the defendant and the victim"); MICH. COMP. LAWS § 777.40 (1995) (providing enhancement in situations involving a defendant's "abuse of authority status" defined to mean that a "victim was exploited out of fear or deference to an authority figure, including . . . a parent, physician, or teacher").

190. *See, e.g.*, U.S. SENT'G GUIDELINES MANUAL § 3A1.1 (U.S. SENT'G COMM 1990) (increasing sentencing guideline range when defendant knew or should have known the victim was a "vulnerable" victim); ALA. SENT'G COMM'N, *supra* note 189 (increasing guideline range if "[t]he victims was particularly vulnerable due to age, infirmity, or reduced physical capacity that was known or should have been known to the defendant"); WASH. REV. CODE § 9.94A.838 (2006) (providing enhanced sentencing allegation for sex offenses where "victim had diminished capacity"); *see also* Joanna Shapland & Matthew Hall, *Victims at Court: Necessary Accessories or Principal Players at Centre Stage?*, *in* HEARING THE VICTIM: ADVERSARIAL JUSTICE, CRIME VICTIMS AND THE STATE, *supra* note 21, at 163, 176–81 (discussing how VISs in England and Wales help to establish the vulnerability of victims at sentencing).

191. *See, e.g.*, Shapland & Hall, *supra* note 190, at 182 (discussing ways in which introducing VISs in England and Wales provided additional and relevant information to judges at sentencing).

192. DAVIES & BARTELS, *supra* note 19, at 36 (commenting on Australian data).

193. Frank, *supra* note 181, at 224.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* at 231.

An earlier (1999) study in Australia,[198] conducted soon after the right to submit VISs was legislated, reported that a magistrate stated, "If it was not for the VIS, I would have thought that he (the victim) could just take a shower and get the whole thing behind him. The VIS makes us, in individual cases, more educated."[199] Judges and prosecutors agreed that in cases of the "normal victim," the harm described in the VIS is expected and reflected in the level of punishment prescribed by law.[200] In the atypical cases, however (e.g., grandmother or child rape victims), such information is useful and should be reflected in the sentence.

A 2006 survey of judges in Canada asked them how often a VIS contains information relevant at sentencing beyond that recounted at trial or in the prosecutors' sentencing submission.[201] Interestingly, almost half of the judges (47%) said that VISs "often" or "sometimes" contain useful information not obtainable from these other sources, while 53% said "seldom" or "almost never."[202] Overall, 50% of the Canadian judges said VISs were useful in "all" or "most" cases, while the other half said they were in "some" or "just a few" cases.[203]

Professor Bandes raises concerns about what kinds of information VISs provide, raising questions about the introduction of irrelevant variables and the optional nature of VISs.[204] We will explore these significant points at greater length below. But it is important to underscore that the Nassar VISs provided information about (among other things) the "financial, social, psychological, and medical impact" of the crimes—factors that are well entrenched in legitimate sentencing considerations.[205] Indeed, Professor Bandes discusses these very impact statements delivered in the Nassar case, conceding that the "statements offered a window into a complex web of institutional and personal complicity that enabled criminal conduct to continue over time"—although, in her view, that window is too narrow for this kind of multi-victim, complex case.[206] Rather than viewing this window as being a glass half-empty (as the

198. Erez & Rogers, *supra* note 1, at 224–25.

199. *Id.* at 225.

200. *Id.*

201. JULIAN V. ROBERTS & ALLEN EDGAR, VICTIM IMPACT STATEMENTS AT SENTENCING: JUDICIAL EXPERIENCES AND PERCEPTIONS 13 (2006).

202. *Id.* at 14.

203. *Id.*

204. Bandes, *supra* note 3, at 1263–67.

205. *See, e.g.*, FED. R. CRIM. P. 32(d)(2)(B).

206. Bandes, *supra* note 3, at 1266.

saying goes), we think the window should be viewed as a glass half-full. In our view, a VIS creates at least a modest window that would be helpful to a judge in crafting an appropriate sentence. Accordingly, keeping that window open is desirable.

ii. Victim Impact Statements Do Not Inappropriately Divert Attention Away From a Defendant's Culpability

The informational value of VISs appears so clearly present in our study and elsewhere[207] that it is hard to understand how VIS critics could advance a counterargument. But gamely (and possibly with a sense of devil's advocacy), counterarguments they do make.

Perhaps recognizing that VISs provide information about the harm from crimes, Professor Vitiello attempts to change the subject by contending that VISs fail to help a judge determine a defendant's culpability. As Vitiello puts it, "While the criminal law does not ignore harm, culpability has emerged as the primary basis for punishment."[208] Indeed, according to Vitiello, the criminal justice system considers harm only in "anomalous" cases.[209]

If Vitiello were correct that a defendant's culpability is the only valid basis for punishment, that premise would still not justify excluding VISs. As the Nassar impact statements make clear, VISs do not solely relate to the after-the-fact impact of crimes on victims. Instead, in describing how the crime was committed (e.g., whether the crime was sophisticated and involved deliberate concealment), the VISs shed light on a defendant's blameworthiness. Here, the VISs revealed such things as the complex grooming practices and abuse of trust that Nassar used—information bearing directly on his culpability.[210] Moreover, Vitiello fails to provide concrete evidence that VISs cause judges to substitute issues of harm for issues related to culpability. The (limited) available evidence suggests otherwise.[211]

In addition, looking to information in a VIS regarding a crime's harm may also provide circumstantial evidence of culpability. The law recognizes that

207. *See, e.g.*, Shapland & Hall, *supra* note 190, at 186 (explaining why "[s]entencing without victim input is impoverished sentencing").

208. VITIELLO, *supra* note 3, at 98.

209. *Id.*

210. *See supra* notes 87–123 and accompanying text.

211. *See* Frank, *supra* note 181, at 228 (providing a survey of Florida trial court judges which found, based on self-reports, that "judges are not 'substitut[ing] harm for culpability, nor . . . consider[ing] harm as the overriding criterion in sentencing'"); *see also infra* notes 435–466 and accompanying text (finding VISs do not generally increase sentence severity).

factfinders might infer that persons intend the natural and probable consequences of their actions.[212] After learning what consequences a defendant inflicted on a victim, a judge might reasonably conclude that the defendant culpably intended those consequences.

But in any event, Vitiello's starting premise—that culpability is generally the be-all and end-all of punishment—is incorrect. His argument assumes that a criminal sentence must rest entirely on retributive grounds linked to culpability. It is well settled, however, that a criminal sentence "can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation."[213] Punishment based on these justifications does not always turn on a defendant's culpability. For example, a state might decide to increase penalties for gun crimes, not because defendants have suddenly become more culpable but rather because the harms from such crimes have become more apparent, necessitating a harsher sentencing regime for deterrence purposes.[214] And "[c]ourts are increasingly using VIS[s] . . . as evidence of general harm to victims and the community in order to determine the extent to which general and specific deterrence and denunciation ought to inform the determination of offence seriousness and the formulation of a proportionate sentence."[215]

The criminal justice process conventionally considers more than culpability, including specifically a crime's harm. Indeed, Vitiello concedes that "harm still counts in criminal law."[216] And since harm "counts," then a VIS uncontroversially helps to provide a sentencer with relevant information—information about a crime's harm.[217]

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212. *Cf.* Francis v. Franklin, 471 U.S. 307, 315–16 (1985) (discussing this inference but holding it cannot be a mandatory presumption at trial).

213. Ewing v. California, 538 U.S. 11, 25 (2003) (citing 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, SUBSTANTIVE CRIMINAL LAW § 1.5, at 30–36 (1986)) (explaining varying theories of punishment); *see also* Paul G. Cassell, *Too Severe?: A Defense of the Federal Sentencing Guidelines (and a Critique of Federal Mandatory Minimums)*, 56 STAN. L. REV. 1017, 1020–40 (2004) (discussing "just deserts" punishment theories versus "crime control" models).

214. *See* JOHANNES ANDENAES, PUNISHMENT AND DETERRENCE 9, 44–46 (1974); JAMES Q. WILSON, THINKING ABOUT CRIME 194–98 (1975); *see also* Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 11 (2010) (discussing deterrent effects from mandatory minimum sentences).

215. TYRONE KIRCHENGAST, VICTIMS AND THE CRIMINAL TRIAL 192 (Matthew Hall & Pamela Davies eds., 2016).

216. VITIELLO, *supra* note 3, at 96.

217. *See, e.g.*, Jancie Nadler & Mary R. Rose, *Victim Impact Testimony and the Psychology of Punishment*, 88 CORNELL L. REV. 419, 420 (2003) ("When people make decisions about blame and punishment, harm matters.").

More broadly, the American criminal justice system often holds criminals responsible even for their crimes' unintended consequences. As the Supreme Court has held, "it is not unusual to punish individuals for the unintended consequences of their *unlawful* acts."[218] This broad understanding dates back hundreds of years. William Blackstone, for example, explained:

> [I]f any accidental mischief happens to follow from the performance of a *lawful* act, the party stands excused from all guilt: but if a man be doing anything *unlawful,* and a consequence ensues which he did not foresee or intend, as the death of a man or the like, his want of foresight shall be no excuse; for, being guilty of one offence, in doing antecedently what is in itself unlawful, he is criminally guilty of whatever consequence may follow the first misbehaviour.[219]

In his book, Vitiello concedes a point made by the Supreme Court in *Payne v. Tennessee* about the relevance of harm to sentencing. In an assault case (among other examples), "the victim could describe the nature and extent of the injuries—facts that are clearly relevant to sentencing under virtually any conceivable sentencing scheme."[220] Indeed, as *Payne* observed, under the Federal Sentencing Guidelines, recommended penalties turn on whether a victim suffered "bodily injury," "serious bodily injury," or "permanent or life-threatening bodily injury."[221] State sentencing guideline systems also use the same types of formulations.[222]

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218. *See, e.g.*, Dean v. United States, 556 U.S. 568, 575 (2009) (citing, e.g., 18 U.S.C. § 1111 (federal felony murder rule); U.S. SENT'G GUIDELINES MANUAL § 2A2.2(b)(3) (U.S. SENT'G COMM'N 2008) (increasing sentencing guideline range for aggravated assault according to the seriousness of the resulting injury)); *accord* United States v. Collazo, 984 F.3d 1308, 1327–28 (9th Cir. 2021) (en banc) ("Once a defendant knowingly or intentionally violates federal law, 'it is not unusual to punish individuals for the unintended consequences of their *unlawful* acts.' The severity of a penalty need not be 'precisely calibrated to the level of mens rea.'") (citations omitted); United States v. Burwell, 690 F.3d 500, 507 (D.C. Cir. 2012) (en banc) ("Nor is it unusual to punish individuals for the unintended consequences of their unlawful acts.").

219. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 26–27 (1769); *see also* Dean v. United States, 556 U.S. 568, 575–76 (2009) (quoting Blackstone with approval).

220. VITIELLO, *supra* note 3, at 96.

221. U.S. SENT'G GUIDELINES MANUAL § 2A2.2(b)(3) (U.S. SENT'G COMM'N 2008) (breaking out various categories of bodily injury); *see also* Payne v Tennessee, 501 U.S. 808, 820 (1991).

222. *See, e.g.*, *Victim Injury*, VA. SENT'G GUIDELINES, https://bycell.mobi/wap/default/item.jsp?entryid=ECMTg2OQ==&itemid=42081&_t=1694491018952 [https://perma.cc/5GV9-JRV4] (increasing the guideline range where defendant "threatened or inflicted an injury" and listing various types of injury).

Vitiello agrees that these are "uncontroversial" examples—and, if so, then it would seem VISs about the extent of a victim's harm should typically be admitted uncontroversially. But Vitiello maintains that "typically" a defendant will know the extent of the harm he is causing.[223] This argument immediately forces Vitiello to confront a standard example from criminal law discussions—the "eggshell" victim, who suffers greater-than-expected injuries. In Vitiello's view, "the criminal law would not typically treat the offender as guilty of the crime with elevated, unforeseen damages."[224]

To support his argument about what "typically" happens, Vitiello offers an English case that is more than a half-century old—*Regina v. Cunningham*.[225] There, a defendant stole a gas meter to extract the coins. In doing so, he broke a gas line, leading to the unintended asphyxiation death of a resident in a home. The appellate court reversed a conviction for the death, noting that while stealing the meter was wicked, the defendant was unaware of the potential harm of death. From this unusual case, Vitiello draws the broad conclusion that "[w]hile the criminal law does not ignore harm, culpability has emerged as the primary basis for punishment."[226]

Cunningham (an English case marred by defective juror instructions) hardly proves that, as a general proposition, American criminal law ignores harm.[227] Vitiello has selected an atypical case involving a defendant who did not intend to harm his victim in any way. Surely a more typical case is one in which a defendant intends to harm a victim to some degree. In such cases, the law often considers the full harm that the victim ends up suffering—even if the harm turns out to be greater than what the defendant may have intended.

A straightforward example of the law considering resulting harm comes from cases where a defendant assaults a victim with intent to cause serious (or grievous) physical injury. If the victim lives, the defendant is charged with aggravated assault. But if the victim dies, the defendant is guilty of first-degree

223. VITIELLO, *supra* note 3, at 96.

224. *Id.* at 96–97. *But cf.* Dean, 556 U.S. at 575 (reaching the opposite conclusion).

225. VITIELLO, *supra* note 3, at 97 (citing R. v. Cunningham [1957] 2 QB 396 (Eng.)).

226. *Id.* at 98.

227. In England as well, Vitiello's argument is not well-founded—English courts typically consider harm. *See* Criminal Justice Act 2003, c. 44. § 143(1) (UK) ("In considering the seriousness of any offence, the court must consider the offender's culpability in committing the offence *and* any harm which the offence caused, was intended to cause or might foreseeably have caused.") (emphasis added); Shapland & Hall, *supra* note 190, at 182 (surveying English case law and reporting that "in a wide range of offences, courts now routinely receive and act on evidence of the consequences for the victim"); *see also id.* (noting introduction of VISs in England and Wales).

murder in many U.S. states[228]—even though he did not intend to kill the victim. In the eyes of the law, the defendant has acted with sufficient culpability to be deemed a murderer, and then the ultimate harm of the victim's death creates liability for murder.

Another common example of American criminal law considering unintended harm involves crimes of recklessness. A standard illustration is a driver who speeds through a crowded area at an exceptionally high speed. If, tragically, the driver strikes and kills a pedestrian, because of the additional harm that resulted—an unintended death—the defendant is charged not with mere reckless endangerment but rather murder.[229]

These examples involve the degree of the crime that a defendant commits—and demonstrate that harm is considered in determining the crime of conviction. But VISs are delivered at sentencing—*after* a defendant has been convicted. And it is common for sentencing schemes to more broadly consider the "seriousness of the offense" as part of determining the appropriate sentence.[230] And, importantly, judges are not generally restricted in the kinds of information that they can consider in crafting an appropriate sentence.[231]

Because sentencing focuses on imposing a sentence reflecting the seriousness of the crime, considerations of a defendant's mental state that may be at the fore during a case's liability phase recede during the sentencing phase—and considerations of harm become more important. One simple illustration of this principle comes from the Federal Sentencing Guidelines. For some of the most commonly charged federal offenses—e.g., fraud and theft crimes—the Guidelines look to the size of the loss to determine the length of a defendant's sentence; the offense level (and corresponding recommended sentence) increase depending on the amount of the "loss."[232] The Sentencing Commission has provided commentary defining "loss" to mean "the greater of *actual loss* or intended loss."[233] In turn, "actual loss" is defined as "the

228. *See, e.g.*, N.Y. PENAL LAW § 125.20 (McKinney 2019).

229. *See, e.g.*, State v. Fuller, 531 S.E.2d 861 (N.C. Ct. App. 2000); *see also generally* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW (9th ed. 2022) (discussing extreme recklessness or "depraved heart" murder).

230. *See, e.g.*, 18 U.S.C. § 3553(a)(2)(A).

231. *See, e.g.*, 18 U.S.C. § 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court . . . may receive and consider for the purpose of imposing an appropriate sentence.").

232. *See* U.S. SENT'G GUIDELINES MANUAL § 2B1.1 (U.S. SENT'G COMM'N 2022).

233. U.S. SENT'G GUIDELINES MANUAL § 2B1.1 cmt. n.3(A) (U.S. SENT'G COMM'N 2022) (emphasis added).

reasonably foreseeable pecuniary harm that resulted from the offense."[234] Courts applying this provision have concluded that the Guidelines provision allows federal courts to calculate a defendant's sentencing range by looking to "the loss the victim actually suffered" rather than to what loss the defendant intended.[235] The theory is that "[i]n fraud cases, amount of loss is meant to be a proxy for the harm (both actual and intended) inflicted by the fraudster's nefarious activities."[236]

These examples all revolve around determining the length of the defendant's prison term. But it is important to recognize that criminal sentencing is multifaceted, including many components beyond incarceration. Indeed, defense attorneys often take advantage of that fact by highlighting non-incarcerative sentencing conditions.[237] For example, a judge may need to impose conditions such as no-contact orders, electronic monitoring, and the like as a means of providing physical safety for a victim when imprisoning a defendant.[238]

Another classic example of a sentencing condition not connected to a prison term is restitution, where the full scope of the harm is relevant. Typically, a judge will order a defendant to pay restitution for "the amount of the loss sustained" as a "result of the offense."[239] In making the determination of a victim's losses, courts are not typically constrained by traditional mens rea requirements; instead, the focus is on compensating victims.[240] Thus, as with the Sentencing Guidelines calculations for prison terms just mentioned, for

234. U.S. SENT'G GUIDELINES MANUAL § 2B1.1 cmt. n.3(A)(i) (U.S. SENT'G COMM'N 2022).

235. *See, e.g.*, United States v. Banks, 55 F.4th 246, 258 (3d Cir. 2022); *cf.* United States v. Gadson, 77 F.4th 16, 19–21 (1st Cir. 2023) (finding no plain error in district court decision to use intended loss rather than actual loss in guidelines calculation, where that produced a higher guideline range).

236. United States v. Flete-Garcia, 925 F.3d 17, 33 (1st Cir. 2019).

237. *See* Benji McMurray, *The Mitigating Power of a Victim Focus at Sentencing*, 19 FED. SENT'G RPTR. 125, 128 (2006).

238. *See* 18 U.S.C. §§ 3563(b)(8), (9), (13), (19) (allowing judge to impose such conditions on a released prisoner as prohibiting possession of a dangerous weapon, requiring psychiatric treatment, refraining from residing in a specified area, and following conditions of home confinement); *see also* Shapland & Hall, *supra* note 190, at 186 (describing how VISs provide relevant information for future protections of victims).

239. *See* 18 U.S.C. § 3663(a)(1)(B).

240. *See, e.g.*, Paroline v. United States, 572 U.S. 434, 444–48, 461–62 (2014) (reading conventional tort law proximate cause principles into criminal restitution statute); *cf.* Paul G. Cassell, James R. Marsh & Jeremy Christiansen, *The Case for Full Restitution for Child Pornography Victims*, 82 GEO. WASH. L. REV. 61, 90–96 (2013) (discussing cases in which restitution awards for victims went *beyond* traditional tort principles).

restitution calculations, losses to a victim need only be foreseeable to the defendant—not actually foreseen.[241] Indeed, because crimes are analogous to intentional torts, even the foreseeability requirement is often applied very loosely at sentencing.[242]

Given that VISs appear to clearly provide information about harm to sentencers, an interesting critique comes from Professor Bandes. She writes that "if VIS[s] are meant to impact sentencing, that impact depends on the serendipity of who decides to—or is encouraged to—give a statement."[243] The obvious response to this critique is to expand the use of VISs so that no victim is left out. And indeed, that is exactly what some important jurisdictions have done. For example, in the federal system, a probation officer prepares a pre-sentence report (PSR) for almost every sentencing.[244] And the PSR must include "information that assesses any financial, social, psychological, and medical impact on any victim."[245] States often follow similar approaches.[246] Thus, the (often-overlooked) effect of a pre-sentence investigation is to ensure that, for cases involving victims, victim-related information will typically be available to a judge at sentencing.

To be sure, the federal and state systems do not mandate that a victim deliver an in-court VIS. But, then again, the federal and state systems likewise do not mandate that a defendant personally allocute in court.[247] Rather than select an extreme—all victims must speak or no victims can speak—the criminal justice system errs on the side of providing judges with more

241. *See Paroline*, 572 U.S. at 449 (discussing restitution for losses that were the "direct and foreseeable results" of the defendant's crime).

242. *See* Dean v. United States, 556 U.S. 568, 575 (2009); *see also generally* Paul G. Cassell & Michael Ray Morris, Jr., *Defining "Victim" Through Harm: Crime Victim Status in the Crime Victims' Rights Act and Other Victims' Rights Enactments*, 60 AM. CRIM. L. REV. (forthcoming 2024) (on file with authors) (discussing generous application of proximate cause principles in criminal cases).

243. Bandes, *supra* note 3, at 1261.

244. *See* FED. R. CRIM. P. 32(d). The only exceptions are low-level offenses and those in which the court makes an explicit finding that existing information in the record enables it to exercise sentencing discretion. FED. R. CRIM. P. 32(c)(1).

245. FED R. CRIM. P. 32(d)(2)(B).

246. *See, e.g.*, UTAH CODE ANN. § 77-18-103(2) (West 2017) ("If a presentence investigation report is required . . . the presentence investigation report . . . shall include . . . any impact statement provided by a victim . . . ."); *see also generally* WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE § 26.5(b), at 1527 (6th ed. 2017) (noting that pre-sentence reports may contain probation officer interviews of victims).

247. The federal rules require only that the defendant have the opportunity to speak. *See* FED. R. CRIM. P. 32(i)(4)(A)(ii). Most states follow a similar approach. *See* LAFAVE, ISRAEL, KING & KERR, *supra* note 246, § 26.4, at 1267.

information rather than less. This is not "serendipity," as Bandes would have it, but simply a natural function of a human system that recognizes victim agency by declining to compel victim participation at sentencing.

In sum, the Nassar VISs properly served important informational purposes.

B. Creating Therapeutic Benefits for the Victim

Another key rationale for allowing VISs is that they serve expressive and communicative functions that can produce therapeutic benefits for victims.[248] The argument supporting this conclusion is straightforward and widely accepted.[249] As one of us (Erez) has explained at length, "[p]roviding input for VIS also helps victims to cope with the victimisation and the criminal justice experience. Many victims who filled out VIS claimed that they felt relieved or satisfied after providing the information."[250] Interestingly, while much of the debate about VISs has swirled around VISs' instrumental usefulness (as discussed in the previous Section), it appears that victims more frequently cite expressive and communicative reasons for wanting to deliver a VIS.[251]

A well-developed theory underlies the therapeutic rationale for VISs.[252] The field of therapeutic jurisprudence—or TJ—is based on the idea that participation in criminal cases can, if structured properly, have therapeutic benefits.[253] Under this conception, TJ "highlights the need and desire of victims and their remaining relatives to be heard, respected, and acknowledged—even

248. *See, e.g.*, Cassell, *supra* note 1, at 621–22.

249. *See, e.g.*, ILIADIS, *supra* note 19, at 48 ("Overwhelmingly, VISs are considered to have had a positive impact on victims, providing them with the opportunity to feel recognised as participants in the process.").

250. Edna Erez, *Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice*, 1999 CRIM. L. REV. 545, 551–52.

251. *See* Roberts, *supra* note 181, at 363–64.

252. For a recent and excellent overview, see Gal & Lowenstein Lazar, *supra* note 7, at 159–61. *See generally* THERAPEUTIC JURISPRUDENCE AND VICTIM PARTICIPATION IN JUSTICE (Edna Erez, Michael Kilchling & Jo-Anne Wemmers eds., 2011).

253. *See, e.g.*, Bruce J. Winick, *Therapeutic Jurisprudence and Victims of Crime*, *in* THERAPEUTIC JURISPRUDENCE AND VICTIM PARTICIPATION IN JUSTICE, *supra* note 26, at 3; Michael L. Perlin, *"In These Times of Compassion When Conformity's in Fashion": How Therapeutic Jurisprudence Can Root out Bias, Limit Polarization, and Support Vulnerable Persons in the Legal Process*, 10 TEX. A&M L. REV. 219 (2023); Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 FORDHAM URB. L.J. 1055, 1055–61 (2003); David Wexler, *Therapeutic Jurisprudence: An Overview*, 17 T.M. COOLEY L. REV. 125 (2000); Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCH., PUB. POL'Y & L. 184 (1997); Michael L. Perlin, *What Is Therapeutic Jurisprudence?*, 10 N.Y. L. SCH. J. HUM. RTS. 623 (1993).

when the eventual outcome is not influenced by their statement."[254] The basic insight is that VISs can empower victims by helping them to "regain a sense of dignity and respect rather than feeling powerless and ashamed."[255]

Our findings support this therapeutic rationale for a VIS—indeed, as noted above, many of the victims referred to the healing qualities of delivering a VIS.[256] One interesting feature we found in the Nassar VISs was several examples of guardians for minors affirmatively requesting that the judge allow their children to deliver a VIS—and the judge concluding that it was in the "best interests" of the child victims to speak. This provides further support for the conclusion that delivering a VIS—by those who choose to do so—can have therapeutic qualities.

These victim acknowledgments about the healing effects of delivering a VIS came during the sentencing hearing itself. Did the victims' perceptions change afterward when they had more time to reflect? In preparing this Article, we did not seek to interview Nassar's victims. But we have attempted to find accounts from other sources about what the victims thought about the process. The accounts we have located paint a uniformly positive picture about having the opportunity to speak. Victims reported finding the process therapeutic and even cathartic (although, obviously, many victims were critical of Nassar's enablers and found preparing for the process difficult).[257]

For example, Rachael Denhollander (the first person to publicly accuse Nassar of sexual abuse and the last person to speak at his sentencing) said later that delivering her VIS gave her the chance to reclaim her voice while making an example of Nassar. "She pondered how to make Judge Rosemarie Aquilina understand the depravity of Nassar's action. . . . She decided to convey in explicit detail how Nassar invaded her body under the guise of treatment . . . . In the process, she felt like she was unburdening herself."[258] "'You need to describe the act in graphic details so the judge can understand

254. Gal & Lowenstein Lazar, *supra* note 7, at 159.

255. Christine A. Trueblood, *Victim Impact Statements: A Balance Between Victim and Defendant Rights*, 3 PHX. L. REV. 605, 626 (2010) (quoting Jayne W. Barnard, *Allocution for Victims of Economic Crimes*, 77 NOTRE DAME L. REV. 39, 41 (2001)); Erez, Ibarra & Downs, *supra* note 26, at 20–24 (outlining the mechanisms by which VISs are thought to contribute to therapeutic jurisprudence).

256. *See supra* notes 162–77 and accompanying text.

257. Emanuella Grinberg, *These Women Made You Understand What Larry Nassar Did to Them*, CNN, https://www.cnn.com/2018/01/27/us/nassar-victim-impact-statements/index.html [https://perma.cc/HX8W-UBKQ] (Jan. 28, 2018, 7:40 PM).

258. *Id.*

and describe the ramifications and consequences of those acts,' she said. 'They're not easy words to speak or put on paper, but there is a power in being able to speak them.'"[259]

Similarly, for Kyle Stephens, "[p]articipating in Nassar's prosecution has helped her heal."[260] "It was never a question for me," she said later about delivering her VIS.[261] "Once I started to see that this process was therapeutic—just because of how much you have to talk about it—I wanted to take every chance I could to liberate myself."[262] More than a year before the sentencing, she began "collecting one-liners, vignettes and scenes in a OneNote tab on her laptop" so that she could weave them together to "paint a vivid picture of her harrowing journey for the judge, [Nassar], and the general public."[263]

> She started shaping her thoughts into a [VIS] about five days before the . . . sentencing, going through [about a dozen] drafts . . . . It was among the hardest things she's ever done, she said . . . . When her feelings started to overwhelm her, she put her face in [her] hands, took deep breaths and breathed through her emotions . . . . 'It's such a complex creative process to get something out like this, because it's about me but it's also about the other victims and moving forward,' she said. 'There's so much to think about.'[264]

For the sake of the judge, "Stephens tried to be brief yet forceful by drawing out the most 'vile' things Nassar had done."[265] "[S]he, too [decided] to describe her abuse in graphic detail."[266] "'It's so hard (for people) to grasp what child abuse truly is. People understand what it is, but if you don't force them to have an emotional reaction to your words, it's not really going to sink in.'"[267]

Stephens also wanted Nassar "'to see how powerful I was and that I was angry,' she said."[268] "I very specifically wanted to talk about the fact that he made me a liar to my parents and he knew what that would do to my life."[269]

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259. *Id.*
260. *Id.*
261. *Id.*
262. *Id.*
263. *Id.*
264. *Id.*
265. *Id.*
266. *Id.*
267. *Id.*
268. *Id.*
269. *Id.*

> When she first stepped up to the podium, a mood of fear and apprehension hung over the room, she said. Then, she addressed him directly and he lowered his face. Her confidence rose in sync with her anger. "Once I got going, he couldn't look at me at first, and that was very empowering. . . . He couldn't even look at me and he had done all those things," she said.[270]

While it was a legal proceeding, it was ultimately about healing: "What, at the end of the day, did you want out of it?"[271]

> Stephens wanted people to see her for who she is today. She wanted the world to know that the worst experiences of her life did not define her, that she was strong, intelligent, and that she was going to be OK. "I just went up there and did me, just Kyle," she said. "I just wanted to be myself."[272]

Shortly after the sentencing, the ABC News program *20/20* interviewed nearly two dozen of Nassar's victims to hear from them. And they also gave positive assessments of having the opportunity to deliver a VIS.[273]

Bailey Lorencen said that, after reading her statement in court, a weight was lifted: "It was just liberating and it gives you the confidence in yourself that you need to feel like your voice does matter."[274]

Taryn Look said that she initially had provided only a written statement, but after others began speaking, she flew to Michigan for the hearing. "'Just to be in that courtroom today amongst everyone and all of us was so powerful because I had felt alone this whole time,' Look told '20/20' . . . . '[A]t this point we have to change the world. We have to change the culture and we have to believe victims.'"[275]

Arianna Castillo said that by delivering her VIS, "I'm getting some of that bravery and confidence back . . . . I figured if I stayed silent I'm only letting him win."[276]

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270. *Id.*

271. *Id.*

272. *Id.*

273. Keely McCarthy, *With Larry Nassar's Sentencing, His Accusers Share Their Own Powerful Words*, ABC NEWS, https://abcnews.go.com/US/larry-nassars-sentencing-accusers-share-powerful-words/story?id=52608540 [https://perma.cc/J583-2GNZ] (Jan. 26, 2018, 9:27 PM).

274. *Id.*

275. *Id.*

276. *Id.*

Helena Weick said that "I just knew I had to get up there and I had to . . . put that shame on him. It's just not mine anymore."[277]

Megan Halicek said it was important to speak so that more women would come forward and know they have support: "Speaking to girls, ones that haven't come forward yet and either have been abused by Nassar or someone else, we're here for you . . . . Join us. Don't be afraid, like we're a force and we're here for you. And change is happening."[278]

Stephanie Robinson said that despite being afraid to come forward, "finding my voice . . . was the best thing. . . . I want . . . other people to know that when you speak out they'll be surrounded by people who love and support you and you can walk in the truth instead of trying to feel like you have to hide."[279]

In a later interview, the *Lansing State Journal* interviewed three Nassar victims more than three years after the hearing, allowing reflection on the experience with even more time. All three victims spoke positively about the VIS hearing.[280]

Emily Morales said that, after confronting Nassar at the hearing, "I feel like that definitely helped me to at least be able to say, conceptually, like OK, he said sorry, that means now I get to forgive him and move on with my life."[281] But things turned out to be more complicated. Morales continued to struggle with rushing through school. "I felt like for me to eventually be able to have closure, I needed him to apologize to me . . . . And he did."[282] After slowing down her educational plans, Morales said she was scoring lower than she did in previous years on depression and anxiety screenings. She was more confident. Things had settled down.

Megan Ginter said that recovering from Nassar's abuse led her to her future career.[283] Ginter said that she had not planned on giving a VIS; she just wanted closure. But she attended a gathering for survivors just before Nassar's sentencing, and she realized she needed to speak: "Even if not for myself, for

277. *Id.*

278. *Id.*

279. *Id.*

280. Kara Berg, *Healing from Nassar's Abuse Wasn't Easy. These Survivors Say It Made Them Stronger*, LANSING ST. J., https://www.lansingstatejournal.com/story/news/2021/09/09/nassar-sentencing-survivors-emily-morales-megan-ginter-katelynne-hall/5432422001/ [https://perma.cc/A4NB-ZU59] (Sept. 8, 2021, 3:07 PM).

281. *Id.*

282. *Id.* For Nassar's statement of apology at the hearing, see *infra* note 372 and accompanying text.

283. *Id.*

other women abused by him . . . . I felt like I had to do it. And I'm so glad I did. I can't imagine healing the same way I did without going to court."[284] To be sure, Ginter struggled after the sentencing, but she said, "I really am glad that I went through all of this . . . I wish the sexual assault didn't happen to me. It had a big negative impact as well. But it demonstrated I can overcome things."[285] Ginter is now planning to be an advocate for sexual abuse victims as her career.[286]

Katelynne Hall said that she was "glad she decided to give a victim impact statement at Nassar's sentencing."[287]

> "It helped a little bit with the healing process, being able to come out and talk about it," Hall said. "For the longest time, I kept it bottled up inside." Hall said being able to speak out about her abuse with a strong group of women behind her was an "amazing feeling." "The sister survivors inspired me," Hall said. "I know how much it helped me and how much power it made me feel again."[288]

In addition to these statements from victims themselves, law professor Amos Guiora (who wrote a book about the Nassar and similar cases) reports that:

> [B]ased on my interviews with Nassar victims, the VISs were empowering and enabled them to confront Nassar face to face. While this did not completely "heal" them, they reported it empowered them and was a positive experience. For example, it provided them with the opportunity, in public, to (as the adage goes) look him in the eye and tell him exactly what they thought of him. The importance and usefulness of this, from their perspective, cannot be overstated.[289]

In deciding whether the VIS hearing was therapeutic, it is also noteworthy that originally about eighty of Nassar's victims planned to deliver an in-court

284. *Id.*
285. *Id.*
286. *Id.*
287. *Id.*
288. *Id.*
289. Interview with Amos Guiora, Professor of L., Univ. of Utah Coll. of L. (Sept. 6, 2023).

VIS. But then, as the highly publicized process moved forward, more and more victims saw exactly what was involved and decided to participate.[290]

Finally, looking back on the hearings, Judge Aquilina concluded that, as the victims spoke, "I literally watched them grow to ten feet, and they got their power back. And it was so transformational even for me . . . . They know they mattered and then when they spoke, they were just transformed into butterflies."[291]

One concern sometimes raised about VISs—even by those who concede their therapeutic qualities—is the administrative burdens associated with allowing victims to speak. Our study suggests that these burdens are insignificant. The average time for a Nassar victim to deliver a VIS was very short—about ten minutes or fewer per victim.[292]

To be sure, in the Nassar case, an unusually large number of victims spoke. But even in such a mass victim case, the victims could all be heard within one week, and Judge Aquilina's docket did not appear to be overwhelmed.[293]

It is also important to understand that in the United States, victims are not typically cross-examined about their statements.[294] Most American jurisdictions do not specifically provide for cross-examination of victims who deliver a VIS,[295] and, in practice, victims (such as Nassar's victims) are not

290. *See Larry Nassar Case: The 156 Women Who Confronted a Predator*, BBC (Jan. 25, 2018), https://www.bbc.com/news/world-us-canada-42725339 [https://perma.cc/3DP6-7NQN] (noting that initially about 90 victims were expected to speak over four days, but that the number ultimately increased to 156 over seven days).

291. Elisha Fieldstadt, *Judge Aquilina Discusses Larry Nassar Case, Sexual Assault Survivors*, NBC NEWS, https://www.nbcnews.com/news/us-news/judge-who-sentenced-larry-nassar-says-her-rebuke-him-helps-n935146 [https://perma.cc/4EW8-6PEE] (Nov. 12, 2018, 9:08 AM).

292. *See supra* Section V.B. Our finding is consistent with other research from Australia. *See* DAVIES & BARTELS, *supra* note 19, at 34–35 (finding that the introduction of VIS in Australia did not lead to significant delays).

293. Likewise, a survey of Florida trial court judges did not report any significant docket impacts from VISs. *See* Frank, *supra* note 181, at 224.

294. The approach in other countries may be different. *See* Vicky De Mesmaecker, *Antidotes to Injustice? Victim Statements' Impact on Victims' Sense of Security*, 18 INT'L REV. VICTIMOLOGY 133, 142 (2012) (reporting that "in nearly all countries where victim statements are in use, the defence has the right to cross-examine the victim about its contents"). To the extent that this understanding is correct, then this means that the empirical research on the therapeutic benefits of VISs in other countries will understate the benefits that would be expected to be found in the United States.

295. *See* Cassell & Erez, *supra* note 2, at 167–73 (surveying American states on the subject); *id.* at 175–96 (providing a fifty-state survey on the law regarding VISs); *see also* United States v. Madrigal, No. 3:22-cr-00019, 2023 WL 5228930, at *3 (W.D. Va. Aug. 15, 2023) (noting that

usually cross-examined.[296] This absence of cross-examination may be an important factor in creating a therapeutic experience.[297]

The experiences of the Nassar victims recounted above support the view that delivering a VIS can be therapeutic. And while these accounts are anecdotal, they fit within a broader body of empirical evidence pointing in the same direction.

In reviewing the empirical evidence, a methodological point is important. Sometimes researchers studying these issues use the victim's "satisfaction" with a case's outcome as the relevant measure.[298] But this approach requires caution.[299] Constructing a satisfaction metric is difficult because expectations and intrinsic aspects of the process may play an outsized role.[300] In addition, and more directly related to VISs, satisfaction in the ultimate outcome is not a reliable indicator of therapeutic benefits.[301] To be sure, in many cases, victims will likely be disappointed with the outcome of the criminal proceedings; but it

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statements by victims under the CVRA are "not testimony that must be given under oath, subject to cross"); United States v. Grigg, 434 F. App'x 530, 533 (6th Cir. 2011) ("Every court that has examined this issue has held that there is no requirement to swear in CVRA victims."); United States v. Tyler, 81 M.J. 108, 112 (C.A.A.F. 2021) (holding that a crime victim has a right to make a statement at sentencing in military court "and may not be cross-examined or examined by the court upon it"); ARIZ. REV. STAT. ANN. § 13-4426.01 (2020) (barring cross-examination of victims about their VIS); Cassell & Erez, *supra* note 2, at 170 n.93 (providing examples of state courts concluding rules of evidence do not apply to VISs).

296. *See* Frank, *supra* note 181, at 214 (finding victims in Florida not frequently cross-examined and not traumatized from delivering a VIS); *see also* LAFAVE, ISRAEL, KING & KERR, *supra* note 246, § 26.6(d), at 2539 (noting that some courts require VISs to be made under oath, but hearsay evidence is generally allowed at sentencings).

297. *See* State v. Lopez, 2020 UT 61, ¶ 52, 474 P.3d 949 (reviewing social science material about trauma to child victims from testifying in adversarial proceedings). *Cf.* John D. Ciorciari & Anne Heindel, *Victim Testimony in International and Hybrid Criminal Courts: Narrative Opportunities, Challenges, and Fair Trial Demands*, 56 VA. J. INT'L L. 1, 17–18 (2016) (noting harms to victims facing cross-examination about their victimization).

298. *See, e.g.*, Antony Pemberton, Frans-Willem Winkel & Marc Groenhuijsen, *Evaluating Victims Experiences in Restorative Justice*, 6 BRIT. J. CMTY. JUST. 98, 99 (2008).

299. *See* Pemberton & Reynaers, *supra* note 26, at 238; ROBYN HOLDER, JUST INTERESTS: VICTIMS, CITIZENS AND THE POTENTIAL FOR JUSTICE 176–77 (2018) (discussing problems with "satisfaction" measures).

300. Pemberton & Reynaers, *supra* note 26, at 238–39.

301. *See id.* at 238 (citing Richard J. McNally, Richard A. Bryant & Anke Ehlers, *Does Early Psychological Intervention Promote Recovery from Posttraumatic Stress?*, 4 PSYCH. SCI. PUB. INT. 45 (2003); Emmanuelle Zech & Bernard Rimé, *Is Talking About an Emotional Experience Helpful? Effects on Emotional Recovery and Perceived Benefits*, 12 CLINICAL PSYCH. PSYCHOTHERAPY 270 (2005)).

is not immediately clear why that possibility argues against measures trying to serve victims' interests within those proceedings.[302]

With these preliminary points in mind, the available empirical evidence suggests that having the opportunity to provide a VIS is at least indirectly beneficial for the psychological well-being of crime victims. Indeed, one recent (2016) survey of the literature concluded that "[t]he empirical evidence on this issue may fairly be described as having settled the matter—victims *benefit* from engaging in the VIS process and by giving statements, and they do so in varying and important ways."[303]

While the matter may not be entirely "settled," the weight of the evidence points in that direction. One of us (Erez) reviewed the literature in 1999 and concluded that "[t]he cumulative knowledge acquired from research in various jurisdictions, in countries with different legal systems, suggests that victims often *benefit* from participation and input. With proper safeguards, the overall experience of providing input can be positive and empowering."[304]

Surveying the relevant literature in 2009, Julian Roberts reached the same positive conclusion. Roberts found that the available "research has used different methodologies, variable and at times small samples of crime victims; yet, with the exception of the early studies conducted 20 years ago . . . victims who submit statements report being satisfied that they had done so."[305]

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302. Pemberton & Reynaers, *supra* note 26, at 239.

303. Frank, *supra* note 181, at 217; *see also* DAVIES & BARTELS, *supra* note 19, at 42 (surveying evidence on VISs in Commonwealth countries and finding that "[m]ost of this research has found that victims generally feel satisfied with their choice to submit an impact statement").

304. Erez, *supra* note 250, at 550–51 (citing, e.g., Edna Erez & Pamela Tontodanato, *The Effect of Victim Participation in Sentencing Sentence Outcome*, 28 CRIMINOLOGY 451 (1990); EDNA EREZ, LEIGH ROEGER & FRANK MORGAN, OFF. OF CRIME STAT. S. AUSTL. ATT'Y-GEN.'S DEP'T, VICTIM IMPACT STATEMENTS IN SOUTH AUSTRALIA: AN EVALUATION (1994); Edna Erez & Ewa Bienkowska, *Victim Participation in Proceedings and Satisfaction with Justice in the Continental Systems: The Case of Poland*, 21 J. CRIM. JUST. 47 (1993); CAROLYN HOYLE, ED CAPE, ROD MORGAN & ANDREW SANDERS, EVALUATION OF THE 'ONE STOP SHOP' AND VICTIM STATEMENT PILOT PROJECTS (1998)).

305. Roberts, *supra* note 181, at 366 (discussing limitations in the available studies but concluding that "the overall pattern of findings" on victims benefitting from providing a statement "is more positive than negative"; collecting eleven studies on the issue); *see also* FIONA LEVERICK, JAMES CHALMERS & PETER DUFF, AN EVALUATION OF THE PILOT VICTIM STATEMENT SCHEMES IN SCOTLAND 85 (2007) (noting 61% of victims reported feeling better after making a victim statement, while 39% found it an upsetting experience, but not necessarily a negative experience).

In 2015, Kim Lens and his colleagues provided additional empirical evidence about the benefits of VIS for emotional recovery.[306] Their longitudinal study of Dutch victims found that those who submitted a VIS were a highly selective group; compared with victims who did not submit a VIS, those who did displayed significantly higher levels of anxiety while experiencing significantly lower levels of control over their own recovery process.[307] The study found that, although delivering a VIS did not have "direct therapeutic effects," when the delivery of the VIS led to an increased perception of procedural justice and control over the recovery process, victims experienced reduced feelings of anger and anxiety and overall improved wellbeing.[308]

Also, Fiona Tait surveyed victims in Australia in 2015. Tait found that "[t]he experience of writing the statement was often considered cathartic, 'liberating[,'] and 'empowering.'"[309] Overall, 74% thought that writing the statement was a positive experience, and 98% would make the statement in court again.[310]

A recent (2023) study by Tali Gal and Ruthy Lowenstein Lazar of the content of VISs delivered in Israeli courts highlighted the importance of the VIS for victims' connectedness and communion, thereby satisfying universal values, emotions, and needs.[311] Further, delivering the VIS helped victims deal with the secondary victimization they experienced, as the VIS reflected "a relational mechanism that allows victims to overcome adversarial barriers and connect with defendants, attorneys, judges, and the community in general."[312]

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306. Kim M.E. Lens, Antony Pemberton, Karen Brans, Johan Braeken, Stefan Bogaerts & Esmah Lahlah, *Delivering a Victim Impact Statement: Emotionally Effective or Counter-Productive?*, 12 EUR. J. CRIMINOLOGY 17 (2015).

307. *Id.* at 30.

308. *Id.* at 31. As this article was going to press, a new article on VIS was published: Marleen Kragting, Nieke Elbers, Freya Augusteijn, Mijke de Waardt, Joris Beijers, Maarten Kunst & Antony Pemberton, *Understanding the Relation Between Agency and Communion and Victim Impact Statements*, 4 INT'L CRIMINOLOGY 66 (2024). While this excellent article is difficult to summarize, it found, overall, that "victims had a positive experience with the VIS, rating it positively and advising others to use it." *Id.* at 75.

309. DAVIES & BARTELS, *supra* note 19, at 47 (citing Fiona Tait, *Testaments of Transformation: The Victim Impact Statement Process in NSW as Experienced by Victims of Crime and Victim Service Professionals* 159, 178 (2015) (Master's thesis, University of Sydney)).

310. *Id.* at 48–49. It bears noting that this research involved written impact statements, not oral statements.

311. Gal & Lowenstein Lazar, *supra* note 7, at 189 (relying on a framework suggested by Pemberton, Aarten & Mulder, *supra* note 28, at 689).

312. Gal & Lowenstein Lazar, *supra* note 7, at 189.

VISs submitted in terrorism cases appear to have unique therapeutic benefits. In the brutal attacks on Muslim worshippers at two mosques in Christchurch, New Zealand, which left fifty-one dead and forty-nine injured, ninety VISs were presented in court.[313] A review of the content of these VISs suggested that, in the context of ideological-based crimes, the impact statements served to provide the attacked community (or in-group) an opportunity for positive self-presentation, on the one hand, and negative "other"-presentation for the terrorist's group, on the other.[314] By focusing on the positive aspects of the attacks' victims, survivors, and New Zealand society, and contrasting them with the negative characteristics of the out-group members that the perpetrator represented, the attacked community members experienced solidarity and self-affirmation while emphasizing the need for tolerance and peaceful coexistence by all people.[315]

The evidence just recounted comes from studies looking directly at the effects on crime victims and how they were reflected in their individual VISs. A different methodology is to ask knowledgeable persons about the effects on crime victims of delivering a VIS. One of us (Erez), together with colleagues, surveyed a sample of American criminal justice professionals. The survey found "a consensus that it was therapeutic for the victims to tell their story and have a chance to explain the impact that a crime had on their lives."[316] Another survey of criminal justice professionals (in several jurisdictions in Canada) found that professionals there "unequivocally" believed that participation in criminal justice proceedings was therapeutic for victims "when they are shown recognition and respect."[317]

In response to this therapeutic rationale for VISs, the critics seem to knock down a strawman. Rather than directly confronting the commonsense conclusion that victims would benefit from at least having the option of addressing the court, critics contend that giving a VIS does not automatically lead to "closure." Professor Vitiello, for example, titles his section on VISs'

313. Ahmad S. Haider, Saleh Al-Salman & Linda S. Al-Abbas, *Courtroom Strong Remarks: A Case Study of the Impact Statements from Survivors and Victims' Families of the Christchurch Mosque Attacks*, 35 INT'L J. SEMIOTICS L. 753, 754 (2022).

314. *Id.* at 757.

315. *Id.* at 757, 766; *see also* Edna Erez et al., *Contested Victimhood in the Adjudication of Terrorism Cases in Israel* (work in progress on file with authors) (reaching similar conclusions).

316. Erez, Ibarra & Downs, *supra* note 26, at 24–25.

317. Jo-Anne Wemmers, *Victims in the Criminal Justice System and Therapeutic Jurisprudence: A Canadian Perspective*, *in* THERAPEUTIC JURISPRUDENCE AND VICTIM PARTICIPATION IN JUSTICE, *supra* note 26, at 67, 80.

therapeutic effects as "closure" and sets up as the target for his attack the proposition that "[v]ictims' rights advocates invoke the need for victims and their families to experience closure to justify many of their policies."[318] But he does not actually cite any victim rights advocate for this proposition, instead relying on a citation to Professor Bandes—a notable critic of VISs.[319] And, in turn, Professor Bandes seems to focus on issues arising in a few death penalty cases where victims' families (or prosecutors) have referred to closure.[320]

We can confidently state that the victims' rights movement does not hitch its defense of VISs to claims of closure. Indeed, both of us have criticized this conception, which acquires different meanings in different crime victimizations or stages of the criminal justice process—i.e., some victims may experience closure when the offender has been identified and arrested, some when a defendant admits guilt, and some when a defendant is convicted and sentenced.[321] One of us (Erez) has explained that professionals in the victims' rights field are wary of using the term "closure."[322] The other of us (Cassell) wrote more than a decade ago that "[i]t is not clear that 'closure' ever really occurs after a violent crime—especially when extreme violence is at issue."[323] The important point remains that "victim impact statements need not deliver total closure to nonetheless be a desirable part of the criminal justice process. [Some victims] would desperately like the chance to make a victim impact statement. Unless there is some compelling countervailing concern, the system ought to accommodate [that] request."[324]

The comments of one Nassar victim well express the importance of delivering a VIS not to obtain complete "closure" but rather at least some "level of closure":

> I'm speaking on behalf of all the girls who experienced this tragedy, whether it was one time or multiple times. . . . Some may be scared to share their experience. I was. I still am sometimes. . . . It left a mental scar that unfortunately will

318. VITIELLO, *supra* note 3, at 101.

319. *Id.* (citing Susan Bandes, *Closure in the Criminal Courtroom: The Birth and Strange Career of an Emotion*, *in* RESEARCH HANDBOOK ON LAW AND EMOTION 102 (Susan A. Bandes, Jody Lyneé Madeira, Kathryn D. Temple & Emily Kidd White eds., 2021)).

320. *See* Bandes, *supra* note 319, at 107–08 (discussing homicide cases).

321. Edna Erez, Julie L. Globokar & Peter R. Ibarra, *Outsiders Inside: Victim Management in an Era of Participatory Reforms*, 20 INT'L REV. VICTIMOLOGY 169, 181–85 (2014).

322. *See* Erez, Ibarra & Downs, *supra* note 26, at 23.

323. Cassell, *supra* note 1, at 623.

324. *Id.*

> always be something that happened. However, I am a strong believer that wounds heal into scars and these scars become stories that you share and heal from each day as time goes on. A voice must be heard in order for all these victims of this tragic event to reach a level of closure.[325]

Professor Vitiello acknowledges that the issue of VISs' therapeutic effects is ultimately an empirical one while contending that "the data do not support a general cathartic effect of victim participation."[326] But his footnote supporting his claim is to outdated information from the 1970s.[327] As discussed above, the clear weight of recent studies in the four decades since suggests some therapeutic benefits. This is likely because, in recent years, reforms have been made to criminal proceedings, "reducing many of the anti-therapeutic tendencies entailed by involvement in [those] proceedings."[328]

Professor Bandes also questions the therapeutic rationale for VISs in her recent article. But as with Vitiello's critique, she primarily focuses on the diversionary question of whether a VIS can deliver "closure."[329] And her critique relies mainly (although not exclusively) on closure issues in death penalty cases[330]—an unrepresentative situation that does not lend itself to broader generalizations.[331]

Ultimately, however, Professor Bandes declines to base her case against VISs on empirical evidence about whether victims benefit from having that opportunity. Instead, she levels a theoretical critique, writing that the "newly minted [therapeutic] goal fits uneasily within the adversarial structure and does not advance any of the traditional purposes of the penal system."[332]

It is hard to understand Bandes's claim that therapeutic arguments for VISs are somehow "newly minted." For example, both of us have been writing about

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325. Sentencing Transcript (1-16-18), *supra* note 9, at 47–48; *see also supra* text accompanying notes 262–263 (providing quotes about closure related to Nassar's apology).

326. VITIELLO, *supra* note 3, at 103.

327. *See id.* at 210 n.148 (citing research from a study "during the late 1970s").

328. Erez, Ibarra & Downs, *supra* note 26, at 37. Also, to the extent that victims may suffer trauma from possible confusion about the purpose of a VIS, that problem can often be dispelled by providing victims with more information about the role of a VIS. *See* DAVIES & BARTELS, *supra* note 19, at 38–39 (collecting evidence on this point).

329. *See* Bandes, *supra* note 3, at 1267–68; Susan A. Bandes, *Victims, "Closure," and the Sociology of Emotion*, 71 LAW & CONTEMP. PROBS. 1, 20 (2009).

330. *See* Bandes, *supra* note 329, at 10 (discussing VIS in a "capital context").

331. *See supra* note 181 and accompanying text.

332. Bandes, *supra* note 3, at 1269 (citing Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L REV. 361, 395–98 (1996)).

this argument for more than two decades.[333] And it is also difficult to understand the impact of her claim that therapeutic goals "fit[] uneasily" within an adversarial structure. Proponents of therapeutic jurisprudence have long noted that the rough edges of an adversarial system of justice—and ways of smoothing those rough edges should be applauded, not condemned.[334]

To bolster her argument, Professor Bandes provides an interesting discussion of the Chanel Miller case (the Stanford swimmer sexual assault case). As recounted by Bandes, the experience of Ms. Miller in delivering a VIS involved "panic and fear" and, ultimately, a lack of self-worth when Miller's rapist received a short sentence.[335] Professor Bandes then wonders, if a VIS is not "meant to make sentences harsher, then what is it for? More broadly, [Miller's case] is a cautionary tale about the victim as collateral damage in an adversary system that too often cloaks punitive aims in the language of healing, making promises it cannot and should not keep."[336]

Using Ms. Miller's VIS to make the case against allowing victims to speak at sentencing seems a curious choice. As is generally known, Miller's VIS went "viral," ultimately being read by more than eight million people in three days, driven by widespread sharing on social media.[337] Miller later wrote a best-selling book—*Know My Name: A Memoir*[338]—in which she attributed "a wave" resulting from her VIS in which she needed to submerge.[339] As she concluded at the end of her book:

> I was forced to fight, in a legal system I did not understand, the bald judge in the black robe, the defense attorney with narrow glasses. Brock with his lowered chin, his unsmiling father, the appellate attorney. The obstacles became harder, I was up against men more educated, more powerful than me, the game rougher, more graphic, serious. I read comments that laughed at my pain. I remember feeling helpless, terrified, humiliated, I cried like I've never cried before. But I remember the

333. *See, e.g.*, Erez, *supra* note 250, at 552; Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment*, 1999 UTAH L. REV. 479, 496–97.

334. *See supra* note 253 and accompanying text (discussing therapeutic jurisprudence literature).

335. Bandes, *supra* note 3, at 1268.

336. *Id.* at 1269.

337. *See* Meaghan Ybos, *The Media Frenzy Over Chanel Miller Boosts Mass Incarceration*, THE APPEAL (Sept. 30, 2019), https://theappeal.org/chanel-miller-brock-turner/ [https://perma.cc/ERE4-43JA]; *People v. Turner*, WIKIPEDIA, https://en.wikipedia.org/wiki/People_v._Turner [https://perma.cc/FBA6-LPQZ].

338. CHANEL MILLER, KNOW MY NAME: A MEMOIR (2019).

339. *Id.* at 255.

> attorney's still shoulders as *guilty* was read. I know Brock slept ninety days in a stiff cot in a jail cell. The judge will never [set] foot in a courtroom again. The appellate attorney's claims were shut down. One by one, they became powerless, fell away, and when the dust settled, I looked around to see who was left.
>
> Only [me]. I survived because I remained soft, because I listened, because I wrote. Because I huddled close to my truth, protected it like a tiny flame in a terrible storm. . . .
>
> Never fight to injure, fight to uplift. Fight because you know that in this life, you deserve safety, joy, and freedom. Fight because it is your life. Not anyone else's. I did it, I am here. Looking back, all the ones who doubted or hurt or nearly conquered me faded away, and I am the only one standing.[340]

In the Miller case, the judge imposed a lenient sentence rather than the sentence Miller recommended. (He was later recalled from office as a result.) Professor Bandes recognizes that the therapeutic qualities of a VIS may depend, to some degree, on the judge's response after hearing from the victim. Bandes then discusses how Judge Aqualina handled the VISs in the Nassar case.[341] As Bandes recounts, Judge Aquilina focused "on creating an environment in which every victim had a voice and felt supported by the judge."[342] But, remarkably, Bandes criticizes Judge Aqualina, writing that it was "unfortunate[]" that "in her efforts to create a healing environment for the victims, the judge quite explicitly aligned herself with the victims against the defendant."[343]

Such criticisms are misplaced. In sentencing Nassar, Judge Aquilina was not required to presume he was innocent. At that stage, Nassar had pleaded guilty to sexually abusing dozens and dozens of girls and young women over several decades. Indeed, the fact that he would spend his life in prison had already essentially been determined.[344] The U.S. Supreme Court has noted that a judge may, after reviewing the evidence in a criminal case, "be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But . . . '[i]mpartiality is not gullibility. Disinterestedness does not mean child-like innocence.'"[345]

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340. *Id.* at 327.

341. Bandes, *supra* note 3, at 1273–75.

342. *Id.* at 1273.

343. *Id.*

344. *See supra* note 10 and accompanying text.

345. Liteky v. United States, 510 U.S. 540, 551 (1994) (quoting *In re* J.P. Linahan, Inc., 138 F.2d 650, 654 (2d Cir. 1943)).

To be sure, given the seven-day hearing involving judicial interactions with more than one hundred victims, it is possible to cherry-pick a few isolated statements from Judge Aquilina that were not well rendered.[346] But, in the course of sentencing a convicted sex offender, a judge is certainly free to express her disapproval. Sentencing, in particular, "is the time for comments against felonious, antisocial behavior recounted and unraveled before the eyes of the sentencer. At that critical stage of the proceeding when penalty is levied, the law vindicated, and the grievance of society and the victim redressed, the language of punishment need not be tepid."[347] As one court explained in a case in which a judge expressed anger at a sex offender:

> Perhaps there is a judge who could remain emotionally neutral when faced with a father who sexually abused his daughter, tended to blame her for the abuse, and then tried to rationalize it by stating that he thought it would have been a good experience for her. But no law requires it.[348]

One final point regarding the therapeutic benefits of delivering a VIS is important. VIS critics are unclear about whether they want to return to a world where victims would be affirmatively barred from delivering a VIS.[349] For example, Bandes begins her article with the concession that VISs are "clearly

346. For example, at one point, Judge Aquilina told Nassar that "[o]ur Constitution does not allow for cruel and unusual punishment. If it did, I have to say I might allow what he did to all of these beautiful souls, these young women in their childhood, I would allow someone or many people to do to him what he did others." Sentencing Transcript (1-16-18), *supra* note 9, at 215; *see also* Bandes, *supra* note 3, at 1274. But this single sentence focusing on Nassar's punishment does not capture the general tenor of hearings, in which Judge Aquilina focused on the victims.

347. People v. Antoine, 486 N.W.2d 92, 93 (Mich. Ct. App. 1992); *accord* Diaz v. State, No. 66589, 2015 WL 3824906, at *2 (Nev. Ct. App. June 16, 2015) (following a domestic victim describing how she was harmed by the defendant's battery, the trial judge advised her to put the crime behind her, suggested she seek counseling from a religious leader, and informed her that the defendant would be going to prison for a long time; the court of appeals concluded the remarks were proper, because they "were made at the end of the victim's impact statement—after all of the other evidence had been presented and immediately before he imposed the sentence").

348. State v. Munguia, 2011 UT 5, ¶ 20, 253 P.3d 1082.

349. *See* VITIELLO, *supra* note 3, at 120 (conceding that "the right to give such statements may be written in stone"); *cf.* Bandes, *supra* note 3, at 1282 (calling not for the abolition of VIS but for "an ongoing series of experiments with a clear-eyed view of the goals we aim for, and a broader sense of the venues in which such goals can be attained").

here to stay."[350] And Vitiello also acknowledges that VISs are well-rooted in the federal system and all fifty states.[351]

The status quo is important because even if one were to conclude that (contrary to the weight of the empirical evidence) the opportunity to provide a VIS is not itself therapeutic, *prohibiting* victim participation in sentencing would be, to put it mildly, anti-therapeutic. Such a world would produce what the victimology literature describes as "secondary victimization"—that is, psychological harm caused to victims by the process itself.[352] Indeed, the bad old days when victims were the forgotten person in the criminal justice[353] was an impetus for the victims' rights movement.[354]

The lack of a meaningful role in criminal justice proceedings is a primary source of victim dissatisfaction.[355] Acknowledgment of the harm done to victims is a protective factor against the development of trauma, and victim acknowledgment is an important factor in victim assessments of sentencing outcomes.[356] Abolishing VISs would be a step backward in the treatment of crime victims—and a traumatic one at that.[357]

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350. Bandes, *supra* note 3, at 1254.

351. *See* VITIELLO, *supra* note 3, at 81, 88. As we note below, many countries in a variety of legal traditions also allow VISs. *See infra* notes 411–422 and accompanying text; *see also* HOLDER, *supra* note 299, at 264 (discussing how the absence of victims from criminal justice processes is a "democratic deficit").

352. *See, e.g.*, Gal & Lowenstein Lazar, *supra* note 7, at 177–81 (discussing how delivering a VIS can help overcome secondary victimization); *see also* Alexa Sardina & Alissa R. Ackerman, *Restorative Justice in Cases of Sexual Harm*, 25 CUNY L. REV. 1, 6 (2022); Michelle A. Jackson, Sarah E. Valentine, Eva N. Woodward & David W. Pantalone, *Secondary Victimization of Sexual Minority Men Following Disclosure of Sexual Assault: "Victimizing me all over again . . .,"* 14 SEXUALITY RSCH. & SOC. POL'Y 275 (2017) (discussing secondary victimization in sexual assault cases); Rebecca Campbell & Sheela Raja, *Secondary Victimization of Rape Victims: Insights from Mental Health Professionals Who Treat Survivors of Violence*, 14 VIOLENCE & VICTIMS 261 (1999) (same); *see also generally* Uli Orth, *Secondary Victimization of Crime Victims by Criminal Proceedings*, 15 SOC. JUST. RSCH. 313 (2002).

353. *See* McDonald, *supra* note 12, at 650.

354. Cassell, *supra* note 12, at 840–45.

355. Pemberton & Reynaers, *supra* note 26, at 232 (citing JOANNA SHAPLAND, JON WILLMORE & PETER DUFF, VICTIMS IN THE CRIMINAL JUSTICE SYSTEM (1985)).

356. *See* Gal & Lowenstein Lazar, *supra* note 7, at 190–93; Pemberton & Reynaers, *supra* note 26, at 232 (citing Andreas Maercker & Julia Muller, *Social Acknowledgment as a Victim or Survivor: A Scale to Measure a Recovery Factor of PTSD*, 17 J. TRAUMATIC STRESS 345 (2004); Uli Orth, *Punishment Goals of Crime Victims*, 27 LAW & HUM. BEHAV. 173 (2003)).

357. While more research is needed, abolishing VISs might also have disparate gender and racial impacts. *See* Erez, Ibarra & Downs, *supra* note 26, at 27 (finding that most professionals surveyed

C. Explaining the Crime's Harm to the Defendant

VISs are also justified on the grounds that they can help explain the crime's harm to the defendant, which might be an important starting point for the defendant's rehabilitation.[358] This argument is unrelated to the ultimate prison (or other) sentence a judge imposes but rather rests on the consequences of a victim looking the "defendant in the eye and let[ting] him know the suffering his misconduct has caused."[359] As Markus Dubber (a thoughtful critic of VISs) has conceded:

> [V]ictim impact evidence lays out before the *offender* the precise nature of [his] act, ideally in such a way as to permit and encourage [him] to identify with the victim's suffering as person. In this way, victim impact evidence can help legitimize the process of [his] punishment in the eyes of the offender and perhaps even contribute to [his] recognition of [himself] as one person among others entitled to mutual respect and, in this sense, to [his] "rehabilitation."[360]

Thus, as Dubber suggests, if a VIS helps a defendant understand and gain empathy for the victim, it may serve as the first step toward *his* effective rehabilitation. A VIS can thus be justified because it may benefit the offender.[361] Indeed, the victim may be "ideally placed to sensitize the offender to the consequences of the crime."[362] "Because both victims and offenders are

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"agree that women . . . are more likely to verbalize and submit a VIS" than men); Jeanna M. Mastrocinque, *Victim Personal Statements: An Analysis of Notification and Utilization*, 14 CRIMINOLOGY & CRIM. JUST. 216, 226 (2014) (finding the odds of women providing a VIS in Britain, referred to as a victim personal statement, were 80% higher for female victims than male; Asian victims were also more likely to provide a statement).

358. *See, e.g.*, Cassell, *supra* note 1, at 623–24; Edna Erez, *Victim Voice, Impact Statements and Sentencing: Integrating Restorative Justice and Therapeutic Jurisprudence Principles in Adversarial Proceedings*, 40 CRIM. L. BULL. 483, 496–97 (2004).

359. Kenna v. U.S. Dist. Ct. for the Cent. Dist. of Cal., 435 F.3d 1011, 1017 (9th Cir. 2006).

360. MARKUS DIRK DUBBER, VICTIMS IN THE WAR ON CRIME: THE USE AND ABUSE OF VICTIMS' RIGHTS 338 (2002).

361. *See, e.g.*, Roberts & Erez, *supra* note 178, at 226.

362. Erez, *supra* note 358, at 496–97; *see also* Shapland & Hall, *supra* note 190, at 187 (discussing how victim participation in sentencing might help a defendant's rehabilitation and "desistance" from committing other crimes). Another possible desirable effect on the defendant from a VIS might be encourage the defendant to accept responsibility by reporting to authorities the others involved in his crime. For example, in delivering her VIS, fifteen-year-old Emma Ann Miller encouraged Nassar to reveal what MSU, USAG, and the U.S. Olympic Committee knew about his abuse. Herman Wong, *Teen Gymnast Confronts Larry Nassar—and Said She's Still Billed for Their*

neither part of the legal profession nor familiar with its legal jargon, a direct appeal by the victim to the offender may be a more effective route to bring offenders to accepting responsibility."[363]

Addressing the defendant directly can be particularly important in cases involving intra-family crimes. In such cases, a VIS can be a mechanism for the family to convey to the defendant their concern for him.[364] According to some criminal justice professionals, "[t]he VIS functions like an extension of family counseling sessions at such poignant moments."[365]

Criticizing this argument, Professor Vitiello claims that "[g]iven the [victims' rights movement's] role in abandoning rehabilitation . . . this argument [about rehabilitating offenders] seems at best a makeweight."[366] But this ad hominem attack directed against the "movement" fails to address the merits of the rehabilitation argument.[367] To our knowledge, the victims' rights "movement" (whomever that might comprise) has not "abandoned" rehabilitation. Indeed, to the contrary, a recent national survey of crime victims' views on safety and justice found that, by a two-to-one margin, victims prefer that the criminal justice system focus more on rehabilitating people who commit crimes than punishing them.[368] And, the same survey found that, by a

Sessions, WASH. POST (Jan. 22, 2018, 10:03 PM), https://www.washingtonpost.com/news/early-lead/wp/2018/01/22/teen-gymnast-confronts-larry-nassar-and-the-school-that-had-still-demanded-payment-for-their-sessions/ [https://perma.cc/NYY2-6WDU]; Sentencing Transcript (1-22-18), *supra* note 9 at 57. It does not appear that her appeal to Nassar led to him cooperating, but perhaps in other cases defendants might do so.

363. Erez, *supra* note 358.

364. Erez, Ibarra & Downs, *supra* note 26, at 25.

365. *Id.*

366. VITIELLO, *supra* note 3, at 106.

367. Vitiello's argument also gets the timing wrong. The concern about rehabilitation as a goal of sentencing is most prominently ascribed to Robert Martinson's influential 1974 article. Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 PUB. INT. 22 (1974); *see also* Robert Martinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 HOFSTRA L. REV. 243 (1979). As later recounted, "[t]he decline of support for the rehabilitative ideal was sudden and qualitative . . . . By the mid-1970s, it had become common to ask, 'Is rehabilitation dead?'" Francis T. Cullen, *Rehabilitation: Beyond Nothing Works*, 42 CRIME & JUST. 299, 314 (2013). The crime victims' rights movement came to the fore later—after support for rehabilitation had already collapsed. *See supra* notes 13–17 and accompanying text (discussing an influential report from the President's Task Force on Victims of Crime released in 1982).

368. ALL. FOR SAFETY & JUST., CRIME SURVIVORS SPEAK: THE FIRST-EVER NATIONAL SURVEY OF VICTIMS' VIEWS ON SAFETY AND JUSTICE (2018), http://www.allianceforsafetyandjustice.org/crimesurvivorsspeak/report [https://perma.cc/S5QZ-FBWY].

three-to-one margin, victims prefer holding people accountable through options beyond prison, such as rehabilitation, mental health treatment, drug treatment, community supervision, or community service.[369]

In addition, our findings here suggest that the issue of VISs playing a rehabilitative role for defendants is not "makeweight." As discussed above,[370] about three-quarters (76%) of the primary victims and about two-thirds (65%) of the indirect victims addressed Nassar. These are large percentages—a clear majority of the VISs in our study[371]—and suggest that the potential positive effects of victims addressing defendants is an important area for future research.

While we are skeptical of relying on what Nassar himself said about the experience, it is interesting that he acknowledged the effect of hearing from victims. In a statement to the court, he said:

> The words expressed by everyone that has spoken, including the parents, have impacted me . . . to my innermost core. With that being said, I understand and acknowledge that it pales in comparison to the pain, trauma and emotions that you all are feeling. It's impossible to convey the depth and breadth of how sorry I am to each and everyone involved. The visions of your testimonies will forever be present in my thoughts.[372]

To be sure, our study could not explore direct rehabilitative effects at any length. While we have a sample size of more than one hundred victims, we have a sample size of one defendant: Nassar. Moreover, Nassar was effectively sentenced to life in prison, meaning he will never have an opportunity to repeat his crimes against women and girls. But an interesting future research project would be to compare recidivism rates of defendants who heard a VIS to those who did not.

A related area for future research our study suggests is the role of forgiveness in delivering a VIS.[373] Victim participation in sentencing through

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369. *Id.*

370. *See supra* note 129 and accompanying text.

371. Another study, however, found that any mention of defendants by victims was rare, occurring in fewer than 10% of cases. *See* Myers, Nuñez, Wilkowski, Kehn & Dunn, *supra* note 34, at 483; *cf.* Booth, Bosma & Lens, *supra* note 7, at 1492–93 (finding significant interaction between victims and defendants in Dutch sentencing proceedings).

372. *The 73 Words Larry Nassar Spoke Before He Was Sentenced to a Lifetime in Prison*, CNN (Feb. 6, 2018, 6:41 AM), https://www.cnn.com/2018/02/05/us/nassar/index.html [https://perma.cc/RD4V-XEHB].

373. *Cf.* JOHN BRAITHWAITE, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION 15 (2002) (cautioning against expecting victims to forgive, on grounds that forgiveness is a gift that only victims can give of their own volition).

VISs may have reinstated the traditional values of punishment, evident in the spontaneous according of "forgiveness" by some victims. In about a quarter of the VISs, "forgiveness" was correlated with direct and indirect religious teachings. Some victims articulated that a prerequisite for forgiveness was a "sincere" apology—something that Nassar's apology lacked. Others emphasized that whatever the outcome in this world, Nassar would ultimately be judged by "a Higher Authority." It can be argued that this undercurrent of traditional attitudes to punishment needs to be recognized in criminal justice processes, and the VIS is an effective way of giving expression to these sentiments without undermining the principles on which contemporary criminal justice systems operate.[374]

D. Serving a Public Educative Function

Beyond educating defendants about the harm their crime inflicted, VISs can also serve to educate the public. Even critics of VISs have conceded that they can potentially serve this public educative function. For example, Professor Bandes's recent article discusses this point extensively, admitting that VISs might serve to "call[] attention to crimes that are poorly understood and underenforced."[375]

The Nassar sentencing hearing might serve as a quintessential example of VISs' public educative function. The hearing served to spotlight the crime of sexual assault and those who enabled Nassar to commit his crimes against the victims. As CNN recounted shortly after the Nassar sentencing hearing, the "stunning victim impact statements from the 'army of survivors' have focused sharply critical attention on the systems of power that protected Nassar for so long."[376]

Indeed, one of the most remarkable—and positive—effects of the Nassar VISs is that the statements encouraged other sex abuse victims to come forward. A compelling example was provided by National Public Radio, which reported what followed after Kyle Stephens began the Nassar sentencing hearing with

374. *See* Edna Erez, Kathy Laster & Paul G. Cassell, *"Give Me that Old Time Morality:" Apology, Forgiveness, and Victim Impact Statements* (work in progress) (on file with authors). It should also be noted that victim "forgiveness" might also be correlated with *less* severe punishment. *Cf. infra* notes 435–466 and accompanying text (discussing the issue of whether VISs increase the severity of punishment).

375. Bandes, *supra* note 3, at 1271.

376. Eric Levenson, *Larry Nassar Apologizes, Get 40 to 125 Years for Decades of Sexual Abuse*, CNN (Feb. 5, 2018, 2:17 PM), https://www.cnn.com/2018/02/05/us/larry-nassar-sentence-eaton/index.html [https://perma.cc/K4GE-7VB2].

her famous statement—"little girls don't stay little forever."[377] Her remarks became national news. And after that first day, other Nassar victims began coming forward. As the prosecution's victim-witness coordinator later recounted, she remembers in particular one mom walking into court. The coordinator explained:

> [The mom was] really quiet and stoic and said, "I need to add my daughter's name to the list." And I was like, "OK, great." I introduced myself and I'm trying to get the information from her and she just starts crying and she goes, "She just told us last night that she was also abused."[378]

Allowing Nassar's victims to speak appears to have helped not only the women and girls Nassar sexually abused but, more broadly, sex assault victims around the world. Several months after the sentencing hearing, Judge Aquilina recounted that "[w]omen have contacted me and said I feel like those girls were telling my story verbatim, and when you spoke to them and you believed them, your words are healing me."[379] Judge Aquilina said that women had told her they recorded her remarks, "and when they need a boost they listen to my words, which I'm grateful for."[380]

Nassar's sentencing also spotlighted the role of those who enabled Nassar's long-running sexual abuse. As the hearing concluded, CNN recounted that, "[t]hough the sentencing marks the end of Nassar's time in the public eye, it has focused critical attention on USA Gymnastics, the US Olympic Committee and Michigan State University, the institutions that employed Nassar for about two decades."[381] Indeed, during the first week of the sentencing hearing, USAG cut ties with the training facility where Nassar abused some of his victims, and three leaders of the board stepped down under public pressure.[382] The cause-and-effect seems clear: "As one brave, young gymnast after another took the podium to lambaste serial molester and former gymnastic physician Larry

377. *See supra* note 134 and accompanying text.

378. *Larry Nassar's Survivors Speak, and Finally the World Listens—and Believes*, NPR (Dec. 10, 2018, 6:01 AM), https://www.npr.org/2018/12/07/674525176/larry-nassars-survivors-speak-and-finally-the-world-listens-and-believes [https://perma.cc/6AR8-727C].

379. Fieldstadt, *supra* note 291.

380. *Id.*

381. Eric Levenson, *Larry Nassar Sentenced to Up to 175 Years in Prison for Decades of Sexual Abuse*, CNN (Jan. 24, 2018, 9:29 PM), https://www.cnn.com/2018/01/24/us/larry-nassar-sentencing/index.html [https://perma.cc/L77Y-YQ3D] (discussing the fact that the "fallout" from the hearing was "only beginning").

382. *Id.*

Nassar, the national governing body for the sport announced . . . that its top executives were stepping down."[383]

Other developments also followed from the sentencing hearing. Within a week of the victims' testimony, Texas Governor Greg Abbott ordered an investigation into allegations of sexual abuse that took place at a training facility in Texas.[384] In a letter to the Texas Department of Public Safety, Abbott said:

> The public statements made by athletes who previously trained at the Karolyi Ranch are gut-wrenching. . . . Those athletes, as well as all Texans, deserve to know that no stone is left unturned to ensure that the allegations are thoroughly vetted and the perpetrators and enablers of any such misconduct are brought to justice.[385]

In addition, shortly after the start of Nassar's victims' testimony, two top MSU officials—President Lou Anna Simon and Athletic Director Mark Hollis—decided to step down.[386]

And amazingly, one Nassar victim said during her statement that MSU was still billing her mother for the medical appointments where Nassar sexually assaulted her. "Are you listening, MSU? I can't hear you. Are you listening?" she pointedly asked.[387] Apparently MSU was listening, because shortly thereafter the school announced that Nassar's patients with outstanding bills would not be billed, and the University was reviewing whether to offer refunds.[388]

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383. Elliot C. McLaughlin, *As Larry Nassar Faces Accusers, USA Gymnastics Leaders Step Down*, CNN (Jan. 22, 2018, 10:56 PM), https://www.cnn.com/2018/01/22/us/usa-gymnastics-board-resignations-larry-nassar/index.html [https://perma.cc/S66R-2ER2].

384. Bryan Flaherty, *Texas Governor Orders Investigation into Karolyi Ranch after Larry Nassar Trial*, WASH. POST (Jan. 30, 2018, 7:07 PM), https://www.washingtonpost.com/news/early-lead/wp/2018/01/30/texas-governor-orders-investigation-into-karolyi-ranch-after-larry-nassar-trial/ [https://perma.cc/V5ZH-8HV9].

385. *Id.*

386. Samuel Chamberlain, *Michigan State President Steps Down Over Larry Nassar Scandal*, FOX NEWS (Jan. 24, 2018, 9:40 PM), https://www.foxnews.com/us/michigan-state-president-steps-down-over-larry-nassar-scandal [https://perma.cc/BX94-8H98]; Dan Murphy, *Michigan State AD Mark Hollis Resigns*, ESPN (Jan. 26, 2018, 11:05 AM), https://www.espn.com/college-sports/story/_/id/22223678/michigan-state-athletic-director-mark-hollis-resigns [https://perma.cc/3PY2-6PZC].

387. Sentencing Transcript (1-22-18), *supra* note 9, at 62.

388. Wong, *supra* note 362.

Similarly, as the victims spoke, related congressional legislation suddenly started to move toward approval. The bill—the Protect Young Victims from Sexual Abuse and Safe Sport Authorization Act—was first proposed in March 2017 and passed the Senate in November 2017.[389] But, while the Nassar victims' testimony was wrapping up in Michigan, a companion bill overwhelmingly passed the House on January 29, 2018, and the next day, the Senate approved the final version unanimously by voice vote.[390] On February 14, 2018—about two weeks after the Nassar sentencing hearing concluded—President Trump signed the bill into law.[391]

All of this fallout from the Nassar VISs suggests that the hearing played an important public educative function. And Professor Bandes acknowledges the power of the Nassar victims' VISs "in conveying the harms of sexual assault, often in an almost unbearably poignant fashion."[392] But, Bandes continues, "[e]ven if this is so, we must nevertheless ask whether a criminal sentencing hearing is the best forum for conveying such information."[393]

Surely this is the wrong question—a classic example of the perfect being the enemy of the good. Few would argue that airing questions of responsibility for sexual assault in a criminal sentencing is using the "best forum." But as the Nassar case amply demonstrates, a sentencing hearing may be one of the few (and, perhaps, the *only*) forums where victims will have a public platform to directly raise their concerns. If the Nassar victims had been denied their day in (sentencing) court, later hearings investigating who was ultimately responsible for enabling Nassar's sexual abuse might have been blocked. And, as recounted above, the sentencing hearing helped to open up other forums for the Nassar victims.[394]

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389. Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act of 2017, Pub. L. No. 115-126, 132 Stat. 318 (2018).

390. Will Hobson, *Bill Targeting Sex Abuse in Olympic Sports, Inspired by Larry Nassar Case, Nears Trump's Desk*, WASH. POST (Jan. 30, 2018, 5:32 PM), https://www.washingtonpost.com/news/sports/wp/2018/01/30/bill-targeting-sex-abuse-in-olympic-sports-inspired-by-larry-nassar-case-nears-trumps-desk/ [https://perma.cc/BG7L-FSDM].

391. Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act of 2017, Pub. L. No. 115-126, 132 Stat. 318 (2018).

392. Bandes, *supra* note 3, at 1271.

393. *Id.*

394. *See supra* notes 129–157 and accompanying text; *see also generally* Christine Hauser & Maggie Astor, *The Larry Nassar Case: What Happened and How the Fallout Is Spreading*, N.Y. TIMES (Jan. 25, 2018), https://www.nytimes.com/2018/01/25/sports/larry-nassar-gymnastics-abuse.html [https://perma.cc/FR2M-KA98].

In response to this seemingly straightforward point, Professor Bandes complains that "as compelling as the victim statements in the Nassar case were, the manner in which the hearings were conducted detracted from their educational value."[395] In support of her argument, Bandes contends that, "[u]nfortunately, in her efforts to create a healing environment for the victims, the judge quite explicitly aligned herself with the victims against the defendant."[396]

In conducting Nassar's sentencing hearing, Judge Aquilina had to consider the interests of more than one hundred sexual abuse victims along with the interests of the man who abused them. To be sure, the fact that Nassar had been convicted of sex abuse did not justify violating his rights. But Bandes seems to be complaining that Judge Aquilina attempted to create "a healing environment for the victims."[397] Creating that environment did not abridge any rights of Nassar.[398] And creating that environment helped more than a hundred victims of sexual abuse recover from the trauma that Nassar criminally inflicted on them.[399] Judge Aquilina's supportive remarks to the victims should not be criticized but commended.

Professor Bandes also argues:

> [B]ecause the statements were part of a sentencing hearing for an individual defendant rather than a forum that could address larger issues, the Nassar hearings were incapable of educating the public about the most important aspects of the harm the young gymnasts suffered—the multiagency, multilayered complicity that allowed the assaults to continue for years.[400]

This is true as far as it goes. But, as just noted, the victims' statements placed pressure on other institutions to investigate the complicity of Nassar's enablers—including pressure on Congress, the Texas Department of Public

395. Bandes, *supra* note 3, at 1272.

396. *Id.* at 1273.

397. *Id.*

398. *See supra* notes 344–348 and accompanying text.

399. *See supra* notes 248–256 and accompanying text.

400. Bandes, *supra* note 3, at 1274 (citing, e.g., Wajeeha Kamal, *A Timeline of Nassar's Abuse: Charges and Michigan State's Response*, STATE NEWS (Jan. 26, 2021), https://statenews.com/article/2021/01/a-timeline-of-nassars-abuse-charges-and-michigan-states-response [https://perma.cc/5UAE-X9UM]); *see also* Rosemary Ardman, Comment, *The Larry Nassar Hearings: Victim Impact Statements, Child Sexual Abuse, and the Role of Catharsis in Criminal Law*, 82 MD. L. REV. 782, 819 (2023) (noting the Nassar victims' statements "functioned as much to absolve the community of its complicity as to illuminate the harm of Nassar's crimes").

Safety, USAG, MSU, and others.[401] The obvious but important point is that while VISs may be incapable of educating the public about all aspects of a crime, they certainly can be a positive step in the right direction. And for that reason alone, they should be allowed.

E. Improving the Perceived Fairness of Sentencing

Another justification for VISs is that they help to improve the fairness of the process—as perceived both by the public and by victims.[402] Given the structure of contemporary criminal justice systems, fairness requires victim participation. The President's Task Force on Victims of Crime Final Report explained this point forcefully in concluding that "[w]hen the court hears, as it may, from the defendant, his lawyer, his family and friends, his minister, and others, simple fairness dictates that the person who has borne the brunt of the defendant's crime be allowed to speak."[403]

Recent victims' rights enactments "recogniz[e] that the sentencing process cannot be reduced to a two-dimensional, prosecution versus defendant affair. Instead, [these laws treat] sentencing as involving a third dimension—fairness to victims—requiring that they be 'reasonably heard' at sentencing."[404] As Professor Douglas Beloof has explained, it is no longer appropriate to evaluate criminal justice issues solely in terms of the venerable "due process" or "crime control" models.[405] Instead, numerous state constitutional amendments, as well as federal and state statutes, now recognize that crime victims should be given the opportunity to participate in criminal proceedings, including sentencing proceedings.[406]

The point here is not that, merely because the defendant gets to allocute at sentencing, the victim should do so as well. Such a claim might be subject to

401. *See* GUIORA, *supra* note 50.

402. *See* Cassell, *supra* note 1, at 624–25; Erez, *supra* note 250, at 555.

403. PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, *supra* note 13, at 77.

404. United States v. Degenhardt, 405 F. Supp. 2d 1341, 1347 (D. Utah 2005) (footnote omitted).

405. Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289, 302.

406. *See* Paul G. Cassell & Margaret Garvin, *Protecting Crime Victims in State Constitutions: The Example of the New Marsy's Law for Florida*, 110 J. CRIM. L. & CRIMINOLOGY 99, 115–16 (2020); *see also, e.g.*, 18 U.S.C. § 3771(a) (providing that crime victims have "[t]he right to be reasonably heard at any public proceeding . . . involving . . . sentencing" and the "right to be treated with fairness"); ARIZ. CONST. art. II, § 2.1 ("To preserve and protect victims' rights to justice and due process, a victim of crime has a right . . . [t]o be treated with fairness . . . [and] [t]o be heard at any proceedings involving . . . sentencing.").

the rejoinder that the criminal justice system sometimes gives some rights to the defendant alone. Rather, the point here is that the defendant is allowed to speak at sentencing because this opportunity is critical to the legitimacy of the proceeding.[407] We allow defendants to speak at sentencing "to assure the appearance of justice and to provide a ceremonial ritual at which society pronounces its judgment."[408] By the same token, allowing victims the same opportunity helps assure perceived fairness. In other words, victim impact evidence is appropriate not merely because defendants have that opportunity; rather, it is appropriate for the *same reason* as defendants have the opportunity.[409]

Of course, determining what procedures contribute to "fairness" is arguably a subjective exercise. But allowing the victims to speak is a recognized part of federal and state criminal justice systems in this country[410] and is expanding to be part of criminal procedures in many other countries around the world as well.

A point VIS critics often overlook is that VISs are not some kind of American exceptionalism.[411] In fact, civil law, inquisitorial jurisdictions (such as France and former French colonies) have long permitted involvement by victims and counsel for victims in criminal processes.[412] Along the same lines,

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407. *See* Kimberly A. Thomas, *Beyond Mitigation: Towards a Theory of Allocution*, 75 FORDHAM L. REV. 2641, 2678 (2007).

408. Giannini, *supra* note 24, at 483 (quoting United States v. Curtis, 523 F.2d 1134, 1135 (D.C. Cir. 1975)); *see also* Thomas, *supra* note 407, at 2672–73.

409. We are indebted to Professor Alan Michaels for this point.

410. *See supra* notes 29–37 and accompanying text.

411. *Cf.* William T. Pizzi, *Soccer, Football and Trial Systems*, 1 COLUM. J. EUR. L. 369 (1995) (discussing differences between the European criminal justice system and the American system through the lens of soccer and American football); *see also generally* TYRONE KIRCHENGAST, VICTIMOLOGY AND VICTIM RIGHTS: INTERNATIONAL COMPARATIVE PERSPECTIVES (2017) (discussing the advance of crime victims' rights around the world).

412. *See* KERSTIN BRAUN, VICTIM PARTICIPATION RIGHTS: VARIATION ACROSS CRIMINAL JUSTICE SYSTEMS 133–73 (2019) (discussing victim involvement in inquisitorial jurisdictions and explaining that because they do not have "a distinct sentencing phase, VISs . . . have not been introduced in Germany, France, Denmark and Sweden"); Janine Barbot & Nicolas Dodier, *Rethinking the Role of Victims in Criminal Proceedings: Lawyers' Normative Repertoire in France and the United States*, 64 REVUE FRANÇAISE DE SCIS. POLITIQUE 407, 408 (Sarah-Louise Raillard trans., 2014) (comparing the expansion of civil action in favor of groups in the French criminal justice system to the ongoing debate over the expansion of VISs in the U.S. criminal justice system); KIRCHENGAST, *supra* note 411, at 90 (noting that the expansion of VISs in common law jurisdictions "brings victims in common law, adversarial jurisdictions slightly closer to victims in civil law countries, where counsel is able to make submissions across all phases of the trial, including sentencing"); *id.* at 144–45 (discussing victim participation in trial and sentencing proceedings under French inquisitorial

many Latin American countries grant victims a voice during criminal proceedings that is roughly equivalent to a VIS, including Argentina, Bolivia, Brazil, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, and Venezuela.[413] And in recent decades, many other countries have made VISs part of their criminal justice architecture.[414] For example, South Korea adopted VISs in the late 1980s, Taiwan in the late 1990s, and Japan in the early 2000s.[415] More recently, encouraged by the European Union, many European countries have moved in the same direction. After a trial period, VISs were introduced nationally in England and Wales in 2001 and Scotland in 2003.[416] According to one tabulation, by the late 2000s, Austria, Belgium, Estonia, Finland, Luxembourg, the Netherlands, Poland, and Romania had likewise adopted VISs.[417] Many other countries—including Australia, Brazil, Canada, Ireland, Israel, Malaysia, and South Africa—have also moved to allow victim participation at sentencing in various forms.[418]

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procedures); *see also* Xavier Blanc-Jouvan, Univ. Paris I, *Worldwide Influence of the French Civil Code of 1804, on the Occasion of its Bicentennial Celebration*, at 1, 5 (Sept. 27, 2004), *in* CORNELL L. SCH. BERGER INT'L SPEAKER PAPERS, Sept. 2004 (explaining that many former French colonies adopted and maintained either identical, or near identical, civil codes as the French Civil Code post decolonization).

413. *See* VERÓNICA MICHEL, PROSECUTORIAL ACCOUNTABILITY AND VICTIMS' RIGHTS IN LATIN AMERICA 50–54 (2018); *see also* KIRCHENGAST, *supra* note 411, at 205 (discussing victims' right to make a statement across all phases through to sentencing in Brazil).

414. *See generally* Maarten Kunst, Giulia de Groot, Jelmar Meester & Janne van Doorn, *The Impact of Victim Impact Statements on Legal Decisions in Criminal Proceedings: A Systematic Review of the Literature Across Jurisdictions and Decision Types*, 56 AGGRESSION & VIOLENT BEHAV. 1 (2021). For a partial timeline on VIS expansion, see Mesmaecker, *supra* note 294, at 134.

415. Tatsuya Ota, *The Development of Victim Support and Victim Rights in Asia*, *in* SUPPORT FOR VICTIMS OF CRIME IN ASIA 113, 127 (Wing-Cheong Cahn ed., 2008).

416. James Chalmers, Peter Duff & Fiona Leverick, *Victim Impact Statements: Can Work, Do Work (For Those Who Bother to Make Them)*, CRIM. L. REV. 360, 360 (2007); *see also* Julian V. Roberts & Marie Manikis, *Victim Personal Statements in England and Wales: Latest (and Last) Trends from the Witness and Victim Experience Survey*, 13 CRIMINOLOGY & CRIM. JUST. 245, 246 (2012).

417. S. VAN DER AA, R. VAN MERRIËNBOER, A. PEMBERTON, J. LÁZARO, C. RASQUETE, C. AMARAL, F. MARQUES & M. PITA, PROJECT VICTIMS IN EUROPE: IMPLEMENTATION OF THE EU FRAMEWORK DECISION ON THE STANDING OF VICTIMS IN CRIMINAL PROCEEDINGS IN THE MEMBERS STATES OF THE EUROPEAN UNION 46 (2009); *see also* Alice K. Bosma, Marc S. Groenhuijsen & Max de Vries, *Victims' Participation Rights in the Post-Sentencing Phase: The Netherlands in Comparative Perspective*, 12 NEW J. EUR. CRIM. L. 128, 129–30 (2021) (discussing victim participatory rights in the Netherlands and other European countries).

418. *See, e.g.*, Tyrone Kirchengast, *Victim Impact Statements and the* Previtera *Rule: Delimiting the Voice and Representation of Family Victims in New South Wales Homicide Cases*, 24 U. TASMANIA L. REV. 114, 115 (2005) (discussing VISs in Australia); Manikis, *supra* note 21, at 87 (discussing VISs

VISs clearly resonate with a sense of justice found across a worldwide swath of cultures and traditions.[419] And victim participation is also expanding in similar ways in international tribunals. A good illustration comes from the Rome Statute of the International Criminal Court (ICC), to which 124 States are parties (including 33 African States, 19 Asian-Pacific States, 19 Eastern European States, 28 Latin American and Caribbean States, and 25 Western European and other states).[420] After the statute went into effect, the ICC held that victims had an independent voice under the statute: "In the Chamber's opinion, the Statute grants victims an independent voice and role in proceedings before the Court. It should be possible to exercise this independence, in particular, vis-à-vis the Prosecutor of the International Criminal Court so that victims can present their interests."[421] An expanding role for victims appears to be a common, contemporary feature of other international tribunals.[422]

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in Canada); Gal & Lowenstein Lazar, *supra* note 7 (discussing VISs in Israel); Shahrul Mizan Ismail, Halila Faiza Zainal Abidin & Apnizan Abdullah, *Victim Impact Statement in Criminal Sentencing: Success or Setback for the Criminal Justice Process*, 8 CURRENT L.J. xv, xix (2017) (discussing development and desirability of VISs in Malaysia since 2012); Annette van der Merwe & Lize-Mari Mitchell, *The Use of Impact Statements, Minimum Sentences and Victims' Privacy Interests: A Therapeutic Exploration*, 53 DE JURE L.J. 1, 2 (2020) (discussing development of VISs in South Africa); *cf.* Amartya Sahastranshu Singh, *Procedural Limitations of Victim Impact Statement in India: A Critical Analysis*, 5 J. VICTIMOLOGY & VICTIM JUST. 100, 101 (2022) (discussing introduction of VISs for homicide cases in Indian courts); Kerstin Braun, *Giving Victims a Voice: On the Problems of Introducing Victim Impact Statements in German Criminal Procedure*, 14 GERMAN L.J. 1889, 1894–95 (2013) (discussing problems of using VISs in Germany but noting victim involvement in other steps in the process); *see also generally* KIRCHENGAST, *supra* note 411, at 223 (discussing expansion of crime victims' rights as a central force in law and policy in the twenty-first century around the world).

419. *See* JONATHAN DOAK, VICTIMS' RIGHTS, HUMAN RIGHTS AND CRIMINAL JUSTICE: RECONCEIVING THE ROLE OF THIRD PARTIES 243 (2008) (noting a shift towards victims' rights arose from a "genuine and deeply-rooted realization that victims have a legitimate interest in the way that criminal justice is administrated, in terms of substance, processes and outcomes"); KIRCHENGAST, *supra* note 411, at 223 (noting the advance of crime victims' rights as a characteristic of twenty-first century criminal justice system).

420. *The States Parties to the Rome Statute*, INT'L CRIM. CT., https://asp.icc-cpi.int/states-parties [https://perma.cc/S7K8-XAVC].

421. Situation in the Democratic Republic of the Congo, ICC-01/04, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ¶ 51 (Jan. 17, 2006), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2006_01689.PDF [https://perma.cc/T58U-ADK9]; *see also* KIRCHENGAST, *supra* note 411, at 109–10.

422. *See, e.g.*, SARAH WILLIAMS, HANNAH WOOLAVER & EMMA PALMER, THE AMICUS CURIAE IN INTERNATIONAL CRIMINAL JUSTICE (Michael Bohlander ed., 2021); SONALI CHAKRAVARTI, SING THE RAGE: LISTENING TO ANGER AFTER MASS VIOLENCE 24–56 (2014)

To some degree, our argument here is circular: We are justifying the use of VISs in a Michigan court proceeding because the Michigan court procedures allowed them—just as many other states and countries would allow them. But this argument is only circular to a degree. Through democratic legislative processes, Michigan passed its Crime Victims' Rights Act, extending victims the right to deliver a VIS in 1985.[423] Then, three years later, the voters in Michigan overwhelmingly approved an amendment to the Michigan Constitution, enshrining victims' rights in Michigan's organic law and specifically protecting a victim's right "to make a statement to the court at sentencing."[424] To be perceived as a fair process, a criminal justice system must generally align with the public's views as to what is a fair process.[425] To our knowledge, there has never been an organized effort to change those enactments in Michigan . Now, more than three decades later, surely the burden of demonstrating that Michigan's VIS provision does not contribute to perceived fairness in the process rests on its critics, not its proponents.

Turning specifically to the Nassar sentencing hearing, reading through the transcripts, it is difficult to understand why hearing from the victims was somehow unfair. To be sure, one can always raise a question about a particular

(tracing the roots of modern victim-oriented criminal justice proceedings in ad hoc tribunals and South Africa's Truth and Reconciliation Commission); Barrie Sander, *The Expressive Limits of International Criminal Justice: Victim Trauma and Local Culture in the Iron Cage of the Law*, 19 INT'L CRIM. L. REV. 1014, 1021 (2019); Jonathan Doak, *The Therapeutic Dimension of Transitional Justice: Emotional Repair and Victim Satisfaction in International Trials and Truth Commissions*, 11 INT'L CRIM. L. REV. 263, 271 (2011); Christine H. Chung, *Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?*, 6 NW. J. INT'L HUM. RTS. 459, 482 (2008); *see also* KIRCHENGAST, *supra* note 411, at 97–120 (surveying crime victims' rights in international tribunals).

423. William Van Regenmorter Crime Victim's Rights Act, MICH. COMP. LAWS §§ 780.751-.834 (1985).

424. MICH. CONST. art. I, § 24(1). More than 80% of Michigan voters voted yes on the amendment. *See* BUREAU OF ELECTIONS, MICH. DEP'T OF ST., INITIATIVES AND REFERENDUMS UNDER THE CONSTITUTION OF THE STATE OF MICHIGAN OF 1963, at 8 (2008), https://www.michigan.gov/-/media/Project/Websites/sos/02lehman/Const_Amend.pdf?rev=53e14fc9a2bb4c628c61faa8d30a51a9 [https://perma.cc/GZ93-NEN8].

425. *See* Stephanos Bibas, *Transparency and Participation In Criminal Procedure*, 81 N.Y.U. L. Rev. 911, 953–54 (2006) (citing Tom R. Tyler, Kenneth A. Rasinski & Nancy Spodick, *Influence of Voice on Satisfaction with Leaders: Exploring the Meaning of Process Control*, 48 J. PERSONALITY & SOC. PSYCH. 72, 75–80 (1985)) (discussing ways to make the criminal justice system more transparent by increasing victim participation; noting that "[p]articipants see the law as more fair and legitimate when they have some control over the process and feel they have heard, whether or not they control ultimate outcomes"); *see also generally* TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006).

statement by a victim or a responding comment by a judge. But the overriding impression that one has from reading the transcripts is that victims were finally being heard—and, judging from the fallout, the public approved. Indeed, more broadly, allowing victims to speak in the process helped to correct a historical injustice, which the late Norwegian criminologist Nils Christie has referred to as the state stealing the conflict from victims.[426]

Against the position that the VIS process (such as used in the Nassar case) enhances the perceived fairness of the process, what do the VIS critics say? Professor Vitiello acknowledges the fairness argument but then diverts into separate issues of whether public defenders' offices are underfunded or whether recent Supreme Court holdings have leaned too far in favor of the prosecution.[427] But those diversionary questions do not address the core issue of whether a criminal justice process in which victim voices at sentencing are silenced would be perceived as fairer than the one America has today. We believe the answer to that question is clear—as laws in all fifty states permitting VISs strongly suggest.

Professor Vitiello also concedes that if "the purpose of [our criminal justice] system is to compensate victims, then victim participation, including victim impact statements, is needed to achieve fairness."[428] But Vitiello gamely maintains that compensating victims is not a "core" function of the criminal justice system.[429] The qualifier "core" is necessary for his argument because, at sentencing, compensating victims is a nearly universal function of the criminal justice system. The federal government and all fifty states have statutes allowing judges to award restitution at sentencing.[430] Indeed, as of 2016, twenty of the thirty-three states with state constitutional amendments protecting crime victims' rights contained some form of a right to restitution.[431] In addition, the

426. Nils Christie, *Conflicts as Property*, 17 BRIT. J. CRIMINOLOGY 1, 4 (1977). Christie also aptly observes that "lawyers are particularly good in stealing conflicts" and that "[c]onflicts become the property of lawyers." *Id.*

427. VITIELLO, *supra* note 3, at 107.

428. *Id.*

429. *Id.*

430. *See e.g.*, 18 U.S.C. §§ 3663, 3663A; *see also generally* TOBOLOWSKY, BELOOF, GABOURY, JACKSON & BLACKBURN, *supra* note 34.

431. *See* TOBOLOWSKY, BELOOF, GABOURY, JACKSON & BLACKBURN, *supra* note 34, at 171; Cassell & Garvin, *supra* note 406, at 129; *see also, e.g.*, FLA. CONST. art. I, § 16(b)(9) (promising victims the state constitutional right to "full and timely restitution in every case and from each convicted offender for all losses suffered, both directly and indirectly, by the victim as a result of the criminal conduct"); WIS. CONST. art. I, § 9m(2) (promising victims the state constitutional right to "full restitution").

federal government and many states *require* restitution for some crimes through various mandatory restitution statutes.[432] It is unclear why these provisions promising crime victims restitution are not a "core" part of the process. And, in any event, so long as they are part of the process, then—as Vitiello concedes—VISs are needed to achieve fairness in that part of the process.

Finally, Professor Vitiello rehashes his argument that VISs can distract a sentencer from offender culpability and render proceedings unfair because punishment might be imposed that is disproportionate to the offender's blameworthiness.[433] But, as discussed earlier, Professor Vitiello is simply wrong in asserting that an offender's sentence must be "proportionate" to blameworthiness.[434]

F. Victim Impact Statement and Sentence Severity

Another concern often raised about VISs is the claim that they will increase sentence severity. Hearing from victims about the impact of a crime, claim VIS critics, will blind sentencers to other considerations and lead to harsher punishments. For example, Professor Vitiello argues that VISs "may lead to punishment that is disproportionate to the offender's blameworthiness."[435] Similarly, Professor Bandes contends that "[t]here is substantial evidence that VIS[s] increase the likelihood of a death sentence," while acknowledging that the effect of VISs in noncapital sentencings is "less clear."[436]

Our findings do not directly shed light on the specific question of whether VISs increase sentence severity. Because Nassar's life sentence had already been effectively determined, the Nassar VISs could not substantially influence the judge's sentence.

But looking more broadly at findings in other studies, the argument that VISs will produce longer prison sentences is unsupported.[437] In 2021, Maarten Kunst and his colleagues undertook a comprehensive review of the empirical evidence regarding VISs' impact on sentence severity across jurisdictions,

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432. *See, e.g.*, 18 U.S.C. § 3663A; *see* LAFAVE, ISRAEL, KING & KERR, *supra* note 246, § 26.6, at 1532 (concluding that "approximately half of the states . . . mandate restitution for enumerated crimes").

433. VITIELLO, *supra* note 3, at 107.

434. *See supra* notes 207–47 and accompanying text.

435. VITIELLO, *supra* note 3, at 107.

436. Bandes, *supra* note 3, at 1258 n.28.

437. *See* DAVIES & BARTELS, *supra* note 19, at 34 ("[A]lthough [victim] impact statements could lead to more severe sentences, the literature suggests that critics' fears that they would lead to this have not been realized.").

examining thirty-one experimental studies and five criminal case file studies. They concluded that "it is currently too early to draw any definite conclusions about the systematic impact of VIS delivery on these types of legal decisions and the mediating or moderating role of third factors."[438] Instead, they concluded, more research was needed.[439]

Fortunately, more research has been conducted. The most recent empirical study of VISs and sentencing outcomes was published in 2023 when Professor Dufour and her colleagues analyzed 1,332 sentencing rulings across Canada from 2016 to 2018.[440] They coded for eighty-seven variables, including information about the VIS, the victims and offenders, crime type, and sentencing outcomes.[441] They found, perhaps unsurprisingly, that VISs are more likely to be delivered in cases in which the crime is more severe.[442] But, once they controlled for the type of crime, the presence of a VIS was not associated with a longer sentencing outcome for the defendant.[443]

As noted, our study could not directly test the hypothesis that VISs lengthen prison sentences. However, our study provides indirect support for the empirical evidence suggesting no direct linkage. Our study suggests that lengthening sentences is not a primary goal of victims in delivering their VIS. After all, the fact that more than one hundred victims traveled to deliver a VIS in the Nassar case—even though the sentence had already effectively been determined—indicates that the victims were not primarily motivated by sentencing outcomes. And if lengthening sentences is not generally a goal of victims, it would be happenstance if lengthening resulted.

Both Professors Vitiello and Bandes raise the concern that VISs could potentially lead to longer sentences. But, at the same time, both seem

438. Kunst, de Groot, Meester & van Doorn, *supra* note 414.

439. *Id.* at 9.

440. *See* Gena K. Dufour, Marguerite Ternes & Veronica Stinson, *The Relationship Between Victim Impact Statements and Judicial Decision Making: An Archival Analysis of Sentencing Outcomes*, 47 LAW & HUM. BEHAV. 484, 487 (2023).

441. *Id.* at 487–88.

442. *Id.* at 493. This finding is consistent with a hypothesis that one of the authors (Cassell) previously advanced: That victims who have been harmed the most might be able to provide the most persuasive arguments at sentencing. *See* Cassell, *supra* note 1, at 639. Professor Bandes has criticized this hypothesis, arguing that I (Cassell) was unable to provide empirical support for the position. *See* Bandes, *supra* note 3, at 1265. I thought that the hypothesis made common sense. But now empirical support exists as well.

443. Dufour, Ternes & Stinson, *supra* note 440, at 491 (finding that, "[o]nce crime type was controlled for, the presence of a VIS was not significantly associated with differences in incarceration sentences").

disappointed that their hypothesis that VISs lead to harsher punishment is unproven in the empirical literature.

Vitiello acknowledges that the "empirical evidence may leave one uncertain about the extent to which victim impact statements increase criminal sentences."[444] But he has an ad hominem card to play: "Whatever doubt one might have about the empirical data, one ought to keep one fact in mind: would prosecutors be such strong supporters of victim impact evidence if they did not believe that it did not increase criminal sentences?"[445]

We believe that empirical debates—such as the issue of VISs on sentence length—should be resolved by empirical evidence, not an inquiry into the (alleged) motivations of those who advocate a public policy reform. But even on that score, Vitiello's analysis is superficial. Vitiello seems to equate the victims' rights movement with mere "law and order" advocacy. The victims' rights movement, however, is far more complex and multifaceted than Vitiello recognizes.[446] As a simple proof of this point, it is impossible to imagine that VISs would have been adopted in the federal system and all fifty states[447]—and an increasing number of other countries[448]—if it was simply designed to further some sort of narrowly defined prosecutorial agenda.

Professor Bandes takes a different tack, stating (quite accurately) that "[p]roponents of VIS[s] generally deny that the statements are meant to lead to lengthier or harsher sentences."[449] And Bandes acknowledges that evidence on sentencing severity (at least in non-capital cases) is unclear.[450] But nonetheless, Professor Bandes writes that the "current way in which VIS evidence is generally utilized" is "as a reflexive argument for a harsher sentence."[451] The Nassar sentence proceeding undercuts her position, as the 168 VISs in the Nassar case were not primarily an argument for a harsher sentence—the sentence had already been effectively determined.

Another serious problem with the argument that VISs will increase sentence severity is its assumption that crimes will produce a uniform "victim" response,

444. VITIELLO, *supra* note 3, at 112.

445. *Id.*

446. *Cf.* KENT ROACH, DUE PROCESS AND VICTIMS' RIGHTS: THE NEW LAW AND POLITICS OF CRIMINAL JUSTICE 318–19 (1999) (discussing complexities in the movement); *see also supra* note 368 and accompanying text (noting that crime victims often prefer a less punitive criminal justice system).

447. *See supra* note 2 and accompanying text.

448. *See supra* notes 411–422 and accompanying text.

449. Bandes, *supra* note 3, at 1255.

450. *Id.* at 1258 n.28.

451. *Id.* at 1262.

leading all victims to press for longer sentences. But as the Nassar VISs demonstrate, victims are unique individuals who have differing responses to crimes and defendants.[452] Indeed, as defense attorney Benji McMurray has recognized, victims do not always side with prosecutors, and defendants and victims may often have common interests: "It does not have to be the case that defendants view victim testimony only as adverse. To the contrary, by sincerely making their victims' interests an aspect of their own self-interest, defendants will change in lasting ways."[453] Notably, even in the Nassar case involving a serial sex offender, a large number of the victims expressed forgiveness as part of their VIS.[454]

Moreover, some research suggests that judges asymmetrically use VISs at sentencing—ignoring a victim's request for a harsher sentence while, in exceptional cases, imposing a shorter period of custody if extended incarceration might create undue hardship for the victim.[455] The basic idea is that if imposing a harsh prison sentence would create additional trauma for a victim, that trauma might be a sound reason for a less severe sentence.[456] This possibility needs to be considered in the balance as well.

Professor Bandes also wonders, if VISs do not generally lead to longer prison sentences, what is the point of even offering them to a judge?[457] The answer is that even if the *substance* of sentences does not change significantly, the *procedure* surrounding sentencing does change—and is fairer to victims.[458]

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452. This "heterogeneity" has been observed in other VIS data sets. *See, e.g.*, Myers, Nuñez, Wilkowski, Kehn & Dunn, *supra* note 34.

453. McMurray, *supra* note 237, at 125, 128–29.

454. *See supra* notes 132, 140, 281 and accompanying text. *Cf.* Hugh M. Mundy, *Forgiven, Forgotten? Rethinking Victim Impact Statements for an Era of Decarceration*, UCLA L. REV. DISCOURSE 302, 306 (2020) (providing illustrations of victims seeking less severe sentence than prosecutors); McMurray, *supra* note 237, at 125 (same).

455. Roberts, *supra* note 20, at 383–86.

456. *Id.* at 385–86.

457. Bandes, *supra* note 3, at 1256.

458. *See supra* notes 402–434 and accompanying text (discussing perceived fairness at sentencing).

Finally, Bandes' argument highlights a single dimension of a criminal sentence—the length of a term of imprisonment.[459] But, as noted above,[460] criminal sentences can have multiple components. For purposes of considering VISs, one important component of a criminal sentence is restitution.[461] By providing information on a crime's harm, a VIS can provide the basis for a restitution award that fully compensates a victim, even if the severity of the sentence does not otherwise change. Indeed, the (limited) empirical evidence seems to support the proposition that a VIS increases the likelihood of restitution being awarded.[462]

Bandes is also a very prominent exponent of the argument that VISs are so overwhelmingly powerful that no fair sentencing decision can proceed in their wake.[463] Reasoning from that premise, some scholars have recommended that victims should submit the VIS only *after* the judge has imposed the defendant's sentence.[464]

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459. Bandes does specifically acknowledge that at sentencing in non-capital cases, judges "[i]n theory at least . . . may deploy sentencing to address a wider range of victims' financial, social, psychological, and medical needs through avenues like restitution, financial assistance, counseling, and other forms of support." Bandes, *supra* note 3, at 1262. We believe these issues are more than theoretical. For example, in the federal system, during 2014–2016, judges required restitution payments of $33.9 billion from 33,158 offenders—or about 15% of the total number of offenders. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-203, FEDERAL CRIMINAL RESTITUTION: MOST DEBT IS OUTSTANDING AND OVERSIGHT OF COLLECTIONS COULD BE IMPROVED (2018). It seems likely that the percentage of state offenders ordered to pay restitution is higher, since many federal crimes (at least for purposes of restitution) are "victimless"—e.g., drug trafficking and immigration offenses.

460. *See supra* notes 237–38 and accompanying text.

461. *See* Cassell, *supra* note 1, at 620–21.

462. *See* Erez & Rogers, *supra* note 1, at 220. We do not view more fully compensating a victim through a larger restitution award as meting out more severe "punishment."

463. *See, e.g.*, Susan Bandes, *Reply to Paul Cassell: What We Know About Victim Impact Statements*, 1999 UTAH L. REV. 545, 549–50. *But cf.* GUIDELINES FOR FAIR TREATMENT OF CRIME VICTIMS AND WITNESSES IN THE CRIMINAL JUSTICE SYSTEM, Guideline 11 cmt. (AM. BAR ASS'N 1983) ("Allowing the victim to provide factual information to the sentencing court about issues of relevance to the sentence is not more a play on the sympathy of the sentencing court than allowing the defendant to provide facts about his or her personal circumstances which may affect a just sentence.").

464. *See* Tracy Hresko Pearl, *Restoration, Retribution, or Revenge? Time Shifting Victim Impact Statements in American Judicial Process*, 20 CRIM. L. BULL. 781 (2014); Carolyn Hoyle, *Empowerment through Emotion: The Use and Abuse of Victim Impact Evidence*, *in* THERAPEUTIC JURISPRUDENCE AND VICTIM PARTICIPATION IN JUSTICE, *supra* note 26, at 249; *cf.* Madison H. Kemph, *Reconsidering the Use of Victim Impact Evidence*, 31 GEO. J. LEGAL ETHICS 673 (2018) (arguing that VISs should generally be excluded because of their "prejudicial" quality).

Such an approach is misguided because it would effectively render the act of delivering a VIS as purely "symbolic rather than meaningful."[465] Moreover, if (as the evidence recounted above suggests) VISs do not increase sentence severity, then—*a fortiori*—they do not increase sentence severity due to excessive emotionalism. An interesting question also remains as to what kind of emotionalism is exhibited in VISs. A careful recent analysis concluded that "while emotional language does populate VIS testimony, sadness is present much more commonly than is anger, which was encountered in less than one half of one percent of all words in the VIS."[466]

G. Victim Impact Statement and Criminal Justice Inequalities

One final argument against VISs is that they exacerbate racial, socioeconomic, and other inequalities in sentencing. The basic contention is that VISs lead sentencers to focus on "nice people" rather than the human quality of victims.[467] Thus, the argument concludes, VISs cause sentencers "to base their sentencing decisions on the individual characteristics of the victim, which leads to the imposition of different punishments for similar crimes, depending on the perceived value of the respective victims."[468]

The response from VIS defenders is that hearing from victims does not invite comparative judgments between victims; instead, a VIS is designed to

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465. Tracey Booth, *Restoring Victims' Voices: Victim Impact Statements in the Sentencing Process*, REFORM, Winter 2005, at 59, 61; *see also* KIRCHENGAST, *supra* note 215, at 304 ("[B]eing taken seriously as a valid stakeholder is foundational, which ultimately supports modes of participation that transform the justice process into one that affords the victim enhanced standing, with a view to substantive and thus therapeutic intervention."); Christine M. Englebrecht, *The Struggle for "Ownership of Conflict": An Exploration of Victim Participation and Voice in the Criminal Justice System*, 36 CRIM. JUST. REV. 129, 146 (2011).

466. Myers, Nuñez, Wilkowski, Kehn & Dunn, *supra* note 34, at 486; *see also* Frank, *supra* note 181, at 225 (noting only one judge out of eleven who responded to a survey thought that VISs presented the possibility of the "emotionalism" of the statement possible affecting sentencing outcomes); EREZ, ROEGER & MORGAN, *supra* note 304, at 40, 70 (discussing how Australian judicial officers reported that VISs "rarely include inflammatory, prejudicial or other objectional statements").

467. *See* Amy K. Phillips, Note, *Thou Shalt Not Kill Any Nice People: The Problem of Victim Impact Statements in Capital Sentencing*, 35 AM. CRIM. L. REV. 93, 105–06 (1997); Donald J. Hall, *Victims' Voices in Criminal Court: The Need for Restraint*, 28 AM. CRIM. L. REV. 233, 235 (1991) (arguing that "the fundamental evil" associated with victim statements is "disparate sentencing of similarly situated defendants").

468. Joseph L. Hoffmann, *Revenge or Mercy? Some Thoughts About Survivor Opinion Evidence in Death Penalty Cases*, 88 CORNELL L. REV. 530, 532 (2003); *accord* VITIELLO, *supra* note 3, at 99–100; Susan A. Bandes, *When Victims Seek Closure: Forgiveness, Vengeance and the Role of Government*, 27 FORDHAM URB. L.J. 1599, 1605–06 (2000); *see also* Hall, *supra* note 467.

show the unique worth of each individual victim and the particular harms that a defendant's crime has caused.[469] As the Supreme Court explained in its decision allowing VISs in capital cases, "victim impact evidence is not offered to encourage comparative judgments . . . for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but that the murderer of a reprobate does not. It is designed to show instead *each* victim's 'uniqueness as an individual human being.'"[470]

In our study, the Nassar victims' VISs did exhibit frequent references to other victims.[471] Indeed, a large majority (76%) of the VISs included such references. But those references were to support other victims (or the need to represent those who were unable to provide a VIS), not some sort of comparison of harm.[472] For example, one victim explained the collective power of Nassar's victims:

> My heart goes out to the athletes, girls, and women you have hurt and been preyed on. I hope by standing up before all of you and the world today they know that women are strong. The women you preyed on for many years are not just innocent little girls with big dreams of becoming amazing athletes. We have grown into strong women who no longer are innocent and scared but we'll stand up and speak out to the once famous Olympic gymnastics doctor. We will stand together, unified, until the laws are changed so that no other little girl is ever abused, penetrated, or molested as you did to us. Women can and will stand up against all abusers.[473]

In other words, the Nassar victims were not arguing for some special or privileged treatment compared to other victims. The 168 Nassar VISs do not support the argument that VISs inevitably lead to comparisons among victims, although it remains theoretically possible that comparisons could be made about how much harm each of Nassar's victims suffered.[474]

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469. *See, e.g.*, Cassell, *supra* note 1, at 638–42; Erez & Rogers, *supra* note 1, at 224–25.

470. Payne v. Tennessee, 501 U.S. 808, 823 (1991).

471. *See supra* notes 159–61 and accompanying text.

472. *Cf.* Wayne A. Logan, *Confronting Evil: Victims' Rights in an Age of Terror*, 96 GEO. L.J. 721, 749 (2008) (observing a "competition of victimhood" in capital cases involving mass killings). We did not observe such competition in the Nassar case, but rather a sisterhood of support. This may suggest that the issues Logan identified in capital cases may not occur in non-capital cases.

473. Sentencing Transcript (1-18-18), *supra* note 9, at 74.

474. *See, e.g.*, Sentencing Transcript (1-18-18), *supra* note 9, at 88 (identifying a victim no longer able to attend classes in person because "being close to any other male that I don't know gives

In the broader debate about whether VISs are desirable, opponents contend that victim statements contribute to racial and other unjustified disparities in sentencing. For example, Professor Vitiello argues that while "victim impact statements are not solely responsible for racial disparity in sentencing," it is possible to "make a strong case that they contribute to those disparities."[475]

In this Article, we do not propose to revisit the contentious world of racial disparities in sentencing and their potential causes.[476] Instead, for present purposes, it is enough to note that the empirical literature fails to demonstrate that VISs have increased sentencing severity, as discussed in the preceding Section.[477] Racially disparate increases in sentencing severity would appear to be a second-level, knock-on effect of increased severity generally—and because the predicate general increases have not been demonstrated, it seems unlikely that the subset of racially disparate increases exists.

Attempting to explain how VISs might contribute to sentencing inequalities, Professor Vitiello claims broadly that "white victims are twice as likely as Black victims to make victim impact statements."[478] From this factual premise, Vitiello contends that "one must be in denial to believe that victim impact evidence does not exacerbate racial inequity in sentencing."[479]

We are not "in denial" about such possibilities. Certainly it is theoretically possible that VISs could unfairly contribute to racial and other forms of sentencing inequities. But then again, it is also possible that VISs could help give voice to disfavored and otherwise disempowered communities,[480] thereby reducing inequity.

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me a panic attack"); Sentencing Transcript (1-18-18), *supra* note 9, at 4 (identifying a victim hospitalized for attempting suicide); Sentencing Transcript (1-18-18), *supra* note 9, at 147 (identifying a victim who suffered from multiple suicide attempts as well as stays at a psychiatric unit).

475. VITIELLO, *supra* note 3, at 115.

476. *Compare, e.g.*, U.S. SENT'G COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER* REPORT 2 (2017) (finding that increased judicial discretion in federal sentencing led to greater racial disparities), *with* Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of* Booker, 123 YALE L.J. 2, 71 (2013) (finding "no evidence that *Booker* increased racial disparity in the exercise of judicial discretion").

477. *See supra* notes 435–466 and accompanying text.

478. VITIELLO, *supra* note 3, at 115–16.

479. *Id.* at 121.

480. *See, e.g.*, Anamika Roy, *Impact Statements: Giving a Voice to Sexual Assault Survivors*, 19 U. MED. L.J. RACE, RELIGION, GENDER & CLASS 370, 370 (2019) (discussing how VISs give voice to the #MeToo movement); Meredith Deliso, *'Why': George Floyd's Family Confronts Derek Chauvin*

In considering the competing possibilities about how VISs might exacerbate—or reduce—sentencing disparities based on race, socioeconomic status, or gender, it is interesting to consider the Nassar case. Defendant Nassar (previously Dr. Nassar[481]) was a white, male, Catholic physician[482] who had considerable reputational and other power as a well-entrenched U.S. Olympics Gymnastics doctor with a related position at MSU.[483] His victims had considerably less power, as they were young, female, and (to a more limited extent) from diverse socioeconomic and racial backgrounds.[484] And yet, the seemingly less powerful victims succeeded in making their voices heard during the sentencing hearing above Nassar's—and, indeed, came back to (as one victim eloquently put it) "destroy [his] world."[485]

Moreover, the statistical support that Professor Vitiello confidently presents (about white victims being twice as likely to present a VIS) collapses on scrutiny. The footnote Vitiello drops to support this claim is not to academic

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at Sentencing, ABC NEWS (June 25, 2021, 3:57 PM), https://abcnews.go.com/US/key-moments-sentencing-derek-chauvin-murder-george-floyd/story?id=78495810 [https://perma.cc/6DLQ-TBAL] (recounting statements from George Floyd's family asking for the maximum sentence for police officer Derek Chauvin's murder).

481. *See Michigan Revokes Nassar's Medical License, Issues Record Fine*, REUTERS (Apr. 6, 2018, 4:23 PM), https://www.reuters.com/article/us-gymnastics-usa-nassar-idUSKCN1HD2W4 [https://perma.cc/UB7B-6JMW].

482. We draw the racial conclusion based on Nassar's appearance. The VISs also contain references to Nassar's familiarity with Catholic doctrine. *See, e.g.*, Sentencing Transcript (1-17-18), *supra* note 9, at 74 (recounting a victim stating to Nassar, "You talked quite a bit about Catholicism in your life. You talked about Catholicism with my mother while sexually violating me").

483. *See* OFF. OF THE INSPECTOR GEN., *supra* note 52; *see also supra* note 119 and accompanying text (describing a victim seeing Nassar as a "world-renowned" doctor).

484. While the vast majority of Nassar's victims (athletes in MSU sports and in the USAG programs) were apparently white, they were a racially diverse group. *See, e.g.*, *Former Michigan State University Softball Player Says She Gave up the Sport She Loved in the Wake of Larry Nassar's Sexual Assaults*, ABC NEWS (Jan. 27, 2018, 3:54 PM), https://abcnews.go.com/Sports/michigan-state-university-softball-player-gave-sport-loved/story?id=52605169 [https://perma.cc/V7GU-P35Y] (discussing Nassar victim Tiffany Thomas Lopez). One non-white victim—Simon Biles—chose not to testify at the sentencing hearing, because she thought it would place too much stress on her. Alexandra Svokos, *Simone Biles Explained Why She Didn't Go to the Nassar Case & It's So Important*, ELITE DAILY (Jan. 31, 2018), https://www.elitedaily.com/p/why-didnt-simone-biles-testify-in-larry-nassars-case-she-says-it-would-have-been-too-much-8078572 [https://perma.cc/92JU-UZ8B]. Biles was placed in foster care when she was three years old and was ultimately raised by her maternal grandfather and his wife. *See* Korin Miller, *Who Are Simone Biles' Parents? Meet the Supportive Mom and Dad Who Raised the Olympian*, WOMEN'S HEALTH (Jan. 11, 2024, 10:18 AM), https://www.womenshealthmag.com/life/a37092376/simone-biles-parents/ [https://perma.cc/M7WL-Y6FD].

485. Sentencing Transcript (1-16-18), *supra* note 9, at 10.

research but rather to a magazine article written by a victims' rights critic—Jill Lepore's article, *The Rise of the Victims'-Rights Movement*, published in the *New Yorker* magazine.[486] In turn, Lepore writes in her article that "[r]esearch also suggests that, though victims of violent crime are disproportionately poor and nonwhite, white victims are twice as likely as black victims to make victim-impact statements."[487]

Lepore does not support her claim with any further information about the research she relies upon. As best we can glean, her unidentified source is a short paper distributed by the National Center for Victims of Crime (NCVC)[488] more than a quarter of a century ago, in 1997. While a copy of the study is no longer available from the NCVC,[489] one of us (Cassell) has included excerpts from the paper in a law school casebook on crime victims' rights.[490] Based on those excerpts, the issue of whether non-white crime victims choose to *make* a VIS was not studied. Instead, the study's focus was whether crime victims were properly *informed* about their rights.[491] The study divided states into two groups: states that strongly protected victims' rights and states that only weakly protected them. And in the sub-set of states that strongly protected victims' rights, 79.7% of the white victims had been informed of the right to make a VIS at a parole hearing, versus 40.6% of the non-white victims.[492] However, the study also noted that this difference "did not rise to a level of statistical significance,"[493] presumably because it rested on an extremely small sample size. In other words, the data that Vitiello relies on is from an old paper studying a different issue that apparently found a difference not rising to the level of statistical significance.

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486. VITIELLO, *supra* note 3, at 116 n.231.

487. Lepore, *supra* note 3.

488. The National Victim Center was renamed the National Center for Victims of Crime in 1998. *See Crime Victims' Rights in America: A Historical Overview*, OVC ARCHIVE (2005), https://www.ncjrs.gov/ovc_archives/ncvrw/2005/pg4b.html [https://perma.cc/WL2U-HESH]. The NCVC website is available at: https://victimsofcrime.org/ [https://perma.cc/A7RR-ZDRP].

489. The Authors made an inquiry to the NCVC on September 4, 2023, and no paper has been provided. Another portion of the NCVC paper, dealing more generally with crime victims' rights, is available, however. *See* Dean G. Kilpatrick, David Beatty & Susan Smith Howley, *The Rights of Crime Victims—Does Legal Protection Make a Difference?*, NAT'L INST. JUST., Dec. 1998, at 1, 5 (indicating that, of those victims who were notified of their rights, 93% made an impact statement).

490. *See* BELOOF, CASSELL, GARVIN & TWIST, *supra* note 2, at 701–03.

491. *See id.* at 702 (discussing reported differences in *receipt* of victims' rights).

492. *Id.*

493. *Id.*

Interestingly, the same paper found "very little difference" between white and non-white respondents about the importance of victims' rights. With regard to the opportunity to make a VIS at sentencing, 86% of the non-white respondents rated the right as "very important." To the extent that the paper is useful from a policy perspective, the paper supports the conclusion that non-white crime victims would support having the right to provide a VIS.[494] The 1997 paper also suggests that, at that time, victims' rights tended to often be underenforced and not consistently provided to crime victims. Fortunately, since then, efforts to expand the enforcement and provision of victims' rights have occurred around the country[495]—and would presumably reduce whatever disparity may have been reported in that unpublished paper.

In sum, little support exists for the proposition that a right to deliver a VIS somehow exacerbates racial and other disparities in the criminal justice system.[496] Indeed, to the contrary, given that the ranks of crime victims are more likely to come from racial and other minorities,[497] our initial assumption should be that expanding victims' rights might actually decrease unwarranted sentencing disparities.

494. *Id.* at 703.

495. *See* Cassell & Garvin, *supra* note 406, at 132–33; Douglas E. Beloof, *The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review*, 2005 BYU L. REV. 256.

496. As noted earlier, there is some evidence (from England) that female and Asian victims are more likely to give a VIS. *See* Mastrocinque, *supra* note 357. We have also located an unpublished Master's Thesis, which appears to have found *no effect* from race in simulated sentencing decisions made by undergraduate psychology students delivering a VIS. *See* Mary E. Talbot, Public Responsiveness to Victim's Recommendations in Their Sentencing Decisions: Role of Victim's Race, Victim Impact Statement and Judge's Instructions 44 (May 2010) (M.A. thesis, Loyola University Chicago), https://ecommons.luc.edu/cgi/viewcontent.cgi?article=1534&context=luc_theses [https://perma.cc/8UYS-94NT] ("Contrary to my original hypothesis no differences in sentencing severity were found based on the race of the victim. The only differences between races were found in the area of restitution allocated where African-American victims were awarded more money than Caucasian victims.").

497. *See, e.g.*, *Crime in the United States 2019: Expanded Homicide Date Table 2*, FED. BUREAU OF INVESTIGATION (2019), https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/expanded-homicide-data-table-2.xls [https://perma.cc/W6HV-YST7] (reporting that 53.7% of all homicide victims were Black or African American); ERIKA HARRELL, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: BLACK VICTIMS OF VIOLENT CRIME (2007), https://bjs.ojp.gov/content/pub/pdf/bvvc.pdf [https://perma.cc/LK96-5D46].

VII. LIMITATIONS IN THIS STUDY

Throughout this Article, we have attempted to note the limitations inherent in our study. In concluding, it may be useful to briefly recapitulate and summarize some of the important limits.

Our study rests on a sample involving a single crime—sexual abuse—committed by a single sex offender. While the data are useful in portraying the various harms victims experience and their different reactions to it, the conclusions that we reach may not apply to other types of crimes.[498]

Similarly, our study rests on VISs that were all presented to a single judge—Judge Aquilina—who was very sympathetic to the concerns and needs of the victims and acknowledged them throughout the proceedings. Court proceedings in front of other, less sympathetic, judges might produce different outcomes.

Our case also comes from a single jurisdiction—Michigan—where victims are not cross-examined about VISs. No cross-examination occurred here. In a jurisdiction permitting cross-examination, which can be traumatizing to victims, the results might have been different.

The victims (and indirect victims) in our study were also unique and not representative of the population of victims. They were all women and adolescents, who were generally high-level athletes (often gymnasts) being treated by Larry Nassar. There is reason to believe that this group of victims is different in various ways from many other crime victims whose cases proceed through America's criminal justice system.

Despite these (and likely other) limitations, we believe that the conclusions we draw about VISs more generally find support in our data set.

VIII. CONCLUSION

Scholars have debated the value of VISs for victims and the criminal justice system, examining the ways VISs give voice to victims at sentencing. This Article reviews a data set of 168 VISs delivered by victims (and indirect victims) of crimes of sexual abuse by Larry Nassar. Capitalizing on the fact that these VISs were all delivered by victims of roughly the same crime committed by the same defendant, this Article explores and confirms what has aptly been described as the "heterogeneity" of VISs.[499]

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498. *See generally* Aya Gruber, *Sex Exceptionalism in Criminal Law*, 75 STAN. L. REV. 755 (2023) (discussing whether sex crimes should be treated different than other crimes).

499. Myers, Nuñez, Wilkowski, Kehn & Dunn, *supra* note 34, at 476–77.

Consistent with earlier research, we find that the VISs delivered by Nassar's victims were varied, reflecting the individualization of the victims,[500] the individualized harms Nassar inflicted through his crimes, and the different ways in which the victims suffered throughout their ordeal. Despite this heterogeneity, however, there were commonalities that stood out. Among other findings in our study, we found that VISs were relatively short in length (typically under ten minutes long). Even so, the VISs commonly provided substantial information about direct harm that victims of Nassar's crimes suffered, as well as indirect harm to others connected by family or other ties to the victims.

The victims also addressed their VISs to varying audiences. Many of the victims spoke directly to Nassar, with a substantial percentage (43%) referring to forgiveness. Many victims also spoke directly to the judge conducting the sentencing hearing. And many victims specifically reference the healing qualities of delivering a VIS.

The Article's findings generally support the merit of allowing victims to have the opportunity to present VISs at sentencing. While the Nassar VISs varied in detail, they commonly contained valuable information relevant to sentencing, which was properly provided to a sentencing judge. The VISs also contained significant evidence of therapeutic value to victims in having the option of presenting a VIS. There were also substantial grounds for believing that a VIS might have educative benefits. A VIS might help a defendant's efforts at rehabilitation. And more broadly, a VIS might perform public educative functions, such as informing the public about the harms of sexual abuse and the culpability of the institutions that enable it.

The Nassar VISs also support the conclusion that giving victims a voice at appropriate points in the criminal justice process can improve the perceived fairness of the process. The VISs helped to align the sentencing process with the view of the public that victims should be heard—a view reflected in both Michigan legislation and the state constitution.

At the same time, we saw little evidence suggesting VISs produce undesirable effects within the criminal justice system. At some level, this conclusion may be unsurprising. VISs are currently permitted not only in Michigan but also in the federal system and the forty-nine other states, as well as in an expanding number of countries around the world. This widespread use

500. Edna Erez & Leslie Sebba, *From Individualization of the Offender to Individualization of the Victim*, *in* THE CRIMINOLOGY OF CRIMINAL LAW 171 (William S. Laufer & Freda Adler eds., 1999).

of VISs reflects the importance of victims' voices being heard for multiple purposes in criminal justice. Our study provides grounds for policymakers to continue supporting the use of VISs and for judges to validate victim experiences as they participate in sentencing processes.