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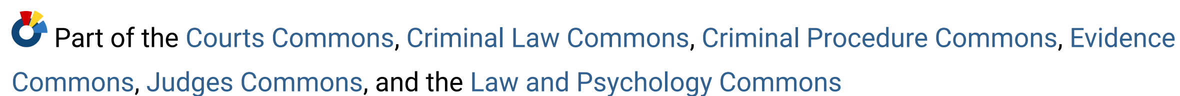
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What Are Victim Impact Statements For?

Susan A. Bandes†

INTRODUCTION

It is an article of faith that victims should have a voice in the criminal justice system—an assertion that seems, on its surface, both self-evident and entirely unobjectionable. But applying the abstract notion of "victims' voice" to the criminal courtroom has proved challenging, both in theory and in practice. Victim impact statements (VIS) are currently the primary vehicle for the expression of the victim's voice in common law criminal justice systems.[1] VIS have been lauded for advancing a broad range of goals, including informing the sentencing judge or jury of the harm caused by the crime,[2] providing healing and catharsis to victims and covictims,[3] educating and confronting perpetrators,[4] and educating the public.[5] Indeed, the recent high-profile victim testimony in the Larry Nassar, Brock Turner, and Bill Cosby prosecutions, among others, has served as a moving and compelling argument for the public education function of VIS.[6]

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† Susan A. Bandes is Centennial Professor of Law Emeritus, DePaul University College of Law. I owe thanks to Bennett Capers, Cynthia Godsoe, Bruce Green, and Kate Mogulescu, with whom I organized the symposium that led to this article, and to Brooklyn Law School and Fordham Law School for hosting the symposium. I also owe thanks for incisive and generous comments to the participants in that symposium, as well as to James Doyle, Aya Gruber, Scott Sundby, and Michael Vitiello. I am also grateful to Sydney Warda and Aarika Nieto, DePaul Law School Class of 2022, for excellent research assistance, and to the *Brooklyn Law Review* for superb editorial assistance.

[1] Tracey Booth, *Victim Impact Statements, Sentencing and Contemporary Standards of Fairness in the Courtroom*, *in* CRIME, VICTIMS AND POLICY (Dean Wilson & Stuart Ross eds., Palgrave Studies in Victims and Victimology, 2015).

[2] Payne v. Tennessee, 501 U.S. 808, 825 (1991).

[3] Paul Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611, 621–23 (2009).

[4] *Id.*

[5] *See, e.g.*, Abby Takas, *Victim Impact Statements Take on New Role After Nassar Case*, MICH. DAILY (Mar. 15, 2018), https://www.michigandaily.com/campus-life/victim-impact-statements-take-new-role-after-nassar-case/ [https://perma.cc/YQQ6-LYWS].

[6] *See, e.g.*, Khadija Lalani, *Larry Nassar's Sentencing Hearing & the Role of Victim Impact Statements*, NULR OF NOTE (Feb. 15, 2018), https://blog.northwesternlaw.review/?p=485 [https://perma.cc/9R5P-YK9K] (arguing that the inclusion of victims in the Nassar case "served a broader purpose of uncovering the truth").

Yet we can acknowledge the emotional power of the statements of Chanel Miller, Simone Biles, Ali Raisman, and others while still asking whether the statements accomplish what their speakers intended, and whether there is a better way to achieve the legitimate goals of VIS without unduly burdening other important trial rights and values.

Three decades after *Payne v. Tennessee* first upheld the admission of VIS in capital trials, there is still no good answer to the question of precisely what relevant information the statements impart and how that information should affect sentencing. Moreover, the information rationale (that victim impact evidence (VIE) is an essential source of information for the sentencer[7]) is at odds with the healing rationale (that choosing to deliver a VIS may be therapeutic for the victim[8]), and this tension has not been adequately addressed. In short, the scholarly debate[9] about VIE is at an unfortunate impasse. VIE is clearly here to stay, despite the fact that the most basic normative and empirical questions about its goals, its efficacy, its fairness, and its impact on the parties remain stubbornly unanswered.

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[7] *Payne*, 501 U.S. at 825–26 (holding that VIS inform the sentencer of the uniqueness of the victim and the impact of the loss on the victim's family).

[8] *Victim Impact Statements*, U.S. DEP'T OF JUST. (Dec. 14, 2020), https://www.justice.gov/criminal-vns/victim-impact-statements [https://perma.cc/A5QR-YXDX] (delivering a VIS "provides an opportunity to express in your own words what you, your family, and others close to you have experienced as a result of the crime. Many victims also find it helps provide some measure of closure to the ordeal the crime has caused.").

[9] I have written extensively and critically about VIS and their effects on both the rights of defendants and the interests of victims. I have raised questions about the impact of VIS on the fairness of criminal trials in the capital punishment context, *see* Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 395 (1996) [hereinafter Bandes, *Empathy, Narrative*]; about the ways in which the prosecution agenda swamps the needs of victims, *see* Susan Bandes, *Victim Standing*, 2 UTAH L. REV. 331, 334, 338 (1999) [hereinafter Bandes, *Victim Standing*]; about their potential to create classes of worthy and unworthy victims, *see* Susan A. Bandes, *When Victims Seek Closure: Forgiveness, Vengeance, and the Role of Government*, 27 FORDHAM URBAN L.J. 1599, 1605–06 (2000) [hereinafter Bandes, *When Victims Seek*]; Susan Bandes & Jessica Salerno, *Emotion, Proof and Prejudice: The Cognitive Science of Gruesome Photos and Victim Impact Statements*, 46 ARIZ. ST. L.J. 1003, 1047 (2014); about their questionable value as a therapeutic tool, *see* Susan A. Bandes, *Victims, "Closure," and the Sociology of Emotion*, 71 LAW & CONTEMP. PROBS., 1, 20 (2009) [hereinafter Bandes, *Victims, "Closure"*]; Susan A. 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 et al. eds., 2020) [hereinafter Bandes, *Closure in the Criminal Courtroom*]; and about the statement as a means of emotional expression, *see* Susan A. Bandes, *Share Your Grief but Not Your Anger: Victims and the Expression of Emotion in Criminal Justice*, *in* EXPRESSION OF EMOTION: PHILOSOPHICAL, PSYCHOLOGICAL AND LEGAL PERSPECTIVES 264–65 (Catharine Abell & Joel Smith eds., 2016) [hereinafter Bandes, *Share Your Grief*]; *see also* Susan A. Bandes, *What Are Victim Impact Statements For?*, ATLANTIC (July 23, 2016) [hereinafter Bandes, *Victim Impact Statements*], https://www.theatlantic.com/politics/archive/2016/07/what-are-victim-impact-statements-for/492443/ [https://perma.cc/YSK2-QY78].

In *Booth v. Maryland*,[10] the US Supreme Court, in a 5–4 opinion, ruled that the admission of victim impact testimony in a capital murder trial violated the Eighth Amendment. The Court held that neither the personal characteristics of the victim nor the emotional impact of the loss on the victim's family was relevant to the jury's sentencing task, and, moreover, that the admission of such testimony "creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner."[11] Just two years later, the Court reversed, holding in a 6–3 decision "that victim-impact statements delivered by crime victims' family members are admissible at capital sentencing hearings."[12] Whereas the *Booth* decision had critiqued the statements

> as emotionally charged testimony that would divert the jury's attention from the defendant's responsibility for the crime and [improperly] focus it on the character and identity of the victim[,] [t]he *Payne* decision . . . found that the statements were valuable precisely because they remind sentencing juries and judges []that ["]the victim is an individual whose death represents a unique loss to society and in particular to his family." It rejected the argument that the statements would influence sentencing based on irrelevant factors, such as the victim's attractiveness, respectability, social class, or race.[13]

Though the Court summarily dismissed the notion that the statements create a hierarchy of victims,[14] it never explained what the capital jury is meant to do with the information about the victim's unique qualities and the emotional impact of his death on his family.[15] Proponents of VIS generally deny that the statements are meant to lead to lengthier or harsher sentences,[16]

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[10] Booth v. Maryland, 482 U.S. 498, 500–01 (1987).

[11] *Id.* at 503.

[12] Bandes, *Victim Impact Statements*, *supra* note 9; *Payne*, 501 U.S. at 827.

[13] Bandes, *Victim Impact Statements*, *supra* note 9 (quoting *Payne*, 501 U.S. at 825); *Payne*, 501 U.S. at 823 ("As a general matter . . . victim impact evidence is not offered to encourage comparative judgments of this kind—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," whatever the jury might think the loss to the community resulting from his death might be."); *see infra* text accompanying notes 46–56.

[14] *Payne,* 501 U.S. at 823–24.

[15] *See* Bandes, *Victim Impact Statements*, *supra* note 9.

[16] Although Frank Carrington, one of the founders of the victims' rights movement and an influential member of the Attorney General's Task Force on Violent Crime, argued that increasing prison sentences would strike the balance between the extreme leniency afforded to criminals and recognizing forgotten crime victims, especially as a deterrent for repeat offenders, *see* FRANK CARRINGTON, THE VICTIMS 266–67 (1975), proponents largely reject this argument. *See, e.g.*, Edna Erez, *Victim Voice, Impact Statement and Sentencing: Integrating Restorative Justice and Therapeutic Jurisprudence Principles in Adversarial Proceedings*, 40 CRIM. L. BULL. 483, 490–91 (2004) (arguing that influencing the sentence has never been a purpose of VIS legislation, and that, "[h]istorically, and at the present, the primary function of the VIS legislation has been expressive or therapeutic—to provide crime victims with a 'voice,'

but offer no explanation for how else the jury's verdict might reflect the information.

The increasingly prominent role of the therapeutic rationale for VIS, both in the lower courts and in public discourse,[17] has further muddied the theoretical waters, both by sugar-coating the carceral goals of VIS and by raising the emotional stakes of legal disagreement.[18] Until this theoretical debate is resolved, the use of VIS will likely continue to expand in ways that cannot be called principled. It is often observed that victims have a "fundamental need . . . to have th[eir] harms named and acknowledged and for those who have done harm to take responsibility."[19] To take these needs seriously requires clear-eyed scrutiny of the capabilities and limits of the criminal justice system, as well as a willingness to consider alternative avenues.

I have argued that the statements, in their current incarnation, too often fail to convey the genuine needs of victims,

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regardless of any impact it may have on sentencing"); *see also* Cassell, *supra* note 3, at 634–37. Paul Cassell, the most prominent advocate for VIS, who has written extensively on the topic, argues that there is little evidence that VIS increase sentence severity (except perhaps in restitution cases), *see* Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment*, 1999 UTAH L. REV. 479, 493 (1999); *The Victims' Rights Amendment, Hearing on H.J. Res. 45, Before the Subcomm. on the Const.*, 114th Cong. 19–93 (2015) (statement of Paul G. Cassell, Ronald N. Boyce Presidential Professor of Criminal Law at the S.J. Quinney College of Law at the University of Utah). Cassell does not precisely argue that VIS *should* not increase sentence severity, *see* Susan Bandes, *Reply to Paul Cassell: What We Know About Victim Impact Statements*, 1999 UTAH L. REV. 545, 549–51 (1999) [hereinafter Bandes, *Reply to Paul Cassell*], and in fact points out that increased punitiveness based on "the description of the harm sustained by the victims" might be an entirely defensible response to the increased accuracy of the information provided. Cassell, *supra* note 3, at 636–37. But, in Cassell's words:

> [R]ecall the justifications for victim impact statements set out earlier in this article. They made no instrumental claims about how sentences might be changed, but rather relied on other justifications such as fairness and therapeutic effects on victims. Put another way, victim impact statements are not (as some critics seem to assume) a ploy to more harshly punish defendants, but rather a procedural device with other aims.

Id. at 636.

[17] Bandes, *Closure in the Criminal Courtroom*, *supra* note 9, at 103 & n10; *see also* FRANKLIN E. ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT 60 (2003) (documenting the rapid rise of the belief in a linkage between capital punishment and "closure"); Nancy Berns, *Contesting the Victim Card: Closure Discourse and Emotion in Death Penalty Rhetoric*, 50 SOCIO. Q. 383 (2009) (tracing the legal and cultural forces that have imbedded closure discourse in the popular imagination).

[18] The therapeutic frame is sometimes invoked to portray critical pushback as lack of concern for victims. *See* DEP'T OF JUST., OFF. OF VICTIMS OF CRIME, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON VICTIM OF CRIME 77 (1982) [hereinafter PRESIDENT'S TASK FORCE] ("The idea that the victim should speak at sentencing has been met with resistance. That opposition and the force with which it has been projected by judges and lawyers is one measure of their lack of concern for victims."); *see also* Cassell, *supra* note 3, at 613.

[19] David Kennedy & Jonathan Ben-Menachem, *Moving Toward an American Police-Community Reconciliation Framework*, *in* THE CAMBRIDGE HANDBOOK OF POLICING IN THE UNITED STATES 563, 569–70 (Tamara Rice Lave & Eric J. Miller eds., 2019).

particularly when those needs do not neatly coincide with the narrow set of solutions provided by our adversary system of criminal justice.[20] Research is ongoing on whether—and how—VIS aid victims with the healing process.[21] For some victims and survivors, particularly those whose wishes are not aligned with the goals of the prosecution,[22] or those whose expectations about the effects or outcomes of VIS are not met,[23] the VIS regime may inflict secondary trauma.[24] Moreover, the early enthusiasm that propelled the rapid adoption of VIS statutes was based on a host of untested assumptions, and in the subsequent decades we have begun to amass a trove of empirical data challenging and often undermining those assumptions.[25] There is evidence of differential treatment of victims, both in terms of who is given information about VIS and in terms of who is encouraged to exercise the right.[26] More research is needed on how widespread

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[20] *See* Bandes*, Empathy, Narrative*, *supra* note 9, at 405–08; Bandes, *Share Your Grief*, *supra* note 9, at 270–74; Bandes, *Victims, "Closure*,*" supra* note 9, at 16–26.

[21] *See, e.g.*, Robert C. Davis & Barbara E. Smith, *Victim Impact Statements and Victim Satisfaction: An Unfulfilled Promise?*, 22 J. CRIM. JUST. 1 (1994) (finding no evidence that VIS increase satisfaction with the criminal justice system). *But see* Julian V. Roberts, *Victim Impact Statements: Lessons Learned and Future Priorities*, VICTIMS OF CRIME RSCH. DIGEST (Dec. 14, 2021), https://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr07_vic4/p1.html [https://perma.cc/L5BG-EDFV] (reporting, based on research on the use of VIS in Canada, that although only a minority of crime victims deliver VIS, those who do generally report satisfaction, particularly when their prior preparation led them to hold realistic expectations).

[22] Charles F. Baird & Elizabeth E. McGinn, *Re-Victimizing the Victim: How Prosecutorial and Judicial Discretion Are Being Exercised to Silence Victims Who Oppose Capital Punishment*, 15 STANFORD L. & POL'Y REV. 447, 467 (2004) (survivors who oppose a death sentence "are forced into an agonizing choice among bad options").

[23] See *infra* discussion of Chanel Miller's response to the reaction to her VIS. *See also* Roberts, *supra* note 21 (emphasizing the importance of avoiding creation of "expectations that cannot be fulfilled").

[24] *See, e.g.*, James R. Acker & Jeanna Marie Mastrocinque, *Causing Death and Sustaining Life: The Law, Capital Punishment, and Criminal Homicide Victims' Survivors*, *in* WOUNDS THAT DO NOT BIND: VICTIM-BASED PERSPECTIVES ON THE DEATH PENALTY 154, 253 (James R. Acker & David R. Karp eds., 2006) (discussing the potentially devastating effect of secondary victimization for murder victims, which is "heightened in capital cases, and particularly fraught for family members who don't support the death penalty"); Vik Kanwar, *Capital Punishment as "Closure": The Limits of a Victim-Centered Jurisprudence*, 27 REV. L. & SOC. CHANGE 215, 215–17 (2001) (discussing the ways in which the legal system may interrupt and otherwise negatively impact the grieving process).

[25] For example, the assumption that VIS will not lead jurors to make comparative judgments about "worthy" and "unworthy" victims, *see* Bandes & Salerno, *supra* note 9, at 1037–40; the assumption that trial courts will be willing and able to guard against unduly prejudicial statements, *see* Wayne A. Logan, *Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Statements in Capital Trials*, 41 ARIZ. L. REV. 143 (1999); and the assumption that VIS will help victims heal and attain "closure," *see* Bandes, *Closure in the Criminal Courtroom*, supra note 9.

[26] Hugh M. Mundy, *Forgiven, Forgotten? Rethinking Victim Impact Statements for an Era of Decarceration*, 68 UCLA L. REV. DISCOURSE 302, 324 (2020) (discussing cases in which the prosecution has encouraged some victims, but not others, to tell their stories); Karen Miller, *Purposing and Repurposing Harms: The Victim Impact Statement and Sexual Assault*, 23 QUALITATIVE HEALTH RES. 1445, 1450 (2013) (making the same point in the context of sexual assault cases in particular).

these disparities are.[27] Researchers are still investigating whether the statements lead to increased sentences,[28] and whether they increase sentencing disparities based on race, gender, or social class.[29] The claim that the statements help victims heal sounds intuitively obvious, good-hearted, and unobjectionable. The danger of such claims is that they may repel careful scrutiny.[30] Without such scrutiny, we cannot place the statements on a more principled and empirically grounded footing, and we cannot identify solutions that better address the needs of victims and protect the rights of the accused.

In this article, I will revisit the information rationale (which is the sole rationale for VIE that the US Supreme Court has explicitly recognized[31]) as well as the therapeutic rationale (which has seized the popular imagination and become firmly entrenched in lower court opinions, media accounts, and popular culture[32]). In addition, I consider a third possible rationale for VIS—public education.[33] Focusing on the powerful and viral VIS delivered at the Larry Nassar guilty plea hearings and at the Brock Turner trial, I consider whether VIS can be defended as an important vehicle for informing the public about the impact of crime, particularly crimes that are underenforced or poorly understood. Consider the moving scene of more than 150 of the world's most accomplished young female gymnasts confronting USA Gymnastics doctor Larry Nassar with the depth of the pain his sexual abuse inflicted,[34] and being reassured by the presiding judge, Rosemarie

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[27] See Miller, *supra* note 26, at 1450.

[28] There is substantial evidence that VIS increase the likelihood of a death sentence. *See* Raymond Paternoster & Jerome Deise, *Heavy Thumb on the Scale: The Effect of Victim Impact Evidence on Capital Decision Making*, 49 CRIMINOLOGY 129, 153 (2011). Their impact in noncapital sentencing is less clear. Maarten Kunst et al., *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 BEHAVIOR 1, 8 (2021).

[29] *See* Bandes & Salerno, *supra* note 9, at 1037–40.

[30] Indeed, as Jill Lepore characterizes it, the 1982 President's Task Force on the Victims of Crime "disavow[ed] legal reasoning—'You cannot appreciate the victim problem if you approach it solely with your intellect.'" 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/6GKR-DU3T].

[31] See *supra* text accompanying notes 12–15 for discussion of *Payne v. Tennessee*.

[32] *See* sources cited *supra* note 18.

[33] I have previously considered whether VIS served a public education function. *See* Bandes, *Share Your Grief*, *supra* note 9, at 276, 278.

[34] Eric Levenson, *Larry Nassar Sentenced to Up to 175 Years in Prison for Decades of Sexual Abuse*, CNN (Jan. 24, 2018), https://www.cnn.com/2018/01/24/us/larry-nassar-sentencing/index.html [https://perma.cc/L8UR-2JPB]; Mahita Gajanan, *'It's Your Turn to Listen to Me.' Read Aly Raisman's Testimony at Larry Nassar's Sentencing*, TIME (Jan. 19, 2018, 4:52 PM), https://time.com/5110455/aly-raisman-larry-nassar-testimony-trial/ (last visited May 19, 2022) (providing gymnast Aly Raisman's full statement).

Aquilina, that they were strong and resilient.[35] Recall the power of Chanel Miller's viral statement in the aftermath of Brock Turner's conviction for sexually assaulting her.[36] Legal critiques tend to appear both heartless and hyper technical in the face of this kind of emotional power. Yet the emotional power of the statements cannot mask the persistent lack of clarity about what the statements are meant to accomplish. I argue that ultimately the current VIS regime arises from and reinforces an individualistic model of crime that is not well suited to illuminating the scope or consequences of criminal behavior, particularly in multi-victim cases like those of Larry Nassar and Jeffrey Epstein. I propose that there are fairer and more robust models for achieving the informational, healing, and educative goals that VIS are meant to serve, and that these models may well require decoupling those goals from the narrow ambit of the criminal justice system.[37]

I. THE GOALS OF VIS

Arguments for VIS invoke two primary goals: providing information to the sentencer[38] and public[39] and providing a source of healing or catharsis for the victim or covictims.[40] The Court in *Payne* described VIS as a means of conveying the "specific harm caused by the defendant" so that the jury may "assess meaningfully the defendant's moral culpability and blameworthiness."[41] The 1982 President's Task Force on Victims of Crime, whose influential recommendations are often credited with ushering in the era of the VIS, also emphasized the information rationale, stating: "A judge cannot evaluate the seriousness of a defendant's conduct without knowing how the

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[35] Scott Cacciola, *Victims in Larry Nassar Abuse Case Find a Fierce Advocate: The Judge*, N.Y. TIMES (Jan. 23, 2018), https://www.nytimes.com/2018/01/23/sports/larry-nassar-rosemarie-aquilina-judge.html [https://perma.cc/36GL-Q78N]; *see also infra* text accompanying notes 133–140.

[36] *See* Colin Dwyer & Rachel Martin, *Chanel Miller, Sexual Assault Survivor, On The 'Immense Relief' of Going Public*, NPR (Sept. 23, 2019, 1:50 PM), https://www.npr.org/2019/09/23/763376211/chanel-miller-sexual-assault-survivor-on-the-immense-relief-of-going-public [https://perma.cc/6D7P-W36A].

[37] *See* Mundy, *supra* note 26, at 332 (recommending the employment of independent victim advocates through the court system, and decoupling the victims' needs from the prosecutor's office).

[38] *See infra* Section I.A.

[39] *See infra* Section I.C.

[40] *See infra* Section I.B. The only goal on which the Supreme Court has weighed in is the provision of information to the sentencer. Specifically, the Court has weighed in on the provision of information to the sentencing jury in capital cases. Lower courts have held that VIS are admissible in noncapital cases. *See* DOUGLAS E. BELOOF, VICTIMS IN CRIMINAL PROCEDURE 642–43 (1999).

[41] Payne v. Tennessee, 501 U.S. 808, 825 (1991).

crime has burdened the victim."[42] And herein lies the central problem posed by VIS as a vehicle for information. What, precisely, is the information the statements are meant to convey? And if indeed this information is essential to the sentencer, why should its provision be voluntary? The President's Task Force offers an interesting window into how these questions might have been resolved. The Task Force recommended *requiring* VIS.[43] Specifically, it sought to require "that the pre-sentence report that is prepared for the judge contain verified information concerning all financial, social, psychological, and medical effects on the crime victim."[44] Had VIS remained on this path, requiring only the provision of concrete information about harm in documentary form in each case, rather than creating an optional venue for oral testimony during the sentencing hearing,[45] it might have obviated many of its current problems.[46]

The problems with VIS in capital cases have been extensively analyzed—by me[47] and others[48]—and I will not

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[42] PRESIDENT'S TASK FORCE, *supra* note 18, at 76–77.

[43] *Id.* at 33 ("Legislation should be proposed and enacted that would . . . [r]equire victim impact statements at sentencing . . . .").

[44] *Id.* It was only when the topic shifted to in-court testimony that the report's recommendations shifted to permissive language. *Id.* at 76–77 (recommending under Judiciary Recommendation 6 that "[j]udges should allow for, and give appropriate weight to, input at sentencing from victims of violent crime" and commenting that the recommendation was two-fold: first, permitting victims to give information to "the person preparing the presentence report" and second, permitting victims to speak in court).

[45] The US Department of Justice states that the pre-sentence report includes "the financial, social, psychological, and, if relevant, medical impact of the crime on the victims; and any victim impact statements." It also instructs witnesses that

> [y]ou also have the option to submit a written statement **AND** give an oral statement at sentencing. Your oral statement can be new or you can read the written statement you previously provided. Combining a written statement with an oral statement during the sentence hearing can be especially impactful and helpful to the court.

Victim Impact Statements, *supra* note 8. "An oral statement at the sentencing allows the judge to hear your voice and its inflections and to put a face to the crime committed." *Id.*

[46] With the caveat that no matter how "concrete" the information, it is subject to bias and misinterpretation.

[47] *See supra* note 9.

[48] *See, e.g.*, Wayne Logan, *Confronting Evil: Victims' Rights in an Age of Terror*, 96 Geo. L.J. 721, 747–52 (2008) (discussing the due process and other challenges presented by VIS in mass-killing cases); MARY LAY SCHUSTER & AMY D. PROPEN, VICTIM ADVOCACY IN THE COURTROOM: PERSUASIVE PRACTICES IN DOMESTIC VIOLENCE AND CHILD PROTECTION CASES 81–82 (2011) (documenting problematic judicial reactions to VIS in domestic violence and sexual assault cases); Robert C. Davis & Barbara E. Smith, *Victim Impact Statements and Victim Satisfaction: An Unfulfilled Promise?*, 22 J. CRIM. JUST. 1 (1994) (finding no evidence that VIS increased victim satisfaction with the criminal justice system); Paternoster & Deise, *supra* note 28 (finding that VIE elicits

revisit those critiques in detail here. Briefly, the *Payne* Court claimed that "victim impact evidence is not offered to encourage comparative judgments [between victims] . . . It is designed to show instead *each* victim's 'uniqueness as an individual human being,' whatever the jury might think the loss to the community resulting from his death might be."[49] Yet there is evidence that VIS do encourage comparative judgments among murder victims based on irrelevant factors[50] like articulateness and attractiveness.[51] There is also cause for concern that VIS may exacerbate the tendency, amply documented in capital sentencing more generally, to encourage invidious comparisons based on the race of the victim.[52]

In addition, if VIS are meant to impact sentencing, that impact depends on the serendipity of who decides to—or is encouraged to—give a statement.[53] As Justice Stevens argued in dissent in *Payne*, it goes without saying that each murder victim is unique[54] and that each loss of life is a tragedy. The "puzzle at the heart of *Payne*"[55] in the capital context has always been how a grieving family member's testimony about the uniqueness of the murder victim or the impact of his loss on those who loved him is relevant to determining which defendants should be sentenced to death.[56] In other words, is it possible to convey the uniqueness of the victim without encouraging comparative judgments, and in particular, without introducing pernicious factors like race, ethnicity, gender, and social class into the sentencing calculus? I argue that it is not.[57]

Even as these problems with the information rationale remain unaddressed, the claim that the delivery of VIE may be therapeutic for victims has come to supplement and perhaps even supplant the information rationale in the legal realm and the

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emotions that led to a heightened probability that the death penalty would be imposed); Miller, *supra* note 26, at 1450 (examining the use and abuse of VIS in sexual assault cases).

[49] Payne v. Tennessee, 501 U.S. 808, 823 (1991).

[50] *But see* Cassell, *supra* note 3, at 639 (positing, albeit without explanation or support, that perhaps the "'articulate' victims are simply those victims who have been harmed the most"). See also *infra* text accompanying note 78, in which I further discuss this assertion.

[51] Bandes & Salerno, *supra* note 9, at 1032, 1049.

[52] *See* Bandes & Salerno, *supra* note 9, at 1037–40 & 1037 n.164 (discussing, inter alia, *McCleskey v. Kemp*, 481 U.S. 279, 286–89 (1987), and the Baldus studies).

[53] Studies suggest that fewer than half of victims currently give statements. 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, 219–20 (2016).

[54] *Payne*, 501 U.S. at 866 (Stevens, J., dissenting).

[55] Bandes & Salerno, *supra* note 9, at 1030.

[56] *Payne*, 501 U.S. at 859–60 (Stevens, J., dissenting).

[57] Bandes, *Share Your Grief*, *supra* note 9, at 277; Bandes & Salerno, *supra* note 9, at 1037–40.

public imagination.[58] The therapeutic frame creates an emotional forcefield around VIE, in capital cases at least, that renders it virtually impervious to legal analysis.[59] It is possible that both the information rationale and the healing rationale have more purchase in noncapital cases, and especially in cases other than homicide. At the sentencing phase, judges are less hamstrung than capital juries in their range of options.[60] In theory at least, judges may deploy sentencing to address a wider range of victims' financial, social, psychological, and medical needs through avenues like restitution, financial assistance, counselling, and other forms of support.[61] Note, though, that this is a departure from the current way in which VIS evidence is generally utilized, as a reflexive argument for a harsher sentence.[62] It is not at all clear that the concept of creating a forum for the "victim's voice," as currently applied,[63] coincides with the very different notion of conveying victims' individual, granular needs.[64] The victim's voice is too often filtered through the harmful lens that assumes healing and "closure"[65] require the harshest punishment available.[66] To take victims' needs seriously requires acknowledging the nuanced and evolving nature of those needs, and the fact that many of them may be

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[58] Bandes, *Closure in the Criminal Courtroom*, *supra* note 9, at 103 & n.10; *see also* ZIMRING, *supra* note 17, at 60 (documenting rapid rise of the belief of a linkage between capital punishment and "closure"). *See generally* Berns, *supra* note 17 (examining the legal and cultural forces that have imbedded closure discourse in the popular imagination).

[59] As I have argued elsewhere, the therapeutic framework has, more broadly, supplanted the retributive rationale for capital punishment in general. Bandes, *Closure in the Criminal Courtroom*, *supra* note 9, at 103 & n.10. Yet there is little evidence that a death sentence will help victims' family members heal—and troubling evidence that it can have precisely the opposite effect. *Id.* at 115–16; *see also* ROBERT JAY LIFTON & GREG MITCHELL, WHO OWNS DEATH?: CAPITAL PUNISHMENT, THE AMERICAN CONSCIENCE, AND THE END OF EXECUTIONS 204–10 (2002); Bandes, *Victims, "Closure,"* *supra* note 9, at 14 n.75. For now, the salient point is that the blunt instrument of a death sentence is not a panacea for the needs of murder victims' survivors. Those needs, even to the extent they can be met by the criminal justice system, are too often simply left unaddressed. *See* DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR 27–29 (2019).

[60] Penalty phase capital juries have a binary choice: impose a death sentence or not.

[61] *Working with Victims of Crime: Victims' Rights, Section 3: Victims Rights*, NAT'L INST. OF CORR., https://info.nicic.gov/wwvc/node/7 (last visited May 19, 2022); *Documenting Restitution Losses*, JUST. SOLS. (Apr. 2, 2011), http://www.justicesolutions.org/art_pub_documenting_restitution_losses.htm [https://perma.cc/4RU7-RX3K].

[62] *See* Bandes, *Victims, "Closure," supra* note 9, at 19; Bandes, *Share Your Grief*, *supra* note 9, at 279–80 (discussing the ways in which the complex needs of victims and survivors are translated into a single message in favor of more punitive sentencing).

[63] *See supra* note 1 and accompanying text.

[64] I owe thanks to Aya Gruber for crystallizing this distinction.

[65] *See* Bandes, *Victims, "Closure," supra* note 9, at 17–19; Bandes, *Closure in the Criminal Courtroom*, *supra* note 9, at 104.

[66] SERED, *supra* note 59, at 31–33.

better addressed by interventions other than lengthy prison sentences, by legal institutions other than the prosecutor's office,[67] and by institutions entirely apart from the criminal justice system.[68] In her important book on the notion of parallel justice, Susan Herman argues for the use of community-based victim advocates who "often have more flexibility in how they approach their work because they are able to focus exclusively on victims' needs without regard to the offender-oriented interests and time pressures of the criminal justice process,"[69] as well as for multiagency initiatives to coordinate and facilitate access to a broad range of services.[70] Concrete, incremental reforms like wider access to support networks and services appear to address many of the needs of victims.[71] But addressing these needs does not require a formal legal forum for the victim's testimony.

This brings us to the core question: what *legitimate* informational or even therapeutic goals are served by VIS delivered in open court? I will consider this question through the lens of the VIS delivered at the Nassar guilty plea hearings and Chanel Miller's VIS during Brock Turner's trial.

A. Information

VIS in sexual assault cases differ from those in capital cases in a number of relevant ways. Most obviously, the statements come from the victims themselves. In addition, the sentencer is a judge rather than a jury, and the judge has more options for responding to the statements than a capital jury does.[72] Nevertheless, many of the same concerns apply to VIS in both contexts. In both contexts, the sentencer is provided with information about the victim's characteristics that is irrelevant to the defendant's culpability, for example information about the victim's attractiveness, articulateness, race, ethnicity, and social class.[73] This information elicits anger and disgust toward the defendant, sympathy for the

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[67] As Lara Bazelon and Bruce Green argue, once a criminal prosecution proceeds, several options become unavailable to the victim, including receiving an apology or an explanation. Lara Bazelon & Bruce A. Green, *Victims' Rights from a Restorative Perspective*, 17 OHIO ST. J. CRIM. L. 293, 316–17 (2020). As they also observe, some victims who would like to tell their stories do not wish to do so in an adversary setting. *Id.*

[68] *See generally* SUSAN HERMAN, PARALLEL JUSTICE FOR VICTIMS OF CRIME 77–130 (2010) (advocating services that begin at the investigative stage).

[69] *Id.* at 102.

[70] *Id.* at 103–05.

[71] *See id.* at 101–13, 130.

[72] The judge has a more flexible range of sentencing options, *see supra* note 60 and accompanying text, and also has more avenues for obtaining information, including a presentence report and the opportunity to engage in a colloquy with the defendant.

[73] *See supra* notes 48–52 and accompanying text.

victim, and other emotions that may interfere with the sentencer's ability to weigh the remainder of the evidence fairly.[74]

Moreover, in sexual assault cases, there is concerning evidence that some victims are more likely to be encouraged to give testimony than others, both because of the prosecutor's desire to tell a powerful story and because of ingrained prejudices about who counts as a credible or worthy victim.[75] There are also concerns about how judges evaluate the testimony. Some of these concerns are endemic to sexual assault cases—in particular, the problem that judges are frequently guided by outmoded and even pernicious assumptions about what makes a rape victim credible, or what makes a rape "serious."[76] These deeply rooted cultural misconceptions must be addressed in all aspects of criminal justice, but it is important to emphasize the particular problems they pose for VIS.

VIS exist in a kind of evidentiary limbo. Judges have expressed understandable perplexity about what evidentiary weight to accord the statements and about how the statements ought to affect their sentencing decisions.[77] Proponents have not confronted the equality and fairness issues raised by the fact that whether to deliver a statement is within the discretion of the victim. VIS introduce two related concerns about sentence disparity. The first, which I and others have discussed extensively, is that VIS introduce irrelevant variables into the sentencing calculus, encouraging comparisons of victims based on attractiveness, articulateness, social class, race, ethnicity, and other problematic factors.[78] The second concern arises from the optional nature of VIS—how are sentencers meant to compare cases in which a VIS has been delivered to cases in which no VIS is presented?

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[74] Bandes & Salerno, *supra* note 9, at 1046–48 (discussing the negative impact of certain emotions elicited by VIS on the sentencer's ability to evaluate not only the VIE but also the *other* evidence presented).

[75] *See* Miller, *supra* note 26, at 1455 (discussing a Canadian study that showed disparities in which sexual assault victims were encouraged to give—or even informed of the right to give—victim impact testimony); Itay Ravid, *Inconspicuous Victims*, 25 LEWIS & CLARK L. REV. 529, 529 (2021) (arguing that the victims' rights movement has been largely white and conservative, has constructed victims as innocent, weak, and ideally female and white, and has approached Black victims as "non-ideal victims and, as such, unworthy of institutional and legal recognition").

[76] SCHUSTER & PROPEN, *supra* note 48, at 55–81.

[77] Logan, *supra* note 25, at 156–58 (discussing the difficulties judges face in enforcing evidentiary rules in VIS cases); *see also* Rhani M. Lott, *How Should Judges Listen to Victim Impact Statements?*, LISTEN LIKE A LAW. BLOG (Feb. 1, 2018), https://listenlikealawyer.com/2018/02/01/how-should-judges-listen-to-victim-impact-statements/ [https://perma.cc/5JNY-EFML] (observing that how judges listen to VIS "depends on how we prioritize the purposes of victim impact statements").

[78] *See supra* notes 48–57 and accompanying text.

The first concern was well articulated by Justice Powell in *Booth*, and reaffirmed by Justice Marshall in his dissent in *Payne*:

> [T]he probative value of such evidence is always outweighed by its prejudicial effect because of its inherent capacity to draw the jury's attention away from the character of the defendant and the circumstances of the crime to such illicit considerations as the eloquence with which family members express their grief and the status of the victim in the community.[79]

Should the sentencer assume that the victim or family member who delivers a powerful, articulate statement has been more severely harmed than the victim or family member who delivers a less affecting statement? Professor Paul Cassell makes this very argument, positing that perhaps the "'articulate' victims are simply those victims who have been harmed the most."[80] Cassell offers no support for the novel suggestion that articulateness in the courtroom might be correlated with the level of harm to the victim. In fact, the evidence points in another more troubling direction: that whether someone is perceived as 'articulate' is affected by language difficulties and other barriers to empathy and understanding, such as race and social class.[81] The distinct danger therefore arises that allowing a sentencer to base a sentence in part on a perception of how articulate a victim is in conveying grief becomes an unintended portal for arbitrary and pernicious factors such as race and social class.

As to the second concern (how are sentencers meant to compare cases in which a VIS has been delivered to cases in which no VIS is presented?), should the judge assume, as some do, that rape victims who choose not to give a statement at all suffer less trauma than those who deliver a statement, and that therefore the defendant in a case without VIE deserves a

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[79] Payne v. Tennessee, 501 U.S. 808, 846 (1991) (Marshall, J., dissenting) (citing *Booth v. Maryland*, 482 U.S. 496, 505–07 (1987), and *South Carolina v. Gathers*, 490 U.S. 805, 810–11 (1989)).

[80] Cassell, *supra* note 3, at 639. In addition, Cassell argues that it will always be the case that some witnesses are more articulate than others. *Id.* at 638. But the fact that irrelevant factors may influence the reception of all testimony is not a good argument for introducing an additional category of problematic testimony. *See Payne*, 501 U.S. at 868 (Stevens, J., dissenting) ("The notion that the inability to produce an ideal system of justice in which every punishment is precisely married to the defendant's blameworthiness somehow justifies a rule that completely divorces some capital sentencing determinations from moral culpability is incomprehensible . . . ").

[81] *See generally* H. SAMY ALIM & GENEVA SMITHERMAN, ARTICULATE WHILE BLACK: BARACK OBAMA, LANGUAGE, AND RACE IN THE U.S. (2012); Nic Subitelu, *Who Is* Articulate*? Biased Perceptions of Language*, LINGUISTIC PULSE (May 8, 2014), https://linguisticpulse.com/2014/05/08/who-is-articulate-biased-perceptions-of-language/ [https://perma.cc/57NL-UZJL].

lighter sentence?[82] If not, by what metric should judges evaluate the emotional harm the statements are meant to convey? As a practical matter, the usual evidentiary guideposts and safeguards are unavailable to answer these baffling questions. The emotional forcefield surrounding the statements makes the basic tools of the adversary system, such as cross examination and objections to irrelevant, cumulative, or prejudicial evidence, appear brutish and insensitive.[83] Thus, judges evaluating the statements and the demeanor and credibility of those who deliver them are left largely unconstrained to draw on their idiosyncratic and sometimes appalling notions about how a "real rape victim" ought to express her feelings in a court of law.[84]

And yet it is arguable that testimony like Chanel Miller's in the Brock Turner case[85] and the testimony of the victims of Larry Nassar[86] did convey valuable information—if not for the sentencer, then for the general public. Perhaps the value of the statements rested not on their bearing on the individual cases, but on their broader educational value as vivid, searing glimpses of the physical, emotional, and mental harms of crimes that are underprosecuted, underestimated, or poorly understood.[87] In the Nassar case, for example, the victims' statements offered a window into a complex web of institutional and personal complicity that enabled criminal conduct to continue over time. This is a compelling argument, but ultimately I conclude that the window provided by VIS was too narrow. Indeed, in light of the recent testimony of Nassar's victims before Congress,[88] a stronger condemnation of what occurred in Judge Aquilina's

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[82] *See, e.g.*, Miller, *supra* note 26, at 1451–52.

[83] Logan, *supra* note 25, at 159–60 (discussing the reluctance of judges to permit cross examination of victims, as well as the strategic dangers to defense attorneys who seek to utilize the usual tools of the advocate).

[84] See, for example, the judges studied by Mary Lay Shuster and Amy D. Propen, who expressed a preference for (i.e., found more credible) sexual assault victims who are deferential to the court and express compassion rather than anger toward their assailants. SCHUSTER & PROPEN, *supra* note 48, at 69.

[85] *See infra* text accompanying notes 99–107.

[86] *See infra* text accompanying notes 133–149.

[87] *See, e.g.*, Khadija Lalani, *Larry Nassar's Sentencing Hearing & the Role of Victim Impact Statements*, NW. L. REV. BLOG (Feb. 15, 2018), https://blog.northwesternlaw.review/?p=485 [https://perma.cc/UW5E-XSCV] (arguing that "the inclusion of victims in the Nassar case . . . served a broader purpose of uncovering the truth," permitted victim evidence in a case in which it would otherwise have been precluded by a guilty plea agreement); *see also infra* Section I.C. The same can be said for the testimony of several victims of Jeffrey Epstein at the hearing to dismiss the charges against him after he died. *See infra* text accompanying notes 124–126.

[88] Hearing on *Dereliction of Duty: Examining the Inspector General's Report on the FBI's Handling of the Larry Nassar Investigation*, U.S. SENATE COMM. ON THE JUDICIARY (Sept. 15, 2021) [hereinafter Hearing on *FBI's Handling of Nassar Investigation*], https://www.judiciary.senate.gov/meetings/dereliction-of-duty-examining-the-inspector-generals-report-on-the-fbis-handling-of-the-larry-nassar-investigation [https://perma.cc/57ZT-PE5E].

courtroom seems appropriate. Victims were asked to exhibit tremendous courage in the criminal courtroom, leaving many of them feeling doubly victimized when it became clear that the trial could do no more than heap opprobrium on a single individual.[89] The complicity of several powerful institutions, which permitted Nassar's conduct to continue for years,[90] has long remained unaddressed. A broader exploration simply cannot occur in a criminal sentencing hearing focused on an individual defendant.[91]

It is also important to add a caveat: part of what made the information in the Nassar case so powerful was the articulateness of the statements and the appeal of the elite gymnasts who delivered them.[92] When we consider the efficacy of such fora, it is important to imagine how more challenging stories told by less sympathetic victims would be received—for example statements by victims of police brutality, some of whom have committed serious crimes and who typically hold marginalized status.[93]

B. Healing

I now turn to the second rationale for VIS—the claim that they are a vehicle for healing and catharsis. I have critiqued the notion of "closure" in detail elsewhere.[94] Here, I will focus on

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[89] *See infra* text accompanying notes 127–128, 133–149.

[90] *See infra* text accompanying notes 144–149.

[91] *See, e.g.*, Bazelon & Green, *supra* note 67, at 316–17 (raising the issue of the nature of the prosecutor's obligation to vindicate collective victim interests, and how that interest is enforced when it diverges from the prosecutor's own institutional or personal preferences).

[92] Likewise, Chanel Miller's statement in the Brock Turner case was extraordinarily powerful. Miller's identity, however, was not public either at the time of trial or at the time the statement went viral. *See* Dwyer & Martin, *supra* note 36.

[93] *See generally* Susan A. Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275 (1999) (examining the ways in which police brutality victims are dismissed and silenced, and connections among police brutality victims are ignored and erased). Or sexual assault victims of marginalized race and status. *See* AYA GRUBER, THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN'S LIBERATION IN MASS INCARCERATION 96–98 (2020); *see also* Kimberle Crenshaw, *How R. Kelly Got Away With It*, N.Y. TIMES (Oct. 1, 2021), https://www.nytimes.com/2021/10/01/opinion/r-kelly-conviction.html [https://perma.cc/FJ7T-SQKP] ("Mr. Kelly's victims were hiding in plain sight . . . for the simple reason that people in the overlapping worlds of entertainment, law and media have been trained to see Black girls and women as dispensable."); Itay Ravid, *Inconspicuous Victims*, 25 LEWIS & CLARK L. REV. 529, 529 (2021) (arguing that the victims' rights movement has been largely white and conservative, has constructed victims as innocent, weak, and ideally female and white, and has approached Black victims as "non-ideal victims and, as such, unworthy of institutional and legal recognition").

[94] *See generally* Bandes, *Victims, "Closure," supra* note 9 (arguing that "closure" is a vague term of recent legal origin, with no basis in psychology); Bandes, *When Victims Seek*, *supra* note 9 (questioning the appropriate role of the justice system in helping

the tensions between healing and punishment, using the Brock Turner case as an illustration.

For Chanel Miller, delivering a VIS at the sentencing hearing of her assailant Brock Turner was apparently not a helpful step in her healing process.[95] Claims about the healing nature of VIS are problematic because they do not address the question of what sort of reaction a victim might need *in order* for her statement to help her heal.[96] In a courtroom, there are limited channels for receiving a response. The response might come from the judge or the defendant as the statement is delivered—but there is no guarantee that either will respond in a manner the victim finds helpful.[97] One of the most damaging aspects of the current VIS regime is the promise it makes to victims, implicitly or explicitly, that their statement will inform the sentence. Even as judges struggle to ascertain what weight to give the statements,[98] the danger is that the victim will be led to expect the sentence to reflect the value the judge assigns to her pain, and will feel unheard, dismissed, and disrespected when the sentence fails to live up to her hopes. This is precisely what occurred in the Turner case.

In her memoir, Chanel Miller details the panic and fear she felt as she delivered her statement.[99] She describes her futile effort to make eye contact with the judge, the fact that the defense attorney never turned to face her, and the fact that Turner's father never turned to look at her.[100] She describes Brock Turner's unemotional demeanor; his "unmoving face . . . [and] stoic profile."[101] She describes the haunting silence that followed her words,[102] and her intense emotions—outrage, shock, humiliation, and sadness—when she heard Judge Persky's reasons[103] for

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victims achieve the claimed state of "closure"); Bandes, *Closure in the Criminal Courtroom*, *supra* note 9 (concluding that there is as yet no empirical support for the use of the criminal courtroom to achieve "closure" and identifying avenues for further study).

[95] See *infra* notes 99–110 for discussion drawing from Miller's account of her courtroom experience in her book.

[96] *See infra* text accompanying notes 108–111.

[97] For a litany of examples from the McVeigh case of a defendant who offers nothing—or certainly nothing helpful—to victims and covictims who seek meaning in his actions, reactions and facial expressions, see generally JODY LYNEE MADEIRA, KILLING MCVEIGH: THE DEATH PENALTY AND THE MYTH OF CLOSURE 19–25, 28–31, 151–54, 194–97, 231–39 (2012).

[98] *See, e.g.*, Logan, *supra* note 25, at 156–57 & n.85.

[99] CHANEL MILLER, KNOW MY NAME: A MEMOIR 230–31 (2020).

[100] *Id.* at 231.

[101] *Id.*

[102] *Id.*

[103] Miller writes extensively and poignantly about her reaction to Judge Persky's reasons, including his findings on remorse, his reactions to the character evidence, and other factors. *Id.* at 232–37.

imposing the sentence he did.[104] She describes turning herself inside out to tell the court about her pain.[105] She describes feeling that the sentence was a referendum on her self-worth. As she said, "I wondered if I was waking up to a truth that I had been the last one to realize; you are worth three months . . . My poisoned life, three months."[106]

Miller's statement, in its viral afterlife, conveyed powerful lessons about the harms suffered by sexual assault victims, and raised hard questions about the influence of selective judicial empathy.[107] I will turn to this public education dimension shortly. But the heated controversy over the length of Turner's sentence[108] is not the only controversy here.[109] Miller's account illustrates the concrete harm to victims that flows from the criminal justice system's failure to address the incoherence at the heart of the information rationale. If the information is *not* meant to make sentences harsher, then what is it for? More broadly, this 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.[110]

There are core theoretical objections to the notion of the sentencing court as a therapeutic venue—this newly minted goal fits uneasily within the adversarial structure and does not advance any of the traditional purposes of the penal system.[111] But the healing rationale also rests on a number of unsupported or untested empirical claims about what victims

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[104] Turner was sentenced to "six months in county jail, followed by three years of probation and lifetime registration as a sex offender." He was "released after serving only three months of his sentence," a customary sentence reduction for good behavior in prison. *See* Michael Vitiello, *Brock Turner: Sorting Through the Noise*, 49 U. PAC. L. REV. 631, 637 (2018).

[105] MILLER, *supra* note 99, at 230.

[106] *Id.* at 242.

[107] *See* M. Eve Hanan, *Remorse Bias*, 83 MO. L. REV. 301, 303 (2018) (discussing Judge Persky's willingness to credit Brock Turner's remorse despite his failure to express remorse in the ways judges usually demand).

[108] Liam Stack, *Light Sentence for Brock Turner in Stanford Rape Case Draws Outrage*, N.Y. Times (June 6, 2016), https://www.nytimes.com/2016/06/07/us/outrage-in-stanford-rape-case-over-dueling-statements-of-victim-and-attackers-father.html [https://perma.cc/59R8-RTAD]. *But see* Vitiello, *supra* note 104 (citing the finding of the California Commission on Judicial Performance that the sentence was "within the parameters set by the law and therefore within the judge's discretion"); *see also* GRUBER, *supra* note 93, at 180 (observing that Judge Persky's sentence followed the probation department's recommendation).

[109] *See supra* note 107.

[110] *See* NAT'L DIST. ATT'YS ASS'N WOMEN PROSECUTORS SECTION, NATIONAL DOMESTIC VIOLENCE PROSECUTION BEST PRACTICES GUIDE 35 (2017), https://ndaa.org/wp-content/uploads/NDAA-DV-White-Paper-FINAL-revised-July-17-2017-1.pdf [https://perma.cc/9S7W-YTAN] ("While seeking and considering the victim's input is important, prosecutors should explain the sentencing phase and make clear it is the judge, not the victim, who decides the sentence.").

[111] Bandes, *Empathy, Narrative*, *supra* note 9, at 395–98.

need.[112] One major question is: what sort of response to a victim's statement is required to promote healing? The legal dialogue on healing and "closure" seems to exist in a parallel universe, making little or no reference to the psychological literature on healing and trauma. The psychological literature emphasizes the importance of careful listening and empathic feedback.[113] Judge Aquilina's response in the Nassar sentencing hearing provided one (albeit highly problematic) example of empathic feedback.[114] The question remains whether training judges to be more empathic is an appropriate or practical option, and whether judges can fulfill that role without sacrificing their duty to impartiality.

We also need information about what aspects of the sentencing hearing contribute to the victim's well-being. If the ability to deliver the statement in a formal setting before an authority figure is what matters, this does not require a sentencing hearing.[115] If, however, what matters is the promise that the judge will take the information into account when determining the sentence, this raises concerns about the evidentiary weight of the statements, the fairness and equality issues raised by the statements' optional nature, the specter of secondary victimization when the sentence does not meet the victim's expectations,[116] and (as in the Nassar and Epstein cases) the investigative and remedial limits of an individual criminal trial.[117] Disentangling these aspects of the hearing and their connection to healing is important, but it is also crucial to emphasize that victims' expectations about what to expect from the criminal justice system do not arise in a vacuum—they are communicated and even shaped by the system itself.[118]

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[112] *See supra* text accompanying notes 29 and 40.

[113] *See, e.g.*, Anke Ehlers & David M. Clark, *A Cognitive Model of Posttraumatic Stress Disorder*, 38 BEHAV. RES. & THERAPY 322, 335–41 (2000) (discussing treatment options for PTSD, all of which require careful listening and feedback to aid patients in elaborating, integrating, and reassessing traumatic experiences).

[114] For discussion of the problematic aspects of the hearings, see *infra* text accompanying notes 132–140.

[115] To the extent VIS fill a need to be heard in a formal setting, more study is needed to disaggregate the factors that might contribute to that effect, for example the role of authority figures, the role of an authoritative setting, the question of whether the setting must be legal in nature, and the question of whether the statement must elicit a particular reaction or lead to a particular outcome in order to be helpful.

[116] *See*, *e.g.*, SUSAN HIRSCH, IN THE MOMENT OF GREATEST CALAMITY: TERRORISM, GRIEF, AND A VICTIM'S QUEST FOR JUSTICE 251 (2006) ("The penalty phase promises agency to victims but often delivers something quite different.").

[117] *See infra* Part III.

[118] *See*, *e.g.*, Bandes, *Closure in the Criminal Courtroom*, *supra* note 9 (discussing the criminal justice system's role in advancing the idea that victims or survivors ought to support long prison sentences or capital sentences as a reflection of the worth of the victim and as a tool for healing).

C. *Public Education*

The final rationale I will discuss for VIS is their educative role. In both the Nassar and Turner cases, it is arguable that these statements served a kind of public information function, calling attention to crimes that are poorly understood and underenforced. Miller's statement, for example, could be considered a much-needed reminder of the dangers of assigning sexual assaults to a denigrating "lesser" category like "date rape."[119] The statements in the Nassar case performed much of this same work in conveying the harms of sexual assault, often in an almost unbearably poignant fashion (witness, for example, the parents of gymnast Kyle Stephens, who had refused to believe their daughter, standing beside her as she gives her statement).[120] Even if this is so, we must nevertheless ask whether a criminal sentencing hearing is the best forum for conveying such information.

We have seen that Chanel Miller's statement, for all its eloquence, did not produce the hoped-for sentence, but instead was the occasion for the infliction of additional trauma.[121] And to the extent the statement served a valuable educative role, we have seen that the statement's educative function arose *after* sentencing, raising the crucial question of whether victim statements could serve this function in a forum that is not tied to an individual prosecution.[122]

The controversial hearing on the dismissal of criminal charges against Jeffrey Epstein after his death highlights this question as well. As a legal matter, this was the proverbial open-and-shut case, since the defendant was deceased and could not, therefore, be sentenced.[123] Yet, as Bruce Green and

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[119] Note, however, that the Miller statement performed this work only when it was released to Buzzfeed after the criminal case was concluded.

[120] Tracy Connor & Sarah Fitzpatrick, *Gymnastics Scandal: 8 Times Larry Nassar Could Have Been Stopped*, NBC NEWS (Jan. 28, 2018), https://www.nbcnews.com/news/us-news/gymnastics-scandal-8-times-larry-nassar-could-have-been-stopped-n841091 [https://perma.cc/U5ZS-ECM2].

[121] *See supra* notes 99–110.

[122] Paul Cassell, in response to Wayne Logan's recommendation for a "commission-like forum" for mass killings, argues that separating VIS from the criminal trial would be problematic because victims would be frustrated at being diverted "away from the criminal trial court that makes substantive sentencing decisions and . . . away from the defendant himself," and it would rob victims of their "meaningful voice in the criminal justice process." Cassell, *supra* note 3, at 643–44 (responding to Logan, *supra* note 48, at 774). Cassell is of course correct that under the rationale of *Payne*, the statements are meant to inform sentencing. *Id.* at 631. The question of whether a separate proceeding could prove therapeutic to victims is distinct.

[123] Bruce A. Green & Rebecca Roiphe, *Punishment Without Process: "Victim Impact" Proceedings for Dead Defendants*, 88 FORDHAM L. REV. ONLINE 28, 28–29 (2019).

Rebecca Roiphe have described in detail, Judge Richard Berman permitted sixteen women to testify at the hearing, where they "emotionally recounted their experiences being sexually abused by Epstein, and lawyers read the statements of seven others."[124] Green and Roiphe are appropriately critical of this decision. As they rightly point out, the healing rationale for VIS cannot simply override legal niceties like the fact that without a live defendant there can be no criminal prosecution.[125] In my view, the even more important point is that the setting was not an appropriate forum for investigating the web of complicity that enabled Epstein to inflict so much harm with such impunity. An individual criminal prosecution is not capable of tracing, illuminating, and responding to that sort of harm.[126]

Likewise, as compelling as the victim statements in the Nassar case were, the manner in which the hearings were conducted detracted from their educational value. A comparison with Judge Matsch's courtroom in the Oklahoma City bombing trial of Timothy McVeigh will illustrate the problem. As Jill Lepore describes in detail, Judge Aquilina's goals in the Nassar hearings were very different from those of Judge Matsch.[127] In Lepore's words, "Matsch spurned theatre; Aquilina turned her courtroom into a stage."[128] McVeigh was accused of "taking the lives of a hundred and sixty-eight people and injuring some seven hundred more in the worst act of domestic terrorism in American history. . . . The Oklahoma City bombing produced an unprecedented number of victims: thousands."[129] Judge Matsch, in line with the *Payne* decision, treated VIS as a source of information designed to inform his sentencing decision, and was determined to screen out information that was redundant or irrelevant. As Jill Lepore describes, he "struggled to draw a line," considering the

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[124] *Id.* at 29–30.

[125] *See id.* at 32–34 (pointing out that there was no relief the judge could award to the victims in the absence of a live defendant, and observing that "[a]t times, victims' presentations at sentencing appear to be intended less to assist the sentencing judge than to fulfill the victims' need for public self-expression").

[126] The Epstein case highlighted some limitations of—or at least tensions in—the Crime Victims' Rights Act, *see* 18 U.S.C. 3771, as Green and Roiphe noted. There was a tragically large class of possible victims, which was terminated when Epstein died. Yet not only the immediate questions about Epstein's own criminal activity, but the larger questions about the complicity of powerful actors in Epstein's wrongdoing, remain unanswered. If there is a broader right for the victims to be heard that survives because of its strong public interest, the problems of tying that right to the prosecution of a single individual become manifest. *Id.* at 33–34.

[127] Lepore, *supra* note 30.

[128] *Id.*

[129] *Id.*

probative value and prejudicial effect of each proffered statement, as well as the cumulative effect of the statements.[130] Ultimately, he permitted thirty-eight VIS.[131]

By contrast, the information rationale went largely unmentioned in Judge Aquilina's courtroom. Judge Aquilina, in the live-streamed January 2018 hearing on Nassar's plea to seven counts of sexual assault, was straightforward about her goals in permitting 156 young women[132] to give statements.[133] Her focus was on creating an environment in which every victim had a voice and felt supported by the judge.[134] Achieving her goal involved a high level of emotionally intense interaction with the victims—something that is outside (or even contrary to) the training of many judges,[135] but that might be helpful if it could be accomplished without damage to the judge's role and the appearance of justice.[136] Unfortunately, in her efforts to create a healing environment for the victims, the judge quite explicitly aligned herself with the victims against the defendant. She commiserated with the victims, referring to them as "sister survivor warriors,"[137] and telling one of them: "'The military has not yet come up with fiber as strong as you' . . . . 'Mattel ought to make toys so that little girls can look at you and say, "I want to be her." Thank you so much for being here, and for your strength.'"[138] She theatrically tossed aside a letter from the defendant in open court.[139] She even expressed her hope that Nassar would receive extralegal punishment in prison,

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[130] *Id.*

[131] *Id.*

[132] Levenson, *supra* note 34. An additional sixty young women gave statements in a separate proceeding after Nassar's guilty plea to three additional counts of criminal sexual conduct. Christine Hauser, *Larry Nassar Is Sentenced to Another 40 to 125 Years in Prison*, N.Y. Times (Feb 5, 2018), https://www.nytimes.com/2018/02/05/sports/larry-nassar-sentencing-hearing.html [https://perma.cc/6P5V-5M57].

[133] *But see* Bonnie D. Ford, *Judgment Call*, ESPN (July 12, 2019), https://www.espn.com/espn/feature/story/_/id/27156746/journey-judge-rosemarie-aquilina [https://perma.cc/Z3DW-YNFS] (noting that the original decision to permit all the victims to give statements arose from a plea agreement).

[134] *See* Francis X. Donnelly & Sarah Rahal, *Nassar Judge Told Women: 'This Is Your Moment*,' DETROIT NEWS (Jan. 24, 2018, 11:53 PM), https://www.detroitnews.com/story/news/local/1273ichigan/2018/01/24/larry-nassar-judge-aquilina/109787762/ [https://perma.cc/FMJ2-4TWL].

[135] *See generally* Terry Maroney, *The Persistent Cultural Script of Judicial Dispassion*, 99 CALIF. L. REV. 629 (2011) (discussing the prevalent view that judges should avoid emotion on the bench).

[136] *See, e.g.*, Takas, *supra* note 5 (quoting survivor Morgan McCaul, who noted that "there was an intense feeling of empowerment (in the courtroom)"); *see also* Bandes, *Victim Impact Statements*, *supra* note 9 (quoting rape survivor's reaction to a "judge's assurance that she was not to blame": "Because of what the judge said, it was so easy just to walk out of that court and start my life.").

[137] Donnelly & Rahal, *supra* note 134.

[138] Cacciola, *supra* note 35 (quoting Judge Aquilina's remarks following gymnast Bailey Lorencen's statement).

[139] Donnelly & Rahal, *supra* note 134.

stating: "Our Constitution does not allow for cruel and unusual punishment. If it did . . . I would allow some or many people to do to him what he did to others."[140]

While the Nassar hearings put the victims' pain on full public display, they could not investigate how the abuse was permitted to go on for so long. Because 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 aspect of the harm the young gymnasts suffered—the multiagency, multilayered complicity that allowed the assaults to continue for years.[141] As Simone Biles made clear when she explained her decision to withdraw from the Olympics,[142] these issues remain unresolved and continue to haunt the victims and other vulnerable gymnasts.[143]

The Nassar hearings were a vivid illustration of the unsuitability of criminal proceedings for illuminating complex causal chains. Their aim was to ostracize and punish a monster,

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[140] Rachel Marshall, *The Moment the Judge in the Larry Nassar Case Crossed the Line*, VOX (Jan. 25, 2018) (alteration in original), https://www.vox.com/the-big-idea/2018/1/25/16932656/judge-aquilina-larry-nassar-line-between-judge-advocate-sentencing (last visited Mar. 18, 2022).

[141] In 1997, former MSU gymnastics coach Kathie Klages received reports of Nassar's abuse. Twenty-four reports of alleged abuse date back to 1998. The first official Title IX complaint against Nassar was filed in 2014. Nassar was arrested in 2016. He pled guilty to a series of felony charges in 2017. Wajeeha Kamal, *A Timeline of Nassar's Abuse: Charges and Michigan State's Response*, ST. 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* James Dator, *A Comprehensive Timeline of the Larry Nassar Case: Key Dates Show Former USA Gymnastics and Michigan State Trainer's Lengthy Campaign of Sexual Abuse, Resulting in Trial and MSU's $500M Settlement to Survivors*, SBNATION (Sept. 15, 2021), https://www.sbnation.com/2018/1/19/16900674/larry-nassar-abuse-timeline-usa-gymnastics-michigan-state (last visited May 2, 2022); Des Bieler, *Larry Nassar Victims Seek $130 Million from FBI for Mishandling Case*, WASH. POST (Apr. 22, 2022, 6:30 AM), https://www.washingtonpost.com/sports/2022/04/22/larry-nassar-fbi-claims/ [https://perma.cc/E9YP-UUK9].

[142] Christian Spencer, *Simone Biles Hints Sexual Abuse Played Role In Shocking Olympics Withdrawal*, HILL (July 28, 2021), https://thehill.com/changing-america/enrichment/arts-culture/565319-simone-biles-hints-sexual-abuse-played-role-in [https://perma.cc/T3LK-4J8L]. She said:

> I should have quit way before Tokyo, when Larry Nassar was in the media for two years. It was too much. But I was not going to let him take something I've worked for since I was 6 years old. I wasn't going to let him take that joy away from me. So I pushed past that for as long as my mind and my body would let me.

Camonghne Felix, *Simone Biles Chose Herself*, N.Y. MAG. (Sept. 27, 2021) (quoting Simone Biles), https://www.thecut.com/article/simone-biles-olympics-2021.html (last visited Mar. 18, 2021).

[143] *See* Jack Morphet, *Simone Biles, McKayla Maroney Rip FBI for Turning Blind Eye to Larry Nassar Sex Abuse*, N.Y. POST (Sept. 15, 2021, 11:04 AM), https://nypost.com/2021/09/15/watch-live-simone-biles-accuses-makes-statement-on-larry-nassar-sexual-abuse/ [https://perma.cc/6R6P-W8XU].

and one of the functions of naming and ostracizing a monster is to avoid examining the conditions that allow monstrous behavior to flourish.[144] The costs of this avoidance are becoming abundantly clear. Recent testimony by gymnasts Simone Biles, Aly Raisman, Maggie Nichols, and McKayla Maroney before the Senate Judiciary Committee[145] highlighted and further exposed the ugly extent of the complicity of USA Gymnastics, the FBI,[146] and the Department of Justice,[147] among other institutions. One of the haunting yet little remarked upon aspects of the hearing—one of the dark undersides of the notion of the criminal courtroom as a platform for the "victim's voice"—is that the victims have had to publicly relive their trauma yet again, and now with the knowledge that the list of victims grew far longer because of institutional inaction.[148] The Nassar VIS moved the public but did nothing to address the institutional problem. As Raisman said in her congressional testimony, "[o]ver the past few years, it has become painfully clear how a survivor[']s healing is affected by the handling of their abuse."[149]

It is at this point that the conflict between information and healing becomes evident in the sentencing context. The claim that healing requires an opportunity to speak during the actual criminal prosecution and prior to sentencing is unproven

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[144] *See* Joseph Kennedy, *Monstrous Offenders and the Search for Solidarity in Modern Punishment*, 51 HASTINGS L.J. 829, 830–33 (2000).

[145] *See* Hearing on *FBI's Handling of Nassar Investigation*, *supra* note 88.

[146] Seventy additional victims have been identified who were abused after the FBI received reports on Nassar's abuse and did not follow up on them. Devlin Barrett, *FBI Failed to Pursue Nassar Sex-abuse Allegations, Inspector General Finds*, WASH. POST (July 14, 2021, 6:30 PM), https://www.washingtonpost.com/national-security/fbi-nassar-investigation-failures/2021/07/14/ebc37274-e4c4-11eb-8aa5-5662858b696e_story.html [https://perma.cc/XV69-2DR4].

[147] *See, e.g.*, Sadie Gurman & Louise Radnofsky, *Justice Department Will Review Decision Not to Charge FBI Agents Who Mishandled Nassar Investigation*, WALL ST. J. (Oct. 5, 2021, 12:42 PM), https://www.wsj.com/articles/justice-department-fbi-nassar-investigation-11633451644 [https://perma.cc/85RF-WMCC] (reporting the DOJ's review of its prior decision not to charge FBI agents who disregarded the Nassar allegations).

[148] In her statement to the Senate Judiciary Committee, Biles said

> I am also a survivor of sexual abuse. And I believe without a doubt that the circumstances that led to my abuse and allowed it to continue, are directly the result of the fact that the organizations created by Congress to oversee and protect me as an athlete . . . failed to do their jobs.

Statement of Simone Biles at Hearing on *FBI's Handling of Nassar Investigation*, *supra* note 88.

[149] Statement of Aly Raisman at Hearing on *FBI's Handling of Nassar Investigation*, supra note 88. Raisman's mother was more pointed still: "If you come from a position of power + you refuse to support/protect children+victims, don't tell them you admire their bravery and won't forget what they've been through. Your inaction makes it clear you'll forget what they've told you as soon as you walk out the door." Lynn Raisman (@LynnRaisman), TWITTER (Sept. 16, 2021, 7:54 AM), https://twitter.com/LynnRaisman/status/1438486568688361476 (last visited Mar. 18, 2022).

as an empirical matter.[150] As Chanel Miller's experience illustrates, for some victims the tight symbiosis between prosecutor and victim can inflict secondary victimization. Proponents of VIS assert that the statements have little effect on sentencing,[151] yet victims are primed to believe the sentence reflects the value the court places on the harm they have suffered,[152] a priming that undermines the very healing process VIE is supposed to serve.

It is possible that victims would welcome an opportunity to speak in a nonadversarial and supportive setting, and without the sense that the sentence will amount to a referendum on the seriousness of their pain. One can be critical of the way Judge Aquilina conducted the Nassar hearings and still recognize that her warmth and her encouraging words appeared restorative and helpful for many of the victims.[153] The question remains—which parts of the hearing were helpful to the victims? If the opportunity to influence sentencing were off the table, and the defendant was no longer present to hear their words, would the majesty of the courtroom, the gravitas of the judge, be enough?[154] Alternatively, would a less imposing and intimidating venue, or at least a less adversarial one, offer

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[150] Indeed, I am aware of no studies that attempt to tease out and assign weight to the factors (e.g., the opportunity to speak about one's loss; the opportunity to speak to an authority figure; the opportunity to speak in a courtroom during an official proceeding; the knowledge that one's statement actually influenced the sentence) that might lead to victim satisfaction after delivery of VIE. This is a fruitful area for further study.

[151] *See supra* note 16. In the noncapital context, unlike the capital context, the question of whether VIS lead to longer sentences has not been definitely resolved. *See, e.g.*, Kunst et al., *supra* note 28, at 8 (noting that the few existing studies investigating the impact of VIS on prison and noncustodial sentences are too low in number for definite conclusions).

[152] This priming occurs in numerous ways. Most directly, it comes from prosecutors and victim agencies that work with prosecutors, but in many respects it is baked into the system. *See* SUSAN JACOBY, WILD JUSTICE: THE EVOLUTION OF REVENGE 237 (1983); Bandes, *When Victims Seek*, *supra* note 9, at 1605 & nn.30–31; *see also* Bandes, *Share Your Grief*, *supra* note 9, at 279–80 (discussing the institutional dynamics that contribute to this priming effect in the context of the Dzhokhar Tsarnaev trial for the Boston Marathon bombing).

[153] But not all victims. *See* Ford, *supra* note 133 (quoting Rachael Denhollander, who observed that there is room "for rethinking some of the purposes of the [criminal] justice system, some of the ways to use the courtroom in ways that are healing, but also discussing how far is too far").

[154] In this particular case, the opportunity to confront Larry Nassar appeared to play an important role in the process for many of the victims. *See also* Bandes, *Share Your Grief*, supra note 9, at 275 (recounting Rebekah Gregory's statement that she found the opportunity to confront Tsarneav helpful even though he showed no reaction to her statement). But such confrontations do not always proceed in a way that is helpful to victims and covictims. *See, e.g.*, *id.*, at 274–76, 276 n.11 (discussing how victims may hope for, but may be disappointed by, a response from the defendant to their VIS and highlighting the case of William Bonin, who "delighted in torturing" the parents of the children he murdered in response to their requests for information).

a more restorative environment?[155] In short, neither the information nor the healing rationale is necessarily tied to the requisites of the criminal sentencing proceeding.

There is another set of concerns about the educative function of criminal proceedings—the worthy victim problem. VIS are based on the principle that the unique characteristics of individual victims, and the impact of their loss on those who loved them, are important to the sentencing process.[156] I have argued that the relevance and weight of this information are, at best, unclear.[157] Moreover, the delivery of VIS in open court introduces several irrelevant and even invidious variables, including the perceived attractiveness, articulateness, and respectability of the victim.[158] In examining the power of the victim testimony in the Nassar hearings, it is hard to ignore the fact that the victims were elite gymnasts—young, appealing, articulate, and in many cases quite famous. The importance of these characteristics should not be underestimated. When we consider the information value of VIS, this question of victim hierarchies is always present. These hierarchies are influenced by biases both implicit and explicit.[159] A prosecutor putting on a compelling case may choose her victim witnesses carefully in order to advance certain preferred narratives. And yet the education function is at its most important when it forces us to confront our biases and teaches us about the kinds of injustices that might otherwise remain invisible.[160] And these injustices will not always take the form of underpunishment of criminal defendants.

[155] Bazelon & Green, *supra* note 67, at 316–17 (reporting that some victims wish to tell their stories but not in an adversarial setting).

[156] *See supra* note 13 and text accompanying notes 41–46.

[157] *See supra* text accompanying notes 48–57.

[158] *See supra* text accompanying notes 48–57.

[159] *See infra* note 92 and accompanying text. Elaine Shpungin, quoting Kinsella, observes that "all attempts at naming or noting victimhood stem from judgments that reflect moralistic, philosophical, cultural and political biases." *The Fluidity of Victimhood*, *in* A VICTIM-LED CRIMINAL JUSTICE SYSTEM: ADDRESSING THE PARADOX 21, # (Theo Gavrielides ed., 2014).

[160] As Martha Minow writes, when violence is inflicted by state officials, "the violation multiplies, for not only are the brutalities shocking and unacceptable, they also betray basic trust in those who govern and leave victims and their families and friends with no lawful or peaceful mode of redress." Martha Minow, *Institutions and Emotions: Redressing Mass Violence*, *in* THE PASSIONS OF LAW 265, 265 (Susan Bandes ed., 2000).

II. DECOUPLING THE EDUCATION FUNCTION FROM THE INDIVIDUAL CRIMINAL TRIAL

As the above descriptions of the Nassar and Epstein cases suggest,[161] victim testimony can play a valuable public education role, but that role may be better served by decoupling the testimony from the individual criminal case. Criminal sentencing always serves expressive aims, but precisely what can be expressed—or accomplished—is limited by our adversary structure. The original problem with VIS—from which all other problems flow—has been the lack of attention to how they fit within that structure. VIS burst on the scene accompanied by a general sense that since they aimed to do good by helping victims, the system should simply be able to accommodate them—and that any reluctance should be chalked up to lack of concern for victims.[162] But once these goals are examined on a granular level, it becomes evident that many of them are at odds with the goals of—or outside the ambit of—the adversary system.[163] As I will discuss below, some of what VIS is meant to accomplish may be better suited to various forms of restorative justice, such as victim-offender mediation or victim impact panels (VIP). Other aims, particularly in the realm of public education and accountability, require fact-finding and public outreach of a sort better suited to truth commissions or Congressional hearings.

A. *Restorative Justice*

Proponents of VIS have emphasized the importance of the ability to confront and even educate the defendant.[164] One

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[161] And certainly, a similar argument could have been made in other accused serial sexual predator cases, for example, the Bill Cosby case.

[162] *See* Cassell, *supra* note 3, at 613 (quoting PRESIDENT'S TASK FORCE, *supra* note 18, at 77: "[The opposition to VIS] and the force with which it has been projected by judges and lawyers is one measure of their lack of concern for victims.").

[163] Lara Bazelon and Bruce Green make this point about the role of victims in criminal court more generally, observing:

> To elevate the priority of victims' concerns, to have them play a more active . . . role in the processing of sexual assault complaints, major structural and ideological changes in the legal system would have to occur. Yet the adjudicative process cannot accommodate such changes, which would radically undermine basic constitutional guarantees . . . .

Bazelon & Green, *supra* note 67, at 4 (quoting Lisa Frohmann, *Constituting Power in Sexual Assault Cases: Prosecutorial Strategies for Victim Management*, 45 SOC. PROBS. 393, 404 (1998)).

[164] *See* Stephanos Bibas & Richard A Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 138 (2004); Cassell, *supra* note 3, at 623–24.

hope is that this confrontation will lead to empathy and remorse on the defendant's part,[165] and perhaps even to an ongoing dialogue. A formal sentencing hearing in criminal court poses a host of legal and psychological barriers to these goals. The primary legal conflict arises from the fact that the defendant's liberty—or life— is on the line. The psychological barriers can be best understood by comparing the criminal courtroom to victim-offender mediation and other restorative justice initiatives. These initiatives, unlike the criminal courtroom, focus on creating the conditions for interchange, shared understanding, and acknowledgement of harm.[166] At least ideally, trained facilitators screen and prepare participants, promulgate rules, and articulate goals.[167]

My point is not that restorative justice is a superior mode of criminal justice—that question can be debated in general,[168] and depends on the values to be advanced, the needs and goals of the parties, the nature of the crime, and other variables. My point is that we should not expect the adversary system to accomplish aims for which it is unsuited or ill-equipped. To be blunt, there is a certain hubris in transposing restorative goals onto an adversary process without taking the necessary steps to train the legal actors involved, or screen and prepare the parties for what may transpire. The practices of restorative justice demonstrate that to make direct confrontation and even sustained interchange fruitful for the parties involves requires commitment, training, resources, and some hard tradeoffs between punitive and educative aims.[169]

One particular form of restorative justice is worth special mention at this juncture: VIP. As Mothers Against Drunk Driving describes in the context of VIP for impaired driving,

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[165] *See* Bibas & Bierschbach, *supra* note 164, at 138.

[166] Kennedy & Ben-Menachem, *supra* note 19, at 568–69. Although VIS are billed as a way to influence the sentencing judge by educating her about the precise nature of the harm the victim has suffered, the sentencing judge has little leeway to respond to such nuance. Restorative justice initiatives, in contrast, may permit more flexibility and fine tuning than a criminal sentencing hearing, for example permitting explanations, apologies, and various forms of restitution.

[167] For a detailed description of one such program, see SERED, *supra* note 59, at 134–38.

[168] For a powerful defense of restorative justice, see SERED, *supra* note 59, at 129–56. For incisive critical accounts, see generally ANNALISE ACORN, COMPULSORY COMPASSION: A CRITIQUE OF RESTORATIVE JUSTICE (2004); MEREDITH ROSSNER, JUST EMOTIONS: RITUALS OF RESTORATIVE JUSTICE (2014); and Kathleen Daly, *The Limits of Restorative Justice*, *in* HANDBOOK OF RESTORATIVE JUSTICE: A GLOBAL PERSPECTIVE 134 (Dennis Sullivan & Larry Tifft eds., 2006).

[169] *See* SERED, *supra* note 59, at 157–90, 235–53.

> The purpose of the Victim Impact Panel (VIP) program is to help drunk and drugged driving offenders to recognize and internalize the lasting and long-term effects of substance-impaired driving. . . .
>
> At a VIP, victims, survivors, and others impacted by substance-impaired driving crashes speak briefly about the crash . . . . They share a first-person account of how the crash impacts their lives.
>
> They do not blame or judge. They simply tell their stories, describing how their lives and the lives of their families and friends were affected by the crash.[170]

The concept of VIP takes seriously the notion that victims can educate offenders or would-be offenders[171] about the nature and gravity of the harm that wrongdoing imposes on victims, as well as its potentially life-altering effect on those who cause harm. VIP are most commonly, though not exclusively,[172] used in DWI cases.[173] VIP decouple the educational function of VIS from the individual criminal trial in general and from the threat of punishment in particular. One study found that this decoupling enabled offenders to grasp the "deep grief of others" without perceiving themselves as victims of bad luck and the system, and that this increased ability to empathize led to immediate changes in attitude and behavioral intentions.[174] Like victim-offender mediation, VIP are premised on the belief that, for the victim to speak freely and be heard, and for the offender to understand the consequences of his

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[170] *Online Victim Impact Panels*, MOTHERS AGAINST DRUNK DRIVING, https://maddvip.org [https://perma.cc/B8W9-GXJL].

[171] *Victim Impact Panels*, ALL. AGAINST INTOXICATED MOTORISTS, https://www.aaim1.org/victim-impact-panels.html [https://perma.cc/FAE5-7BZM]. VIP are offered to high schools, private industry, and other venues to "create awareness, encourage prevention and illustrate the devastating consequences of impaired driving." *Victim Impact Panels*, STOP DWI N.Y., https://stopdwi.org/resources-victim-impact-panel [https://perma.cc/63CF-82D8]. The requirement to attend a VIP may be used as part of a sentence in a DWI case. *Id.*

[172] *See, e.g.*, Jeff Bouffard et al., *The Effectiveness of Various Restorative Justice Interventions on Recidivism Outcomes Among Juvenile Offenders*, 15(4) YOUTH VIOLENCE & JUV. JUST. 465 (2017) (juvenile context); Mary Koss & Mary Achilles, *Restorative Justice Responses to Sexual Assault*, NAT'L ONLINE RES. CTR. ON VIOLENCE AGAINST WOMEN (2008), http://vawnet.org/sites/default/files/materials/files/2016-09/AR_RestorativeJustice.pdf [https://perma.cc/8JVV-PW27] (sexual assault context); Diane Zosky, "*Walking in Her Shoes": The Impact of Victim Impact Panels on Perpetrators of Intimate Partner Violence*, 13 INT'L J. EVIDENCE-BASED RES., POL'Y, & PRAC. 739 (2018) (intimate partner violence context); Jean M. Callihan, *Victim Impact Statements in Capital Trials: A Selected Bibliography*, 88 CORNELL L. REV. 569 (2003) (death penalty cases).

[173] Dean G. Rojek et al., *The Effect of Victim Impact Panels on DUI Rearrest Rates: A Five-Year Follow-Up*, 41 CRIMINOLOGY 1319, 1319–21 (2003); Stuart W. Fors & Dean G. Rojek, *The Effect of Victim Impact Panels on DUI/DWI Rearrest Rates: A Twelve-Month Follow-Up*, 60 J. STUD. ON ALCOHOL 514, 514–15 (1999).

[174] David Shinar & Richard P. Compton, *Victim Impact Panels: Their Impact of DWI Recidivism*, 11 ALCOHOL, DRUGS & DRIVING 73, 74 (1995).

wrongful behavior, their encounter must take place in a nonadversarial setting.[175]

B. *Investigative Commissions ("Truth-telling and Fact-Finding"[176])*

There is a rich, vast, and varied literature about the venues for investigating, communicating, and repairing systemic harm—it would be foolhardy to even begin to summarize it. One essential characteristic is shared by all the most effective and powerful analyses: a focus on carefully identifying the goals of the proceeding, each of which will require difficult choices about venue, rules for participation, limits on testimony, and remedial options.[177] As I have argued above and elsewhere, VIE is a weaker vehicle because of the failure to make such hard choices—for example, between the need of every victim to be heard and the court's need for relevant information that does not unfairly prejudice the defendant. If one of the goals of VIE is to become an effective vehicle for public education, this will require significant changes, many of which cannot be effectuated in the criminal courtroom.

For example, in their excellent discussion of effective reconciliation processes in the context of repairing police-civilian relationships in overpoliced communities, David Kennedy and Jonathan Ben-Menachem identify certain building blocks that explicitly address the role of the larger community in effectuating change, including: "Truth-telling and a statement of historical fact; [n]arrative collection and sharing; [and] [s]ustainable mechanisms for concrete repair and policy and practice change."[178] Kennedy and Ben-Menachem emphasize the importance of reaching a consensual understanding of the harm done, creating a record of that understanding, and then disseminating it.[179] They emphasize the importance of "structured listening sessions" and "sustained engagements"[180] between those in power and those in the affected community. They recommend creating a record that acknowledges harm, includes empirical data on criminal justice disparities, and traces and evaluates historical efforts to

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[175] *Id.*

[176] Kennedy & Ben-Menachem, *supra* note 19, at 574.

[177] *See generally* Minow, *supra* note 160 (discussing the goals of various types of legal proceedings and the choices that might flow from them).

[178] Kennedy & Ben-Menachem, *supra* note 19, at 569.

[179] *Id.*

[180] *Id.* at 573.

address wrongdoing.[181] One essential component of this and similar models is the willingness to explore systemic explanations,[182] rather than reflexively embrace "single-cause explanations that focus on a lone practitioner."[183] These sorts of approaches offer promise for advancing a number of important goals, including creating platforms for ongoing dialogue, tailoring remedies to the needs of individual victims, addressing the roots of ongoing or systemic harm, and imposing meaningful remedies (both compensatory and deterrent) for systemic abuse. One salient characteristic of all these promising recommendations is that they require us to begin finding solutions, tools, skills, and venues beyond the criminal courtroom.

CONCLUSION

As one recent critique of the Nassar hearings noted, "There is no roadmap for justice, because under this system, we have never seen it . . . we simply do not know, and cannot know, what the occurrence, prevention or resolution of harm could look like in our society under more just conditions."[184] VIS were shoehorned into the adversarial system with little attention to whether they improve the lot of victims, how they burden the rights of defendants, or what impact they have on the integrity of the criminal process. What is needed is 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.

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[181] *Id.* at 574–75.

[182] For an example of such an approach, consider the City of Chicago's response to the police torture scandal and its lengthy coverup. Among other innovations, the City Council mandated the development of a middle school and high school curriculum teaching the lessons of the scandal, including an examination of community and official responses to the torture and strategies for moving forward. Thai Jones, *How Chicago's Public Schools Are Teaching the History of Police Torture*, NEW YORKER (Sept. 27, 2018), https://www.newyorker.com/news/dispatch/how-chicagos-public-schools-are-teaching-the-history-of-police-torture [https://perma.cc/DC2D-RQHT].

[183] *See* James M. Doyle, *A "Safety Model" Perspective Can Aid Diagnosis, Prevention, and Restoration After Criminal Justice Harms*, 59 SANTA CLARA L. REV. 107, 112–13 (2019); *see also* Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778 (2021) (discussing police reforms that would shift power from the police to those who have been most harmed by policing).

[184] Kelly Hayes & Mariame Kaba, *The Sentencing of Larry Nassar Was Not 'Transformative Justice.' Here's Why*, THE APPEAL (Feb. 5, 2018), https://theappeal.org/the-sentencing-of-larry-nassar-was-not-transformative-justice-here-s-why-a2ea323a6645/ [https://perma.cc/RBM2-ESFE].