In Defense of Victim Impact Statements

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The crime victim's right to deliver a "victim impact statement" at sentencing is enshrined in the American criminal justice system. Victims have this right in all federal sentencings and in virtually all state sentencings. Indeed, the victim's right to speak is even protected in many state constitutions. Yet remarkably for such a near-universal feature of criminal sentencing, the right has received virtually no support from the legal academy. Disagreeing with the nationwide consensus, legal academics have generally taken the view that victim impact statements are some sort of ploy to lengthen offenders' sentences or lead to excessive emotionalism in sentencing.

In this article, I want to suggest, at least on this issue, the public consensus is right and the law professors are wrong. Victim impact statements have received such widespread support because they promote justice without interfering with any legitimate interests of criminal defendants. The statements help convey valuable information to sentencing judges and have other beneficial effects. The benefits are all obtained without unfairly prejudicing defendants in any tangible way.

My argument proceeds in four substantive parts. It begins in Part I by briefly tracing the crime victims' rights movement in this country, which, in recent years, has successfully argued for the right of victims to deliver an impact statement at sentencing. Part II then provides a real world example of a victim impact statement—a statement by Sue Antrobus regarding the criminal sale of the handgun used to murder her daughter. Looking at Sue Antrobus's statement will allow the reader to assess the desirability of victim statements with the knowledge of what such a statement actually looks like.

Part III then lays out the four main justifications for victim impact statements. First, they provide information to the sentencing judge or jury about the true harm of the crime—information that the sentencer can use to craft an appropriate penalty. Second, they may have therapeutic aspects, helping crime victims recover

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This article is dedicated to Sue and Ken Antrobus, who have inspired me through their efforts to deliver a victim impact statement at the sentencing of the man who illegally sold the handgun used to murder their daughter.

from crimes committed against them. Third, they help to educate the defendant about the full consequences of his crime, perhaps leading to greater acceptance of responsibility and rehabilitation. And finally, they create a perception of fairness at sentencing, by ensuring that all relevant parties—the State, the defendant, *and* the victim—are heard.

Part IV rebuts the objections that critics have raised to victim impact statements. The claim that victim impact statements do not relate to the purposes of punishment is refuted by the fact that they provide information about the severity of crimes, a salient consideration for judges at sentencing. The claim that the statements are so emotional that they will overwhelm sentencers is disproven by empirical evidence showing little effect from victim statements on sentence severity. The claim that victim impact statements lead to unfair inequality is invalid in view of the need to create fairness within criminal cases by allowing a victim response to allocution from criminal defendants and their families. And finally, the claim that a competition of victimhood arises in mass killing cases, even if true, provides no basis for abolishing the victim impact statements entirely.

I. BRIEF HISTORY OF THE MODERN CRIME VICTIMS' RIGHTS MOVEMENT AND VICTIM IMPACT STATEMENTS

To put the debate about victim impact statements[1] into context, some history may be useful. The start of the crime victims' rights movement is conventionally placed in the 1970s, when various groups became concerned about the treatment of victims in the nation's criminal justice system. The movement sprung from disparate sources. "Law and order" conservatives decried the seemingly single-minded focus of the judicial system on the rights of criminal defendants and inattention to countervailing interests. But concern was by no means limited to the political right. For example, advocates for the poor condemned the fact that the government did nothing to ameliorate the financial consequences of crime on indigent victims. The civil rights movement worried about the victims of racial violence in the South and the inability of those victims to force effective criminal prosecutions. And feminists criticized the treatment of rape victims, who were often themselves placed on trial during rape prosecutions.[2]

Responding to these groups, in the 1970s lawmakers began to enact legislation addressing these victim-related problems in the criminal justice system.

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[1] In this article, I decline to use the abbreviation "VIS" for victim impact statements, finding it to be unhelpful "initialese." *See* BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 447 (2d ed. 1995).

[2] *See generally* DOUGLAS E. BELOOF, PAUL G. CASSELL & STEVEN J. TWIST, VICTIMS IN CRIMINAL PROCEDURE 3–42 (2d ed. 2006) (describing background of the victims' rights movement); Douglas E. Beloof, *The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review*, 2005 BYU L. REV. 255; Shirley S. Abrahamson, *Redefining Roles: The Victims' Rights Movement*, 1985 UTAH L. REV. 517, 521; William F. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AM. CRIM. L. REV. 649 (1976).

For example, legislators passed crime victims compensation schemes and rape shield provisions. But while these progressive efforts on particular issues were widely applauded, no comprehensive effort to review the treatment of crime victims in the American criminal justice system was made until 1982. That year, President Reagan appointed a task force on the victims of crime. Following public hearings around the country, the Task Force released an influential report.[3]

The Task Force concluded that the criminal justice system had "lost the balance that has been the cornerstone of its wisdom"[4] and recommended various reforms to expand the role of crime victims. Of particular interest here are the Task Force's recommendations regarding victim impact statements. The Task Force recommended that "[v]ictims, no less than defendants, are entitled to have their views considered" at sentencing.[5] The Task Force, therefore, called for legislation that would require victim impact statements at sentencing and for such a statement to be included in all pre-sentence reports provided to judges.[6] That statement should contain information "concerning all financial, social, psychological, and medical effects [of the crime] on the crime victim."[7]

The Task Force observed that the idea of victim impact statements "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. It is also an indication of how much is wrong with the sentencing system."[8] Objections to victim impact statements rested on two grounds: waste of time and improper pressure on judges. With regard to the concern about time, the Task Force responded that "[d]efendants speak and are spoken for often at great length, before sentence is imposed. It is outrageous that the system should contend it is too busy to hear from the victim."[9] And with regard to the concern about unduly pressuring judges, the Task Force answered that:

> The judge cannot take a balanced view if his information is acquired from only one side. The prosecutor can begin to present the other side, but he was not personally affected by the crime or its aftermath, and may not be fully aware of the price the victim has paid.[10]

In addition to recommending victim impact statements and other particular reforms, the Task Force also called for an amendment to the United States

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

4 *Id.* at 16.

5 *Id.* at 76.

6 *Id.* at 33, 77.

7 *Id.* at 33.

8 *Id.* at 77.

9 *Id.* at 77.

10 *Id.* at 78.

Constitution protecting crime victims' rights. The proposed amendment, to be added to the Sixth Amendment, would have read: "Likewise, the victim, in every criminal prosecution shall have the right to be present and to be heard at all critical stages of judicial proceedings."[11]

The crime victims' movement's dream became to pass such a federal constitutional amendment, which would comprehensively protect victims' rights throughout the country. But realizing that securing such an amendment was a daunting task, the crime victims' movement decided to organize to promote such amendments to state constitutions. After succeeding in the states, the victims' movement then planned to return to the task of obtaining a federal constitutional amendment.[12]

The movement had considerable success in promoting victims' rights in the states. Beginning in 1982, thirty-two states adopted victims' rights amendments to their own state constitutions.[13] While these amendments took varying forms, Ohio's can serve to illustrate the types of rights protected. In 1994, Ohio voters gave crime victims the general constitutional right to "be accorded fairness, dignity, and respect in the criminal justice process" as well as rights to notice, protection, and a "meaningful role in the criminal justice process." [14] In the implementing legislation, the Ohio Legislature provided for victim impact statements, requiring that:

> (A) Before imposing sentence upon, or entering an order of disposition for, a defendant or alleged juvenile offender for the commission of a crime or specified delinquent act, the court shall permit the victim of the crime or specified delinquent act to make a statement. . . .
> (B) The court shall consider a victim's statement made under division (A) of this section along with other factors that the court is required

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[11] *Id.* at 114.

[12] For a discussion of the history, see generally Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment*, 1999 UTAH L. REV. 479 [hereinafter Cassell, *Reply to the Critics*]; Paul G. Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373 [hereinafter Cassell, *Utah's Victims' Rights Amendment*]; LeRoy L. Lamborn, *Victim Participation in the Criminal Justice Process: The Proposals for a Constitutional Amendment*, 34 WAYNE L. REV. 125 (1987).

[13] *See* ALA. CONST. art. I, § 6.01; ALASKA CONST. art. I, § 24; ARIZ. CONST. art. 2, § 2.1; CAL. CONST. art. 1, § 28; COLO. CONST. art. II, § 16a ; CONN. CONST. art. 1, § 8(b); FLA. CONST. art. 1, § 16(b); IDAHO CONST. art. I, § 22; ILL. CONST. art. 1, § 8.1; IND. CONST. art. 1, § 13(b); KAN. CONST. art. 15, § 15; LA. CONST. art. 1, § 25; MD. DECL. OF RIGHTS art. 47; MICH. CONST. art. 1, § 24; MISS. CONST. art. 3, § 26A; MO. CONST. art. 1, § 32; NEB. CONST. art. I, § 28; NEV. CONST. art. 1, § 8; N.J. CONST. art. 1, § 22; N.M. CONST. art. II, § 24; N.C. CONST. art. I, § 37; OHIO CONST. art. I, § 10a; OKLA. CONST. art. 2, § 34; OR. CONST. art. I, § 42; R.I. CONST. art. 1, § 23; S.C. CONST. art. I, § 24; TENN. CONST. art. I, § 35; TEX. CONST. art. 1, § 30; UTAH CONST. art. I, § 28; VA. CONST. art. I, § 8-A; WASH. CONST. art. 1, § 35; WIS. CONST. art. 1, § 9m.

[14] OHIO CONST. art. I, § 10a.

> to consider in imposing sentence or in determining the order of disposition. . . .[15]

The Ohio law also gave defendants a chance to respond to the victim impact statement and to obtain a continuance, if necessary, to rebut new and material information from the victim.[16]

Ohio's recognition of a victim's right to give a victim impact statement is representative of the law in all fifty states. Forty-eight states guarantee victims the right to be heard, in some form or another, at sentencing. The remaining two allow victim impact statements at the discretion of the sentencing judge.[17]

After making considerable progress to protect victims' rights at the state level, victims' advocates decided to make an effort for federal constitutional protection in 1995. They took the view that the state protections "frequently fail[ed] to provide meaningful protection whenever they come into conflict with bureaucratic habit, traditional indifference, [or] sheer inertia."[18] To place victims' rights in the constitution, victims' advocates (led most prominently by the National Victims' Constitutional Amendment Network (NVCAN)) approached the President and Congress.[19] On April 22, 1996, Senators Jon Kyl, Orrin Hatch, and Dianne Feinstein, with the backing of President Bill Clinton, introduced a federal victims' rights amendment.[20] The intent of the amendment was to "restore, preserve, and protect, as a matter of right for the victims of violent crimes, the practice of victim participation in the administration of criminal justice that was the birthright of every American at the founding of our Nation."[21] The proposed amendment protected the right to be heard, including in particular "the right to be heard at any proceeding involving sentencing."

While the proposed Victims' Rights Amendment always had significant backing in Congress, it could never attract the required two-thirds support. As a result, in 2004 the victims' movement decided to instead press for a far-reaching federal statute protecting victims' rights in the federal criminal justice system.[22] In

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[15] OHIO REV. CODE ANN. § 2930.14 (West 2006).

[16] OHIO REV. CODE ANN. § 2930.14(B) (West 2006).

[17] The provisions are helpfully collected in Douglas E. Beloof, *Constitutional Implications of Crime Victims as Participants*, 88 CORNELL L. REV. 282, 299–305 (2003) [hereinafter Beloof, *Implications*].

[18] Laurence H. Tribe & Paul G. Cassell, *Embed the Rights of Victims in the Constitution*, L.A. TIMES, July 6, 1998, at B5.

[19] *See generally* Steven J. Twist, *The Crime Victims' Rights Amendment and Two Good and Perfect Things*, 1999 UTAH. L. REV. 369. For more information about NVCAN, see www.nvcap.org.

[20] 142 CONG. REC. S3792 (daily ed. Apr. 22, 1996) (statement of Sen. Kyl).

[21] S. REP. NO. 108-191, at 1–2 (2003); *see also* S. REP. NO. 106-254, at 1–2 (2000).

[22] Jon Kyl et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, Nila Lynn Crime Victims' Rights Act*, 9 LEWIS & CLARK L. Rev. 581, 584, 591 (2005).

exchange for backing off from the federal amendment in the short term, victims' advocates received near universal congressional support for a "broad and encompassing" statutory victims' bill of rights.[23] This "new and bolder" approach not only created a string of victims' rights, but also provided funding for victims' legal services and created remedies when victims' rights were violated.[24] The federal legislation is noteworthy here because it included (among other things) a guaranteed right for all victims in federal cases to be "reasonably heard" at any sentencing.[25]

II. AN EXAMPLE OF A VICTIM IMPACT STATEMENT

As a result of these efforts by the crime victims' rights movement, it is now virtually universal law that crime victims can deliver a victim impact statement at sentencing. But what does such a statement actually look like? One way to proceed would be in the arid language of a law school hypothetical. This seems unsatisfactory, given that a considerable part of the debate about the statements centers on their emotional content. Consider, then, a real world example of a victim impact statement.

The example comes from my hometown of Salt Lake City, Utah. On February 12, 2007, six persons were gunned down and many more injured in the so-called "Trolley Square Massacre."[26] The shooter was Salejman Talovic, who obtained two firearms and much ammunition before entering the Trolley Square Shopping Center, intending to kill as many people as possible. Talovic obtained one of his firearms from Mackenzie Hunter. In a hurried transaction in a parking lot, Talovic paid $800 for a stolen handgun. Talovic had earlier asked Hunter to help him buy the handgun because, as a juvenile, he could not buy one. When Hunter asked Talovic why he wanted the handgun, Talovic said it was for a bank robbery.

One of the victims of the Trolley Square massacre was Vanessa Quinn. She was a young woman in the prime of her life. She grew up in Cincinnati, Ohio, and was the first person in her family to earn a college degree. I realize that this article is appearing in a Buckeye publication. But I am sure the Buckeye Nation will not mind a favorable mention of one Cincinnati Bearcat: Vanessa Quinn was a soccer player for the Bearcats, and reportedly, quite a good one.

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[23] 150 CONG. REC. S4261 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

[24] *Id.* at S4262 (statement of Sen. Feinstein).

[25] 18 U.S.C.A. § 3771(a)(4) (2004).

[26] *See Trolley Square Killer, 18, Had Two Weapons, Police Say*, SALT LAKE TRIB., Feb. 13, 2007, at A1.

Vanessa Quinn in action for the Bearcats

After the murder of Vanessa and the other Trolley Square victims, the U.S. Attorney's Office in Utah began a criminal investigation into how Talovic got the guns he used to perpetrate the massacre. In May 2007, the Office indicted Mackenzie Hunter for the illegal sale of the handgun to Talovic. The indictment charged that Hunter knew that Talovic was a juvenile who could not lawfully purchase handguns and, moreover, that Hunter made the sale with knowledge that the handgun would be used in a violent crime.[27] On November 1, 2007, Hunter elected to plead guilty to a reduced misdemeanor charge—illegal sale of a handgun to a minor, but without knowledge of how it would be used.

The next day, *The Salt Lake Tribune* ran an article about the desire of some of the crime's victims to give statements at sentencing.[28] The article particularly described the plight of Sue and Kenny Antrobus, Vanessa's parents. They wanted to give a victim impact statement at Hunter's sentencing—but the U.S. Attorney's Office thought that the court would not permit it. Coincidentally, that day was my last day on the job as a federal district court judge—a position that I was leaving to do pro bono crime victims' litigation. I was put in touch with the Antrobuses and agreed to represent them pro bono in their efforts to deliver a victim impact statement.

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[27] Indictment at 2, United States. v. Hunter, No. 2:07-CR-307-DAK (D. Utah May 16, 2007).

[28] Lisa Rosetta & Brooke Adams, *For Trolley Victims, No Day in Court*, SALT LAKE TRIB., Nov. 2, 2007, at A1.

Sue and Kenny Antrobus, with Vanessa's husband Richard Quinn.

So here is what a victim impact statement actually looks like:

> My name is Susan Antrobus[.] I am the mother of Vanessa Quinn, who was murdered at Trolley Square Mall February 12, 2007. I am writing this letter to you in hopes that you can understand why I feel the need to give an impact statement on behalf of my daughter Vanessa. . . .
>
> How has this affected my family[?] [T]o be honest I don't know yet, I can only tell you how it has affected us to this point in time. My Mom gave up her fight for life, 6 weeks after Vanessa was taken from us, and my youngest daughter Susanna had a miscarriage the same night my Mom passed away. My husband and I cry every day, we struggle to get through each and every day, you wake up with it, you carry it through your day and it goes to bed with you every night. All you can do is hope tomorrow will be a little easier [than] today. February 12 has never ended for us; it feels like one long continuous day that will never end. . . .
>
> If you're old enough at 18 to give your life up for this country, you're old enough to know what you're doing when you sell an illegal weapon to a minor. I am asking and pleading with this court to give Mr. Hunter the a maximum sentence to send a message to the people of this country and people like Mr. Hunter, that if you chose to engage in illegal weapons to minors you will be held responsible for your actions, and maybe some people would get it. . . .
>
> It cost us 7,000 dollars to lay our daughter Vanessa to rest. . . .

> I think I deserve to give an impact statement, since Vanessa is not here to speak for herself, I don't think 10 minutes is asking for much considering what we've lost for a life time. . . .[29]

Was Sue Antrobus able to give this impact statement? Before I tell you the "rest of the story" about *whether* she was able to give a victim impact statement, this example puts us in a good position to consider the main issue I want to address in this essay—*should* she be able to give a victim impact statement?

III. JUSTIFICATIONS FOR VICTIM IMPACT STATEMENTS

What are the justifications for allowing victims and their representatives,[30] like Sue Antrobus, to give victim impact statements? At some level here, I may be defending the obvious; After all, I am defending something that is the law in virtually all fifty states and the federal system. However, it might be useful to think systemically about the justifications for allowing victims to give impact statements. The justifications fall into four main areas.

A. *Providing Information to the Sentencer*

A victim impact statement provides information to the sentencer.[31] Typically in this country, the sentencer is a judge; in a few jurisdictions, juries are given this task,[32] and in capital cases juries often determine whether to impose a death

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[29] Exhibit 1 to Memo in Support of Sue and Ken Antrobus' Motion to Have Vanessa Quinn Recognized as a Crime Victim, to be Recognized as her Representative, to make an In-Court Impact Statement, and to Receive Restitution, United States v. Hunter, No. 2:07-CR-307-DAK (D. Utah Dec. 13, 2007).

[30] In homicide cases, representatives of the murdered victim are generally allowed to exercise the right to give a victim impact statement. *See* 18 U.S.C. § 3771(e) (2006) ("In the case of a crime victim who is . . . deceased, . . . family members . . . may assume the crime victim's rights . . . ."). *See generally* BELOOF, CASSELL & TWIST, *supra* note 2, at 61–69 (discussing victims' representatives). In this article, I assume that the statement is presented on behalf of a specific victim. *Cf.* Katie Long, Note, *Community Input at Sentencing: Victim's Right or Victim's Revenge?*, 75 B.U. L. REV. 187, 195–96 (1995) (discussing "community impact" statements at sentencing); Paul H. Robinson, *Should the Victims' Rights Movement Have Influence Over Criminal Law Formulation and Adjudication?*, 33 MCGEORGE L. REV. 749, 756–58 (2002) (individual victims are too close to criminal cases to be able to provide objective information, but crime victims organizations might appropriately fill that role).

[31] For simplicity, in this article I will assume the victim is presenting an impact statement about the harm of the crime, setting aside the potentially more complicated issues that arise when victims seek to give their opinion on the proper sentence. *See generally* BELOOF, CASSELL & TWIST, *supra* note 2, at 647–55 (discussing this issue); Wayne A. Logan, *Opining on Death: Witness Sentence Recommendations in Capital Trials*, 41 B.C. L. REV. 517 (2000) (same).

[32] *See* Paul G. Cassell, *Too Severe?: A Defense of the Federal Sentencing Guidelines (And a Critique of Federal Mandatory Minimums)*, 56 STAN. L. REV. 1017, 1023–24 (2004) (collecting examples of jury sentencing).

sentence. These sentencers (both judges and juries) need to know the harm caused by the criminal to determine a proper sentence. For example, the widely-cited factors governing federal sentencing include the "seriousness of the offense."[33] Obviously more serious—i.e., more harmful—offenses require more stringent penalties. As Professors Nadler and Rose put it, "When people make decisions about blame and punishment, harm matters."[34]

Victim impact statements provide information about the full harm of the defendant's crime.[35] The President's Task Force on Victims of Crime concluded that "[a] judge cannot evaluate the seriousness of a defendant's conduct without knowing how the crime has burdened the victim."[36] It is for this reason that the American Bar Association has endorsed victim impact statements, explaining that "good decisions require good—and complete—information. . . . [I]t is axiomatic that just punishment cannot be meted out unless the scope and nature of the deed to be punished is before the decision-maker."[37]

Examples of detailed information that a victim might provide about the defendant's crime are legion. For example, if the defendant physically injured the victim, the victim could describe the nature and extent of the injuries—facts that are clearly relevant to sentencing under virtually any conceivable sentencing scheme. The federal sentencing guidelines, for example, assign various recommended penalties depending on whether the victim suffered "bodily injury," "serious bodily injury," or "permanent or life-threatening bodily injury."[38] Victims can also provide valuable information on whether these injuries were caused deliberately or accidentally. As the President's Task Force forcefully put it, "Others may speculate about the defendant's potential for violence; it is the victim who looked down the barrel of the gun, or felt his blows, or knew how serious were the threats of death that the defendant conveyed."[39] For financial crimes, victims can provide information about their losses and often can describe the sophistication of the defendant's scheme—factors relevant to sentencing.[40]

A related, secondary point is that a victim impact statement can contain important information about restitution. Restitution is often an option at

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[33] 18 U.S.C.A. § 3553(a)(2)(A) (2006).

[34] Janice Nadler & Mary R. Rose, *Victim Impact Testimony and the Psychology of Punishment*, 88 CORNELL L. REV. 419, 420 (2003).

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

[36] PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, *supra* note 3, at 76–77.

[37] *A.B.A. Guidelines for Fair Treatment of Crime Victims and Witnesses*, 1983 A.B.A. SEC. CRIM. JUST. 18, 21.

[38] U.S.S.G. § 2A2.2(3) (2007).

[39] PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, *supra* note 3, at 77–78.

[40] *See, e.g.*, U.S.S.G. § 2B1.1(b)(1) (2008) (increasing penalties for financial offenses based on the loss suffered); U.S.S.G. § 2B1.1(b)(9) (2008) (increasing penalties for offenses that involve "sophisticated means"); *see generally* Jayne W. Barnard, *Allocution for Victims of Economic Crimes*, 77 NOTRE DAME L. REV. 39 (2001).

sentencing and, at least in the federal system, is required for violent crimes and some other serious offenses.[41] This can be important for victims, like the Antrobuses. The Antrobuses lived on an extremely limited income, yet had to pay $7,000 in funeral expenses for Vanessa, which they covered only by pulling money out of their very modest retirement account.

B. *Benefiting the Victim*

Giving information to the sentencer, as just explained, might be viewed as a "rights-based" approach to victim impact evidence. But there are other, broader purposes underlying victim impact statements, purposes that are supported by "rite-based" theories.[42] As one federal district court judge put it, "[E]ven if a victim has nothing to say that would directly alter the court's sentence, a chance to speak still serves important purposes. . . . '[Victim] allocution is both a rite and a right.'"[43]

Giving victims a chance to participate in the rite of allocution can have important benefits for the victim. Professor Mary Giannini observes that by delivering a victim impact statement in court,

> the victim gains access to a forum that directly and individually acknowledges her victimhood.
>
> The moment of sentencing is among the most public, formalized, and ritualistic parts of a criminal case. By giving victims a clear and uninterrupted voice at this moment on par with that of defendants and prosecutors, a right to allocute signals both society's recognition of victims' suffering and their importance to the criminal process.[44]

There may be therapeutic aspects to a victim giving a victim impact statement. As one victim explained the process, "The Victim Impact Statement allowed me to construct what had happened in my mind. I could read my thoughts. . . . It helped me to know that I could deal with this terrible thing."[45] Another victim said, "[W]hen I read [the victim impact statement] [in court] it healed a part of me—to speak to [the defendant] and tell him how much he hurt

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[41] *See* 18 U.S.C. § 3663A (2006).

[42] *See* Mary Margaret Giannini, *Equal Rights for Equal Rites?: Victim Allocution, Defendant Allocution, and the Crime Victims' Rights Act*, 26 YALE L. & POL'Y REV. 431 (2008).

[43] United States v. Degenhardt, 405 F. Supp. 2d 1341, 1349 (D. Utah. 2005) (quoting United States v. De Alba Pagan, 33 F.3d 125, 129 (1st Cir. 1994)).

[44] Giannini, *supra* note 42, at 452 (quoting Richard A. Bierschbach, *Allocution and the Purposes of Victim Participation Under the CVRA*, 19 FED. SENT'G REP. 44, 46–47 (2006)).

[45] ELLEN K. ALEXANDER & JANICE HARRIS LORD, IMPACT STATEMENTS: A VICTIM'S RIGHT TO SPEAK, A NATION'S RESPONSIBILITY TO LISTEN 22 (1994) (quoting victim).

me."[46] Still another victim reported that "I believe that I was helped by the victim impact statement. I got to tell my step-father what he did to me. Now I can get on with my life."[47] And, if the judge acknowledges what the victim has said in the statement, the judge's words can be (as one victim put it) "balm for her soul."[48]

These healing effects are not unusual. One thorough assessment of the literature on victim participation explained, "The cumulative knowledge acquired from research in various jurisdictions, in countries with different legal systems, suggests that victims often benefit from participation and input. With proper safeguards, the overall experience of providing input can be positive and empowering."[49] Thus, the consensus appears to be that victim impact statements allow the victim "to regain a sense of dignity and respect rather than feeling powerless and ashamed."[50]

Of course, not every crime victim will benefit from being involved in the court process. Professor Dubber has recounted the competing possibilities when he noted that:

> A victim's testimony at the sentencing hearing (orally or in writing) may strengthen the victim's sense of self after the traumatic experience of crime. Then, again, it may discourage the victim from reassembling herself as a person, instead of continuing to conceive of herself as a victim, and thus prolong the experience of criminal victimhood, rather than help overcome it.[51]

But no crime victim is required to deliver such a statement. Instead, the right to speak is one that the victim can choose to exercise—or not to exercise—depending on her assessment of whether it will be useful.

The benefits that crime victims derive from delivering victim impact statements may be one facet of a larger movement: the "therapeutic jurisprudence" movement. This movement contends that it is important to consider not just the outcomes of legal processes, but the effects of the processes themselves on participants in the legal system.[52] The goal is to consider ways in which legal

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[46] Cassell, *Utah's Victims' Rights Amendment*, *supra* note 12, at 1395 n.107.

[47] *Id.*

[48] Amy Propen & Mary Lay Schuster, *Making Academic Work Advocacy Work: Technologies of Power in the Public Arena*, 22 J. BUS. & TECH. COMM. 299, 318 (2008).

[49] Edna Erez, *Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice*, CRIM. L. REV., July 1999, at 545, 550–51 [hereinafter Erez, *Big Bad Victim*].

[50] Kenna v. U.S. Dist. Court for C.D. Cal., 435 F.3d 1011, 1016 (9th Cir. 2006) (quoting Barnard, *supra* note 40, at 41).

[51] MARKUS DIRK DUBBER, VICTIMS IN THE WAR ON CRIME: THE USE AND ABUSE OF VICTIMS' RIGHTS 336 (2002).

[52] *See* JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS 6–8 (Bruce J. Winick & David B. Wexler eds., 2003).

processes might be made agents of therapeutic change.[53] Giving crime victims the chance to deliver impact statements may well be a good example of such favorable benefits from the process itself.

The point should not be overstated. Occasionally the claim is made that victim impact statements will automatically bring "closure" to victims from a crime. It is not clear that "closure" ever really occurs after a violent crime—especially when extreme violence is at issue.[54] But victim impact statements need not deliver total closure to nonetheless be a desirable part of the criminal justice process. Sue Antrobus would desperately like the chance to make a victim impact statement. Unless there is some compelling countervailing concern, the system ought to accommodate her request.

C. *Explaining the Crime's Harm to the Defendant*

In many jurisdictions, a victim can elect to deliver an impact statement in open court, in the presence of not only the judge but also the defendant.[55] This is a rite that has nothing to do with the ultimate sentence imposed, but rather is a chance for a victim "to look [the] . . . defendant in the eye and let him know the suffering his misconduct has caused."[56] As Marcus Dubber (a thoughtful critic of victim impact statements) has conceded:

> [V]ictim impact evidence lays out before the *offender* the precise nature of [his] act, ideally in such a way as to permit and encourage [him] to identify with the victim's suffering as person. In this way, victim impact evidence can help legitimize the process of [his] punishment in the eyes of the offender and perhaps even contribute to [his] recognition of [himself] as one person among others entitled to mutual respect and, in this sense, to [his] 'rehabilitation.'[57]

As Dubber suggests, if a victim impact statement helps a defendant understand and gain empathy towards the victim, it may serve as the first step

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[53] *See generally* DAVID B. WEXLER, THERAPEUTIC JURISDPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (1990).

[54] *See generally* Michelle Goldberg, *The "Closure" Myth*, SALON, Jan. 21, 2003, *available at* http://dir.salon.com/story/news/feature/2003/01/21/closure/print.html ("No psychological study has ever concluded that the death penalty brings 'closure' to anyone except the person who dies . . . ."); *Rethinking "Closure"*, Article 3 (Murder Victims' Families for Human Rights, Cambridge, M.A.), Fall 2008/Winter 2009, at 1–2 (arguing that "closure" does not come from executing death row inmates).

[55] *See, e.g.*, W. VA. CODE ANN. § 61-11A-2(b) (LexisNexis 2005) ("[T]he court shall permit the victim . . . [to make] an oral statement [at sentencing].").

[56] Kenna v. U.S. Dist. Court for C.D. Cal., 435 F.3d 1011, 1017 (9th Cir. 2006).

[57] DUBBER, *supra* note 51, at 338.

towards *his* effective rehabilitation. A victim impact statement can thus be justified because it may be beneficial for the offender.[58] Indeed, the victim may be

> ideally placed to sensitize the offender to the consequences of the crime . . . . Because both victims and offenders are neither part of the legal profession nor familiar with its legal jargon, a direct appeal by the victim to the offender may be a more effective route to bring offenders to accepting responsibility.[59]

For Sue Antrobus, this is an important reason for wanting to speak to Mackenzie Hunter. She is not entirely convinced that he understands the devastating effects of his crime. She wants a chance to make this clear to him, hoping that it will keep him from committing crimes in the future.

D. *Improving the Perceived Fairness of Sentencing*

A final justification for victim impact statements is that they help to improve the perceived fairness of the process. Recent victims' rights enactments "recogniz[e] that the sentencing process cannot be reduced to a two-dimensional, prosecution versus defendant affair. Instead, [these laws treat] sentencing as involving a third dimension—fairness to victims—requiring that they be 'reasonably heard' at sentencing."[60] Professor Douglas Beloof has developed this point most systematically in his influential article *The Third Model of Criminal Process: The Victim Participation Model*.[61] There he explains that it is no longer appropriate to evaluate criminal justice issues solely in terms of the venerable "due process" or "crime control" models.[62] Instead, numerous state constitutional amendments as well as federal and state statutes recognize that crime victims should be given the opportunity to participate in criminal proceedings, including sentencing proceedings.

Given the structure of contemporary criminal justice systems, fairness requires victim impact statements. The *President's Task Force on Victims of Crime Final Report* explained the point forcefully in concluding that "[w]hen the court hears, as it may, from the defendant, his lawyer, his family and friends, his

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[58] *See, e.g.*, Julian V. Roberts & Edna Erez, *Communication in Sentencing: Exploring the Expressive Function of Victim Impact Statements*, 10 INT'L REV. OF VICTIMOLOGY 223, 226 (2004).

[59] Edna Erez, *Victim Voice, Impact Statements and Sentencing: Integrating Restorative Justice and Therapeutic Jurisprudence Principles in Adversarial Proceedings*, 40 CRIM. L. BULL. 483, 496–97 (2004) [hereinafter Erez, *Victim Voice*].

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

[61] 1999 UTAH L. REV. 289 [hereinafter Beloof, *Third Model*].

[62] *Id*. at 290; *cf.* HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 149–53 (1968) (developing these two models).

minister, and others, simple fairness dictates that the person who has borne the brunt of the defendant's crime be allowed to speak."[63] Similarly, the ABA has reasoned that "[a]llowing the victim to provide factual information to the sentencing court about issues of relevance to the sentence is no more a play on the sympathy of the sentencing court than allowing the defendant to provide facts about his or her personal circumstances which may affect a just sentence."[64]

The point here is not that, merely because the defendant gets to allocute, the victim should do so as well. Such a claim might be subject to the rejoinder that the criminal justice system gives some rights to the defendant alone. For example, the defendant uniquely possesses a right to remain silent and the benefit of a presumption of innocence. The point here is that the defendant is allowed to speak at sentencing because this opportunity is critical to the legitimacy of the proceeding.[65] We allow defendants to speak at sentencing to "assure the appearance of justice and to provide a ceremonial ritual at which society pronounces it judgment."[66] By the same token, allowing victims the same opportunity assures perceived fairness. In other words, victim impact evidence is appropriate not merely because defendants have this opportunity; rather, it is appropriate for the *same reason* as defendants get it.[67]

In asking for the chance to give her victim impact statement in court, Sue Antrobus knew that Mackenzie Hunter (and his attorney) would have that chance. She simply wanted an equal opportunity to be a part of the sentencing process. Denying her that chance would understandably reduce her acceptance—and presumably the public's as well—of whatever sentence the judge ultimately chose to impose in the case.

IV. THE (MISGUIDED) ATTACKS ON VICTIM IMPACT STATEMENTS

The main justifications for victim impact statements, briefly sketched out here, have apparently been persuasive to lawmakers around the country, as victim impact statements are widely approved in this country.[68] To truly engage the

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[63] PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, *supra* note 3, at 77.

[64] *A.B.A. Guidelines for Fair Treatment of Crime Victims and Witnesses*, *supra* note 37, at 18.

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

[66] Giannini, *supra* note 42, at 482 (quoting United States v. Curtis, 523 F.2d 1134, 1135 (D.C. Cir. 1975)); *see also* Thomas, *supra* note 65, at 2672–73.

[67] I am indebted to Professor Alan Michaels for this point.

[68] And they are in other countries as well. On March 15, 2001, the European Union adopted a Framework Decision on the standing of crime victims with a view to harmonizing the basic rights of crime victims within its twenty-seven member states. *See* Council Framework Decision 2001/220, 2001 O.J. (L 082) 1 (JHA). Specifically, the Framework Decision was designed to ensure that crime victims play "a real and appropriate role in [the European] criminal legal system," *id.* at Art. 2, by guaranteeing victims the right to participate and be heard in important criminal proceedings—including presumably sentencings. *See id.* at Arts. 1–3 (requiring member states to "safeguard the

subject, it is perhaps more useful to evaluate the arguments of those who would alter the status quo by abolishing victim impact statements.

In focusing on these substantive concerns, I do not mean to overlook possible procedural questions about how courts should receive victim impact testimony. Given that victim impact statements can lead judges to pronounce more severe sentences on criminal defendants, due process considerations may require that defendants be allowed some opportunity to challenge factual information found in those statements. But this procedural question about how to resolve disputed facts raised by victims strikes me as a question of detail. Sentencing procedures can always be adjusted to provide whatever level of procedural fairness is appropriate for defendants.[69] Existing procedures typically allow defendants to challenge any disputed material fact at sentencing,[70] presumably giving defendants the ability to challenge factual claims made by victims in their statements. In Ohio, for example, the relevant statute explicitly gives the defendant an opportunity to respond to the victim impact statement and to obtain a continuance if necessary to rebut new and material information from the victim.[71] As another example, in federal capital cases, the defendant is given the opportunity "to rebut any information received at the [penalty] hearing, and shall be given fair opportunity to present argument" against the death penalty.[72]

Rather than ponder the more technical question of how to administer victim impact statements, I would like to address the overarching question of whether to allow such statements at all. Consider, then, the arguments that have been raised against victims speaking at sentencing.

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possibility for victims to be heard during proceedings and to supply evidence" and broadly defining "proceedings"). European countries are now moving forward in this direction. *See, e.g.*, James Chalmers et al., *Victim Impact Statements: Can Work, Do Work (For Those Who Bother to Make Them)*, CRIM. L. REV., May 2007, at 360 (describing Scottish program); Roberts & Erez, *supra* note 58, at 224 (noting victim impact rights in Wales and England). *See generally* HUMAN RIGHTS WATCH, MIXED RESULTS: U.S. POLICY AND INTERNATIONAL STANDARDS ON THE RIGHTS AND INTERESTS OF VICTIMS OF CRIME 25–27 (2008) (discussing international human rights agreements recognizing crime victims' rights to participate in criminal proceedings).

[69] *See, e.g.*, Paul G. Cassell, *Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure*, 2007 UTAH L. REV. 861, 936–37 (discussing protections for defendants in responding to victim impact statements in the federal system).

[70] *See, e.g.*, U.S.S.G. § 6A1.3 (2008) (stating that the parties "shall be given an adequate opportunity to present information" as to any sentencing factor "reasonably in dispute").

[71] OHIO REV. CODE ANN. § 2930.14 (LexisNexis 2006) (giving the defendant an opportunity to respond to the victim impact statement and allowing him or her to obtain a continuance if necessary to rebut new and material information from the victim).

[72] 18 U.S.C. § 3593(c) (2000).

A. *The Claim that Victim Impact Statements Do Not Relate to the Purposes of Punishment*

Perhaps the most commonly advanced attack on victim impact statements is the claim that they are unrelated to the purposes of punishment. The argument is that victim impact statements present the mere feelings or emotions of crime victims, which do not bear on the blameworthiness of a criminal's actions or the severity with which he should be punished.

A prominent example of this argument comes from the Supreme Court's 1987 decision, *Booth v. Maryland*.[73] This capital case arose from the robbery and murder of an elderly couple, Irvin Bronstein and his wife Rose. John Booth and an accomplice entered the Bronstein's home to steal money. Booth was a neighbor of the Bronsteins and knew that the couple could identify him. So he bound and gagged them, then repeatedly stabbed both of them in the chest with a kitchen knife. The Bronstein's son discovered their bodies two days later.

A jury found Booth guilty of two counts of first degree murder, and the prosecutor sought the death penalty. The probation officer prepared a written victim impact statement about the Bronsteins and about the impact of the crime on their surviving family members. Their son, for example, said that he suffered from lack of sleep and depression. Their granddaughter described how the murders ruined the wedding of a close family member; shortly after the wedding, instead of leaving on a honeymoon, the bride attended a funeral.[74]

The probation officer concluded the report with a note on the permanent impact on the surviving family members:

> It became increasingly apparent to the writer as she talked to the family members that the murder of Mr. and Mrs. Bronstein is still such a shocking, painful, and devastating memory to them that it permeates every aspect of their daily lives. It is doubtful that they will ever be able to fully recover from this tragedy and not be haunted by the memory of the brutal manner in which their loved ones were murdered and taken from them.[75]

The victim impact statement was read to the jury, and it returned a death sentence. A challenge to the victim impact statement ultimately reached the Supreme Court.

Justice Powell wrote a 5-4 decision finding the reading of the victim impact statement improper and reversing the death penalty. The centerpiece of his opinion was a passage finding that the statement was not related to any proper purpose of punishment:

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[73] 482 U.S. 496 (1987).

[74] *Id.* at 500.

[75] *Id.* (quoting from the record) (internal citation omitted).

> The focus of a [victim impact statement] is not on the defendant, but on the character and reputation of the victim and the effect on his family. These factors may be wholly unrelated to the blameworthiness of a particular defendant. As our cases have shown, the defendant often will not know the victim, and therefore will have no knowledge about the existence or characteristics of the victim's family.[76]

Before turning to the merits of Justice Powell's claim, one exceedingly curious aspect of the decision is worth noting. Reasoning from the premise that "death is different," Justice Powell limited the Court's prohibition of victim impact statements to capital cases because "the considerations that inform the [capital] sentencing decision may be different from those that might be relevant to other liability or punishment determinations."[77] Justice Powell went on to observe that 36 states and the federal system allowed victim impact statements in non-capital settings and that the Court was expressing no view on these uses. But if, as Justice Powell asserted, victim impact statements truly deal with factors "wholly unrelated to the blameworthiness of a particular defendant,"[78] that logic does not stop with first degree murder. Rather, it would extend likewise to forbid victim impact evidence in cases of second degree murder, rape, robbery, fraud, pickpocketing, and any other crime one could think of. Even accepting the premise that "death is different," the question remains: how is the death penalty context different and in some way relevant to the admission of victim impact evidence?[79] Just as a death sentence cannot be revoked, neither can a five-year prison sentence that has been served.[80] And surely both sentences should be based on evidence related to the culpability of the defendant. Justice Powell's unjustified limitation of the reach of his decision gave the impression that it ultimately rested on animus to death sentences, not on the unreliability of victim evidence. As Professor George Fletcher put it, basing a sentence on a defendant's blameworthiness "is a sound principle for all criminal cases, but one that seems compelling to the Court only when the stakes are life and death."[81]

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[76] *Id.* at 504. For a more academic presentation of the same argument, see Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 986–1006 (1985) (outlining why goals of criminal statements do not support victim participation in sentencing).

[77] *Booth*, 482 U.S. at 509 n.12.

[78] *Id*. at 505.

[79] *Cf.* Margaret Jane Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1162 n.67 (1980) ("It is difficult to capture what is involved in the notion that death is different.").

[80] *See* JEFFRIE G. MURPHY, RETRIBUTION, JUSTICE, AND THERAPY 240 (1979). *See generally* Daniel Suleiman, Note, *The Capital Punishment Exception: A Case for Constitutionalizing the Substantive Criminal Law*, 104 COLUM. L. REV. 426, 447–51 (2004) (collecting objections to the "death is different" slogan).

[81] GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS 199 (1995). *Cf.* Stephen J. Schulhofer, *The Trouble with Trials; the Trouble with Us*, 105 YALE L.J. 825,

More fundamentally, Justice Powell was simply wrong to maintain that victim impact statements are unrelated to the blameworthiness of a defendant. To demonstrate the point, it is useful to consider what factors courts and legislators conventionally consider when determining the seriousness of an offense. A good statement of the basic principles is found in Professor Joshua Dressler's handy treatise, *Understanding Criminal Law*. There he notes that, in establishing criminal penalties, "The lawmaker must determine the *harmfulness* of each offense, taking into consideration the immediate victim, family members, and society as a whole."[82] Thus, as set out by Professor Dressler, harmfulness—including harm to "the immediate victim" and "family members" —is obviously and uncontroversially a driving factor in making blameworthiness decisions. The debate about victim impact statements, therefore, devolves to whether they help the sentencer determine such an offense's harm. If they do shed light on harm, they relate to the purposes of punishment.

To see whether a victim impact statement sheds light on harm, consider Sue Antrobus's statement. Would the sentencer in that case have learned nothing from hearing what it has been like for her and her family since the murder of Vanessa Quinn? My own assessment is that her statement would be quite helpful in formulating an appropriate sentence, as it shows the full consequences of the defendant's crime. Without such information, a judge may get a distorted picture of what happened.[83] Indeed, having seen a fair number of victim impact statements as a federal district court judge, my impression is that it would be quite rare for a judge or juror to learn nothing new about the loss caused by the crime from reading a victim impact statement.

Any reader who disagrees with me should take a simple test: Read an actual victim impact statement from a serious crime all the way through, and see if you truly learn nothing new about the enormity of the loss.[84] Sadly, the reader will have no shortage of such victim impact statements to choose from. Actual impact statements from court proceedings are accessible in various places.[85] Other

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848–49 (1995) (book review) (noting differences between victim participation in capital and non-capital sentencings and concluding that "wholesale condemnation of victim participation under all circumstances is surely unwarranted").

[82] JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 57 (4th ed. 2006) (emphasis added).

[83] *See* Brooks Douglass, *Oklahoma's Victim Impact Legislation: A New Voice for Victims and Their Families: A Response to Professor Coyne*, 46 OKLA. L. REV. 283, 289 (1993) (offering example of jury denied truth about full impact of a crime).

[84] My argument here is a slight revision of the argument I presented in Cassell, *Reply to the Critics*, *supra* note 12, at 488–89.

[85] *See, e.g.*, Booth v. Maryland, 482 U.S. 496, 509–15 (1987) (attaching impact statement to opinion); Official Trial Transcript, United States v. Nichols, No. 96-CR-68 (D. Colo. Dec. 29, 1997), 1997 WL 790551 (containing various victim impact statements at sentencing of Terry Nichols); Official Trial Transcript, United States v. McVeigh, No. 96-CR-68 (D. Colo. June 5, 1997), 1997 WL 296395 (containing various victim impact statements at sentencing of Timothy McVeigh); *Speaking Out for the Victims*, AM. LAW, Mar. 1995, at 54, 54–55 (statement by Federal Judge Michael Luttig at the sentencing of his father's murderers).

examples can be found in moving essays written by family members who have lost a loved one to a murder and who have had that loved one suffer a serious violent crime. A powerful example is the collection of statements from families devastated by the Oklahoma City bombing, collected in Marsha Kight's affecting *Forever Changed: Remembering Oklahoma City, April 19, 1995*.[86] Kight's compelling book is not unique, as equally powerful accounts from the family of Ron Goldman,[87] children of Oklahoma City,[88] Alice Kaminsky,[89] George Lardner Jr.,[90] Dorris Porch and Rebecca Easley,[91] Mike Reynolds,[92] family of Elizabeth Smart,[93] Deborah Spungen,[94] John Walsh,[95] and Marvin Weinstein[96] make all too painfully clear. Intimate third-party accounts offer similar insights about the generally unrecognized, yet far-reaching consequences of homicide and other serious crimes.[97]

A recent empirical study of state trial judges confirms that victim impact statements can convey new information about a crime's harm. Professors Amy Propen and Mary Lay Schuster interviewed twenty-eight Minnesota trial judges in 2004 to 2006, reporting the judges' views on what made victim statements "persuasive."[98] Persuasive statements included those that "provide new information on a case, . . . display insight into the crime or relationship with the defendant, or offer a vivid account of the crime that distinguishes it from the

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[86] MARSHA KIGHT, FOREVER CHANGED: REMEMBERING OKLAHOMA CITY, APRIL 19, 1995 (1998).

[87] THE FAMILY OF RON GOLDMAN WITH WILLIAM & MARILYN HOFFER, HIS NAME IS RON (1997).

[88] NANCY LAMB & CHILDREN OF OKLAHOMA CITY, ONE APRIL MORNING: CHILDREN REMEMBER THE OKLAHOMA CITY BOMBING (1996).

[89] ALICE R. KAMINSKY, THE VICTIM'S SONG (1985).

[90] GEORGE LARDNER, JR., THE STALKING OF KRISTIN: A FATHER INVESTIGATES THE MURDER OF HIS DAUGHTER (1995).

[91] DORRIS D. PORCH & REBECCA EASLEY, MURDER IN MEMPHIS: THE TRUE STORY OF A FAMILY'S QUEST FOR JUSTICE (1997).

[92] MIKE REYNOLDS & BILL JONES WITH DAN EVANS, THREE STRIKES AND YOU'RE OUT! . . . A PROMISE TO KIMBER: THE CHRONICLE OF AMERICA'S TOUGHEST ANTI-CRIME LAW (1996).

[93] ED & LOIS SMART WITH LAURA MORTON, BRINGING ELIZABETH HOME: A JOURNEY OF FAITH AND HOPE (2003).

[94] DEBORAH SPUNGEN, AND I DON'T WANT TO LIVE THIS LIFE (1983).

[95] JOHN WALSH WITH SUSAN SCHINDEHETTE, TEARS OF RAGE: FROM GRIEVING FATHER TO CRUSADER FOR JUSTICE: THE UNTOLD STORY OF THE ADAM WALSH CASE (1997).

[96] MILTON J. SHAPIRO WITH MARVIN WEINSTEIN, WHO WILL CRY FOR STACI? THE TRUE STORY OF A GRIEVING FATHER'S QUEST FOR JUSTICE (1995).

[97] *See, e.g.*, GARY KINDER, VICTIM (1982); JANICE HARRIS LORD, NO TIME FOR GOODBYES: COPING WITH SORROW, ANGER AND INJUSTICE AFTER A TRAGIC DEATH (4th ed. 1991); SHELLEY NEIDERBACH, INVISIBLE WOUNDS: CRIME VICTIMS SPEAK (1986); DEBORAH SPUNGEN, HOMICIDE: THE HIDDEN VICTIMS xix–xxiii (1998); JOSEPH WAMBAUGH, THE ONION FIELD (1973).

[98] Propen & Schuster, *supra* note 48.

typical or average crime of its sort."[99] One of the interviewed judges gave the example of a statement that caused him to "learn of the victim's injury and impact in . . . several dimensions that have never been flashed before my brain before . . . ."[100] The study's authors thus concluded that "[t]he most persuasive impact statements seem to be those in which the victim describes relationship dynamics, in domestic assault cases, and personal accounts, in other crimes, that the judge *would otherwise be unable to see or understand*."[101]

The educative effects of victim impact statements have been shown in other ways as well. Professor Edna Erez had found that "legal professionals [in South Australia] who have been exposed to [victim impact statements] have commented on how uninformed they were about the extent, variety and longevity of various victimizations, and how much they have learned . . . about the impact of crime on victims . . . ."[102] Similarly, a mock juror study found that the level of harm expressed in the victim impact statement, and not the emotional state of the witnesses, affected sentencing judgments.[103]

Four years after the *Booth* decision, the Supreme Court agreed that victim impact statements help educate sentencers about harm and overruled its earlier prohibition on all victim impact evidence.[104] In *Payne v. Tennessee*, the Court concluded: "Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities."[105] As explained by the Court and several concurring Justices, homicide is a crime that has foreseeable consequences—not only the death of an individual, but disruption of the web of life. For example, Justice Souter in a concurring opinion explained:

> The fact that the defendant may not know the details of a victim's life and characteristics . . . should not in any way obscure the further facts that death is always to a 'unique' individual, and harm to some group of survivors is a consequence of a successful homicidal act so foreseeable as to be virtually inevitable.[106]

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[99] *Id.* at 315.

[100] *Id.*

[101] *Id.*

[102] Erez, *Big Bad Victim*, *supra* note 49, at 554.

[103] Bryan Myers, Steven Jay Lynn & Jack Arbuthnot, *Victim Impact Testimony and Juror Judgments: The Effects of Harm Information and Witness Demeanor*, 32 J. APPLIED SOC. PSYCHOL. 2393 (2002). Because this is a study of mock jurors, questions arise about its applicability to real-world sentencing decisions. *See infra* note 106 and accompanying text.

[104] Whether *Payne* also effectively overruled *Booth*'s prohibition of a victim's recommendations on sentence remains an open question. *See* BELOOF, CASSELL, & TWIST, *supra* note 3, at 647–55 (collecting materials on this issue).

[105] 501 U.S. 808, 825 (1991).

[106] *Id.* at 838 (Souter, J., concurring).

These arguments are compelling. Victim impact statements reveal information about the crime—and particularly about the harm of a crime—which makes them quite relevant to a core purpose of sentencing: ensuring that the punishment fits the crime. Proper punishment cannot be meted out unless judges and juries know the dimensions of the crime and the harm it has caused. Victim impact statements educate them about these salient facts so that they can impose an appropriate sentence.

B. *The Claim that Victim Impact Evidence Is So Emotional That It Will Overwhelm Sentencers*

The next objection to victim impact evidence is almost at odds with the one just discussed. Some critics have taken the position that, far from being irrelevant, victim impact statements are almost too relevant—i.e., they are such powerful evidence at sentencing that they overwhelm judges and juries. Some critics have even gone so far as to refer to the idea of victim impact as the "pollution" of sentencings with emotion.[107] Professor Susan Bandes, who may be the nation's leading scholar on emotion and the law, has put the claim this way:

> . . . [S]tudies suggest that victim impact evidence, particularly when it conveys intense emotional pain, evokes sympathy and anger in jurors. Jurors perceive greater suffering after hearing such statements, and hear the emotional intensity of the statements as "a cry for help or relief." There is evidence that the anger they feel upon hearing victim impact statements translates into feelings of punitiveness. There is also evidence, more generally, that anger tends to interfere with the sound judgment—it inhibits detailed information processing, increases tendencies to blame, including misattributions of blame, and exacerbates the urge to punish.[108]

In attacking victim impact statements for producing improper emotions, Professor Bandes is careful not to attack the strawman of emotional outbursts in

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[107] *See* Erez, *Victim Voice*, *supra* note 59, at 484 (noting this description by English commentators).

[108] Susan Bandes, *Victims, "Closure," and the Sociology of Emotion*, 21 (Univ. of Chi. Law Sch. Pub. Law & Legal Theory Working Paper Series, Paper No. 208, 2008) [hereinafter Bandes, *Victims*], *available at* http://ssrn.com/abstract=1112140 (footnotes omitted). This article will shortly be published in 72 *Law and Contemporary Problems* (forthcoming 2009). For other interesting works by Bandes on emotion and the law, see SUSAN BANDES, THE PASSIONS OF LAW (2001); Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361 (1996) [hereinafter Bandes, *Empathy*]. For a similar argument to Bandes', see Bruce A. Arrigo & Christopher R. Williams, *Victim Vices, Victim Voices, and Impact Statements: On the Place of Emotion and the Role of Restorative Justice in Capital Sentencing*, 49 CRIM. & DELINQ. 603 (2003).

the courtroom. A victim or surviving family member who jumps up in the middle of a hearing to blurt out some assertion is subject to the control of a trial judge no less than disruptive defendants.[109] Nor does Professor Bandes parade out a few isolated examples of overwhelming evidence. Such illustrations would be subject to the rejoinder that, with victim impact evidence no less than other evidence, the trial judge retains discretion to screen out extremely prejudicial testimony.[110] In the Oklahoma City bombing trial, for example, the trial judge excluded testimony about the gruesome process through which victims identified the mangled bodies of their loved ones, evidence about a father's poem about his dead child, and a photograph of a mother releasing a dove in lieu of a funeral because her child's body was not yet found, on grounds that they were overwhelmingly prejudicial.[111] The point here is not that the trial judge reached the right ruling on these particular issues, as powerful arguments (by Professor Laurence Tribe, among others) have been raised against these specific rulings.[112] Rather, the point is that there will be some extreme cases of victim impact evidence that may have to be dealt with through doctrines regulating excessive prejudice. In steering clear of such oddities, Professor Bandes raises a fair critique of the emotional content of a properly presented, "normal" victim impact statement.

Professor Bandes, however, apparently limits her argument to capital cases,[113] again raising the question of consistency. Is she conceding that the great bulk of victim impact statements, delivered in non-capital cases, are proper?[114] But even with regard to capital cases, Bandes' reasoning is flawed. She begins with what she evidently regards as a damning premise—that "[j]urors perceive greater

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[109] *See* Beloof, *Implications*, *supra* note 17, at 294–95.

[110] *See*, *e.g.*, 18 U.S.C. § 3593(c) (Supp. V 2005) (stating that at a federal capital sentencing hearing, the trial judge may exclude testimony "if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury").

[111] Reporter's Transcript, United States v. McVeigh, No. 96-CR-68 (D. Colo. June 3, 1997), http://www.cnn.com/US/9703/okc.trial/transcripts/june/060397.am.txt.

[112] *See* Laurence H. Tribe, *McVeigh's Victims Had a Right to Speak*, N.Y. TIMES, June 9, 1997, at A25, *available at* http://query.nytimes.com/gst/fullpage.html?res=9401E3D6173CF93AA35755C0A961958260. *But see* Richard Burr, *Litigating with Victim Impact Testimony: The Serendipity that Has Come from* Payne v. Tennessee, 88 CORNELL L. REV. 517, 518–26 (2003) (arguments from McVeigh's defense attorney that too much impact testimony was allowed).

[113] *See* Bandes, *Victims*, *supra* note 108, at 5.

[114] In an e-mail to me, Professor Bandes makes the point more explicitly but adds a note of explanation: "[Y]es, I am speaking only about capital punishment, and that's precisely my point . . . that context matters. I have considered victim impact statements and the emotions they evoke in the context of a trial with a guilt phase and a penalty phase—and the particular emotional dynamics of that proceeding. I am arguing for a more careful teasing out of the things survivors actually need or expect from victim impact statements so we can figure out whether the legal system can provide them . . . ." E-mail from Professor Susan Bandes to Professor Paul Cassell (Sept. 16, 2008) (on file with author). I continue to wonder how the "context" of a capital trial can be so completely different from those of other trials as to warrant a ban on a commonly-used form of evidence—victim impact evidence.

suffering after hearing such statements . . . ."[115] But this is precisely the point. Listening to victim impact evidence is how jurors begin to comprehend the full harm that a homicide causes. Professor Bandes goes on to reason that the jurors' perceptions of suffering "translate[] into feelings of punitiveness."[116] But this is seemingly just a fancy way of saying that crimes with more serious harm will be punished more severely. Nothing is wrong with that. If, for example, the federal district court judge had heard Sue Antrobus's victim impact statement and decided that the illegal gun sale had more serious consequences than he had previously appreciated, the fact that he imposed a longer sentence would not be proof that the system was working, not failing.

In my view, Bandes needs to more carefully distinguish between prejudice and *unfair* prejudice from a victim's statement. It is a commonplace of evidence law that a litigant is not entitled to exclude harmful evidence, but only *unfairly* harmful evidence.[117] Bandes appears to believe that a sentence imposed following a victim impact statement rests on unjustified prejudice or "undifferentiated vengeance."[118] But one might just as easily conclude that the sentence rests on a fuller understanding of all of the murder's harmful ramifications.

Professor Bandes's argument is also carefully hedged. Thus, she writes that "studies suggest" certain potential consequences and that "there is evidence that" jurors may do certain things. These hedges are all required a difficult fact for those who criticize victim impact statements on grounds of its effects on sentencers: good evidence that victim impact statements generally lead to harsher sentences is lacking.

The evidence on the effect of victim impact evidence in capital cases is very slim. In a 1999 law review article in the *Utah Law Review*, I surveyed the available empirical evidence on actual capital cases and found no significant effect on the outcome of capital cases.[119] There is some tentative suggestion in *simulated* juror studies that victim impact statements might have an effect on death penalty decisions.[120] But whether simulation studies can provide useful insights into the

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[115] Bandes, *Victims*, *supra* note 108, at 21.

[116] *Id*.

[117] *See, e.g.*, FED. R. EVID. 403 (permitting evidence to be excluded based on significant risk of "unfair prejudice"). *See generally* MANGRUM & BENSON ON UTAH EVIDENCE 135–36 (2007–08 ed.) (distinguishing between the concepts of "prejudice" and "unfair prejudice").

[118] Bandes, *Empathy*, *supra* note 108**,** at 396.

[119] Cassell, *Reply to the Critics*, *supra* note 12, at 491–92.

[120] *See* Edith Greene, *The Many Guises of Victim Impact Evidence and Effects on Jurors' Judgments*, 5 PSYCHOL., CRIME & L. 331, 334 (1999) (discussing mock jury research); Edith Greene, Heather Koehring & Melinda Quiat, *Victim Impact Evidence in Capital Cases: Does the Victim's Character Matter?*, 28 J. APPLIED SOC. PSYCHOL. 145 (1998) (finding support for hypothesis that victim impact evidence would affect jurors' capital sentencing decisions); James Luginbuhl & Michael Burkhead, *Victim Impact Evidence in a Capital Trial: Encouraging Votes for Death*, 20 AM. J. CRIM. JUST. 1 (1995) (finding support for hypothesis that victim impact evidence would increase jurors' votes for death penalty). *But cf.* Ronald Mazzella & Alan Feingold, *The Effects of Physical Attractiveness, Race, Socioeconomic Status, and Gender of Defendants and Victims on Judgments of*

operation of real world juries, particularly juries making life or death decisions, is open to question.[121]

In any event, simulation research is clearly a second-best choice to research about actual jurors' decision making. Recently Professor Ted Eisenberg and his colleagues at Cornell gathered data about *actual* capital cases by interviewing over two-hundred jurors who sat on capital trials in South Carolina between 1985 and 2001. These researchers found no link to death sentences, concluding: "We find [no] significant relation between the introduction of [victim impact evidence] and sentencing outcomes."[122]

Moving to the larger body of research on the effect of victim impact statements on non-capital sentences, the empirical evidence also finds little effect on sentence severity. For example, a study in California concluded that "[t]he right to allocution at sentencing has had little net effect . . . on sentences in general."[123] A study in New York similarly reported "no support for those who argue against [victim impact] statements on the grounds that their use places defendants in jeopardy."[124] A careful scholar recently reviewed all of the available

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Mock Jurors: A Meta-Analysis, 24 J. APPLIED SOC. PSYCHOL. 1315 (1994) (finding, through meta-analysis of previous research, that "[e]ffects of victim characteristics on juror's judgments were generally inconsequential"); Bryan Myers et al., *Victim Impact Statements and Mock Juror Sentencing: The Impact of Dehumanizing Language on a Death Qualified Sample*, 22 AM. J. FORENSIC PSYCHOL. 39 (2004) [hereinafter Myers et al., *Victim Impact*] (finding that mock jurors who read a statement dehumanizing a defendant were more likely to impose a death sentence, but that this result was not statistically significant). For a good overview of the many open questions in the psychological literature, see generally Bryan Myers et al., *Psychology Weighs In on the Debate Surrounding Victim Impact Statements and Capital Sentencing: Are Emotional Jurors Really Irrational?*, 19 FED. SENT'G REP. 13 (2006) [hereinafter Myers et. al., *Psychology*].

[121] *See* Free v. Peters, 12 F.3d 700, 705–06 (7th Cir. 1993) (finding that there is little "a priori reason" to think short simulation studies would offer insight into abilities of real juries who spend days and weeks becoming familiar with the facts of a case); Paul G. Cassell, *The Guilty and the 'Innocent': An Examination of Alleged Cases of Wrongful Conviction from False Confessions*, 22 HARV. J.L. & PUB. POL'Y 523, 600 n.454 (1999); Myers et al., *Psychology*, *supra* note 120, at 17 ("The decisions participants in a jury simulation make hold no real consequences, and so it is difficult to extrapolate the findings to real capital trials where the consequences are so grave."). The concerns about the realism of mock jury research apply with particular force to emotionally-charged death penalty verdicts. *See* Mark Costanzo & Sally Costanzo, *Jury Decision Making in the Capital Penalty Phase: Legal Assumptions, Empiracal Findings, and a Research Agenda*, 16 L. & HUM. BEHAV. 185, 191 (1992) ("[T]he very nature of the [death] penalty decision may render it an inappropriate topic for jury simulation studies.").

[122] Theodore Eisenberg et al., *Victim Characteristics and Victim Impact Evidence in South Carolina Capital Cases*, 88 CORNELL L. REV. 308 (2003).

[123] EDWIN VILLMOARE & VIRGINIA N. NETO, NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, EXECUTIVE SUMMARY, VICTIM APPEARANCES AT SENTENCING HEARINGS UNDER THE CALIFORNIA VICTIMS' BILL OF RIGHTS 61 (1987) [hereinafter NIJ SENTENCING STUDY].

[124] Robert C. Davis & Barbara E. Smith, *The Effects of Victim Impact Statements on Sentencing Decisions: A Test in an Urban Setting*, 11 JUST. Q. 453, 466 (1994); *accord* ROBERT C. DAVIS ET AL., VICTIM IMPACT STATEMENTS: THEIR EFFECTS ON COURT OUTCOMES AND VICTIM SATISFACTION 68 (1990) (concluding that the result of the study "lend[s] support to advocates of victim impact statements" since no evidence indicates that these statements "put[] defendants in

evidence in this country and elsewhere, and concluded that "sentence severity has not increased following the passage of [victim impact] legislation."[125]

So if there is no effect on sentences, some may question why we should bother with victim impact statements at all?[126] But recall 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. Professor Edna Erez has explained the point nicely:

> Influencing the sentence, however, has never been an explicit or implicit purpose of [victim impact statement] legislation. At best, advocates hoped that details about victim harm would have beneficial side effects such as contributing to sentence commensurability. Historically, and at the present, the primary function of the [victim impact statement] legislation has been expressive or therapeutic—to provide crime victims with a "voice," regardless of any impact it may have on sentencing.[127]

Moreover, even if victim impact statements lead to harsher penalties in general or to a longer sentence in a particular case, that would hardly provide a convincing reason for banning them. When Professor Bandes contends that victim statements "[translate] into feelings of punitiveness,"[128] she is implicitly assuming that this greater punitiveness is somehow improper. But one could just as easily say that excluding victim impact evidence might "translate into feelings of mercy." Without a baseline for telling us whether punitiveness or mercy is proper, no reason exists to prefer one legal regime over the other. Professor David Friedman has suggested this conclusion, observing:

> If the legal rules present the defendant as a living, breathing human being with loving parents weeping on the witness stand, while presenting

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jeopardy [or] result in harsher sentences").

[125] Erez, *Big Bad Victim*, *supra* note 49, at 548; *see also* Edna Erez, *Victim Participation in Sentencing: And the Debate Goes On . . .* , 3 INT'L REV. OF VICTIMOLOGY 17, 22 (1994); *cf.* Propen & Schuster, *supra* note 48, at 315 (reporting that the most common effect of impact statements is to make changes at the margins, such as "affect[ing] the conditions of probation, causing the judge to order anger-management treatment, drug and alcohol supervision, domestic violence counseling, or such.").

[126] *See* Andrew Sanders et al., *Victim Impact Statements: Don't Work, Can't Work*, 2001 CRIM. L. REV. 447 (raising this argument in connection with pilot victim impact regimes in England and Wales).

[127] *See* Erez, *Victim Voice*, *supra* note 59, at 490–91 (citation omitted); *see also* Chalmers et al., *supra* note 68, at 371–72.

[128] Bandes, *Victims*, *supra* note 108, at 21.

> the victim as a shadowy abstraction, the result will be to overstate, in the minds of the jury, the cost of capital punishment relative to the benefit.[129]

Correcting this misimpression is not distorting the decision-making process, but eliminating a distortion that would otherwise occur.[130] This interpretation meshes with empirical studies in non-capital cases suggesting that, if a victim impact statement makes a difference in punishment, the description of the harm sustained by the victims is the crucial factor.[131]

Even apart from debating the empirical effects of the emotion conveyed by victim impact statements, a more fundamental response is possible: What's wrong with emotion? Professors Douglas Berman and Stephanos Bibas have recently made this point nicely when they explain:

> When a wild animal threatens us, we do not judge or condemn it. We may incapacitate it or scare it off, but it is ludicrous to be angry at a shark or a tree for killing someone. Animals, plants, and objects are not moral agents. . . .
>
> We are angry at moral agents because we acknowledge that they had the freedom to choose and chose wrongly. Anger recognizes and respects their freedom, holding them accountable for their choices. Our anger reflects our care for our victimized fellow man and our outrage at the criminal who should have known better. Anger underscores the moral community we share with victims and criminals. Crimes have torn the social fabric and demand justice, payback to condemn the crime, vindicate the victim, and denounce the wrongdoer. Where there is no anger, there is no justice and no sense of community. Grave moral wrongs demand righteous indignation and action. Executing Adolf Eichmann was hardly necessary to incapacitate or deter him, but it was essential to condemn the Holocaust and vindicate its victims.[132]

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[129] David D. Friedman, *Should the Characteristics of Victims and Criminals Count?:* Payne v. Tennessee *and Two Views of Efficient Punishment*, 34 B.C. L. REV. 731, 749 (1993).

[130] *See id.* (reasoning that the *Payne* rule "can be interpreted . . . as a way of reminding the jury that victims, like criminals, are human beings with parents and children, lives that matter to themselves and others").

[131] *See*, *e.g.*, Edna Erez & Pamela Tontodonato, *The Effect of Victim Participation in Sentencing on Sentence Outcome*, 28 CRIMINOLOGY 451, 469 (1990); *see also* Propen & Schuster, *supra* note 48, at 316, 315 (reporting that judges want a victim impact statement presented "in a balanced tone that is not overly emotional" and that the most persuasive statements included those that "provide new information on a case . . . or offer a vivid account of the crime that distinguishes it from the typical or average crime of its sort").

[132] Douglas A. Berman & Stephanos Bibas, *Engaging Capital Emotions*, 102 NW. U. L. REV. COLLOQUY 355, 360 (2008), http://www.law.northwestern.edu/lawreview/colloquy/2008/17/ (citation omitted); *cf.* Susan A. Bandes, *Child Rape, Moral Outrage, and the Death Penalty*, 103 NW. U.L. REV. COLLOQUY 17, 28 (2008) [hereinafter Bandes, *Child Rape*], http://www.law.northwestern.edu/lawreview/colloquy/2008/27/ (responding to Berman and Bibas,

As Berman and Bibas suggest, some emotion is inherently desirable in a criminal process. Indeed, if we were to attempt to move to an emotionless system of criminal justice, perhaps the biggest losers might be criminal defendants. Defendants, defense attorneys, and family members frequently make emotional pleas at sentencing for mercy, pleas that the law routinely allows. Their pleas, no less than the pleas of victims, are a proper part of the criminal justice system.

C. *The Claim that Victim Impact Statements Lead to Unjustified Inequality*

The next attack on victim impact statements is that they can lead to unjustified inequality. Eloquent victims and their families, the argument goes, will obtain longer sentences for the defendants in their cases than will less eloquent victims. Thus, as one author has claimed, to permit victim impact evidence is to essentially say "Thou Shalt Not Kill Any Nice People."[133] Professor Joe Hoffman has laid out the argument clearly:

> [V]ictim impact evidence encourages capital sentences to base their sentencing decisions on the individual characteristics of the victim, which leads to the imposition of different punishments for similar crimes, depending on the perceived value of the respective victims. . . .
> . . . [I]t [also] allows for disparate treatment of defendants based on the relative articulateness and persuasiveness of the survivors.[134]

This claim, too, founders on the problem that the empirical evidence simply does not provide proof that victim impact statements (articulate or otherwise)

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but conceding that emotional responses to crimes need to be taken "very seriously").

[133] Amy K. Phillips, Note, *Thou Shalt Not Kill Any Nice People: The Problem of Victim Impact Statements in Capital Sentencing*, 35 AM. CRIM. L. REV. 93 (1997).

[134] Joseph L. Hoffmann, *Revenge or Mercy? Some Thoughts About Survivor Opinion Evidence in Death Penalty* Cases, 88 CORNELL L. REV. 530, 532–33 (2003); *see also* Donald J. Hall, *Victims' Voices in Criminal Court: The Need for Restraint*, 28 AM. CRIM. L. REV. 233, 235 (1991) (arguing that "the fundamental evil" associated with victim statements is "disparate sentencing of similarly situated defendants").

A variant on the inequality objection to victim impact evidence is that it will lead to "comparative worth" arguments by prosecutors seeking a death sentence, i.e., that a defendant should be sentenced to death because his life is worth less than the life of the murder victim. *See generally* Erin McCampbell, Note, *Tipping the Scales: Seeking Death Through Comparative Value Arguments*, 63 WASH. & LEE L. REV. 379 (2006). The constitutionality of such arguments remains an unsettled question. *See Humphries v. Ozmint*, 397 F.3d 206 (4th Cir. 2005) (en banc) (holding over vigorous dissent that a comparative worth argument did not violate clearly established precedent). I do not view comparative worth arguments as a valid objection to victim impact evidence. Even assuming that such arguments are constitutional, prosecutors can easily make them in any case whether or not victim impact evidence has been introduced.

generally change real world sentences.[135] Without such proof, it is simply not true that victim impact statements lead to different punishments for similar crimes.

But let us assume that the next empirical study convincingly documents some demonstrated lengthening in prison sentences from victim impact evidence[136] and, further, that "articulate" victims were able to gain longer sentence increases than other victims. An interesting methodological question would then arise as to what made the "articulate" victim more effective. Perhaps the reason that these victims' requests for harsher sentences were more persuasive than others was simply because they had a better reason to ask for a longer sentence. Put another way, maybe "articulate" victims are simply those victims who have been harmed the most.[137]

Even assuming a new study finds a unique "articulateness" factor unrelated to the merits of the case, this sort of difference is hardly unique to victim impact evidence. Indeed, if taken to its logical conclusion, an articulateness objection would probably require the nation's court systems to be closed down. As Paul Gewirtz has recognized, "If courts were to exclude categories of testimony simply because some witnesses are less articulate than others, no category of oral testimony would be admissible."[138] Justice White's powerful dissenting argument in *Booth* went unanswered and remains unanswerable: "No two prosecutors have exactly the same ability to present their arguments to the jury; no two witnesses have exactly the same ability to communicate the facts; but there is no requirement . . . that the evidence and argument be reduced to the lowest common denominator."[139]

Consider one obvious example of evidence that we allow even though it may vary in persuasiveness for reasons unrelated to the merits of the case. Current rulings from the Supreme Court invite *defense* mitigation evidence from a defendant's family and friends, despite the fact that some defendants may have

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[135] *See supra* note 105–106 and accompanying text.

[136] The hypothetical study could also find a *shortening* in sentences from victim impact evidence. Not every victim wants a harsher criminal penalty, a point defense attorneys would do well to bear in mind. *See* Benji McMurray, *The Mitigating Power of a Victim Focus at Sentencing*, 19 FED. SENT'G REP. 125, 127 (2006); Beloof, *Third Model*, *supra* note 61, at 302. "Studies suggest that most victims are far less vengeful and punitive than most lawyers assume." Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal* Procedure, 114 YALE L.J. 85, 137 (2004); *see also* Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. 15, 17–18, 24–25. Indeed, even in capital cases, some victims' representatives may argue for a lengthy prison sentence rather than a death sentence. *See, e.g.*, Lynn v. Reinstein, 68 P.3d 412, 413–14 (Ariz. 2003). *But cf.* Chalmers et al., *supra* note 68, at 363 (finding no evidence that victim impact statements influence sentences in a downward direction in Scotland).

[137] *Cf.* Myers et al., *supra* note 103, at 2393 (discussing mock juror study of victim impact statements finding level of harm significantly affected sentencing judgments).

[138] Paul Gewirtz, *Victims and Voyeurs at the Criminal Trial*, 90 NW. U. L. REV. 863, 882 (1996).

[139] Booth v. Maryland, 482 U.S. 486, 518 (1987) (White, J., dissenting).

more or less articulate acquaintances. In *Payne*, for example, the defendant's parents testified that he was "a good son" and his girlfriend testified that he "was affectionate, caring, and kind to her children."[140] In another case, a defendant introduced evidence of having won a dance choreography award while in prison.[141] Surely this kind of testimony, no less than victim impact statements, can lead to disparate treatment of defendants based on the relative articulateness and persuasiveness of their family and friends;[142] yet, it is routinely allowed.

Given that our current system allows almost unlimited mitigation evidence on the part of the defendant, an argument for equal justice requires, if anything, that victim statements be allowed. Equality demands fairness not only *between* cases, but also *within* cases.[143] Excluding victim impact evidence would lead to tremendous unfairness—both actual and perceived—by creating a sentencing system with "one side muted."[144] The Tennessee Supreme Court stated the point bluntly in its decision in *Payne*, explaining:

> It is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of Defendant . . . without limitation as to relevancy, but nothing may be said that bears upon the character of, or the harm imposed, upon the victims.[145]

With haunting eloquence, a father whose ten-year-old daughter, Staci, was murdered, explained why victims should be heard. Before the sentencing phase began, Marvin Weinstein asked the prosecutor for the opportunity to speak to the jury because the defendant's mother would have the chance to do so. The prosecutor replied that Florida law did not permit this. Here was Weinstein's response to the prosecutor:

> What? I'm not getting a chance to talk to the jury? He's not a defendant anymore. He's a murderer! A convicted murderer! The jury's made its decision. . . . His mother's had her chance all through the trial to sit there and let the jury see her cry for him while I was barred.[146] . . . Now she's

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[140] Payne v. Tennessee, 501 U.S. 808, 826 (1991).

[141] *See* Boyde v. California, 494 U.S. 370, 382 n.5 (1990).

[142] Walton v. Arizona, 497 U.S. 639, 664–67 (1990) (Scalia, J., concurring) (criticizing decisions allowing such varying mitigating evidence on equality grounds).

[143] *See* Gewirtz, *supra* note 138, at 873–74 (developing this position); *see also* PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, *supra* note 3, at 16 (asserting that for laws to be respected, they must be just—not only to the accused, but to victims as well); Beloof, *Third Model*, *supra* note 61, at 291–92 (noting that fairness within cases is part of a third model of criminal justice).

[144] *Booth*, 482 U.S. at 520 (Scalia, J., dissenting); *accord* PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, *supra* note 3, at 76–77; Gewirtz, *supra* note 138, at 873–74.

[145] State v. Payne, 791 S.W.2d 10, 19 (Tenn. 1990), *aff'd*, 501 U.S. 808 (1991).

[146] Weinstein was subpoenaed by the defense as a witness and therefore required to sit outside

> getting another chance? Now she's going to sit there in that witness chair and cry for her son, that murderer, that murderer who killed my little girl!
>
> Who will cry for Staci? Tell me that, who will cry for Staci?[147]

What then of Hoffman's other argument: that jurors will base their decision on individual characteristics of victims, drawing distinctions between "worthy" and "unworthy" victims (or, more colorfully, "nice" people and "not nice" people). Here again, the critics of victim impact statements are making an empirical claim—without supporting empirical evidence. And there is good reason to think no such supporting evidence will ever emerge. Nothing in real-world victim impact statements suggests any support of comparative conclusion. Sue Antrobus's victim impact statement never argues, for example, that Vanessa Quinn was somehow the "best" daughter in the world—only that Vanessa was *her* daughter, a unique person, a person who ought to be considered in imposing sentence. As the Supreme Court explained in *Payne*:

> [V]ictim 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" . . . .[148]

A particularly poignant illustration of why victim impact evidence applies to all victims—not just "nice" victims—comes from the Supreme Court's pre-*Payne* decision of *South Carolina v. Gathers*, which (following the holding in *Booth*) excluded victim impact evidence about a murder victim. The victim was an out-of-work, mentally-handicapped man who lived in a park—a "homeless person" in the current vernacular. The prosecutor referred to the victim (who was referred to by his friends as "Reverend Minister") as follows:

> Reverend Minister Haynes, we know, was a very small person. He had his mental problems. Unable to keep a regular job. And he wasn't blessed with fame or fortune. And he took things as they came along. He was prepared to deal with tragedies that he came across in his life.
> . . . You will find some other exhibits in this case that tell you more about a just verdict. Again this is not easy. No one takes any pleasure

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the courtroom. *See* SHAPIRO & WEINSTEIN, *supra* note 96, at 215–16. For a discussion of the issues surrounding a victim's right not to be excluded from trials, see generally Douglas E. Beloof & Paul G. Cassell, *The Crime Victim's Right to Attend the Trial: The Reascendant National Consensus*, 9 LEWIS & CLARK L. REV. 481 (2005).

147 SHAPIRO & WEINSTEIN, *supra* note 96, at 319–20.

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

> from it, but the proof cries out from the grave in this case. Among the personal effects that this defendant could care little about when he went through it is something that we all treasure. Speaks a lot about Reverend Minister Haynes. Very simple yet very profound. Voting. A voter's registration card.
>
> Reverend Haynes believed in this community. He took part. And he believed that in Charleston County, in the United States of America, that in this country you could go to a public park and sit on a public bench and not be attacked by the likes of Demetrius Gathers.[149]

The Supreme Court concluded that this argument was improper under *Booth.* But it made no claim that this was some sort of "comparative worth" argument by the prosecutor; rather, it simply asserted that the evidence did not (in the eyes of the court) bear on "the defendant's moral culpability."[150] But Justice O'Connor's response that prosecutors ought to be able to "convey[] to the jury a sense of the unique human being whose life the defendant has taken"[151] seems, for the reasons I have tried to convey here, far more persuasive.

D. *The Claim That Permitting Victim Impact Statements in Mass Victim Cases Creates a "Competition of Victimhood."*

Professor Wayne Logan recently raised one last objection to victim impact statements worth considering. He draws on recent "mass killing" trials to see how victim impact evidence has worked in practice. Looking at *United States v. McVeigh*, *United States v. Nichols*, *United States v. Bin Laden*, and *United States v. Moussaoui*, he contends that in such trials, a "competition of victimhood" ensues in which personal differences among victims are accentuated.[152] In cases with a large number of victims, "there naturally comes a greater prospect for differing sentiments on the propriety of capital punishment."[153] Not only will the Government favor victim-witnesses who support capital punishment, but "[w]ith mass killings, the government necessarily must choose from among many potential witnesses."[154] This selection process has the obvious potential, Professor Logan observes, to alienate those victims not selected. Finally, Logan points out that not every mass killing case will lead to a death penalty—with the life sentences for Oklahoma City bomber Terry Nichols and 9/11 conspirator Zacarias Moussaoui serving as illustrations. These life sentences, after much victim-impact evidence

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[149] South Carolina v. Gathers, 490 U.S. 805, 810 (1989).

[150] *Id.* at 812.

[151] *Id.* at 817 (O'Connor, J., dissenting).

[152] Wayne A. Logan, *Confronting Evil: Victims' Rights in an Age of Terror*, 96 GEO. L.J. 721, 749 (2008).

[153] *Id.* at 748–49.

[154] *Id.* at 750.

presented by the Government in an effort to obtain a death sentence, can be seen "as a personal betrayal of VIE witnesses, perversely serving to diminish, in a most public manner, the memory of victims and the enormous hardship suffered."[155]

Professor Logan raises these points not as mere practical problems to be worked through, but rather as undermining the legitimacy of victim impact evidence in mass killing cases (and, he impliedly suggests, in every capital homicide case).[156] But, as with other critics of victim impact evidence, he never convincingly explains why we ought to treat victim impact statements differently in some particular subset of criminal cases. For example, even a routine fraud prosecution can reveal troublesome "personal differences among victims." Some victims may want the swindler to serve a lengthy prison sentence, while others may prefer to have him on probation and working to pay restitution more quickly.[157] Yet in this country we uncontroversially allow victims to be heard in fraud cases, counting on the sentencing judge to make what accommodations are possible for multiple victims and then to consider the competing concerns and impose an appropriate sentence.

To be sure, mass killing cases can create trial management issues because the sheer number of victims may require some winnowing of the number who will speak. But these issues are not unique to mass killing cases (mass fraud cases present them more commonly), and judges have tools to deal with these issues.[158] If as a result of this selection process some victims are allowed to speak while others are not, it may cause some interpersonal stress or alienation from the process. Against this cost side of the ledger, however, must be assayed the many positive benefits of allowing victims to speak.[159]

Perhaps more important, Professor Logan's recommended cure for these problems is far worse than the disease. Based on the problems that he sees in victim impact evidence in capital cases, Professor Logan suggests that victims should not be heard at all in the criminal process. But recognizing that this silencing of victims creates its own harms, he then suggests that they should be able to speak in a "commission-like forum"[160] similar to truth and reconciliation commissions that have been used following atrocities in Sierra Leone, Cambodia, and (most prominently) South Africa.[161] What the victims would do before this

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[155] *Id.* at 751. They can also be seen as a refutation of the claim, discussed earlier in this article, that victim impact statements will inevitably overwhelm a jury and lead to a death sentence. *See supra* Part IV.B (discussing whether emotion from victim statements overwhelms sentencers).

[156] Logan, *supra* note 152, at 774.

[157] *Cf.* McMurray, *supra* note 136, at 125 (raising this possibility).

[158] *See, e.g.*, 18 U.S.C. § 3771(d)(2) (Supp. V 2005) (allowing judges to adopt reasonable approaches to victim issues in mass victim cases).

[159] *See supra* Part III.B (describing benefits victims derive from giving victim impact statements).

[160] Logan, *supra* note 152, at 774.

[161] *See* Olivia Lin, *Demythologizing Restorative Justice: South Africa's Truth and Reconciliation Commission and Rwanda's Gacaca Courts in Context*, 12 ILSA J. INT'L & COMP. L.

Commission Professor Logan leaves unexplained. Presumably he envisions that they would have an opportunity to make a "record" of the crime and to expiate the crime's effects by testifying there.

But even agreeing to these might be viewed as benefits from the proposal, the downsides appears far more significant. The victims would, no doubt, be quite frustrated at being diverted there—away from the criminal trial court that makes substantive sentencing decisions and, indeed, away from the defendant himself. Such a "commission-like forum" would actually bear little resemblance to, for example, the South African Truth and Reconciliation Commission. That Commission was designed to be the initial and exclusive forum for handling most testimony. The Commission required prospective criminal defendants to appear personally to make "full disclosure" of their crimes, in exchange for which they were granted amnesty.[162] Victims had an opportunity to participate in this process and challenge the version of the facts presented by perpetrators.[163] None of this dialog seems likely to occur before the secondary forum Professor Logan envisions, as the defendant would have no reason to ever go there after completing his criminal trial. And witnesses, too, might find little reason to rehash their previous sworn trial testimony, particularly because their forum statements could do nothing to punish the defendant but might serve as the basis for the defendant seeking a new trial on grounds of "inconsistencies." Finally and most fundamentally, as Logan himself seemingly recognizes, the model of reconciliation commissions is not a good one for handling mass killings, as "reconciliation is often neither desired nor appropriate as an exclusive response."[164]

Professor Logan's ideas are well-intentioned and thoughtfully advanced. But victims likely would view his proposal as hustling them off to some sort of feel-good, international bureaucracy, a clear recipe for inflicting "secondary harm" on them. One of the animating purposes of the victims' rights movement has been to give victims a meaningful voice in the criminal justice process, to avoid adding procedural insult to the substantive injury that the criminal has already inflicted.[165] Victims suffer when they are told that, unlike the defendant and his family, they will not be permitted to take part in a criminal trial.[166] This trauma stems from the

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41 (2005).

[162] Promotion of National Unity and Reconciliation Amendment Act 87 of 1995 s. 19, *available at* http://www.info.gov.za/acts/1995/a87-95.pdf.

[163] *See* Albert L. Sachs, *Honoring the Truth in Post-Apartheid South Africa*, 26 N.C. J. INT'L L. & COM. REG. 799, 805 (2001) (giving the example of Steven Biko's family challenging the version of his death presented by police officers).

[164] Logan, *supra* note 152, at 774.

[165] *See* Beloof, *Third Model*, *supra* note 61, at 294 (explaining the concept of "secondary harm"); *see also* Douglas E. Beloof, *Weighing Crime Victims' Interests in Judicially Crafted Criminal Procedure*, 56 CATH. U. L. REV. 1135, 1151 (2007).

[166] For a general discussion of the harms caused by disparate treatment, see LINDA E. LEDRAY, RECOVERING FROM RAPE 125 (2d ed. 1994) (noting that it is important in the healing process for the rape victims to take back control from rapist and to focus their anger towards him); LEE MADIGAN &

fact that the victim perceives that the "system's resources are almost entirely devoted to the criminal, and little remains for those who have sustained harm at the criminal's hands."[167] As two noted experts on the psychological effects of crime have concluded, failure to offer victims a chance to participate in criminal proceedings can "result in increased feelings of inequity on the part of victims, with a corresponding increase in crime-related psychological harm."[168] On the other hand, there is mounting evidence that "having a voice may improve victims' mental condition and welfare."[169] For some victims, making a statement helps restore balance between themselves and the offenders.[170] Others may consider it part of a just process or may want "to communicate the impact of the offense to the offender."[171]

Professor Logan is quite right to raise the concern that the current process of picking and choosing which of hundreds of victims get to make an oral statement in a mass victim criminal case can be "emotionally harmful."[172] No doubt it is because of this concern that federal prosecutors have been extraordinarily thoughtful about this process. For example, in the *Moussaoui* case (involving the so-called "twentieth 9/11 hijacker"), they sought to present in court a "reasonable sample" of victim impact witnesses "to convey properly the devastation caused on that infamous day."[173] As the prosecutors described it to the court, the sample was designed to be representative across a number of different dimensions:

NANCY C. GAMBLE, THE SECOND RAPE: SOCIETY'S CONTINUED BETRAYAL OF THE VICTIM 97 (1991) (noting that during arraignment, survivors "first realized that it was not their trial, [and] that the attacker's rights were the ones being protected."); Beloof, *Third Model*, *supra* note 61, at 294–96 (explaining that victims are exposed to two types of harms: the first from crime itself, and the second, from the criminal process); Deborah P. Kelly, *Victims*, 34 WAYNE L. REV. 69, 72 (1987) (noting that "victims [want] more than pity and politeness; they [want] to participate"); Marlene A. Young, *A Constitutional Amendment for Victims of Crime: The Victims' Perspective*, 34 WAYNE L. REV. 51, 58 (1987) (discussing ways in which victims feel aggrieved from unequal treatment).

[167] Task Force on the Victims of Crime and Violence, *Executive Summary: Final Report of the APA Task Force on the Victims of Crime and Violence*, 40 AM. PSYCHOLOGIST 107, 109 (1985).

[168] Dean G. Kilpatrick & Randy K. Otto, *Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning*, 34 WAYNE L. REV. 7, 19 (1987) (collecting evidence on this point); *see also* Ken Eikenberry, *The Elevation of Victims' Rights in Washington State: Constitutional Status*, 17 PEPP. L. REV. 19, 26–32 (1989) (studying positive impacts of Washington's victims' rights constitutional amendment); Erez, *Big Bad Victim*, *supra* note 49, at 550–51 ("The cumulative knowledge acquired from research in various jurisdictions . . . suggests that victims often *benefit* from participation and input."); Jason N. Swensen, *Survivor Says Measure Would Dignify Victims*, DESERET NEWS (Salt Lake City), Oct. 21, 1994, at B4 (noting anguish widow suffered when denied chance to speak at sentencing of husband's murderer).

[169] Erez, *Big Bad Victim*, *supra* note 49, at 552.

[170] *See id.*.

[171] *Id.* at 551; *see also* S. REP. NO. 105-409, at 17 (1998) (finding that victims' statements have important "cathartic" effects).

[172] Logan, *supra* note 152, at 749.

[173] Government's Motion Pursuant to the "Justice for All Act" at 3, United States v.

> The representative sample includes a cross-section from each of the four flights . . . . Moreover, the representative sample includes a diversity in terms of race, religion, economic status and occupation, and also in terms of relationship to the victim (i.e., spouse, parent, sibling, child, friend, etc.). The representative sample also includes victims who were injured, representing the thousands injured during the attacks.[174]

To expand the participation of victims, the *Moussaoui* prosecutors also introduced into evidence a large poster with photos of decedents and four notebooks containing 408 letters from victims and survivors.[175]

The process used in cases like *Moussaoui* may not be perfect; but it is certainly better than a process that denies any role to any victim. For example, Professor Logan cites the experience of Marsha Kight, whose daughter was murdered by Timothy McVeigh and Terry Nichols in the Oklahoma City bombing.[176] She did not favor the death penalty for McVeigh, so the Government did not select her as one of the victim impact witnesses it presented at the penalty phase of McVeigh's trial. Ms. Kight's experience, contends Professor Logan, shows the marginalization of some (anti-death penalty) crime victims. But the only thing worse than marginalizing *some* crime victims is marginalizing *all* victims. When I asked Ms. Kight (my former pro bono client) what she thought of Professor Logan's suggestion that, based on her case, no victims should be heard at the penalty phases of capital cases, she responded: "Eliminating victim impact statements due to my being disallowed to make such a statement recalls the 'baby with the bath water' cliché. Should all victims be punished because I was punished?"[177]

No doubt mass killing cases and other mass victim cases will present challenges in administering victims' rights. Prosecutors, courts, and victims organizations will have to wrestle with seemingly mundane questions of how to get victims notice of court hearings and more substantive questions of which victims will be allowed to speak in person and which will be remitted to written victim impact evidence. But Professor Logan and other critics of victim impact evidence have yet to make a convincing case for silencing all victims, in mass killing sentencings or otherwise.

Moussaoui, No. 01-455-A (E.D. Va. Dec. 6, 2005).

[174] *Id.*

[175] Logan, *supra* note 152, at 740.

[176] *Id.* at 749 n.198; *see also supra* note 86 and accompanying text (discussing Marsha Kight's book regarding the Oklahoma City bombing).

[177] E-mail from Marsha Kight to author (Sept. 10, 2008) (on file with author).

V. CONCLUSION

For all these reasons, I believe that the critics of victim impact statements have it wrong and the nation's elected representatives have it right: crime victims should have the opportunity to provide a victim impact statement at sentencing. But to conclude, I want to return briefly to the story of Sue Antrobus. Was she allowed to give a victim impact statement at the sentencing of the man who criminally sold the murder weapon used to kill her daughter Vanessa?

Since the prosecution was being handled in federal court, the federal victims' rights law (the Crime Victims' Rights Act) applied. This law gives crime victims (and, if they are deceased, their representatives) the right to be "reasonably heard at . . . sentencing."[178] In Sue's case, no doubt existed that she and her husband Ken were Vanessa's representatives. But was Vanessa a "crime victim"? Obviously, when Sulejman Talovic murdered her, she was a victim of his crime. But he was never prosecuted, as an off-duty police officer managed to kill him on the night of the massacre. So the only criminal prosecution was for Hunter's illegal sale of the murder weapon to Talovic. Was she a victim of *that* crime?

The Crime Victims' Rights Act defines a "victim" as a "person *directly and proximately* harmed as a result of the commission of a Federal offense."[179] Vanessa was "directly" harmed by Hunter's crime when the handgun he illegally sold was used to kill her. Whether she was "proximately" harmed by the crime is the sticking point.[180] In the district court, her pro bono lawyers argue that the term should be interpreted consistently with notions of "proximate" cause in tort law. Basic tort law principles permit a defendant to be held accountable for actions that lead to a crime by another person where the defendant could reasonably foresee that crime. Given that Hunter and Talovic apparently talked about a bank robbery during the sale of the weapon, Sue Antrobus's lawyers argued that foreseeability of misuse of the gun was established.

The district court, however, saw things differently:

> The actions of Talovic were an independent, intervening cause which broke the necessary chain of causation. While the court does not want to minimize in any way the harm suffered by those who were killed, injured, or had loved ones killed or injured by Talovic, that harm is not sufficiently connected to Hunter's offense of unlawfully selling a firearm to a minor for this court to consider Hunter's actions to be the direct and proximate cause of the harm.[181]

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[178] 18 U.S.C. § 3771(a)(4) (Supp. V 2005).

[179] 18 U.S.C. § 3771(e) (Supp. V 2005) (emphasis added).

[180] *See generally* Andrew Nash, Note, *Victims By Definition*, 85 WASH. L. REV. 1419 (2008) (discussing definition of "victim" in the CVRA).

[181] Memorandum Decision & Order at 10, United States v. Hunter, No. 2:07-CR-307-DAK (D. Utah Jan. 3, 2008).

The district court therefore held that Vanessa Quinn was not a "victim" under the CVRA and that her mother, Sue Antrobus, had no right to give an impact statement at sentencing.

The district court also recognized (as Sue Antrobus's attorneys had argued) that it had discretion to hear from Sue Antrobus. The court, however, concluded that it had already read the materials submitted by her. In view of that "adequate" understanding of Sue Antrobus's position, the court found no need to exercise its discretion in favor of allowing her to speak.[182] The district court then sentenced Hunter to fifteen months in prison, at the low end of the applicable Guideline range. And Sue Antrobus was not able to speak.

I believe that the district court erred in concluding that Sue Antrobus's daughter was not a victim of the illegal sale of the handgun used to murder her. I argued this point to the Tenth Circuit on appeal,[183] explaining why Hunter should have been held accountable for the harm that his crime caused. The Tenth Circuit recently dismissed the appeal on jurisdictional grounds, but suggested that Sue Antrobus could take up the issue again in the district court in light of newly-revealed evidence from the Government that Hunter and Talovic had talked about bank robbery during the sale of the gun.[184] Other lawyers and I then filed a motion to have the issue reopened before the district court, a motion that was ultimately unsuccessful.[185]

But in concluding this article, I want to focus on the district court's remarkable conclusion that there was no need to exercise its discretion to allow Sue to speak because it already understood her position. This is a crabbed view of the purposes of victim impact statements—assuming they exist solely for the benefit of the court. Instead, as I have tried to explain, victim impact statements serve broader ends. They not only provide information to judges, but also give possible therapeutic benefits to victims, educate defendants about the harms of their crime, and ensure that the sentencing process is viewed as fair by the broader public. So I will continue fighting for the right of crime victims like Sue Antrobus to give a victim impact statement at Mackenzie Hunter's sentencing. She deserved that opportunity even though the courts never gave it to her. And victims all over this country deserve the right to be heard before judges and juries make final decisions when they impose a sentence.

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[182] *Id.* at 13.

[183] *See* United States v. Hunter, No. 08-4010 (10th Cir. 2008). The Tenth Circuit had earlier rejected an effort by the Antrobuses to mandamus the district court, concluding that the district court's decision that Vanessa Quinn was not a "victim" was not "clearly and indisputably" in error, the standard for mandamus relief. *In re* Antrobus, 519 F.3d 1123, 1124 (10th Cir. 2008).

[184] United States v. Hunter, 548 F.3d 1308 (10th Cir. 2008).

[185] *See* Order, United States v. Hunter, No 2:07-CR-307-DAK (D. Utah Feb. 10, 2009), *pet. denied*, *In re* Antrobus, No. 09-4024 (10th Cir. Feb. 28, 2009).