



CRIME VICTIMS' INSTITUTE

COLLEGE OF CRIMINAL JUSTICE

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The Continuing Debate on Victim Impact Statements

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When addressing crime in the U.S. legal system, much attention is placed on the government's efforts to solve cases and issue punishment. As such, coverage of criminal prosecutions largely centers on legal strategies adopted by opposing counsel, the details of forensics evidence, judicial decision-making, and—if a case goes to trial—the dynamics of jury deliberations (Barnett, 2005; Klentz et al., 2020). This pattern is critiqued by scholars and advocates who note that the individual most directly affected by the crime, the victim-survivor^[1], is often relegated to the background throughout the criminal justice process (Englebrecht, 2011, 2012; McGrath, 2023). Efforts to re-center the perspectives and needs of people most impacted by victimization, while not ideal, have seen notable successes over the past several decades.

The Victims' Rights Movement of the 1970s and 1980s arose to promote fairness toward victim-survivors and increase their role in the criminal justice process (Braun, 2019). The Movement helped influence the passage of two federal statutes: the Victims' Rights and Restitution Act (VRRRA) of 1990 and the Crime Victims' Rights Act (CVRA) of 2004. The VRRRA describes the services the federal government is required to provide to victims, such as information about counseling resources as well as medical, social, and other support services. The CVRA sets forth the rights that a person has as a crime victim-survivor. Included in the CVRA are the rights to reasonable protection, timely notice of hearings, receive financial restitution, and be treated with dignity and respect. Many states have adopted their own legislation. For example, in Texas, the Rights of Crime Victims statute was passed in 1985, which created the use of a written VIS. The Crime Victims' Bill of Rights was incorporated into Article I of the Texas Constitution in 1989.

One of the greatest achievements of the Movement is helping to secure the right for victim-survivors to attend court proceedings and be heard (Braun, 2019; Nadler & Rose, 2002). This is accomplished through the preparation and delivery of a victim impact statement (VIS).

This written or oral statement gives victim-survivors the opportunity to speak during sentencing or parole hearings to explain the effects that the victimization has had on their lives (Englebrecht & Chavez, 2014; Updegrove, 2020). In its practical purpose, the VIS informs the judge, jury, or parole board about details related to the physical, emotional, psychological, and financial impact of crime, and that information can be taken into consideration in sentencing and parole decisions (Boppre & Miller, 2014; Craig & Sailofsky, 2022). Beyond its value in facilitating informed decision-making regarding punishment, the VIS also serves an empowering and cathartic purpose, as victim-survivors can use it as a vehicle to "gain a sense of control and influence, and be actively involved" (Peace & Forrester, 2012, p. 107).

These benefits explain why victims' rights advocates fully support the use of VIS, and the practice is encouraged by many legal practitioners and scholars as well, as a way to give victim-survivors a larger role in the criminal justice process (Cassell, 2009). However, the use of VIS in sentencing is not without contention. Opponents view VIS as prejudicial to the defendant, in that decision-makers will institute harsher punishments than if a statement was not included at all (Lens et al., 2015). Essentially, critics contend that the content and delivery of a VIS have the potential to cloud decision-making by jurors who may be unable to make objective legal decisions due to a lack of formal training (Engelbrecht, 2011; Kleinstuber et al., 2020; Roberts & Erez, 2004). For instance, if a particularly poignant and impassioned statement generates profound empathy toward the victim or intense anger toward the defendant, jurors may be driven by emotions rather than rationality, and ultimately impose a harsher sentence that is (Bandes, 2021; Bandes & Salerno, 2014; Nuñez et al., 2016). Specifically with reference to capital cases, opponents argue that VIS can make the difference between life and death for defendants (Blume, 2011; Phillips, 1997; Simmons, 2019).

^[1]The individual directly injured by a crime will be referred to as a victim-survivor, which reflects that the individual has experienced physical or emotional harm and is going through the recovery process. Although there is debate regarding this term, victim-survivor acknowledges both harm and resilience, and reflects the differences in labels used among people who have been victimized themselves (Boyle & Clay-Warner, 2018; Schwark & Bohner, 2019).

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Moreover, scholars have called for a thorough consideration of how VIS may have impacted to long prison sentences amid current movements for sentencing reform and decarceration (Mundy, 2020). The U.S. Supreme Court has weighed in on this intense debate several times over the past three decades.

U.S. Supreme Court Jurisprudence

The primary role of the U.S. Supreme Court is to establish whether legislation is constitutional, and it has made determinations on the propriety and legality of VIS on four separate occasions, all of which involved death sentences, but are applicable to criminal charges in general. The first of these is *Booth v. Maryland* (1987), in which the Court considered the issue of whether impact evidence is irrelevant, unduly inflammatory, and therefore violative of the Eighth Amendment's ban on cruel and unusual punishment. The ruling in *Booth* made inadmissible impact evidence that does not directly relate to the crime. The Court reasoned that such statements are essentially un rebuttable, allow for extraneous factors to enter into the sentencing decision, and could shift jurors' attention away from the factual evidence of the crime to personal opinions and sentiments. Two years later, the Court reiterated its position on the impermissibility of VIS in *South Carolina v. Gathers* (1989). Although the deliverer of the VIS was the prosecutor rather than a surviving family member, the Court nevertheless excluded the evidence on the grounds that such remarks are overly prejudicial and unrelated to the defendant's blameworthiness.

Two years after *Gathers*, the Court again addressed the constitutionality of VIS in *Payne v. Tennessee* (1991). In an unexpected turn—considering its previous decisions—the Court reversed its past rationales on the issue. The ruling explained that emotionality is not reason enough for total exclusion. The Court further articulated that VIS are an important way for the speaker to emphasize the gravity of their harm and loss and such evidence is meaningful to the sentencing body, whether jury or judge. The decision also stated that giving victim-survivors the opportunity to deliver a statement during the sentencing phase is parallel to the defendant's ability to introduce mitigating evidence: an explanation about their background that can encourage leniency, such as adverse childhood experiences (e.g., abuse and neglect; *Payne*, 1991, p. 822).

The Court once more considered the content and admissibility of VIS in *Bosse v. Oklahoma* (2016). In this ruling, the Court clarified that the key points of both *Booth* and *Payne* coexist. Here, the Court explained that the Eighth Amendment does not prohibit the entry of evidence that explains the impact that death had on the surviving family members, but VIS are still precluded from discussing “characterizations and opinions about the crime, the defendant, and the appropriate sentence” (*Bosse*, 2016, p. 827).

Victim Impact Statements in High-Profile Trials

Since the Court's ruling in *Payne*, VIS have been used widely in both capital and non-capital case nationwide. *Payne* (and later *Bosse*) also gave jurisdictions significant “latitude in the boundaries of admissibility for different types of VIS, as the Supreme Court did not set clear guidelines on what type of statements are acceptable” (Craig & Sailofsky, 2022, p. 3-4). Some jurisdictions even allow in-person VIS to be supplemented by photo montages, music, and video footage (Englebrecht, 2012; Frank, 2015; Updegrove, 2020; Younglove et al., 2009). The use and parameters of VIS usually only receive attention from the general public following sentencing in high-profile cases. Four trials, in particular, garnered a significant amount of media attention and public commentary (Abrams & Potts, 2020; Eiler et al., 2018; Gerson, 2023; Gilmore, 2019; Healy, 2015; Lutz, 2018; Kempf, 2018).

The Aurora Movie Theater Shooting

On July 20, 2012, James Holmes committed a fatal mass shooting inside the Century 16 Theater in Aurora, Colorado, during a midnight film screening. The shooting killed 12 people and injured 70 others in just 10 minutes (Healy, 2015). Holmes was convicted of multiple charges of first-degree murder and attempted first-degree murder in July 2015. During the formal sentencing hearing of the case in August 2015, approximately 100 survivors, witnesses, and family members were able to describe the far-reaching effects of the crime on their lives during in-person statements (O'Neill, 2015). One survivor, Theresa Hoover, told the court: “I'm now a single mother of one child ... My life is basically half of what it was” (Healy, 2015, p. 1). After statements concluded, Holmes received 12 life without parole (LWOP) sentences for the murders, in addition to a maximum of 3,300 years in prison for the attempts and weapons charges.

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The Stanford Case

In June 2016, the nation learned about the California case of Brock Turner, a then-Stanford college student who sexually assaulted an unconscious young woman on campus (Stack, 2016). The public outrage following the news rested not only on the crime itself but also on the sentence Turner received after being convicted of sexual assault. Although the maximum penalty for the conviction was 14 years in prison, Judge Aaron Persky sentenced Turner to six months in jail, of which he only served three. The survivor read her VIS in court describing the multiple harms she faced since the 2015 attack. The full statement was subsequently published online, as Emily Doe, and it was widely read and lauded. One of the most salient parts of her VIS includes the following: “Your damage was concrete; stripped of titles, degrees, enrollment. My damage was internal, unseen, I carry it with me. You took away my worth, my privacy, my energy, my time, my safety, my intimacy, my confidence, my own voice, until today.” The survivor revealed her identity in 2019, Chanel Miller, and also published a memoir, *Know My Name*. In a rare occurrence, following news of the sentence, California voters removed Judge Persky in a 2018 recall election—a feat not accomplished since the 1930s—in reaction to what they saw as excessive leniency for Turner (Gersen, 2023). Many victims’ rights groups felt that activism worked in this case and can work in others, and the recall was described as a triumph for the broader #MeToo movement (Gilmore, 2019). However, even before the recall was successful, some legal scholars cautioned that such an outcome could lead to harsher sentences going forward if elected judges feel that they must bend to the will of voters to retain their seats rather than issuing rulings independently (Meares, 2016).

U.S. Olympic Gymnasts

On November 22, 2017, Larry Nassar pleaded guilty to multiple counts of first-degree criminal sexual conduct with minors under the age of 16. The plea came after months of shocking and disturbing revelations that Nassar committed years-long assaults of girls and young women under the guise of providing legitimate medical treatment while working as a physician for the U.S. women’s national gymnastics team (Gajanan, 2018). Nassar was convicted in 2018 and the sentencing hearing lasted seven days during which more than 150 survivors spoke or submitted statements (Lutz, 2018). One survivor who read a statement was Olympic gold medalist Aly Raisman, who said: “[T]his group of women you so heartlessly abused over such a long period of time, are now a force and you are nothing. The tables have turned, Larry. We have our voices, and we are not going anywhere” (Gajanan, 2018). Thereafter, Nassar was sentenced to a range of 40 to 175 years in prison.

The Parkland School Shooting

On February 14, 2018, Nikolas Cruz committed the deadliest mass shooting at a high school in U.S. history (Chuck et al., 2018). That day, he entered Marjory Stoneman Douglas High School in Parkland, Florida, killing 14 students and 3 staff members, and injuring 17 others. Though initially choosing to plead not guilty in March 2018 and proceed to trial on 17 counts of first-degree murder and 17 counts of attempted first-degree murder, Cruz later entered a guilty plea in October 2021. During the capital sentencing trial in July 2022, dozens of survivors and family members delivered statements expressing the trauma they endured. One family member, Anthony Montalto, told the court: “It’s a great pain [only] I feel. To go from a younger brother to an only child in less than six hours is a dramatic change for anyone ... I wish that I could come home and see her again” (Lenthang, 2022). After statements concluded, Cruz received 34 consecutive LWOP sentences.

The El Paso Walmart Shooting

On August 3, 2019, Patrick Crusius committed a fatal mass shooting inside a Walmart store in east El Paso, Texas. The shooting killed 23 people and injured 22 others (Branham, 2019). Crusius pleaded guilty to 90 federal murder and hate crime charges in July 2023. During the formal sentencing hearing later that month, 36 survivors, witnesses, and family members attended to express the harm they endured because of the shooting (Garcia, 2023). One survivor, Stephanie Melendez, said in her VIS: “I want you to remember my voice. I speak for all the daughters who lost their fathers. [In] your act of hatred, you stole a good man from this world. ... He will be remembered but you will not.” (Flores et al., 2023, p. 7). After statements concluded, Crusius received 90 consecutive life sentences. A state capital murder trial is still expected (Garcia, 2023).

Empirical Research on the Effects of VIS on Sentence Severity

Despite legal permissibility and wide usage, especially in high-profile cases, VIS are still frequently criticized under the assumption that, when present, they ultimately cause jurors to be more punitive. Beyond theoretical commentaries by legal scholars, there have been several empirical assessments of the impact of VIS (Georges et al., 2013; Lens et al., 2015; Nuñez et al., 2015; Schweitzer & Nunez, 2017). Most research on the VIS-sentence severity relationship uses simulations of trial proceedings and mock jurors who impose hypothetical sentences. This trend is understandable since there are considerable ethical constraints in studying this relationship in actual trials. However, even the existing literature based on simulations is mixed, with some studies demonstrating a higher probability of harsher sentencing when VIS is introduced, and other studies indicate that VIS either has no effect on sentencing outcomes or a very weak effect (i.e., statistically nonsignificant) relationship (Kunst et al., 2021). It is likely that inconsistencies in results across studies using mock jurors may be due in part to variations in research procedures (Paternoster & Deise, 2011).

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One of the most consequential aspects of study design is how participants are chosen (i.e., sampling method). For instance, much of the prior research on VIS and sentencing uses convenience sampling, which lacks a specific pattern for study recruitment, and participants are selected because they are the easiest for the researchers to access (Galloway, 2005). Although convenience sampling is relatively simple to perform as well as low-cost and less time-consuming, it has substantial disadvantages, such as the potential for skewed results if particular subgroups of the target demographic are under- or over-represented (Clark, 2017). Most of the existing simulation studies use college students as participants, which limits heterogeneity in the sample, as the typical characteristics of the “traditional” college student population are similar with respect to demographics such as age (18 to 24; (National Center for Education Statistics, 2023). Consequently, their views, attitudes, and decisions may not be consistent with the perspectives of the general public (Hanel & Vione, 2016; Peterson, 2001; Wevodau et al., 2014).

Another methodological concern relates to jury deliberations. In actual trials, jurors must deliberate in a closed group setting before rendering their sentence decisions. However, many of the existing studies have participants make sentencing recommendations without the inclusion of a deliberation component. This is problematic because the group-based deliberation process can influence juror decision-making (Lynch & Haney, 2009). Other scholars have noted that even if a deliberation component is included in the study design, there is still a significant limitation to inferring real-world trends when using simulations, as “mock jurors reach a decision regarding an imaginary defendant” (Boppre & Miller, 2014, p. 430), which potentially removes the meticulousness that is expected when deliberations happen in actual trials.

Furthermore, the degree of realism in study conditions is a methodological concern that impacts results when studying the effect of VIS on sentencing outcomes in simulations. There are a few notable works that addressed this limitation by using actual cases. An early study by researchers Erez and Tontodonato (1990) analyzed 500 felony (non-capital) cases in Ohio to determine whether sentencing decisions made by judges were influenced by the presence of VIS. Findings indicated that in cases where a VIS was filed with the court, there was a higher frequency of defendants receiving a custodial sentence rather than probation. A few years later, researchers Davis and Smith (1994) conducted an experiment in New York using approximately 293 felony (non-capital) cases in which the cases were randomly assigned to one of three conditions: (1) interviews conducted and written VIS distributed to judges; (2) interviews conducted but VIS not prepared or distributed; and (3) no statement interviews conducted. The results showed that VIS did not result in significantly stricter sentencing decisions.

More recent research continues to use simulations but attempts to have more realistic conditions. These largely focus on VIS in capital cases, which are most consequential if they have an arbitrary effect on an outcome as severe as the death penalty. In actual criminal trials where jurors are the decision-makers, VIS are usually delivered in person by the victim-survivor or their family. Despite this real-world element, written VIS are the most common version used in the existing research, which may not provide a precise assessment (McGowan & Myers, 2004). A few studies have included recorded or in-person delivery of the VIS to provide a closer comparison to actual outcomes. For example, participants in a study conducted by researchers Platania and Berman (2006) watched videotaped footage of an impact statement based on an actual trial and delivered by a local actor playing the role of a surviving mother. The participants were assigned to experimental conditions to determine whether sentencing decisions would differ between those in the high-emotion group (i.e., sobbing speaker) and those in the low-emotion group (i.e., stoic speaker). In another study using video-recorded reenactment of a trial, Nuñez and colleagues (2017) assigned participants to different conditions based on emotion type, angry VIS and sad VIS, to determine the impact on punishment severity. Although both studies stand out for their efforts to use more realistic elements, the results speak to the potential for variations in simulated environments. The 2006 study found no significant effect of emotion level on participants’ sentence recommendations, whereas the 2017 study found that statements delivered with anger led to an increase in death sentences.

Despite the variation between these outcomes, they do provide some evidence that demeanor is influential. As Nuñez and colleagues (2017) explain, “VIS, in and of themselves, may not lead to capricious decision making” (p. 879), since the condition that elicited anger was consequential to punitiveness, and the sad disposition was not significant in either study. Furthermore, Myers and colleagues (2018) used transcripts from sentencing phases of criminal trials to examine VIS content in actual cases and determine the emotional impact of the rhetoric. The researchers analyzed almost 200 capital trial transcripts and found that despite the legal objective that VIS address the physical, psychological, and financial harm experienced by victim-survivors, such information was relatively infrequent: content on physical impact in 9.4%, content on psychological harm in 26.6%, and content on financial harm in 3.9% of cases. Instead, VIS primarily spoke about the positive attributes of their loved one as well as how important the person was to the family structure, and rarely included prohibited statements about retribution or sentence recommendations—with sadness emerging far more often than anger. These findings are encouraging with respect to the relationship between VIS and sentencing. Essentially, the disposition of the victim-survivor could temper any undue severity while still providing the opportunity for them to have a voice.

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VIS in Texas

Texas has a comprehensive system for victim-survivors to participate in the criminal justice process and share their experiences with the court and corrections systems. The state's VIS form asks victim-survivors to explain the emotional, psychological, physical, and financial effects of the crime. The form is later considered by the local district or county attorney's office as well as the judge prior to sentencing or prior to a plea agreement being accepted, and is reviewed by the Board of Pardons and Paroles before voting on whether to grant or deny release (TDCJ, 2017). The state also updates its VIS information documents, based on decisions made by the VIS Revision Committee, to make sure that the process is effectively communicated to victim-survivors (Hill, 2022). For instance, the most recent update of the form and instructions—entitled “Your Voice, Your Right!”—includes a QR code that links to the TDCJ Victims Services Division (VSD) website. The website also provides a printable brochure with a user-friendly flowchart that explains how the VIS moves through the criminal justice process.

In 2017, the VSD published the results of an observation study conducted in collaboration with the Texas Crime Victim Clearinghouse to assess how frequently victim-survivors complete and return the form after it has been distributed by each county. The study reported that only 14.7% of the VIS form were completed and returned to the county in 2014, 14.6% in 2015, and 16.4% in 2016. The study included counties identified as high-output (e.g., 50% or higher return rate) to observe their day-to-day handling and processing of the forms to learn about the most effective practices. The most effective practices included: (a) developing and updating written policies and procedures that incorporated resources from the Clearinghouse and the Texas District and County Attorneys Association; and (b) sending VIS forms to victim-survivors pre-indictment and processing mailing of VIS forms each day. Based on their successful practices, county personnel who participated in the study made several recommendations to improve service provision such as: (a) creating a safe, comfortable environment for victim-survivors; (b) participating in ongoing training; and (c) maintaining strong collaborative relationships with local nonprofit organizations.

In light of these findings, the VSD should conduct a follow-up study to determine why VIS return rates have not improved in the years since the county observations. Although VSD published recommendations for counties to implement, statewide return rates still remain low—only ranging between 14.3% and 16.3% between 2018 and 2022 (VSD Annual Reports, 2018, 2019, 2020, 2021, 2022). Additionally, it would be valuable to speak more with victim-survivors to better understand the barriers they face when trying to complete and return the VIS, and gather their suggestions for simplifying the participation process.

For example, the VSD study discussed how victim-survivors expressed confusion about the option to deliver a statement during the sentencing hearing, which is called an allocution. As the process is designed now, returning the VIS form does not automatically guarantee that the victim-survivor will be able to speak in court, as they have to contact a Victim Assistance Coordinator who then notifies the local district or county attorney's office. It is possible that streamlining or linking the VIS form submission process to the allocution request process could alleviate much of the confusion. Hearing from victim-survivors more regularly, either through empirical studies or community engagement and outreach workshops, can better inform the VSD and VIS Revision Committee about what changes are most necessary.

Conclusion

While commentary from legal scholars, advocates, and criminal justice practitioners about the parameters and content of VIS may prompt further procedural changes at the local and state levels, the inclusion of impact statements will likely remain an important part of the sentencing phase in U.S. criminal prosecutions. If there are to be fewer or greater rules about how VIS are developed and used in the trial process, such modifications should be supported not only by improvements in the recognition of victim-survivors' rights but also by sound empirical evidence. Researchers who investigate the relationship between VIS and sentencing outcomes in the future should take heed of limitations in the existing literature to design a study that produces rigorous and reliable results. Ultimately, coping with victimization is aided by processes that permit the full understanding of the harm, such as VIS, as well as processes that facilitate healing and restoration. People on both sides of the aisle can agree that restorative justice for everyone impacted by the crime is essential to achieving fair and meaningful outcomes and to re-centering victim-survivors' needs.

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