

## Impact Statements: Giving a Voice to Sexual Assault Survivors

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## IMPACT STATEMENTS: GIVING A VOICE TO SEXUAL ASSAULT SURVIVORS

BY ANAMIKA ROY\*

As a result of the #MeToo movement and heightened media attention on high-profile sexual assault cases, victims' voices are being heard outside of a sentencing hearing in a courtroom.<sup>1</sup> Victim impact statements (VISs) are being streamed on the internet, circulated online, and helping other victims open up about their own experiences.<sup>2</sup> In a criminal proceeding, VISs are often the sole opportunity offered to crime victims to talk about the harm they suffered and can provide a form of healing for victims.<sup>3</sup> That opportunity is particularly necessary for sexual assault victims, as that remains one of the most underreported crimes because victims do not feel their harm will be acknowledged by the criminal legal system.<sup>4</sup>

In the wake of the #MeToo movement,<sup>5</sup> a renewed focus on the stories of sexual assault victims requires a reexamination of how a victim's voice is included in the criminal legal system.<sup>6</sup> Even in cases where the parties are not public figures or garner media attention, the VIS is an essential part of the criminal justice system because it allows the community to feel heard, which in turn ensures sexual assaults are reported and perpetrators are held accountable.<sup>7</sup> But as many victims feel they are left out of the criminal legal process, it is increasingly clear that more needs to be done to make sentencing hearings more inclusive

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<sup>1</sup> See *infra* text accompanying notes 9-24.

<sup>2</sup> See *infra* text accompanying notes 14-24.

<sup>3</sup> See *infra* Part I.

<sup>4</sup> See *infra* Part II.

<sup>5</sup> The 'me too' movement was founded in 2006 as a way to help sexual assault victim-survivors, especially women of color from low income families, find ways to heal with help from other victim-survivors and community advocates. In 2017, the #MeToo hashtag brought the movement to a national and later international stage on social media to highlight the prevalence of sexual assault. ME TOO, <https://metoomvmt.org/about/#history> (last visited Jan. 15, 2019).

<sup>6</sup> See *infra* Part III.

<sup>7</sup> See *infra* Part I.

to sexual assault victims, while still maintaining the integrity of the process and protecting defendants' rights.<sup>8</sup> This note will examine ways courts can strike that balance.

Perhaps the most well-known VIS in recent years was read in a courtroom before the #MeToo movement gained traction at the sentencing of Brock Turner in June 2016.<sup>9</sup> Turner was convicted of sexually assaulting an unconscious woman after a party in Palo Alto, California.<sup>10</sup> He was sentenced to six months in jail and three years of probation for three felony counts of sexual assault, a conviction that typically carried a maximum sentence of fourteen years in prison in California.<sup>11</sup> The seemingly light sentence gained widespread attention and was seen as the epitome of white, male privilege given Turner's background as a Stanford-educated, champion swimmer with aspirations to compete in the Olympics.<sup>12</sup> Santa Clara County Superior Court Judge Aaron Persky justified the sentence by stating, "A prison sentence would have a severe impact on him. I think he will not be a danger to others."<sup>13</sup>

The following day, online news website BuzzFeed, published the VIS of the woman who was attacked by Turner.<sup>14</sup> The written statement was more than 7,000 words and began with a chilling sentence: "You don't know me, but you've been inside me, and that's why we're here today."<sup>15</sup> The statement was viewed more than five million times on BuzzFeed's website, read in its entirety by CNN anchor Ashley Banfield on live television, and read on the floor of the U.S. House of Representatives by a bipartisan group of members of Congress.<sup>16</sup> In the VIS, the 23-year-old victim, later identified as Chanel Miller, chronicles her

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<sup>8</sup> See *infra* Part II.

<sup>9</sup> Liam Stack, *Light Sentence for Brock Turner in Stanford Rape Case Draws Outrage*, THE NEW YORK TIMES (June 6, 2016), <https://www.nytimes.com/2016/06/07/us/outrage-in-stanford-rape-case-over-dueling-statements-of-victim-and-attackers-father.html?module=inline> (last visited Nov. 10, 2018).

<sup>10</sup> Stack, *supra* note 9.

<sup>11</sup> Stack, *supra* note 9.

<sup>12</sup> Stack, *supra* note 9.

<sup>13</sup> Stack, *supra* note 9. In his sentence, Judge Persky focused on the impact Turner's actions had on Turner himself, not the victim.

<sup>14</sup> Katie J.M. Baker, *Here's The Powerful Letter The Stanford Victim Read To Her Attacker*, BuzzFeed News (June 3, 2016), <https://www.buzzfeednews.com/article/katiejmbaker/heres-the-powerful-letter-the-stanford-victim-read-to-her-raft-xf2YDd8Xv>.

<sup>15</sup> Baker, *supra* note 14.

<sup>16</sup> Stack, *supra* note 9; Stanford University Sexual Assault Victim Impact Statement, U.S. House of Representatives (June 15, 2016), <https://www.c-span.org/video/?411210-4/stanford-university-sexual-assault-victim-impact-statement>.

version of what transpired the night Turner raped her, including the impact the assault had on her, from learning that she had been assaulted to experiencing a grueling trial rife with victim-blaming.<sup>17</sup> It also gives a scathing indictment on how the criminal justice system treats sexual assault victims and the role of privilege, and includes a call to action for other sexual assault victim-survivors.<sup>18</sup>

In response to Turner's sentence, Miller told BuzzFeed News, "I want the judge to know that he ignited a tiny fire. If anything, this is a reason for all of us to speak even louder."<sup>19</sup> Perhaps it was such a fire that led to more than 150 women in January 2018 to speak at the sentencing of Larry Nassar, a doctor for U.S.A. Gymnastics who pleaded guilty to several counts of sexual assault.<sup>20</sup> The sentencing was livestreamed on the internet as victims spoke over several days.<sup>21</sup> Presiding Judge Rosemarie Aquilina gave words of encouragement to every person who gave a statement and told the women that "the whole world" was listening to their stories.<sup>22</sup> Quotes from the victims' statements, including a handful of Olympic medalists such as Aly Raisman, McKayla Maroney, and Jordyn Wieber, were circulated on social media and became a rallying cry for sexual assault victim-survivors.<sup>23</sup> Judge Aquilina's decision to provide this massive platform for Nassar's victims and openly support those who took the podium itself garnered widespread attention, the vast majority of it favorable by the public.<sup>24</sup>

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<sup>17</sup> Baker, *supra* note 14. "Victim blaming" is the attitude that the victim bears responsibility for the assault rather than the perpetrator based on factors including whether the victim was drinking before the attack, whether the victim is in a relationship, and what the victim was wearing, among other factors. HARVARD LAW SCHOOL HARASSMENT ASSAULT LAW-STUDENT TEAM, <https://orgs.law.harvard.edu/halt/how-to-avoid-victim-blaming/> (last visited Jan. 15, 2019).

<sup>18</sup> Stack, *supra* note 9; Baker, *supra* note 14.

<sup>19</sup> Baker, *supra* note 9.

<sup>20</sup> Scott Cacciola, *Victims in Larry Nassar Abuse Case Find a Fierce Advocate: The Judge*, THE NEW YORK TIMES (Jan. 23, 2018), <https://www.nytimes.com/2018/01/23/sports/larry-nassar-rosemarie-aquilina-judge.html?action=click&module=RelatedCoverage&pgtype=Article&region=Footer>.

<sup>21</sup> Cacciola, *supra* note 20.

<sup>22</sup> *Id.*

<sup>23</sup> Carla Correa & Meghan Louttit, *More than 160 women say Larry Nassar sexually abused them. Here are his accusers in their own words*, N.Y. TIMES (Jan. 24, 2018), <https://www.nytimes.com/interactive/2018/01/24/sports/larry-nassar-victims.html>.

<sup>24</sup> See, e.g., D'Arcy Maine, *An open letter to the judge presiding over Larry Nassar's sentencing hearing*, ESPN.COM (Jan. 18, 2018) (demonstrating one person's appreciation for Judge Aquilina's choice to give victims a platform for self-expression), <http://www.espn.com/espnw/voices/article/22135371/an-open-letter-judge-presiding-larry-nassar-sentencing-hearing>.

However, among the legal community, it did raise questions about the impact of so-called “activist judges.”<sup>25</sup> The Nassar sentencing was unusual for several reasons, aside from Judge Aquilina’s disposition toward Nassar, including the sheer number of victims who spoke at sentencing and the profile of the victims themselves.<sup>26</sup> Even the victim in the Turner case had the educational background to write an eloquent, 7,000-word statement and the resourcefulness to then send the statement to a news website.<sup>27</sup> Most victims are simply forgotten.<sup>28</sup>

While this note will examine the way VISs have been used in sentencing hearings for a range of crimes, it is important to note the legal system needs to be more inclusive of victims in sexual assault cases during sentencing. Studies show that sexual violence can cause both immediate physical harms as well as chronic conditions such as pelvic pain, migraines, and infertility, but also psychological harm such as anxiety, depression, substance abuse, and posttraumatic stress disorder.<sup>29</sup> During a trial, sexual assault victims can be subjected to questions about what they were wearing at the time of the assault, whether they had been drinking that night, whether they had a significant other, and other questions to shift blame.<sup>30</sup> These questions prevent other victims from coming forward.<sup>31</sup> In the wake of the Turner and Nassar cases, sexual assault victims are continuing to see judges hand down sentences that feel disproportionate to the harm the victim experienced, showing the need for reforms in how victims are included in the criminal legal process.<sup>32</sup>

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<sup>25</sup> Rachel Marshall, *The moment the judge in the Larry Nassar case crossed a line*, VOX.COM (Jan. 25, 2018), <https://www.vox.com/the-big-idea/2018/1/25/16932656/judge-aquilina-larry-nassar-line-between-judge-advocate-sentencing> (arguing that “by aligning herself so closely with the victims and so clearly rooting against Nassar, Aquilina also reinforced the dangerous idea that judges can and should be in sync with public sentiment.”); See Elizabeth Slattery, *How to Spot Judicial Activism: Three Recent Examples*, THE HERITAGE FOUNDATION (June 13, 2013), <https://www.heritage.org/the-constitution/report/how-spot-judicial-activism-three-recent-examples> (discussing different forms of judicial activism); *Infra* Part III. The term “activist judge” is used to describe a judge who decides a case based on personal preference instead of binding precedent. The term is often used in partisan contexts, especially in high-profile cases.

<sup>26</sup> Correa & Louttit, *supra* note 23.

<sup>27</sup> See *supra* notes 14-15.

<sup>28</sup> Karen-Lee Miller, *Purposing and Repurposing Harms: The Victim Impact Statement and Sexual Assault*, 23 QUALITATIVE HEALTH RESRES. 1445, 1446 (2013).

<sup>29</sup> *Id.* at 1446.

<sup>30</sup> Baker, *supra* note 14.

<sup>31</sup> Karen-Lee Miller, *supra* note 28 at 1447.

<sup>32</sup> See Mary Ann Georgantopoulos, *A Former Baylor University Fraternity President Accused Of Sexual Assault Will Serve No Jail Time After A Judge Approved His Plea Deal*, BUZZFEED NEWS (Dec. 10, 2018), <https://www.buzzfeednews.com/article/maryannegeorgan->

## I. BACKGROUND

Victim Impact Statements (VISs) are statements read by or on behalf of crime victims during criminal trials at the sentencing phase.<sup>33</sup> Information from the VIS is typically included in the presentencing report that is given to the judge.<sup>34</sup> All 50 states allow VISs in some form during the sentencing process.<sup>35</sup> After the defendant is convicted, written or oral VISs can be submitted to the judge to consider before sentencing the defendant.<sup>36</sup> VISs describe the emotional, physical, and financial impact the victim and those close to the victim have suffered as a direct result of the crime.<sup>37</sup> The use of VISs originated in English Common Law where such statements were allowed in trespass and trespass on the case actions where the Crown “stood in the shoes” of the victim.<sup>38</sup> Under the early American colonial criminal justice system, prosecutions were private actions where a victim would pay a public official to prosecute the crime.<sup>39</sup> That changed in the eighteenth century when the prosecution became a state action, leading to a shift away from adjudicating crimes in a versus offender framework to state versus offender.<sup>40</sup> In order to still include victims in the process, victims still made statements at some point during the trial.<sup>41</sup> Since then, crime victims have been allowed to submit a statement during sentencing based

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topoulos/former-baylor-fraternity-sexual-assault-plea-deal-no-jail?utm\_source=dynamic&utm\_campaign=bffbbuzzfeed&ref=bffbbuzzfeed (last visited Dec. 21, 2018); see also Mihir Zaveri, *Man Who Raped Woman Dying of Overdose Gets Less Than 3 Years*, THE NEW YORK TIMES (Nov. 19, 2018), <https://www.nytimes.com/2018/11/19/us/alyssa-noceda-bryan-varela-sentenced.html> (last visited Nov. 19, 2018).

<sup>33</sup> Mark Stevens, *Victim Impact Statements Considered in Sentencing*, 2 CAL. CRIM. L. REV. 1, 1 (2000).

<sup>34</sup> THE NATIONAL CENTER FOR VICTIMS OF CRIME, VICTIM IMPACT STATEMENTS (2008), <http://victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/victim-impact-statements>; Congress passed the Victim and Witness Protection Act of 1982 which amended Congress amended the Federal Rules of Criminal Procedure to include a mandate that statement in presentence reports “shall contain . . . information concerning any harm, including financial, social, psychological, and physical harm, done to or loss suffered by any victim of the offense.” Talbert, *The Relevance of Victim Impact Statements to the Criminal Sentencing Decision*, 36 UCLA L. REV. 199, 200 (1988).

<sup>35</sup> THE NATIONAL CENTER FOR VICTIMS OF CRIME, *supra* note 34.

<sup>36</sup> U.S. ATTORNEY’S OFFICE NORTHERN DISTRICT OF CALIFORNIA, VICTIM IMPACT STATEMENTS: KNOW YOUR RIGHTS (2016), <https://www.justice.gov/usao-ndca/page/file/1021216/download>.

<sup>37</sup> *Id.*

<sup>38</sup> Stevens, *supra* note 33 at 1–2.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 2.

on the theory that the victim is in the best position to explain the impact of the crime on the individual and society.<sup>42</sup>

A. *Booth v. Maryland – U.S. Supreme Court’s first look at VISs*

The United States Supreme Court has changed its position over time on whether VISs should be allowed at sentencing, based on three cases involving capital punishment.<sup>43</sup> The first time the Court took on this issue was in *Booth v. Maryland*<sup>44</sup> in which it held in a 5–4<sup>45</sup> decision that the introduction of a VIS at sentencing in a capital murder case violated the defendant’s Eighth Amendment rights because its admission “creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner.”<sup>46</sup> The majority expressed concern that because a VIS is focused on the victim’s character and reputation, factors that may have nothing to do with the defendant’s culpability may sway the jury’s decision.<sup>47</sup> For example, a jury may impose a death sentence based on the degree to which a victim can express its grief, or the victim’s standing in society.<sup>48</sup> The VIS in *Booth* described the victim’s personal characteristics and the emotional impact the crime had on the family.<sup>49</sup> The state argued the victim impact evidence should be considered as a “circumstance” of the crime as it revealed the extent of harm Booth caused and that there was a “foreseeable nexus” between the murders and the harm to the victim’s family.<sup>50</sup>

However, the Supreme Court found that a VIS could take the jury’s attention away from the defendant’s background and circumstances that led to the crime.<sup>51</sup> In addition, it would be difficult to rebut evidence in a VIS without diverting the attention of a sentencing hearing away from the defendant, serving only to inflame the jury and divert it from relevant evidence about the crime and the defendant.<sup>52</sup> The Court also recognized that in murder cases, the defendant may not know the

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<sup>42</sup> *Id.*

<sup>43</sup> *See infra* Part I.

<sup>44</sup> 482 U.S. 496 (1987).

<sup>45</sup> *Id.* The *Booth* Court majority (5-4) included Powell, Brennan, Marshall, Blackmun, and Stevens, JJ. Dissenting were: Rehnquist, CJ., White, O’Connor, and Scalia, JJ. *Id.*

<sup>46</sup> *Id.* at 503.

<sup>47</sup> *Id.*

<sup>48</sup> *Booth*, 482 U.S. at 503.

<sup>49</sup> *Id.* at 502.

<sup>50</sup> *Id.* at 503.

<sup>51</sup> *Id.* at 504.

<sup>52</sup> *Id.* at 504–505.

victim and, by extension, not know anything about the victim's family.<sup>53</sup> Defendants also rarely select victims based on whether the murder will impact anyone other than the murder victim, the Court opined.<sup>54</sup> If there is a case where the murderer knew the victim or knew information included in a VIS, the degree of knowledge about the consequences of the defendant's actions may increase his or her moral culpability.<sup>55</sup>

The *Booth* court was also concerned about whether the victim's family's eloquence when delivering a VIS could disproportionately influence the jury's decision to impose a harsher sentence.<sup>56</sup> In *Booth*, the Court described the victim's family as being "articulate and persuasive in expressing their grief and the extent of their loss."<sup>57</sup> However, some victims will not have a family, or the family will not be as articulate about their grief as the family in *Booth*, even though their pain is just as severe.<sup>58</sup> The Court felt that handing down a death sentence based on how moved a jury is by a victim or victim's family's VIS would be too dangerous and should be irrelevant to the question of, "who may merit the death penalty, should live or die."<sup>59</sup> Conversely, the Court also believed such a decision should not turn on the victim's character and standing in the community, finding that that information was not a "principled way" to differentiate between cases where the death penalty should be imposed and where it should not.<sup>60</sup>

### B. Reaffirming Booth

In *South Carolina v. Gathers*,<sup>61</sup> the Court overturned a death sentence against a defendant who pleaded guilty to brutally beating and stabbing a man to death.<sup>62</sup> A South Carolina jury sentenced Demitrius Gathers to death after the prosecution improperly introduced a statement about the victim's religious orientation.<sup>63</sup> The Court held that bringing up that evidence using the VIS "was purely fortuitous and could not

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<sup>53</sup> *Booth*, 482 U.S. at 504.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 505.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Booth*, 482 U.S. at 505.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 506 (citing *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980) (opinion of Stewart, J.)).

<sup>61</sup> 490 U.S. 805 (1989).

<sup>62</sup> *Id.* at 811.

<sup>63</sup> *Id.*



provide any information relevant to [Gathers'] moral culpability."<sup>64</sup> By introducing information about the victim's religious propensities in the VIS, the Court found prosecution was trying to assert that victims who were religious should be held in higher regard than those who were not, creating an Eighth Amendment problem.<sup>65</sup>

### C. *Balancing the Scales with Payne*

Two years after *Gathers*, the Supreme Court granted certiorari in *Payne v. Tennessee*.<sup>66</sup> In *Gathers*, the Court gave broad latitude to the defendants to introduce mitigating evidence about their personality.<sup>67</sup> In *Payne*, the Court rejected that view, citing Justice Cardozo's opinion in *Snyder v. Massachusetts*:<sup>68</sup> "Justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."<sup>69</sup> In its decision in *Payne*, the Court intended to keep the balance.<sup>70</sup> The Court held that any evidence and arguments related to the victim and the impact the victim's death has on their family was admissible at a capital sentencing hearing and that the Eighth Amendment does not bar the use of a VIS at sentencing.<sup>71</sup> Instead, the Court said VISs could be challenged under the Fourteenth Amendment's Due Process Clause.<sup>72</sup> In the opinion, Chief Justice Rehnquist does not elaborate on a standard that should be applied with respect to legal relevance of a VIS, but Federal Rule of Evidence 403 may be applied as it fits with the Due Process Clause.<sup>73</sup>

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<sup>64</sup> *Id.* at 810; See Mark Stevens, *Victim Impact Statements Considered in Sentencing*, 2 CAL. CRIM. L. REV. at 8–9.

<sup>65</sup> Stevens, *supra* note 33 at 9.

<sup>66</sup> 501 U.S. 808 (1991).

<sup>67</sup> See *Gathers*, 490 U.S. 805, 817 (O'Connor, J., dissenting) (citing *Lockett v. Ohio*, 438 U.S. 586, 604 (1978): "[T]he Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death").

<sup>68</sup> 291 U.S. 97, 122 (1934).

<sup>69</sup> *Payne*, 501 U.S. at 827 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934)).

<sup>70</sup> *Id.* at 827.

<sup>71</sup> *Id.* at 810–812.

<sup>72</sup> *Id.* at 809 (citing *Darden v. Wainwright*, 477 U.S. 168, 179–183 (1986)).

<sup>73</sup> Stevens, *supra* note 33 at 10; "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence," Fed. R. Evidence 403.

The Supreme Court made a rare departure from the doctrine of stare decisis in overturning precedent in such a short period of time.<sup>74</sup> The Court opined that *Booth* and *Gathers* were both “decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions” and have been questioned by justices in later decisions and not been applied consistently by lower courts.<sup>75</sup> Previously, the Supreme Court of Tennessee affirmed Payne’s conviction and the sentence, rejecting the defendant’s argument that the prosecution’s closing argument violated his Eighth Amendment rights as applied in *Booth* and *Gathers*.<sup>76</sup> The Court found the victim’s grandmother’s testimony was “technically irrelevant” but “did not create a constitutionally unacceptable risk of an arbitrary imposition of the death penalty and was harmless beyond a reasonable doubt.”<sup>77</sup> In *Booth*, the Supreme Court was concerned about comparative judgments about victims and questioned whether defendants knew about their victims’ character before killing them.<sup>78</sup> However, in *Payne*, the Court found that the victim impact evidence is not offered to encourage punishment based on whether a defendant who kills a devoted parent is more deserving of the death penalty over the killer of someone who did not have a family.<sup>79</sup> Instead, the Court found VISs are designed to show the uniqueness of each victim and to help the jury figure out what the loss to the community may be from the victim’s death.<sup>80</sup> In most cases, victim impact evidence “serves entirely legitimate purposes,” by creating an avenue for courts to consider the harm inflicted by a defendant when imposing a sentence.<sup>81</sup>

#### D. Crime Victims’ Rights Act

Thirteen years after the Supreme Court decision in *Payne*, Congress enacted the Crime Victims’ Rights Act as part of the Justice for All Act, which went into effect in October 2004.<sup>82</sup> The statute gives vic-

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<sup>74</sup> *Payne*, 510 U.S. at 827. When this case was decided, the Supreme Court had overturned 33 of its past constitutional decisions in whole or in part in previous 20 terms. *Id.* at 828.

<sup>75</sup> *Id.* at 828–829.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 816 (quoting *Payne v. Tennessee*, 791 S.W.2d 10, 18 (1990)).

<sup>78</sup> *Booth v. Maryland*, 482 U.S. 496 (1987).

<sup>79</sup> *Payne*, 510 U.S. at 823.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 825.

<sup>82</sup> Crime Victims’ Rights Act, 18 U.S.C. § 3771 (2004).

tims the right to be reasonably heard at sentencing, the right to be present at all court hearings related to the offense, be notified of the terms of any plea agreement and be treated fairly with respect to the victim's "dignity and privacy."<sup>83</sup> Despite the implementation of victims' rights measures both at the state and federal levels since the 1970s, sexual assault remains one of the most underreported crimes.<sup>84</sup> In 2016, only 23% of incidents of sexual assault and rape were reported to the police, less than any other type of crime.<sup>85</sup> Victims who choose not to report rape and sexual assault cite reasons including: fear of not being believed, self-blame, and concerns about how the criminal justice system will handle the complaint as the primary reasons for staying silent.<sup>86</sup> Some have also feared reprisal or worry that the police will consider a rape or sexual assault a private matter, particularly in cases where the assailant is known to the victim or is an intimate partner.<sup>87</sup>

This paper will examine the often conflicting interests between what victims hope to get out of the criminal justice system by giving an impact statement at sentencing versus the need to have a process that protects the rights of defendants.<sup>88</sup> Part II will examine what victims hope to get out of giving an impact statement, and whether the criminal trial process accomplishes that goal.<sup>89</sup> Part III will look at the debate among criminal justice advocates over the use of VISs and criticisms about their effect on sentencing due to their variability depending on the victim's ability to articulate their experience.<sup>90</sup> Part IV will examine whether the platform "activist" judges like the one Rosemarie Aquilina gave victims at Larry Nassar's sentencing should be the norm, or whether that disposition makes judges vulnerable to public sentiment and compromise the integrity of the criminal justice system.<sup>91</sup> Part V will provide recommendations for how VISs should be used in sentencing hearings to give victims a stake in the criminal justice system while maintaining the integrity of the process.<sup>92</sup>

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<sup>83</sup> 18 U.S.C. § 3771 (a) 2–4, 8, 9.

<sup>84</sup> NATIONAL INSTITUTE OF JUSTICE, REPORTING OF SEXUAL VIOLENCE INCIDENTS (2010), <https://www.nij.gov/topics/crime/rape-sexual-violence/Pages/rape-notification.aspx> [hereinafter *National Crime Victimization Survey 2016*].

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* The NCVS survey found the victim knew the attacker in 72% of cases. *Id.*

<sup>88</sup> See *infra* Parts II-III.

<sup>89</sup> *Infra* Part II.

<sup>90</sup> *Infra* Part III.

<sup>91</sup> *Infra* Part IV.

<sup>92</sup> *Infra* Part V.

## II. WHAT VICTIMS WANT OUT OF THE CRIMINAL JUSTICE PROCESS

The concept of giving victims a chance to speak at sentencing gives legitimacy to the criminal justice system.<sup>93</sup> VISs play a variety of roles in sentencing and have come to be accepted as a source of healing for victims because it is one of the only instances where they are part of the criminal justice process.<sup>94</sup> Former U.S. District Court Judge Paul G. Cassel, a victims' rights scholar, identifies four benefits of VISs.<sup>95</sup> First, the statements provide information to the sentencing judge or jury about the harm to assist in crafting an appropriate penalty.<sup>96</sup> Second, giving a VIS can be therapeutic to help crime victims recover from the harm they suffered.<sup>97</sup> Third, the statement itself can educate defendants about the consequences of their crime, accept responsibility for committing the crime, and help rehabilitate the defendant.<sup>98</sup> Finally, allowing VISs at sentencing hearings ensures that all relevant parties are heard in court.<sup>99</sup>

Defendants are also allowed to speak at their sentencing to "assure the appearance of justice and to provide a ceremonial ritual at which society pronounces its judgment."<sup>100</sup> Victims do not have to speak at a sentencing hearing, but should be afforded the opportunity if they wish to do so.<sup>101</sup> VISs create an opportunity for victims to speak at sentencing, along with the defendant, in an effort to bring "assures perceived fairness" into the criminal justice system.<sup>102</sup> That gives victims the right to speak at sentencing for the same reason defendants get that right.<sup>103</sup>

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<sup>93</sup> Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611, 625 (2009); Kimberly A. Thomas, *Beyond Mitigation: Towards a Theory of Allocation*, 75 FORDHAM L. REV. 2641, 2678 (2007).

<sup>94</sup> Cassell, *supra* note 93 at 621.

<sup>95</sup> *Id.* at 619–623.

<sup>96</sup> *Id.* at 619–621.

<sup>97</sup> *Id.* at 621–623.

<sup>98</sup> *Id.* at 623–624.

<sup>99</sup> Cassell, *supra* note 93 at 624–625.

<sup>100</sup> *Id.* at 625 (quoting Mary Margaret Giannini, *Equal Rights for Equal Rites?: Victim Allocation, Defendant Allocation, and the Crime Victims' Rights Act*, 26 YALE L. & POL'Y REV. 431, 482 (2008)).

<sup>101</sup> *Id.* at 622–623.

<sup>102</sup> *Id.* at 625; Mary Margaret Giannini, *Equal Rights for Equal Rites?: Victim Allocation, Defendant Allocation, and the Crime Victims' Rights Act*, 26 YALE L. & POL'Y REV. 431, 482 (quoting *United States v. Curtis*, 523 F.2d 1134, 1135 (D.C. Cir. 1975)).

<sup>103</sup> Cassell, *supra* note 93 at 625.

It is important to not paint all crime victims with a broad brush in terms of what they consider justice, but one commonality among victims of sexual violence is the need to be heard.<sup>104</sup> As stated by Professor Leigh Goodmark, “Simply having the opportunity to tell one’s story, unmediated and whatever form one chooses is an essential element of justice for those who have been harmed.”<sup>105</sup> In addition, the chance to speak, uninterrupted, and without skepticism about their story is crucial particularly for those who have survived a traumatic experience.<sup>106</sup> VISs can potentially help give victims that voice in the criminal legal process and allow sexual assault victims to establish what they experienced, present their point of view and be recognized as “valid and trustworthy sources of information, thus restoring their dignity.”<sup>107</sup>

Crime victims perceive justice in different ways, but the legal system is widely seen as the primary means to get justice for crime victims.<sup>108</sup> However, the legal system can have contradictory aims, and can run the risk of undermining the rights of defendants or fail to include the voices of victims in the process.<sup>109</sup> Victims want their pain to be acknowledged and validated, for the perpetrator to be held responsible, and a commitment to prevent the same harm from being inflicted from

<sup>104</sup> “Two people who have experienced the same violence may have very different expectations of what justice is and notions of they want from the justice process.” Leigh Goodmark, “*Law and Justice Are Not Always the Same*”: *Creating Community-Based Justice Forums for People Subjected to Intimate Partner Abuse*, 42 FLA. ST. U. L. REV. 707, 727 (2015); Haley Clark, *A Fair Way to go: Justice for Victim-Survivors of Sexual Violence*, in RAPE JUSTICE: BEYOND THE CRIMINAL LAW 18, 19 (Anastasia Powell et al. eds.) (identifying “the crucial need for acknowledgement and validation in responding to victim-survivors, the desire for perpetrator responsibility and accountability, the role of retributive and punitive responses, and the relevance of a broader commitment to safety and prevention” as key aspects of justice for victim-survivors of sexual violence).

<sup>105</sup> Leigh Goodmark, *Law and Justice are Not Always the Same: Creating Community-Based Justice Forums for People Subjected to Intimate Partner Abuse*, 42 FLA. ST. U. L. REV. 707, 727–728 (2015).

<sup>106</sup> *Id.* at 727–728 (quoting Richard J. Goldstone, *Foreword* to MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE IX (1998) at 58).

<sup>107</sup> *Id.* at 728 (citing Susan L. Miller & M. Kristen Hefner, *Procedural Justice for Victims and Offenders?: Exploring Restorative Justice Processes in Australia and the U.S.*, 32 JUSTICE Q. 142, 144 (2013), available at <http://www.tandfonline.com/doi/full/10.1080/07418825.2012.760643#UuFJYBAo5aQ>).

<sup>108</sup> Nicola Henry, Asher Flynn & Anastasia Powell, *The Promise and Paradox of Justice*, in RAPE JUSTICE BEYOND THE CRIMINAL LAW 1, 5 (Anastasia Powell et al. eds.) (2015).

<sup>109</sup> *Id.* “Law’s power is itself full of complexities and contingencies. Law, disguised as justice may bring some satisfaction and other therapeutic gains to victim-survivors and the community more generally, but law can never fully erase the injury or long-term impacts of violence. Law ultimately promises, but fails to deliver justice.” *Id.*

others by that perpetrator in the future.<sup>110</sup> For many victims, that acknowledgment comes from the criminal legal system.<sup>111</sup> However, sexual assault is one of the most unreported crimes across.<sup>112</sup> In addition, internationally that allow victims to submit impact statements, only between 15% and 30% of victims choose to do so.<sup>113</sup> Those figures show that there is a lot of work to be done in how the criminal justice system allows victims to be heard.<sup>114</sup> In addition, many scholars, activists, and legal professionals argue that rape law reforms have had a negligible impact on reporting, prosecutions, and conviction rates, as well as negligible improvements in “procedural justice” for both victims and defendants.<sup>115</sup>

The criminal legal process is rightfully focused on the defendant, but even though victims are supposed to be given the opportunity to be heard at sentencing, victims find that they are not given enough of a voice in the criminal justice system.<sup>116</sup> Participants in one study involving sexual assault victim-survivors found that they were not a priority in the criminal justice system and were not allowed to give input on how their case was pursued.<sup>117</sup> Even cases that reached the sentencing phase, victim-survivors who participated in the study found that perpetrators were not compelled to take responsibility for their actions by the criminal justice system.<sup>118</sup> One participant said:

One of the things I found somewhat unsatisfying in recent times was . . . how in sentencing this person, the picture that was painted of this poor pathetic man who had had a hard life and all that, and how that’s taken into account in sentencing. And yet there’d been such denial of what he’d done for so long, till the last minute, and I

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<sup>110</sup> *Id.* at 19

<sup>111</sup> *Id.*

<sup>112</sup> Miller, *supra* note 28 at 1447; Common law countries are countries whose legal systems are derived from England. Common law countries include the United States, Australia, Canada, South Africa, and India, among others. UNIVERSITY OF EXETER LAW SCHOOL, <https://socialsciences.exeter.ac.uk/law/study/undergraduate/commonlawcountries/> (last visited Dec. 19, 2018).

<sup>113</sup> Miller, *supra* note 28 at 1446.

<sup>114</sup> *See generally* Henry, Flynn & Powell, *supra* note 108 at 1–6 (discussing the failure of courts to prosecute sexual assault cases, secure convictions and proportionate sentences).

<sup>115</sup> *Id.* at 3.

<sup>116</sup> Haley Clark, *A Fair Way to go: Justice for Victim-Survivors of Sexual Violence*, in RAPE JUSTICE: BEYOND THE CRIMINAL LAW 18, 21 (Anastasia Powell et al. eds.) (2015).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 25.

just thought there was a contradiction there. Yeah, I don't know, they gave him six months because of the time that he did it and the time now and that he hasn't been re-caught and to me, so he hasn't been caught because of either luck, who knows if he did it or he didn't do it. To me once is enough. Oh there's not a pattern here. So what? That hurt me. If anything I had to say bad about the day where he was sentenced it was, yeah you haven't done it to anyone else so we'll just give you six months.<sup>119</sup>

When cases are settled, a defendant takes a guilty plea, or during sentencing, the defendant does not have to necessarily admit to wrongdoing to the extent the victim feels he or she was harmed.<sup>120</sup> Offenders have various avenues to avoid responsibility including denying offenses, minimizing the charges through plea bargaining, to remain silent, and to introduce mitigating factors at sentencing.<sup>121</sup> Those avenues available to defendants can impede a victim-survivor's goal to have their assault acknowledged within the criminal justice system.<sup>122</sup>

While victim-survivors want acknowledgement of the harm that they experienced in the criminal legal system, holding perpetrators accountable does not always align with adversarial system under which criminal cases are adjudicated.<sup>123</sup> However, that is the balancing act within which VISs exist in the criminal legal system.<sup>124</sup> VISs serve a critical function in giving victims a voice and the greater community a role in the legal process but have to fulfill that need for victims within the protections built into the system to protect the rights of defendants.<sup>125</sup>

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<sup>119</sup> *Id.* at 25–26.

<sup>120</sup> *Id.*

<sup>121</sup> *See Clark, supra* note 116, at 26.

<sup>122</sup> Henry, Flynn & Powell, *supra* note 108 at 26.

<sup>123</sup> *Id.* at 27.

<sup>124</sup> *See supra* Part I.

<sup>125</sup> *See supra* Part I.

### III. CRITICISMS OF VISS: VARIABILITY AND IMPACT ON DEFENDANTS

A common criticism of victim impact statements, discussed in *Booth*, is that they focus on the victim's feelings and the emotional impact of the crime, rather than the blameworthiness of the defendant or the severity of the punishment he or she should receive.<sup>126</sup> As Justice Powell said in the majority opinion in *Booth*:

Allowing the jury to rely on a VIS therefore could result in imposing the death sentence because of factors about which the defendant was unaware, and that were irrelevant to the decision to kill. This evidence thus could divert the jury's attention away from the defendant's background and record, and the circumstances of the crime.<sup>127</sup>

However, even though the Supreme Court's rationale against allowing VISSs in *Booth* was about a man getting the death penalty in a murder case, that line of reasoning to exclude VISSs extended to other crimes.<sup>128</sup> The circumstances of sexual assault cases are different, particularly given the high number of female victim-survivors and the low rate at which sexual assaults are reported.<sup>129</sup>

Another criticism of VISSs is that victim impact testimony brings an element of arbitrariness into the sentencing process both in jury and in bench trials.<sup>130</sup> This is also a criticism born out of VISSs in capital trials, where a jury in particular is more likely to identify with the experience of the victim or the victim's family than the defendant's story and the circumstances that led up to the crime being committed.<sup>131</sup> Some of that variability also comes from how well the victim is able to articulate

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<sup>126</sup> Cassell, *supra* note 93 at 627.

<sup>127</sup> *Booth v. Maryland*, 482 U.S. 496, 505 (1987).

<sup>128</sup> Cassell, *supra* 93 at 628.

<sup>129</sup> *National Crime Victimization Survey 2016*, *supra* note 84; Miller, *supra* note 28.

<sup>130</sup> Diana Minot, *Silenced Stories: How Victim Impact Evidence in Capital Trials Prevents the Jury from Hearing the Constitutionally Required Story of the Defendant*, 102 J. CRIM. L. & CRIMINOLOGY 227 (2013). See *Booth*, 482 U.S. at 505 (discussing that capital sentencing decisions based on victim impact statements are arbitrary because statements can vary from case to case).

<sup>131</sup> Minot, *supra* note 130 at 238; See *Booth*, 482 U.S. at 505 (discussing that capital sentencing decisions based on victim impact statements are arbitrary because statements can vary from case to case).



their experience in a way that sways a jury and judges, even though judges are typically difficult to sway through VISs.<sup>132</sup>

With respect to protecting the defendant's rights during sentencing, there are safeguards in place to ensure that a defendant's story is heard by way of the Due Process Clause under the Fourteenth Amendment.<sup>133</sup> The defendant gets the opportunity to rebut evidence that relates to the victim earlier in the trial, before the sentencing phase.<sup>134</sup> In *Booth*, the Court did not allow victim impact evidence because it would be "difficult, if not impossible" for the defendant to rebut that evidence without shifting the focus of the sentencing hearing away from the defendant and toward the victim.<sup>135</sup> However, the tactical decision of whether or not the defendant should rebut an impact statement does not vary from making that same decision regarding other witnesses.<sup>136</sup> Since there are constitutional protections for defendants during the rest of the trial where they can question elements of the victim's story and give the factfinder a chance to hear the defendant's side of the story, VISs at sentencing should focus on the victim-survivor.

While VISs inherently may not intentionally place certain victims in higher esteem over others, studies have shown that in sexual assault cases decades after *Payne* was decided, VISs by individuals who are well-educated, have counsel, and are generally more high-profile are more likely to be heard and even circulated outside the courtroom.<sup>137</sup> Victims most likely to submit VISs are women, elderly, pregnant, or a minor, someone victimized at home, knew the offender, or the offender was male.<sup>138</sup> VISs are generally written submissions rather than spoken in court.<sup>139</sup> Victims who choose to speak are typically white or of a higher occupational status.<sup>140</sup> Even in the high-profile sexual assault cases discussed earlier, the 150 women who spoke at Larry Nassar's sentencing included several Olympic medalists, who are well-known to the public, such as Aly Raisman, whose VIS was circulated on social media.<sup>141</sup> Sexual assault victims typically do not get that platform of

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<sup>132</sup> See Minot, *supra* note 130 at 245.

<sup>133</sup> See *Payne v. Tennessee*, 501 U.S. 808 (1991).

<sup>134</sup> *Id.* at 828.

<sup>135</sup> *Id.* at 826.

<sup>136</sup> *Id.*

<sup>137</sup> Miller, *supra* note 28 at 1446 (providing statistics on victims who give impact evidence at sentencing).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> Cacciola, *supra* note 20.

support at sentencing, evidenced by the low number of victims who elect to provide a statement or speak at sentencing.<sup>142</sup>

#### IV. INFLUENCE OF JUDGE'S CONDUCT ON THE EFFECTIVENESS OF VISs?

A judge's demeanor can have a strong impact on a victim's experience in providing an impact statement at sentencing.<sup>143</sup> Judges typically are not as swayed by VISs as easily as a jury.<sup>144</sup> But given the number of high-profile sexual assault cases where a judge sentenced the defendant, it is important to look at the bench's influence on the effectiveness of VISs. Studies show that sexual assault victims who provided impact statements at sentencing had different experiences and reactions from judges depending on the circumstances under which the assault occurred.<sup>145</sup>

One study found that judges are more sympathetic toward a VIS when the victim has been sexually assaulted by a stranger, or if the crime was particularly egregious such as the rape of an elderly person.<sup>146</sup> Conversely, a judge was less likely to be moved by a VIS in a sexual assault case when the victim was "a prostitute compared to a respectable citizen," or when the judge considered the victim to be complicit in his or her own assault because the victim was either dating the offender or there was alcohol involved.<sup>147</sup> That point of view is based on what feminists call "rape mythology," which makes judges want to identify "real rape" and "real victim."<sup>148</sup> Those prejudices can complicate how sexual assault victims present their impact statements.

Research shows that in order for victims to feel the therapeutic benefits of giving an impact statement, they need to feel validated by the legal system.<sup>149</sup> When the contents of a VIS was unfairly scrutinized

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<sup>142</sup> Miller, *supra* note 28 at 1446.

<sup>143</sup> See *infra* text accompanying notes 128–36.

<sup>144</sup> See *infra* text accompanying notes 125–27.

<sup>145</sup> Cacciola, *supra* note 20.

<sup>146</sup> *Id.*

<sup>147</sup> Miller, *supra* note 28 at 1447.

<sup>148</sup> *Id.* "Rape mythology" is based on commonly-held beliefs that rapes occur under narrow circumstances and to certain people, and is used to undermine victim-survivors' experiences. Lauren Parcher, "An Aura of Disbelief: Rape Mythology and Victim Blaming in the Legal Response to Disclosure of Sexual Violence," 22 *Social Justice and Community Engagement* 16–17 (2017).

<sup>149</sup> Miller, *supra* note 28 at 1447.

by either defense counsel or victim-blaming judges, studies show providing the statement was a source of more harm to the victim.<sup>150</sup> For example, some judges in one study did not believe they could learn any new information from a VIS that they did not already know from other testimony during trial:

The judge was handed the [VIS]. . . . He just took the envelope and waved it at me and said, “Is there anything in here that the complainant hasn’t already told me?” . . . And I said, “I couldn’t say, your Honor,” and he said, “Oh, I’m sure it’s all the same,” and he just put it back in the file, unread . . . That was the end of it.<sup>151</sup>

On the flip side, research shows that other judges believed victim impact testimony was essential to determine whether there were any mitigating factors in the case.<sup>152</sup> In one case, a judge refused to give an offender with no criminal record more than a two-year sentence in a penetrative sexual assault on an unconscious woman because the victim had chosen not to file a VIS.<sup>153</sup> The judge said that without a VIS, he was going to assume that no harm was done and that was a mitigating factor.<sup>154</sup>

Other judges are more supportive of victims’ claims of harm.<sup>155</sup> In that same study, researchers found judges who allowed assault victims to include harm of a sexual nature in their statement, even though the offender was convicted of nonsexual assault.<sup>156</sup> Another judge recognized the harm a sex worker experienced after she sexually assaulted, even though she did not provide a VIS.<sup>157</sup> Sometimes a prosecutor might make a tactical decision based on the severity of the crime and the judge’s reputation to decide whether or not to spend a lot of time on claims of harm.<sup>158</sup>

During the Larry Nassar sentencing, Judge Aquilina was in the national spotlight for giving a large platform to Nassar’s victims, but

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<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 1452.

<sup>152</sup> *See id.*

<sup>153</sup> *Id.*

<sup>154</sup> Miller, *supra* note 28 at 1452.

<sup>155</sup> *Id.* at 1452.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

her conduct also raised questions about whether her lack of partiality was crossing a line.<sup>159</sup> One of the questionable remarks during sentencing occurred when Judge Aquilina said “Our Constitution does not allow for cruel and unusual punishment. If it did . . . I would allow some or many people to do to him what he did to others,” a statement that could be interpreted as wishing for Nassar to be raped in prison.<sup>160</sup> Those words were akin to an “eye for an eye” mentality that may be heard in a VIS, but not from a judge, given a judge’s charge to remain impartial.<sup>161</sup> The rationale for Judge Aquilina’s demeanor during the sentencing hearing was that Nassar had already been found guilty, and at this stage in the proceedings, judges are encouraged to say what they think.<sup>162</sup>

The Larry Nassar case was an exception for a variety of reasons.<sup>163</sup> The extent of the harm Nassar inflicted, the number of victims, as well as his standing as a high-profile doctor for USA Gymnastics, all made Nassar different from the average defendant.<sup>164</sup> Those factors raise the question of whether judges should follow Judge Aquilina’s lead in handling sexual assault cases by taking on the advocate’s role during sentencing. The problem with a judge advocating for victim-survivors is that it may be seen as contrary to the bench’s role as an impartial party.<sup>165</sup> As public defender Rachel Marshall states, “By aligning herself so closely with the victims and so clearly rooting against Nassar, Aquilina also reinforced the dangerous idea that judges can and should be in sync with public sentiment.”<sup>166</sup>

However, if judges are not sympathetic to the harms inflicted upon a victim, then it could have chain reaction on whether victim-survivors are willing to submit statements, whether victim-survivors report their assault in the first place, and ultimately whether the community has a stake in the criminal legal process. The Nassar sentencing showed the importance of strength in numbers as more than 150 women testified at sentencing, and the number of victim-survivors who wanted speak

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<sup>159</sup> See Marshall, *supra* note 25.

<sup>160</sup> *Id.*

<sup>161</sup> See *id.*

<sup>162</sup> Cacciola, *supra* note 20; “At a sentencing, a judge can say and is encouraged to say just what she thinks,” New York University law professor Stephen Gillers told The New York Times; *But see* Rachel Marshall, *supra* note 135 (arguing that judges should not openly speak in favor of victims).

<sup>163</sup> *Supra* notes 20-24.

<sup>164</sup> *Supra* notes 20-24.

<sup>165</sup> Marshall, *supra* note 25.

<sup>166</sup> *Id.*

grew as the hearing gained more public attention.<sup>167</sup> Judge Aquilina made it clear that that stage of the proceedings was for the victim-survivors, and gave each person a words of encouragement as they took the stand.<sup>168</sup>

The Nassar sentencing opened the door to give victim-survivors a voice in other parts of the legal process.<sup>169</sup> Just a few months later at Bill Cosby's trial where he was convicted of drugging and sexually assaulting Andrea Constand in 2004, the judges allowed five women who made similar accusations against Cosby but were not involved in the present case, to testify.<sup>170</sup> At Cosby's first trial on those same charges in 2017, before the #MeToo movement was in full force and before the Larry Nassar sentencing, only one additional alleged victim was permitted to testify and the trial ended with a hung jury.<sup>171</sup> While that is another example of a high-profile case, it does show the value in having victim-survivors more involved in the criminal legal process because the testimony of the five additional women who spoke at Cosby's trial was persuasive.<sup>172</sup> The additional victim testimony changed the case from he-said-she-said, a refrain often used to minimize in sexual assault cases, to showing Cosby's pattern of sexual assault.<sup>173</sup>

## V. PROPOSED RECOMMENDATIONS

### A. VISs and sentencing recommendations

The purpose of a VIS is to help the factfinder understand the harm experienced by the victim.<sup>174</sup> It is not the victim's job to suggest a punishment for the defendant.<sup>175</sup> To protect the actual sentencing part of the criminal process, victims should be prohibited from suggesting that the defendant should, for example, "die in prison."<sup>176</sup> Doing so may unduly inflame a jury's emotions or undermine the prosecutor's trial

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<sup>167</sup> Ross Kramer and Suzanne Jaffe Bloom, LAW 360, "Cosby's Conviction And How #MeToo Is Affecting Legal Cases" (last updated Oct. 10, 2018).

<sup>168</sup> Cacciola, *supra* note 20.

<sup>169</sup> *See infra* text accompanying note 143.

<sup>170</sup> Kramer & Bloom, *supra* note 167.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *See supra* Part I.

<sup>175</sup> *See supra* Part I.

<sup>176</sup> *See supra* Part I.

strategy.<sup>177</sup> Before Boston Marathon bomber Dzhokhar Tsarnaev's sentencing, the family of Martin Richard, a boy who was killed in the bombing took out a page in *The Boston Globe* to ask prosecutors to not seek the death penalty.<sup>178</sup> The Richard family argued that the death penalty would lead to endless appeals and prevent the family from moving on.<sup>179</sup> Tsarnaev was later sentenced to death, as the purpose of the Richard family's statement was to show "aggravating factors, the extreme atrocity, the impact on innocent people."<sup>180</sup>

*B. Valuing VISs based on content, not existence*

Experiences of sexual assault victim-survivors and judges' responses to victim impact testimony show the need for additional protections to allow victim-survivors to be able to have a voice in the criminal legal process.<sup>181</sup> First, the absence of a VIS per se should not reduce the credibility of the victim's experience. However, the defendant who is found guilty of sexual assault should not get a reduced sentence because a VIS was not submitted.<sup>182</sup> There are legitimate reasons for a victim to choose to not provide a VIS including fear of not being believed, fear of retribution, or not wanting to go through the trauma of facing their attacker in the courtroom.<sup>183</sup> Penalizing the victim for choosing to not provide a VIS does not increase the likelihood of that victim, or other sexual assault victim-survivors to provide VISs, it merely creates a system where victim-survivors are continually afraid to come forward.<sup>184</sup>

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<sup>177</sup> Miller, *supra* note 28 at 1450.

<sup>178</sup> *Id.*

<sup>179</sup> Katharine Q. Seelye, *Parents of Youngest Boston Marathon Victim Oppose Death Penalty for Tsarnaev*, *THE NEW YORK TIMES* (April 17, 2015), <https://www.nytimes.com/2015/04/18/us/martin-richard-boston-marathon-bombing.html>.

<sup>180</sup> *Id.*; Jennifer Levitz, *Boston Marathon Bomber Dzhokhar Tsarnaev Sentenced to Death, Apologizes to Victims*, *THE WALL STREET JOURNAL* (June 24, 2015), <https://www.wsj.com/articles/dzhokhar-tsarnaev-apologizes-before-being-sentenced-to-death-for-boston-bombing-1435170191>.

<sup>181</sup> *See supra* Part II.

<sup>182</sup> Miller, *supra* note 28 at 1452.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*; Henry, Flynn & Powell, *supra* note 108.

*C. Addressing bias based on VIS comprehension*

Judges should be asked to control the likability of victim by looking at harm in a more generic way.<sup>185</sup> This will address concerns about the factfinder being swayed by the eloquence of the victim impact statement and leading to bias in favor of those who are better educated, well-spoken victim.<sup>186</sup> Going back to the evolution of the role of victims in the American criminal justice system, the process moved away from victims hiring prosecutors to prosecutors working for the state or municipality.<sup>187</sup> The judge is required to impose a sentence based on the harm done to the state.<sup>188</sup> When it comes to assessing that harm, a judge should look at how the defendant's actions harm society, including what the sentence will mean for future victim-survivors of sexual assault.<sup>189</sup>

As part of that analysis, judges should be trained to not look for the so-called "real rape narrative."<sup>190</sup> People have a tendency to look for familiar themes in interactions, for example, the tendency to warn women against engaging in "risky" behaviors.<sup>191</sup> Because of that responsibility often put on women, sexual assault is often reduced to a certain set of facts and a type of event where women are held accountable for getting themselves into a situation or for not preventing it in the first place.<sup>192</sup> The most common narrative around sexual assault is typically "a stranger assault, violent, the result of risky activities by women."<sup>193</sup> While variation in VISs may at first glance seem to bring bias into the sentencing process based on how a victim shares his or her experience, judges should instead view the spectrum of VISs as a way to fight the "real rape narrative" and instead acknowledge that the legal system needs to respond to sexual violence through different, multi-layered approaches.<sup>194</sup> Victim-survivors do not all have the same views

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<sup>185</sup> See *infra* Part VI-C.

<sup>186</sup> See *infra* Part VI-C.

<sup>187</sup> Stevens, *supra* note 33 at 1–2.

<sup>188</sup> See Kaufman, J., *Sentencing: The Judge's Problem*, THE ATLANTIC (Jan. 1960), <https://www.theatlantic.com/past/docs/unbound/flashbks/death/kaufman.htm>.

<sup>189</sup> *Id.*

<sup>190</sup> Asher Flynn, *Sexual Violence and Innovative Responses to Justice*, in RAPE JUSTICE: BEYOND THE CRIMINAL LAW 92, 94 (Anastasia Powell et al. eds., 2015).

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 97.

and not all sexual assaults are the same, and that does not make the pain of any victim less legitimate.<sup>195</sup>

*D. Challenge the way victims are perceived*

Judges could receive special training on understanding the trauma sexual assault victim-survivors experience, that could help them understand how victims respond to the criminal justice system. The current criminal prosecution process is adversarial and is designed to hold the defendant accountable and gauge the defendant's blameworthiness.<sup>196</sup> But the process is not built to accommodate the needs and interests of the victim.<sup>197</sup> However, the victim needs to have a voice in the system for it to have credibility and judges play a large role in securing that within the court system<sup>198</sup>. If judges understand of the plight of sexual assault victim-survivors, others may feel comfortable coming forward and providing VISs. While the judge in the Nassar case may have crossed some lines by putting on the activist judge hat,<sup>199</sup> one thing other judges should take away from her example that there is value in letting victims know that their voice matters in the criminal legal process. In a world where victims still see the legal process as the primary way to get justice for the harm they experienced, it is important for judges to send victims that message.<sup>200</sup>

Another way to make the legal process more accommodating of sexual assault victim-survivors, thereby making them more likely to provide impact statements, is through specialized courts.<sup>201</sup> Special courts like that were introduced in South Africa in 1993 to improve treatment of victim-survivors in the criminal prosecution process, to encourage collaboration between agencies, and to improve sexual assault reporting and conviction rates.<sup>202</sup> By 2002, courts were required to have victim assistance services available such as separate waiting rooms, private consultation rooms, and on-hand counseling services.<sup>203</sup> While the

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<sup>195</sup> See *supra* Part II.

<sup>196</sup> See *supra* Part IV.

<sup>197</sup> *Supra* Part I.

<sup>198</sup> See *supra* Part IV

<sup>199</sup> See Marshall, *supra* note 25.

<sup>200</sup> See *supra* Part II.

<sup>201</sup> Flynn, *supra* note 190 at 98.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*



program had mixed results with respect to giving victim-survivors access to resources, delays in cases being heard, and failure to communicate the outcome of cases to victim-survivors, overall victim satisfaction with the process increased compared to the regular court process, regardless of the outcome of their cases.<sup>204</sup> That also led to an increase in conviction rates with 62% convictions rates for rape in specialized courts compared to 42% in regional courts from January 2002 to November 2003.<sup>205</sup> In Victoria, Australia, instead of entire specialized courts, specially trained judicial officers preside over sexual violence cases.<sup>206</sup> The courts also have time restrictions that a trial must take place within three months of the accused's arraignment.<sup>207</sup> Those examples show that there are ways to make the legal process more inviting to victim-survivors and encourage them to take advantage of the rights afforded to them under the Crime Victims' Rights Act, and by the Supreme Court.

## VI. CONCLUSION

VISs are a crucial part of the criminal justice process and stakeholders within the court system should do more to include the voice of victim-survivors of sexual assault in the courtroom.<sup>208</sup> In *Payne*, the Court sought to restore balance toward giving the victim a chance to discuss the harm inflicted upon them by the defendant.<sup>209</sup> However, despite that decision and the Crime Victims' Rights Act, sexual assaults continue to be one of the lowest reported crimes in the United States as victim-survivors do not feel comfortable providing a VIS.<sup>210</sup> Better resources in the courtroom and more training for judges to handle sexual assault victim-survivors will ensure the next time a sexual assault victim-survivor steps up to give an impact statement, they will feel the sense of strength and empowerment that Judge Aquilina sought to give in her courtroom.<sup>211</sup>

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<sup>204</sup> *Id.* at 99

<sup>205</sup> *Id.* While the number of specialist courts have fluctuated over the years due to funding, the South African government has committed to opening 22 new special courts for sexual offenses as of 2013. *Id.* at 100.

<sup>206</sup> Flynn, *supra* note 190 at 100.

<sup>207</sup> *Id.*

<sup>208</sup> See *supra* Part I–III, V–VI.

<sup>209</sup> *Payne v. Tennessee*, 501 U.S. 808 (1991).

<sup>210</sup> Miller, *supra* note 28.

<sup>211</sup> See *supra* Part VI.