

## The Larry Nassar Hearings: Victim Impact Statements, Child Sexual Abuse, and the Role of Catharsis in Criminal Law

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## COMMENT

### THE LARRY NASSAR HEARINGS: VICTIM IMPACT STATEMENTS, CHILD SEXUAL ABUSE, AND THE ROLE OF CATHARSIS IN CRIMINAL LAW

ROSEMARY ARDMAN\*

“[A] parade of horror and catharsis,” read the *Washington Post* headline after the first day of victim impact statements at Larry Nassar’s sentencing.<sup>1</sup> After being accused of sexually abusing hundreds of girls during his decades-long tenure as team physician for USA Gymnastics, Nassar entered into an unusual plea agreement that allowed unlimited victim impact testimony during his sentencing hearings in Ingham County, Michigan.<sup>2</sup> Nearly 150 victims addressed the court—and Nassar himself—over the course of eight days, eloquently describing the harm they suffered and the systemic complicity that allowed his crimes to continue for decades.<sup>3</sup> Judge Rosemarie Aquilina celebrated the victims throughout the proceedings, praising their courage and the power of their testimony.<sup>4</sup> She also vividly condemned Nassar, at one point suggesting that a fitting punishment would be for him to suffer the same sexual violations that he had inflicted.<sup>5</sup> Instead, Nassar, age fifty-four, received 40 to 175 years in prison.<sup>6</sup> The hearings were broadcast

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1. Will Hobson, *At Larry Nassar Sentencing Hearing, a Parade of Horror and Catharsis*, WASH. POST (Jan. 18, 2018, 11:42 AM), [https://www.washingtonpost.com/sports/olympics/at-larry-nassar-sentencing-hearing-a-parade-of-horror-and-catharsis/2018/01/18/19bed832-fc55-11e7-8f66-2df0b94bb98a\\_story.html](https://www.washingtonpost.com/sports/olympics/at-larry-nassar-sentencing-hearing-a-parade-of-horror-and-catharsis/2018/01/18/19bed832-fc55-11e7-8f66-2df0b94bb98a_story.html).

2. *People v. Nassar*, No. 345699, 2020 WL 7636250, at \*1 (Mich. Ct. App. Dec. 22, 2020). Nassar pled guilty to seven counts of first-degree criminal sexual conduct. In exchange, prosecutors dropped eight other counts and agreed not to pursue further charges. *Id.*

3. *Id.* at \*2.

4. *Id.*

5. *Id.* at \*6.

6. *Id.* at \*2.

around the world, hailed as a watershed moment for the #MeToo Movement and victims' rights.<sup>7</sup> A few years later, however, appellate courts in Michigan nearly granted Nassar's motions for resentencing and judicial disqualification due to Judge Aquilina's bias against him and partiality toward the victims.<sup>8</sup>

The Nassar hearings provide a vista into challenging legal questions regarding both victims' rights and child sexual abuse.<sup>9</sup> Victim impact statements have been controversial for decades, but Nassar's sentencing put them to unprecedented use.<sup>10</sup> The hearings were unique in the number of statements admitted and Judge Aquilina's extraordinary efforts to create a healing environment for the women and girls who testified.<sup>11</sup> This approach, and the victims' testimony itself, garnered incredible media attention and public praise.<sup>12</sup> Yet in this acclaim, Nassar's case exemplifies the dissonance in society's response to child sexual abuse.<sup>13</sup> Nassar was loathed across the world during the hearings, but his crimes were possible only because so many around him disbelieved the victims, or did not care.<sup>14</sup> How should we understand the celebration of the victims' testimony in light of this earlier indifference?

Catharsis is a prominent theme in discourse about victims' rights—invoked both by courts and in popular commentary—and this concept can illuminate the paradox that characterizes the use of victim impact statements at Nassar's sentencing.<sup>15</sup> Classically, as articulated by Aristotle, catharsis

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7. E.g., Carla Correa, *The #MeToo Moment: For U.S. Gymnasts, Why Did Justice Take So Long?*, N.Y. TIMES (Jan. 25, 2018), <https://www.nytimes.com/2018/01/25/us/the-metoo-moment-for-us-gymnasts-olympics-nassar-justice.html>; Eric Levenson, *Larry Nassar's Sexual Abuse Victims Finally Get Their Days in Court*, CNN (Jan. 15, 2018, 12:27 PM), <https://www.cnn.com/2018/01/15/us/larry-nassar-gymnastics-me-too-sentence>; Eren Orbey, *The Victims of Larry Nassar Who Dared to Come Forward First*, NEW YORKER (May 25, 2019), <https://www.newyorker.com/culture/culture-desk/the-victims-of-larry-nassar-who-dared-to-come-forward-first>.

8. See *infra* Section I.A.2.

9. See *infra* Part II.

10. See *infra* Section II.A.

11. See *infra* Section I.A.

12. E.g., Jeffrey Toobin, *How Larry Nassar's Trial Made the Case for Cameras in the Court*, NEW YORKER (Feb. 8, 2018), <https://www.newyorker.com/news/daily-comment/how-larry-nassars-trial-made-the-case-for-cameras-in-the-court>; Bridget Read, *What the #MeToo Movement Can Learn from the Women Who Put Larry Nassar Away*, VOGUE (Jan. 26, 2018), <https://www.vogue.com/article/what-metoo-can-learn-from-women-who-put-larry-nassar-away>; see *supra* note 7.

13. See *infra* Section II.C.

14. See *infra* Sections I.A.1, II.C.

15. See *infra* Sections I.C, II.C. For examples of commentary on the “catharsis” of the Nassar hearings, see, for example, Hobson, *supra* note 1 (describing the sentencing as “a parade of horror and catharsis”); Orbey, *supra* note 7 (characterizing Nassar's victims' testimony as a “cathartic, excoriating chorus”); Bonnie D. Ford, *Judgement Call*, ESPN (July 12, 2019),

refers to the strange pleasure evoked by tragic drama, the enjoyment an audience finds in the depiction of terrible events.<sup>16</sup> Sigmund Freud, the founder of psychoanalysis, reframed catharsis as a therapeutic principle, arguing that patients could heal from trauma by expressing repressed memories and emotions.<sup>17</sup> Law has shown a striking interest in both the therapeutic and dramatic modes of catharsis.<sup>18</sup> The cathartic, healing power of testimony is a common justification for victim impact statements, and this logic was at the heart of Nassar's sentencing arrangement.<sup>19</sup> Nassar's case also exemplifies what the Supreme Court has called "community catharsis": the way the criminal process channels the outrage of the public and reinforces social norms.<sup>20</sup> However, by identifying catharsis as a legal goal, courts both invoke and elide the concept's controversial intellectual history.<sup>21</sup>

Through a close analysis of the Nassar hearings, this Comment will explore the relationship between victim impact statements, catharsis, and society's response to child sexual abuse.<sup>22</sup> Victim impact statements have been subject to vigorous scholarly debate since their inception, celebrated by supporters—a rare coalition of progressives and conservatives—for humanizing criminal law, and attacked by critics for making impossible promises to victims and encouraging a turn to revenge within the criminal system.<sup>23</sup> This Comment makes four contributions to this extensive body of scholarship. First, it explores how the idea of catharsis has informed the law's understanding of the benefits of victim impact statements.<sup>24</sup> Second, it uses the legal concept of community catharsis to present a novel critique of the statements' expressive value.<sup>25</sup> Third, it shows how the role of victims at

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[https://www.espn.com/espn/feature/story/\\_/id/27156746/journey-judge-rosemarie-aquilina](https://www.espn.com/espn/feature/story/_/id/27156746/journey-judge-rosemarie-aquilina) (describing the hearings as "a collective catharsis of grief, anger and resolve"); Dan Barry, Serge F. Kovaleski, & Juliet Macur, *As F.B.I Took a Year to Pursue the Nassar Case, Dozens Say They Were Molested*, N.Y. TIMES (Feb. 3, 2018), <https://www.nytimes.com/2018/02/03/sports/nassar-fbi.html> (stating that "a communal catharsis has played out" at the Nassar hearings); Scott Cacciola, *Victims in Larry Nassar Abuse Case Find a Fierce Advocate: The Judge*, N.Y. TIMES (Jan. 23, 2018), <https://www.nytimes.com/2018/01/23/sports/larry-nassar-rosemarie-aquilina-judge.html> (describing Judge Aquilina's efforts to create "a cathartic forum" for the victims).

16. See ARISTOTLE, POETICS 1449b (M.E. Hubbard, trans.), reprinted in A NEW ARISTOTLE READER 543–44 (J.L. Ackrill, ed., 1987) (describing catharsis as the *telos* of tragic drama).

17. JOSEF BREUER & SIGMUND FREUD, STUDIES ON HYSTERIA 8 (James Strachey, trans. & ed., Basic Books 2000) (1895).

18. See *infra* Section I.C. While the dramatic form of catharsis centers the experience of the audience, in Freud's therapeutic conception, catharsis is for the speaker.

19. See *infra* Sections I.C.2, II.A.2.

20. See *infra* Section I.C.3.

21. See *infra* Section I.C.1.

22. See *infra* Part II.

23. See *infra* Section II.A.

24. See *infra* Sections I.C, II.A.

25. See *infra* Sections I.C.3, II.A.3, II.B.

Nassar's sentencing lays bare a deep cultural ambivalence toward child sexual abuse—competing disgust and fascination, fear and indifference.<sup>26</sup> Fourth, it presents an alternative model of victim impact testimony that combines the strengths of both restorative justice and the traditional criminal process.<sup>27</sup>

This Comment will ultimately argue that we should be skeptical of the public catharsis of events like Nassar's sentencing, which can disguise prurience as social change.<sup>28</sup> Though lauded as a sign of cultural transformation, the outrage and sensationalism that surrounded the hearings functioned more to absolve the public of its own complicity in child sexual abuse.<sup>29</sup> Nassar's prison sentence was just, but the use of victim impact statements in the hearings encouraged the audience to fixate on him as a scapegoat rather than confront the political, social, and familial norms that facilitated his crimes.<sup>30</sup> For this reason, this Comment contends, victim impact statements should be separated from the sentencing process into a parallel proceeding capable of illuminating the culpability of a wider range of actors.<sup>31</sup>

Part I provides an overview of Nassar's sentencing and appeal,<sup>32</sup> the legal landscape of victim impact statements,<sup>33</sup> and criminal law's use of the concept of catharsis.<sup>34</sup> Part II first discusses three major goals of victim impact statements and their relationship to catharsis.<sup>35</sup> Second, it draws on sociology and literary theory to critique the way that individual criminal proceedings like Nassar's have come to symbolize deeper social reckonings.<sup>36</sup> Third, it considers how the Nassar hearings illuminate the cyclical panic and apathy that has defined society's response to child sexual abuse.<sup>37</sup> Finally, it argues that victim impact statements should be severed from sentencing to better support victims, protect defendants' rights, and facilitate broader forms of accountability.<sup>38</sup>

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26. *See infra* Section II.C.

27. *See infra* Section II.D.

28. *See infra* Section II.C.

29. *See infra* Sections II.B–C.

30. *See infra* Sections II.B–C.

31. *See infra* Section II.D.

32. *See infra* Section I.A.

33. *See infra* Section I.B.

34. *See infra* Section I.C.

35. *See infra* Section II.A.

36. *See infra* Section II.B.

37. *See infra* Section II.C.

38. *See infra* Section II.D.

## I. BACKGROUND

Nassar's sentencing exemplifies the power of victim impact statements ("VIS"), the signature achievement of the victims' rights movement.<sup>39</sup> The statements, which can be either oral or written, provide a legal mechanism for victims to describe to the court the harm they have suffered and, in most cases, give input on the sentencing decision.<sup>40</sup> Victims' rights first became a major political cause in the 1970s, championed by an unusual coalition of feminists and tough-on-crime conservatives, and VIS is now protected federally and in all fifty states.<sup>41</sup> The Nassar hearings highlight one of the major justifications of VIS: the idea that speaking at sentencing provides a cathartic outlet for victims.<sup>42</sup> Nassar's sentencing also illustrates a more public form of catharsis: the ability of the criminal process to provide "community catharsis" by channeling collective anger and expressing social norms.<sup>43</sup>

### A. *The Nassar Hearings*

On November 22, 2017, Lawrence Gerard Nassar pleaded guilty in the Ingham County Circuit Court before Judge Rosemarie Aquilina to seven counts of first-degree criminal sexual conduct.<sup>44</sup> The charges stemmed from his abuse of hundreds of prepubescent and adolescent girls during his decades working as a sports doctor at Michigan State University ("MSU") and as the team physician for USA Gymnastics.<sup>45</sup> Despite complaints made as early as

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39. Jill Lepore, *The Rise of the Victims'-Rights Movement*, NEW YORKER (May 21, 2018), <https://www.newyorker.com/magazine/2018/05/21/the-rise-of-the-victims-rights-movement>.

40. See *infra* Section I.B.

41. See *infra* Section I.B. Maryland has long been a leader in victims' rights and was at the center of the first constitutional challenge to VIS. See *infra* notes 102, 129.

42. See *infra* Section I.C.2. For examples of media coverage celebrating the "catharsis" of the Nassar hearings, see *supra* note 15.

43. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571–72 (1980); see *infra* Section I.C.3.

44. *People v. Nassar*, No. 345699, 2020 WL 7636250, at \*1–2 (Mich. Ct. App. Dec. 22, 2020). As a condition of the agreement, prosecutors dropped eight additional counts of first-degree criminal sexual conduct and agreed not to pursue any additional charges. Nassar separately pleaded guilty to three further counts of first degree criminal sexual conduct in Eaton County, Michigan, and to federal child pornography charges. The child pornography charges were resolved first, and he received a sixty-year federal sentence. For the Eaton County charges, he eventually received several concurrent terms of 40 to 125 years in prison. *Id.*

45. *Id.* Among Nassar's victims were famous athletes on the USA Olympic Gymnastics Team. The role of USA Gymnastics and MSU in covering up Nassar's abuse eventually became a major scandal for both institutions. See *infra* notes 46–47.

1997,<sup>46</sup> an internal investigation by MSU in 2014,<sup>47</sup> and an FBI investigation that began in July 2015,<sup>48</sup> Nassar remained employed until September 2016, when the *Indianapolis Star* reported allegations from several victims.<sup>49</sup> Finally, in 2017, Nassar was charged with first-degree criminal sexual conduct and entered a plea agreement that provided a minimum sentence of twenty-five to forty years, with the maximum to be determined by the court.<sup>50</sup> The plea also permitted unlimited victim impact testimony, and over 150 women and girls delivered statements.<sup>51</sup> The hearings were a media sensation, making headlines around the country and lauded as a major moment in the reckonings of the #MeToo Movement.<sup>52</sup>

### 1. *The Ingham County Sentencing*

Over the course of eight days, Nassar’s victims described the abuse they endured and its lingering effects on their lives.<sup>53</sup> Unusually, the judge directed Nassar to sit in the witness box, facing the victims, and many victims

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46. *People v. Klages*, 984 N.W.2d 822, 823–27 (Mich. Ct. App. 2021). In 1997, several young gymnasts reported abuse to Kathie Klages, a MSU gymnastics coach and youth gymnastics administrator who had referred numerous patients to Nassar. *Id.* at 824. She expressed disbelief and said that “a lot could go wrong” if the girls continued making allegations. *Id.* at 825. Following Nassar’s sentencing, Klages was convicted of lying to a peace officer for denying that she had received complaints about Nassar, but her conviction was overturned because her denial was not “a material fact” in the investigation. *Id.* at 825–29.

47. *Id.* at 825–26. Charges related to Nassar’s crimes were also brought against Lou-Anna Simon, MSU’s former president, and William Strampel, former dean of MSU’s College of Osteopathic Medicine. *Id.* at 826. Simon was charged with making false statements, but the case was dismissed for lack of evidence. *People v. Simon*, No. 354013, 2021 WL 6059599, at \*1, \*7 (Mich. Ct. App. Dec. 21, 2021). Strampel was convicted of willful neglect of duty for failing to properly supervise Nassar—and misconduct in office for his own sexual exploitation of students—and sentenced to eleven months in prison. *People v. Strampel*, No. 350527, 2021 WL 137609, at \*1, 1 n.1 (Mich. Ct. App. Jan. 14, 2021).

48. A report by the Office of the Inspector General found pervasive problems with the FBI’s handling of Nassar’s case, including a disturbing lack of urgency regarding the investigation. OFF. INSPECTOR GEN., NO. 21-093, INVESTIGATION AND REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION’S HANDLING OF ALLEGATIONS OF SEXUAL ABUSE BY FORMER USA GYMNASTICS PHYSICIAN LAWRENCE GERARD NASSAR, at iv–v (July 2021), <https://oig.justice.gov/sites/default/files/reports/21-093.pdf>.

49. *Klages*, 984 N.W.2d at 826; see Tim Evans, Mark Alesia & Marisa Kwiatkowski, *Former USA Gymnastics Doctor Accused of Abuse*, INDIANAPOLIS STAR (Jan. 24, 2018, 4:35 PM), <https://www.indystar.com/story/news/2016/09/12/former-usa-gymnastics-doctor-accused-abuse/89995734/> (reporting the initial allegations against Nassar).

50. *Nassar*, 2020 WL 7636250, at \*1.

51. *Id.* at \*2.

52. See *id.* at \*9, \*11 (discussing press coverage of the case); *supra* notes 7, 12, 15.

53. *Nassar*, 2020 WL 7636250, at \*1. See generally IN OUR OWN WORDS, <https://inourownwords.us/> (last visited Apr. 4, 2023) (collecting Nassar’s victims’ testimony and the judge’s responses).

addressed Nassar directly.<sup>54</sup> The procession of girls and young women spoke to the trauma they experienced at his hands, the systemic failure of the adults and institutions around them to intervene, and their wishes regarding Nassar's fate.<sup>55</sup> Because Nassar had already received a sixty-year federal sentence on child pornography charges—virtually guaranteeing that he would die in prison—Judge Aquilina presented the hearings as a way of symbolically recognizing the harm of child sexual abuse.<sup>56</sup> On the first day of testimony, she described the task of determining Nassar's sentence by asking, “[h]ow much is a young girl's life worth?”<sup>57</sup>

After each victim delivered her statement, Judge Aquilina responded with support and comfort, sometimes speaking at length about the power of the victims' words.<sup>58</sup> She also viscerally denounced Nassar throughout the hearings.<sup>59</sup> Following one statement, the judge responded: “[Y]ou kicked him down with your words, did an awesome job with that.”<sup>60</sup> After watching a video submitted by an anonymous teenage girl on the first day of the hearings, she suggested that a fitting punishment would be for Nassar to experience the same sexual abuse as his victims.<sup>61</sup> Referring to her discretion to determine the maximum sentence, Judge Aquilina stated:

I will decide at sentencing how long. The plea agreement, which, as I said, I will honor, but on the tail end I'll make that determination. How much is a young girl's life worth? Our constitution does not allow for cruel and unusual punishment. If it did, I have to say I might allow what he did to all of these beautiful souls, these young women in their childhood, I would allow someone or many people to do to him what he did to others.

Our country does not have an eye for an eye and Michigan doesn't have the death penalty so I don't know how to answer how much is a young girl's life worth, but I have children of my own and there's not enough gold in the planet that would satisfy that question, and I think all of you victims are gold. You're valuable. I'm so very sorry this happened and, [victim], I've heard your scream. I will make a tough decision. I hope you will like it.<sup>62</sup>

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54. Typically, victims deliver their testimony to the court while the defendant remains at the defendant's table. Jamie R. Abrams & Amanda Potts, *The Language of Harm: What the Nassar Victim Impact Statements Reveal About Abuse and Accountability*, 82 U. PITT. L. REV. 71, 74–75 (2020).

55. See generally IN OUR OWN WORDS, *supra* note 53.

56. *Nassar*, 2020 WL 7636250, at \*6.

57. *Id.*

58. *Id.* at \*2.

59. *Id.* at \*15 (Shapiro, J., dissenting).

60. *Id.*

61. *Id.* at \*6 (majority opinion).

62. *Id.* (alteration in original).



After over a week of testimony, Nassar, age fifty-four, received a sentence of 40 to 175 years for the Ingham County charges.<sup>63</sup> As she imposed his sentence, the judge said, “I’ve just signed your death warrant.”<sup>64</sup> Six months later, Nassar filed motions seeking resentencing and the disqualification of Judge Aquilina due to her bias against him and her partiality to the victims.<sup>65</sup> Both motions were denied at the circuit level, and Nassar appealed.<sup>66</sup>

## 2. *The Appeal*

Although the Court of Appeals of Michigan sharply criticized Judge Aquilina’s conduct, a 2-1 majority affirmed the circuit court’s denial of Nassar’s motions.<sup>67</sup> The majority found that Judge Aquilina’s comment about cruel and unusual punishment, quoted above, “was wholly inappropriate” but not sufficient to demonstrate actual prejudice or bias.<sup>68</sup> As far as her supportive remarks to the victims: “Such expressions do not establish disqualifying bias or an appearance of impropriety. The victims are not parties to this case.”<sup>69</sup> Quoting the chief judge of the circuit court, the majority observed that Judge Aquilina “basically meant to provide ‘emotional restitution.’”<sup>70</sup> She also presented legitimate factors in support of the sentencing decision, including the crime’s impact on victims.<sup>71</sup> Finally, most of Nassar’s claims were untimely, which further persuaded the court to deny his motions for resentencing and disqualification.<sup>72</sup>

The dissent questioned the sentencing arrangement as a whole and argued that Judge Aquilina’s conduct compromised fundamental judicial norms.<sup>73</sup> The opinion particularly condemned her “wish that defendant be subjected to repeated sexual assaults as punishment for his crimes” and

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63. *Id.* at \*2. As a condition of the plea agreement, Nassar’s state and federal sentences run concurrently. *Id.*

64. *Id.* at \*15 (Shapiro, J., dissenting).

65. *Id.* at \*2 (majority opinion). In addition to her statements during the sentencing hearings, Nassar argued that Judge Aquilina demonstrated bias in later press comments, public appearances, and social media posts. *Id.*

66. *Id.*

67. *Id.* at \*1.

68. *Id.* at \*6; *see supra* text accompanying note 62.

69. *Nassar*, 2020 WL 7636250, at \*11.

70. *Id.*

71. *Id.* at \*7.

72. *Id.* at \*3. Nassar’s motion relied primarily on Judge Aquilina’s actions during sentencing, which fell well outside the fourteen-day filing window for disqualification motions. However, he also referenced her later attendance at an awards ceremony and social media activity, which had occurred within fourteen days of his filing. *Id.* The Court of Appeals questioned the propriety of these actions, but found that they did not indicate impermissible bias or impartiality. *Id.* at \*11.

73. *Id.* at \*12 (Shapiro, J., dissenting).

provided other numerous examples of her “improper” denunciations of Nassar.<sup>74</sup> While it is not inappropriate for a judge to provide solace to victims, “when statements of solidarity with the victims are repeated many, many times and intermingled with repeated denunciations of the defendant and predictions of the suffering he will endure as a result of his conviction and sentence, it changes the character of the proceeding.”<sup>75</sup> The dissent also expressed broader concern about the “unique” sentencing process that allowed unlimited victim impact testimony, in contrast to typical procedures that would have permitted statements only by the victims of the crimes covered in the plea.<sup>76</sup>

After the Court of Appeals ruled against him, Nassar petitioned the Supreme Court of Michigan for review.<sup>77</sup> Though it denied his request, the Supreme Court of Michigan stated, “[w]e share the concerns of both the Court of Appeals majority and dissent about the conduct of the sentencing judge in this case and seriously question whether the majority committed error by affirming the trial court’s denial of defendant’s motion for disqualification and motion for resentencing.”<sup>78</sup> The case presented “a close question,” but, on balance, the procedural problems with Nassar’s claims and limited precedential value of the questions weighed against taking up the appeal.<sup>79</sup> In light of these factors, the court concluded, “we decline to expend additional judicial resources and further subject the victims in this case to additional trauma.”<sup>80</sup>

### *B. The Legal Landscape of Victim Impact Statements*

A victim impact statement is evidence submitted by the victim regarding the effects of the crime, generally delivered at sentencing.<sup>81</sup> Unlike testimony at trial, when a defendant’s guilt is determined, VIS speaks to secondary attributes of the crime, typically providing information about the character of

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74. *Id.* at \*15. In addition to her remark that sexual abuse might be a fitting punishment, Judge Aquilina:

[R]epeatedly referred to defendant as a “monster” who is going to “wither away” and “disintegrate” in prison, and stated that he “will be spending the rest of his life behind bars,” “trapped in a small cell with bars” during which time the “[l]ife will be sucked out of him,” and he will be “crushed.”

*Id.* (second alteration in original).

75. *Id.* at \*16.

76. *Id.* at \*12.

77. *People v. Nassar*, 974 N.W.2d 833, 833 (Mich. 2022).

78. *Id.*

79. *Id.*

80. *Id.* at 833–34.

81. CHARLES DOYLE, CONG. RSCH. SERV., RL33679, CRIME VICTIMS’ RIGHTS ACT: A SUMMARY AND LEGAL ANALYSIS OF 18 U.S.C. § 3771, at 31–32 (2021), <https://sgp.fas.org/crs/misc/RL33679.pdf>.

the victim, the harm suffered, and any sentencing recommendations.<sup>82</sup> First implemented in the 1970s,<sup>83</sup> the use of VIS expanded dramatically over the next several decades into an established, though controversial, part of the criminal process.<sup>84</sup>

### *1. The Rise of Victims' Rights*

Victim impact statements are the hallmark achievement of the victims' rights movement, the product of an unusual alliance between feminists and law-and-order conservatives.<sup>85</sup> The movement began in the 1970s amid rising crime rates, feminist activism against sexual and domestic violence, and conservative backlash to the Warren Court's expansion of defendants' rights.<sup>86</sup> It grew dramatically under the racialized tough-on-crime politics of the 1980s, and, in 1982, President Ronald Reagan established the President's Task Force on Victims of Crime to comprehensively review the treatment of victims in the criminal system.<sup>87</sup> At the end of that year, the Task Force released its influential and troubling Final Report, concluding, "the criminal justice system has lost an essential balance. . . . [T]he system has deprived the innocent, the honest, and the helpless of its protection."<sup>88</sup> One major recommendation was to amend the Sixth Amendment—which guarantees criminal defendants protections like the right to counsel<sup>89</sup>—to also provide victims the right "to be present and to be heard at all critical stages of judicial proceedings."<sup>90</sup>

Notably, the Final Report opened with an extensive and provocative description of the unique challenges faced by victims of sexual violence.<sup>91</sup> The Report began with a fictional "composite" account of a crime victim—a middle-aged woman raped at knife-point—addressed directly to the reader: "You are a 50-year-old woman living alone. You are asleep one night when suddenly you awaken to find a man standing over you with a knife at your throat. As you start to scream, he beats and cuts you. He then rapes you."<sup>92</sup>

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82. *Id.* at 27.

83. VIS was developed in 1976 by the chief probation officer of Fresno County, California, though this early version provided only "an objective inventory of victim injuries and losses." 153 CONG. REC. E2227 (daily ed. Oct. 24, 2007) (statement of Rep. Jim Costa).

84. *See infra* Sections I.B.1–3.

85. Lepore, *supra* note 39.

86. *Id.*

87. PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT, at ii (1982) [hereinafter TASK FORCE FINAL REPORT].

88. *Id.* at 114.

89. U.S. CONST. amend. VI.

90. TASK FORCE FINAL REPORT, *supra* note 87, at 114–15.

91. *Id.* at 3–13.

92. *Id.* at 3.

Both police and hospital workers dismiss the incident: “Bleeding from cuts, your front teeth knocked out . . . you are told that your wounds are superficial, that rape itself is not considered an injury.”<sup>93</sup> Over the next eighteen months, “you” endure disrespectful treatment by the prosecutor, defense counsel, and judge, as well as harassment from the defendant and his friends.<sup>94</sup> Eventually “you” learn that the attacker has also raped five others, one of them an eight-year-old:

During her testimony she was asked to describe her attacker’s anatomy. Spectators laughed when she said she did not understand the words being used. When she was asked to draw a picture of her attacker’s genitalia the girl fled from the courtroom and ran sobbing to her mother, who had been subpoenaed by the defense and had to wait outside. The youngster was forced to sit alone and recount, as you did, each minute of the attack. You know how difficult it was for you to speak of these things; you cannot imagine how it was for a child.<sup>95</sup>

The assailant eventually receives three years in prison, though due to good-time credits, he will likely serve less than half of that sentence.<sup>96</sup>

This emphasis on sexual assault was an exception to the general conservative opposition to women’s rights, and it contributed to the strong bipartisan appeal of the victims’ rights movement.<sup>97</sup> After the publication of the Final Report, Congress and state legislatures began rapidly enacting many of the Task Force’s recommendations, including the right to deliver victim impact testimony.<sup>98</sup> By 1990, VIS was enshrined in several state constitutions.<sup>99</sup>

## 2. *Booth v. Maryland and Payne v. Tennessee*

The use of VIS at sentencing presents constitutional issues, particularly in the context of death penalty proceedings.<sup>100</sup> In 1987, in *Booth v.*

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93. *Id.*

94. *Id.* at 4–11.

95. *Id.* at 7–8.

96. *Id.* at 11.

97. Lepore, *supra* note 39; see TASK FORCE FINAL REPORT, *supra* note 87, at 49–50 (arguing that the legal system should be flexible in its response to family violence, unlike other crimes).

98. See DOYLE, *supra* note 81, at 2–3 (discussing victims’ rights laws passed in the late twentieth century).

99. R.I. CONST. art. I, § 23 (1986); FLA. CONST. art. I, § 16(b) (1988); MICH. CONST. art. I, § 24 (1988); TEX. CONST. art. I, § 30 (1989); WASH. CONST. art. I, § 35 (1989); see *States Victim Rights Amendments, NAT’L VICTIMS’ CONST. AMEND. PASSAGE*, <https://www.nvcap.org/states/stvras.html> (last visited Mar. 17, 2023) (compiling a list of state victims’ rights amendments, including the dates enacted and margins of support).

100. See *infra* notes 101–120 and accompanying text.

*Maryland*,<sup>101</sup> the Supreme Court held that the admission of VIS in the sentencing phase of a capital trial violates the Eighth Amendment's prohibition on cruel and unusual punishment.<sup>102</sup> Petitioner John Booth and a companion had robbed an elderly Baltimore couple, Irvin and Rose Bronstein, then stabbed them to death.<sup>103</sup> The jury was read an impact statement that described the Bronsteins' outstanding character and the suffering of their surviving family members in the wake of the murders.<sup>104</sup> After being sentenced to death, Booth argued that the statement unconstitutionally introduced arbitrary factors into the sentencing decision.<sup>105</sup> The Court agreed, finding that the personal trauma of a murder victim's family did not bear on a defendant's "personal responsibility and moral guilt."<sup>106</sup> The *Booth* Court also noted that VIS has concerning suggestions for victims themselves: "We are troubled by the implication that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy."<sup>107</sup>

*Booth's* prohibition on VIS in death penalty proceedings lasted four years, until *Payne v. Tennessee*.<sup>108</sup> Pervis Payne was convicted of brutally murdering Charisse Christopher and her two-year-old daughter Lacie, and nearly killing her three-year-old son Nicholas.<sup>109</sup> During sentencing, the prosecutor asked Charisse's mother about the murders' effects on Nicholas.<sup>110</sup> She responded:

He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I tell him yes. He says, I'm worried about my Lacie.<sup>111</sup>

Overruling *Booth*, the Court held that the statement was properly admitted and that evidence about the character of the victim and effects of

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101. 482 U.S. 496 (1987).

102. *Booth* resulted from a Maryland law that required the inclusion of VIS in presentence reports for all felony crimes, including capital cases. *Id.* at 498–99. For more background on victims' rights in Maryland, see *infra* note 129.

103. *Booth*, 482 U.S. at 497–98.

104. *Id.* at 499–500. The statement described the closeness of the couple's relationship, Irvin Bronstein's strong work ethic, and Rose Bronstein's "young at heart" personality. *Id.* at 499 n.3. It also noted that "[t]heir funeral was the largest in the history of the Levinson Funeral Home and the family received over one thousand sympathy cards, some from total strangers." *Id.*

105. *Id.* at 501.

106. *Id.* at 502 (citing *Enmund v. Florida*, 458 U.S. 782, 801 (1982)).

107. *Id.* at 506 n.8.

108. 501 U.S. 808 (1991).

109. *Id.* at 811–13.

110. *Id.* at 814.

111. *Id.* at 814–15

the crime is permissible even in capital proceedings.<sup>112</sup> Writing for the majority, Chief Justice Rehnquist criticized *Booth* for “turning the victim into a ‘faceless stranger’” and “depriv[ing] the State of the full moral force of its evidence.”<sup>113</sup> The harm experienced by a crime victim, he concluded, is not arbitrary information, but an important aspect of the defendant’s blameworthiness.<sup>114</sup>

After *Payne*, one Eighth Amendment limitation on VIS remains.<sup>115</sup> In death penalty cases, the sentencer cannot consider victims’ opinions about the defendant, the crime, or the appropriate sentence.<sup>116</sup> *Payne* explicitly did not reconsider the prohibition on such evidence,<sup>117</sup> and, twenty years later, the Court clarified that it remains prohibited under *Booth*.<sup>118</sup> However, this limitation only applies when the death penalty is a possibility.<sup>119</sup> Many of Nassar’s victims, for instance, testified at length regarding their opinions of him and the sentence they hoped to see imposed.<sup>120</sup>

### 3. Current Statutory and Constitutional Protections

The victims’ rights movement continued to gain momentum in the years after *Payne*.<sup>121</sup> Since the early days of the movement, advocates hoped to ultimately pass a victims’ rights amendment to the United States Constitution—one of the recommendations of the President’s Task Force in 1982.<sup>122</sup> Beginning in 1996, the Amendment was repeatedly introduced in Congress with significant bipartisan support,<sup>123</sup> including an endorsement by President Bill Clinton.<sup>124</sup> However, it always failed to muster the requisite two-thirds votes, and in 2004 Congress instead passed the Crime Victims’ Rights Act, providing by statute many of the proposed Amendment’s

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112. *Id.* at 827.

113. *Id.* at 825 (quoting *South Carolina v. Gathers*, 490 U.S. 805, 821 (1989) (O’Connor, J., dissenting)).

114. *Id.* at 819.

115. *See infra* notes 116–120.

116. *Bosse v. Oklahoma*, 580 U.S. 1, 2–3 (2016).

117. *Payne*, 501 U.S. at 830 n.2.

118. *Bosse*, 580 U.S. at 3.

119. *See, e.g.*, *People v. Jones*, 445 N.W.2d 518, 520 (Mich. Ct. App. 1989) (recognizing that the victim’s wish for the defendant to receive the maximum possible sentence was a valid factor for the judge to consider).

120. *E.g.*, *Kaylee Lorincz*, IN OUR OWN WORDS (Aug. 29, 2018), <https://inourownwords.us/2018/08/29/kaylee-lorincz/>; *Sterling Riethman*, IN OUR OWN WORDS (Aug. 29, 2018), <https://inourownwords.us/2018/08/29/sterling-riethman/>; *Rachel Denhollander*, IN OUR OWN WORDS (Aug. 29, 2018), <https://inourownwords.us/2018/08/29/rachael-denhollander/>.

121. *See infra* notes 122–131 and accompanying text.

122. TASK FORCE FINAL REPORT, *supra* note 87, at 114–15.

123. *E.g.*, S.J. Res. 52, 104th Cong. (1996); H.J. Res. 129, 105th Cong. (1998); H.J. Res. 64, 106th Cong. (1999); H.J. Res. 48, 108th Cong. (2003).

124. S. REP. NO. 105-409, at 7 (1998).

protections.<sup>125</sup> The provision regarding VIS guarantees “the right [of victims] to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.”<sup>126</sup>

At the state level, victims’ rights also continued to expand.<sup>127</sup> By the end of the twentieth century, every state provided some form of VIS by statute, with most granting broad protections.<sup>128</sup> As of 2021, thirty-eight states have amended their constitutions to include rights for crime victims.<sup>129</sup> In Michigan, where Nassar was sentenced, an amendment ratified in 1988 guarantees victims the right “to make a statement to the court at sentencing.”<sup>130</sup> By statute, Michigan provides that crime victims have “the right to appear and make an oral impact statement at the sentencing of the defendant.”<sup>131</sup>

### C. Catharsis and Criminal Law

Over the last several decades, catharsis has become a major theme in the debate over victims’ rights.<sup>132</sup> While VIS was initially presented as a way to provide information to the sentencer, courts and lawmakers have increasingly justified the statements based on the cathartic power of victim testimony.<sup>133</sup> More broadly, the Supreme Court has developed the idea of “community catharsis” to explain the importance of public participation in the criminal process.<sup>134</sup> These are two distinct strands of doctrine, but as this Comment

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125. Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims’ Rights Act, Pub. L. No. 108-405, 118 Stat. 2261 (2004) (codified as amended at 18 U.S.C. § 3771); see DOYLE, *supra* note 81, at 5 (discussing the history of the Act). One of the victims memorialized in the Crime Victims’ Rights Act’s (“CVRA”) title, Stephanie Roper, was from Maryland, and her murder galvanized a robust and early victims’ rights movement in the State. See *infra* note 129.

126. 18 U.S.C. § 3771(a)(4). However, the law says nothing about the weight to afford victim impact testimony, with a congressional report on the CVRA merely stating, “[V]ictims must be heard, but their views are not necessarily controlling.” DOYLE, *supra* note 81, at 31.

127. See *infra* notes 128–129 and accompanying text.

128. DOYLE, *supra* note 81, at 2, 2 n.12.

129. *Id.* at 2, 2 n.11. Maryland, a long-time leader in victims’ rights, added VIS to the state constitution in 1994. MD. CONST. Decl. of Rts., art. 47. The strong victims’ rights movement in Maryland began with the brutal murder of Stephanie Roper in 1982. *About MCVRC, MD. CRIME VICTIMS RES. CTR.*, <https://www.mdcrimevictims.org/about/> (last visited Feb. 19, 2023). In 1986, Maryland adopted statutory protections for crime victims, including the VIS law at issue in *Booth*. See *Booth v. Maryland*, 482 U.S. 496, 498 (1987) (discussing the Maryland statute mandating VIS). The federal Crime Victims’ Rights Act, which passed in 2004, was dedicated to Stephanie Roper and several other high-profile murder victims. See *supra* note 125.

130. MICH. CONST. art. 1, § 24.

131. MICH. COMP. LAWS. § 780.765(1) (2018).

132. See *infra* Section I.C.2.

133. See *infra* Section I.C.2.

134. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571–72 (1980); see *infra* Section I.C.3.

later explores, community catharsis bears on VIS in important ways.<sup>135</sup> For now, this Section provides a general overview of the idea of catharsis and its role in criminal law.<sup>136</sup>

### *1. Catharsis in Philosophy and Psychology*

Law has borrowed the idea of catharsis from the fields of philosophy and psychology, where it is an ambiguous and controversial topic.<sup>137</sup> Aristotle developed the concept of catharsis to explain the paradoxical pleasure evoked by tragic art—the enjoyment an audience derives from the representation of terrible events.<sup>138</sup> In a famously enigmatic section of *Poetics*, Aristotle argued that tragedy “effect[s] through pity and fear the *catharsis* of such emotions.”<sup>139</sup> The meaning of this passage has been subject to extensive debate, but the most common interpretation is that catharsis refers to the purgation of negative emotions; by experiencing “pity and fear,” the audience expels them.<sup>140</sup>

This idea eventually inspired Sigmund Freud, who incorporated catharsis into his early theory of psychoanalysis and is largely responsible for elevating the concept to its current status.<sup>141</sup> In *Studies on Hysteria*, published in 1895, Freud and German physician Joseph Breuer claimed to successfully treat “hysteria” by making patients describe and relive repressed traumatic memories.<sup>142</sup> This “cathartic therapy” inverted a crucial feature of Aristotle’s catharsis: Rather than acting on audience, Freud’s catharsis was for the speaker.<sup>143</sup> By articulating their trauma and experiencing its attendant emotions, patients could “relive, and therefore resolve, earlier painful experiences which were unfinished.”<sup>144</sup> Despite the controversy of Freud’s legacy, especially his theory of memory repression, this conception of catharsis has become quite embedded in the popular and legal imagination.<sup>145</sup>

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135. See *infra* Section II.A.3

136. See *infra* Sections I.C.1–3.

137. See T.J. SCHEFF, CATHARSIS IN HEALING, RITUAL, AND DRAMA 20–21 (1979) (describing the intellectual history of catharsis).

138. ARISTOTLE, *supra* note 16, at 543–44.

139. *Id.* at 544.

140. Eva Schaper, *Aristotle’s Catharsis and Aesthetic Pleasure*, 18 PHIL. Q. 131, 131–32 (1968).

141. SCHEFF, *supra* note 137, at 43.

142. BREUER & FREUD, *supra* note 17, at 5–6.

143. See *supra* notes 138–140 and accompanying text.

144. SCHEFF, *supra* note 137, at 13.

145. See, e.g., Louis Menand, *Why Freud Survives*, NEW YORKER (Aug. 21, 2017), <https://www.newyorker.com/magazine/2017/08/28/why-freud-survives> (describing Freud’s lingering influence).



## 2. *Catharsis and Victims' Rights*

Courts and lawmakers have drawn on Freud's model of catharsis to argue that VIS is necessary to help victims heal.<sup>146</sup> In 1998 and 2000, reports by the Senate Judiciary Committee in support of the proposed Victims' Rights Amendment named the "cathartic effects" of victim testimony as one of two justifications for the right to deliver VIS: "First, such a right guarantees that the sentencing court . . . will have full information about the impact of a crime . . . . Second, the opportunity for victims to speak at sentencing can sometimes provide a powerful catharsis."<sup>147</sup> During a 2000 Senate debate on the Amendment, then-Senator Joseph Biden echoed this idea:

[Victims] have to be able to know that they had some hand in the idea that the person who did bad things to them was pursued, and they got their day in court . . . . Part of the catharsis in healing is to be able to go through the process and believe you are getting fair and decedent treatment.<sup>148</sup>

As law professor Paul Mostellar notes, the Amendment would have had the remarkable effect of elevating victim catharsis to quasi-constitutional status, declaring it a fundamental purpose of criminal proceedings.<sup>149</sup>

Though the Victims' Rights Amendment failed, catharsis has continued to inform the law's understanding of VIS.<sup>150</sup> In allowing the family of a murdered mother and son to submit a slideshow of the victims set to background music, a Maryland trial court stated that "it would be cathartic to, for the last time, be able to fully discuss their sister and their nephew."<sup>151</sup> The Indiana Court of Appeals, in finding that a sentencer was correct to consider a victim's allegations about a defendants' character, said, "the statement allows for a degree of catharsis by the victim or the victim's representative, permitting him or her to express their recommendation as to a sentence, the impact a crime had, and their feelings toward the defendant, all in a judicial setting."<sup>152</sup> As the United States District Court for the Eastern District of New York put it, "[v]ictim impact statements may also serve as a catharsis for victims, helping to assuage the bitterness at the fates that they have suffered."<sup>153</sup>

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146. See *infra* notes 147–153 and accompanying text.

147. S. REP. NO. 105-409, at 17, 28 (1998); S. REP. NO. 106-254, at 18, 33 (2000).

148. 146 CONG. REC. S3003 (daily ed. Apr. 27, 2000) (statement of Sen. Joseph Biden).

149. Robert P. Mostellar, *Victim Impact Evidence: Hard to Find the Real Rules*, 88 CORNELL L. REV. 543, 553 (2003).

150. See *infra* notes 151–153 and accompanying text.

151. *Lopez v. State*, 458 Md. 164, 172, 181 A.3d 810, 814 (2018).

152. *Cloum v. State*, 779 N.E.2d 84, 93 (Ind. Ct. App. 2002).

153. *United States v. Blake*, 89 F. Supp. 2d 328, 351 (E.D.N.Y. 2000).

### 3. *Community Catharsis*

The cathartic effects of VIS are theoretically for the speaker—the victim who testifies—but catharsis is classically for the audience, and courts have shown a striking interest in this version as well.<sup>154</sup> In *Richmond Newspapers, Inc. v. Virginia*,<sup>155</sup> the Supreme Court articulated the concept of “community catharsis” to explain how the criminal process channels public anger and expresses social norms.<sup>156</sup> The case considered a newspaper’s challenge to a trial judge’s decision to close the courtroom in a high-profile murder trial.<sup>157</sup> Finding that the judge erred, the Court explained:

Civilized societies withdraw both from the victim and the vigilante the enforcement of criminal laws, but they cannot erase from people’s consciousness the fundamental, natural yearning to see justice done—or even the urge for retribution. The crucial prophylactic aspects of the administration of justice cannot function in the dark; no *community catharsis* can occur if justice is “done in a corner [or] in any covert manner.”<sup>158</sup>

Public criminal trials, the Court stated, thus provide a necessary “outlet for community concern, hostility, and emotion,” preventing these reactions from morphing into “vengeful ‘self-help’” and vigilantism.<sup>159</sup> Lower courts have echoed this reasoning.<sup>160</sup> The United States Court of Appeals for the Third Circuit and the Pennsylvania Supreme Court both invoked “community catharsis” to justify broad media access to materials related to criminal cases.<sup>161</sup> The Rhode Island Supreme Court made a brief but striking reference to the concept when it noted that high-profile trials serve “the interests of retribution, deterrence, and community catharsis.”<sup>162</sup>

Perhaps most notably, the United States District Court for the Southern District of West Virginia, in a decision rejecting a plea agreement in a heroin

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154. See *infra* notes 155–166 and accompanying text.

155. 448 U.S. 555 (1980).

156. *Id.* at 570–72.

157. In the underlying murder case, the defendant was charged with stabbing the manager of a motel to death. His initial conviction was overturned because a bloody shirt had been improperly admitted into evidence. Two subsequent trials ended in mistrials. In the fourth trial, which gave rise to the claim by *Richmond Newspapers*, the defendant moved to close the courtroom due to the presence of a family member of the victim in the audience. *Id.* at 559–60.

158. *Id.* at 571–72 (emphasis added) (alteration in original).

159. *Id.* at 571.

160. See *infra* notes 161–166.

161. *United States v. Criden*, 648 F.2d 814, 822 (3d Cir. 1981) (allowing the press to copy and broadcast videotapes introduced into evidence in a public corruption case); *Commonwealth v. Fenstermaker*, 530 A.2d 414, 417 (Pa. 1987) (holding that the press could view arrest warrants of defendants charged with homicide and rape).

162. *In re Derderian*, 972 A.2d 613, 618 (R.I. 2009) (finding as moot a newspaper’s request to access completed juror questionnaires in a manslaughter case stemming from an infamous nightclub fire).

distribution case, sharply criticized the entire plea system for undermining community catharsis.<sup>163</sup> In a section titled “The Public’s Ability to Achieve Community Catharsis,” the court explained that robust community participation in the criminal process is vital as both an emotional outlet and opportunity for moral and civic education.<sup>164</sup> The proliferation of guilty pleas in place of jury trials threatens both of these functions by largely eliminating the public’s role in dispensing justice.<sup>165</sup> As the next Part will discuss, the district court’s theory of community catharsis can shed light on the public value of VIS in situations like Nassar’s sentencing.<sup>166</sup>

## II. ANALYSIS

In a sense, it is fitting that a case of child sexual abuse would take the logic of the victim impact statement to its most extreme.<sup>167</sup> Sexual violence has long been a focus of the victims’ rights movement, and crimes against children engender a particular horror.<sup>168</sup> However, the condemnations of Nassar and celebrations of the victims’ testimony contrast starkly with the disbelief and disregard that allowed his crimes to continue for decades.<sup>169</sup> The concept of catharsis can illuminate this dissonance.<sup>170</sup>

Nassar’s sentencing vividly illustrates the cathartic effects of VIS on the public as well as victims.<sup>171</sup> As Princeton historian Jill Lepore observes, “Aquilina turned her courtroom into a stage.”<sup>172</sup> Millions tuned in to cry as the victims cried, to share the judge’s fury, to cheer when Nassar was finally punished.<sup>173</sup> For individuals, catharsis is a way to heal after trauma.<sup>174</sup> For the community, the catharsis of criminal proceedings can be a source of solidarity and public morality.<sup>175</sup> However, this Comment argues that the community catharsis of the Nassar hearings also functioned to exculpate the

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163. *United States v. Wilmore*, 282 F. Supp. 3d 937, 941, 945–46 (S.D.W. Va. 2017).

164. *Id.* at 945–46 (“The jury trial creates a more educated populace that respects the law and has faith in the judicial system. . . . The jury trial also instills or reaffirms the public’s faith in the criminal justice system. It ‘allows peaceful expression of community outrage at arbitrary government or vicious criminal acts.’” (footnote omitted) (quoting *United States v. Lewis*, 638 F. Supp. 573, 580–81 (W.D. Mich. 1986))).

165. *Id.*

166. *See infra* Part II.

167. *See infra* Sections II.B–C.

168. *See supra* Section I.B.1; *infra* Section II.C.

169. *See supra* notes 46–49; *infra* Section II.C.

170. *See infra* Sections II.B–C.

171. *See infra* Sections II.A.2–3.

172. Lepore, *supra* note 39.

173. *Id.*

174. *See supra* Section I.C.2.

175. *See supra* Section I.C.3; *infra* Section II.B.

public from its own complicity in sexual abuse.<sup>176</sup> This Part first discusses the goals of VIS and how they relate to the idea of catharsis.<sup>177</sup> Second, it critiques the way that individual criminal cases like Nassar’s have come to symbolize broader political projects.<sup>178</sup> Third, it argues that the community catharsis of these events contributes to the cycles of panic and indifference that characterize society’s response to the sexual abuse of children.<sup>179</sup> Finally, it makes the case that separating VIS from sentencing would address problematic features of current victims’ rights policies and create a forum better suited for reckoning with the complicity that so often characterizes child abuse.<sup>180</sup>

### A. *The Purposes of Victim Impact Statements*

The functions of VIS are complexly intertwined with the concept of catharsis.<sup>181</sup> Advocates have cited a host of justifications for the statements, which fall into three general categories: informational, therapeutic, and expressive.<sup>182</sup> First, VIS provides information to the sentencer about the harm of the crime.<sup>183</sup> Second, the catharsis of testimony can help victims heal.<sup>184</sup> Third, for the public, the statements can express and reinforce social norms—a function that closely relates to the “community catharsis” described in *Richmond Newspapers, Inc. v. Virginia*.<sup>185</sup> This Section considers how these goals manifested at the Nassar hearings, with particular focus on the expressive function and its relationship to community catharsis.<sup>186</sup>

#### 1. *The Informational Goals of Victim Impact Statements*

The initial purpose of VIS—and the only one explicitly recognized by the Supreme Court—is to provide information to the sentencer.<sup>187</sup> As the

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176. See *infra* Sections II.B–C.

177. See *infra* Section II.A.

178. See *infra* Section II.B.

179. See *infra* Section II.C.

180. See *infra* Section II.D.

181. See *infra* Sections II.A.2–3.

182. See Susan A. Bandes, *What Are Victim Impact Statements For?*, 87 BROOK. L. REV. 1253, 1253 (2022) [hereinafter Bandes, *What Are Victim Impact Statements For?*] (discussing VIS goals of information, healing, and public education); Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611, 611–12 (2009) (arguing that VIS informs the court, helps victims heal, creates a public perception of fairness, and educates defendants); Erin Sheley, *Victim Impact Statements and Expressive Punishment in the Age of Social Media*, 52 WAKE FOREST L. REV. 157, 165 (2017) (discussing expressive functions of VIS).

183. See *infra* Section II.A.1.

184. See *infra* Section II.A.2.

185. See *infra* Section II.A.3.

186. See *infra* Sections II.A.1–3.

187. Bandes, *What Are Victim Impact Statements For?*, *supra* note 182, at 1258.

President's Task Force argued, the statements can provide information that might be unclear from the facts of the crime itself: "[I]t is the victim who looked down the barrel of the gun, or felt [the defendant's] blows, or knew how serious were the threats of death that the defendant conveyed."<sup>188</sup> However, it is often unclear exactly what information the statements deliver.<sup>189</sup> As the Court suggested in *Booth v. Maryland*, the fact that a murder victim played piano well or had a high IQ should not bear on the seriousness of the crime.<sup>190</sup> Legal scholar Susan Bandes, an expert on law and emotion, argues that the information of VIS actually distracts from questions of culpability by appealing to "hatred, the desire for undifferentiated vengeance, and even bigotry."<sup>191</sup> In cases of sexual assault, for example, VIS provides irrelevant information such as "the victim's attractiveness, articulateness, race, ethnicity, and social class," which, depending on the circumstances, can elicit bias against either the victim or defendant.<sup>192</sup>

In one sense, VIS does provide clear information to the sentencer: the victim's opinion on the appropriate sentence, which is permitted in all contexts except death penalty proceedings.<sup>193</sup> Many of Nassar's victims made sentencing requests, with most asking for the maximum penalty.<sup>194</sup> Yet, this concept that a victim has a say in an offender's sentence is troubling.<sup>195</sup> Should someone who assaults a particularly forgiving woman or girl receive a lesser punishment? The law's answer is unclear.<sup>196</sup> Though victims have the right to be heard, the ambiguous evidentiary weight of VIS gives sentencing courts almost complete discretion to elevate or ignore victim testimony.<sup>197</sup> In the context of sexual assault, Bandes points out, this leaves judges "largely unconstrained to draw on their own idiosyncratic and sometimes appalling notions about how a 'real rape victim' ought to express her feelings in a court of law."<sup>198</sup> Judge Aquilina explicitly sought to deliver

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188. TASK FORCE FINAL REPORT, *supra* note 87, at 77–78; *see* Cassell, *supra* note 182, at 620 (arguing that victim impact evidence is relevant to the seriousness of the offense).

189. Bandes, *What Are Victim Impact Statements For?*, *supra* note 182, at 1263–67.

190. *Booth v. Maryland*, 482 U.S. 496, 506 n.8 (1987); Bryan Myers & Edith Greene, *The Prejudicial Nature of Victim Impact Statements*, 10 PSYCH. PUB. POL'Y & L. 492, 507 (2004).

191. Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 365 (1996) [hereinafter Bandes, *Empathy*].

192. Bandes, *What Are Victim Impact Statements For?*, *supra* note 182, at 1263–64.

193. *See supra* notes 115–120 and accompanying text.

194. *See supra* note 120.

195. For instance, many critics have pointed out that the statements represent a return to a private, revenge-based mode of criminal justice. *See infra* note 222.

196. Bandes, *What Are Victim Impact Statements For?*, *supra* note 182, at 1265–66.

197. *Id.*; *see supra* note 126.

198. Bandes, *What Are Victim Impact Statements For?*, *supra* note 182, at 1266.

a verdict that Nassar's victims desired,<sup>199</sup> but many others have had starkly different experiences.<sup>200</sup>

## 2. *The Therapeutic Goals of Victim Impact Statements*

Over the last several decades, the debate about VIS has increasingly centered on the statements' therapeutic power.<sup>201</sup> As discussed above, courts and lawmakers have used the idea of catharsis to justify the use and expansion of victim impact testimony, nearly passing a constitutional amendment partly on this basis.<sup>202</sup> Many legal scholars—and victims themselves—similarly make the case that VIS provides a vital healing opportunity.<sup>203</sup> Kyle Stephens, the first woman to testify at Nassar's sentencing, remarked, “[t]his process has been horrific, but surprisingly therapeutic.”<sup>204</sup> Law professor Erin Sheley explains, “[a] victim impact statement can . . . be understood as a means through which a victim rebuilds his or her world through speech.”<sup>205</sup>

The cathartic power of VIS has special appeal in cases of sexual violence.<sup>206</sup> Sexual assault is commonly understood as a crime against autonomy: In a sense, it is an assault on *self* itself.<sup>207</sup> The idea of testimony as a means of reclaiming agency is particularly compelling in this context, and feminists have long held up storytelling as a strategy for empowerment.<sup>208</sup> Moreover, the public recognition and support that victims can receive through their testimony at sentencing—after the offender has been found guilty—is a poignant counter to the hostility that often

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199. See *People v. Nassar*, No. 345699, 2020 WL 7636250, at \*6 (Mich. Ct. App. Dec. 22, 2020) (“I will make a tough decision. I hope you will like it.”); *Christina Barba*, IN OUR OWN WORDS (Aug. 29, 2018), <https://inourownwords.us/2018/08/29/christina-barba/> (“There’s sentencing considerations that I have heard from all of you collectively, individually. Each voice is important. Each voice sends a message. Each story, although similar, is very special and there are some facets that are different, so it really helps put all the pieces in perspective, and you are brave.”).

200. Bandes, *What Are Victim Impact Statements For?*, *supra* note 182, at 1268–69. For example, Bandes discusses the experience of Chanel Miller, who was raped by Stanford swimmer Brock Turner. *Id.* Infamously, despite Miller’s haunting testimony, Turner received only a six-month sentence. *Id.*

201. *Id.* at 1258.

202. See *supra* Section I.C.2.

203. E.g., Cassell, *supra* note 182, at 621–22; Sheley, *supra* note 182, at 175–76; Mary Margaret Giannini, *Equal Rights for Equal Rites?: Victim Allocution, Defendant Allocution, and the Crime Victims’ Rights Act*, 26 YALE L. & POL’Y REV. 431, 449–50 (2008).

204. Kyle Stephens, IN OUR OWN WORDS (Aug. 5, 2018), <https://inourownwords.us/2018/08/05/kyle-stephens/>.

205. Sheley, *supra* note 182, at 175–76.

206. See *infra* notes 207–210 and accompanying text.

207. E.g., Lynne Henderson, *Rape and Responsibility*, 11 L. & PHIL. 127, 157–58 (1992); *Coker v. Georgia*, 433 U.S. 584, 597–98 (1977) (describing rape as “the ‘ultimate violation of self’” other than homicide (quoting LISA BRODYAGA ET AL., U.S. DEP’T OF JUST., RAPE AND ITS VICTIMS: A REPORT FOR CITIZENS, HEALTH FACILITIES, AND CRIMINAL JUSTICE AGENCIES 1 (1975))).

208. Lepore, *supra* note 39.

characterizes earlier proceedings.<sup>209</sup> Judge Aquilina exemplified this therapeutic logic when she remarked to one young victim:

You are a really strong sister survivor and you're strong enough to talk in court. Your voice is strong. Your passion is there. I can tell you're healed, and your sister survivors are healing as well, and your voice of change has been echoed over and over again, and it's happening, and your voice is so strong.<sup>210</sup>

However, despite the indisputable power of victim impact testimony, these therapeutic goals are problematic in a criminal court.<sup>211</sup> As Bandes explains, VIS promises forms of relief that the law is poorly suited to provide: “We are witnessing a confusion or conflation of cultures—the therapeutic and the legal; a mapping of the language of private grief onto an entirely different sort of emotion culture—collective, public, hierarchical, adversarial, coercive.”<sup>212</sup> In this respect, the doctrine underlying VIS has become an odd blend of criminal law and self-help psychology.<sup>213</sup> While many of Nassar’s victims found the statements beneficial, this positive experience hinged on an extraordinarily supportive judge who imposed an extremely long sentence, problematic conditions that others are not likely to encounter.<sup>214</sup> Ultimately, a sentencing hearing is not a therapy session, and creating a genuinely supportive environment for victims risks undermining the legitimacy of the court—precisely what occurred at the Nassar hearings.<sup>215</sup> As Lepore sums it up, “the victim impact statement rests on both the therapeutic, speak-your-truth commitment of a trauma-centered feminism and the punitive, lock-them-up imperative of law-and-order conservatism. Arguably, this has been a bad marriage.”<sup>216</sup>

### 3. *The Expressive Goals of Victim Impact Statements*

Most of the debate over victims’ rights has focused on what VIS does for victims and sentencers, but the statements can also have a profound effect on the surrounding community.<sup>217</sup> As Nassar’s sentencing illustrates, victim

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209. See Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 3–5 (2017) (discussing the legal system’s tendency to dismiss women’s allegations of sexual assault).

210. *Kaylee Lorincz*, *supra* note 120.

211. See *infra* notes 212–216.

212. Susan A. Bandes, *Victims, “Closure,” and the Sociology of Emotion*, L. & CONTEMP. PROBS., Spring 2009, at 1, 12.

213. Bandes, *What Are Victim Impact Statements For?*, *supra* note 182, at 1267–70; Mostellar, *supra* note 149, at 544.

214. Bandes, *What Are Victim Impact Statements For?*, *supra* note 182, at 1273–74.

215. *Id.*; see *supra* Section I.A.

216. Lepore, *supra* note 39.

217. See *infra* notes 218–236 and accompanying text.

testimony can send a public message about the harm of criminal conduct, enhance the community's interest in the criminal process, and create a general sense of fairness by signaling the law's respect for victims.<sup>218</sup> These goals are part of the expressive function of criminal law: the power of punishment—and the processes associated with it—to express social values and norms.<sup>219</sup> In this, the effects of VIS on the public intertwine with the concept of community catharsis articulated in *Richmond Newspapers*.<sup>220</sup> However, as the Nassar hearings demonstrate, there is a dark side to this catharsis.<sup>221</sup>

VIS is often criticized for centering private harm—similar to a tort claim—and making personal revenge a concern of criminal law.<sup>222</sup> However, in some ways, a victim stands as a proxy for the general public, expressing not merely his or her own pain, but the experience of the community as a whole.<sup>223</sup> By channeling this public sentiment, victim participation at sentencing can provide the same community catharsis as a criminal trial, functioning as an outlet for collective emotion and a sort of morality lesson for the public.<sup>224</sup> As the Court observed in *Richmond Newspapers*, “public trials ha[ve] significant community therapeutic value.”<sup>225</sup> With Nassar avoiding a trial by pleading guilty, his sentencing instead provided the opportunity for the public to express its outrage.<sup>226</sup> In this sense, the much-praised catharsis of the hearings was as much for the audience as for the victims.<sup>227</sup>

Supporters suggest that this function of VIS is essential to the legitimacy of the criminal system.<sup>228</sup> To remove victims, Sheley contends,

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218. See Bandes, *What Are Victim Impact Statements For?*, *supra* note 182, at 1271–77 (discussing VIS as a form of public education); Sheley, *supra* note 182, at 174–75 (arguing that VIS strengthens the community's stake in criminal law); Cassell, *supra* note 182, at 624–25 (stating that VIS improves “the perceived fairness” of sentencing).

219. Sheley, *supra* note 182, at 165.

220. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571–72 (1980); *see supra* Section I.C.3.

221. *See infra* notes 232–236 and accompanying text.

222. *E.g.*, Lynne N. Henderson, *The Wrongs of Victims' Rights*, 37 STAN. L. REV. 937, 938–42 (1985). As Lepore puts it, “[r]emoving victims from criminal prosecutions had been the work of centuries; putting them back in has been the work of decades.” Lepore, *supra* note 39.

223. Paul Gewirtz, *Victims and Voyeurs at the Criminal Trial*, 90 NW. U. L. REV. 863, 892–93 (1996); Sheley, *supra* note 182, at 158–59, 175.

224. *See* Gewirtz, *supra* note 223, at 892 (arguing that VIS helps channel the public impulse to revenge); Bandes, *What Are Victim Impact Statements For?*, *supra* note 182, at 1271 (observing that VIS in Nassar's case “call[ed] attention to crimes that are poorly understood and underenforced”).

225. *Richmond Newspapers*, 448 U.S. at 570.

226. *See supra* Sections I.A.1, I.C.3.

227. *See supra* note 15.

228. *See infra* notes 229–231.



dismisses the “social experience of harm” and diminishes the power of the criminal process to communicate the boundaries of acceptable conduct.<sup>229</sup>

Law professor Paul Gewirtz argues:

To treat victim impact evidence as off-limits . . . would be to say that what the public connects with most at the trial is inadmissible. If we wish to keep public confidence in the courts and . . . to allow the courts to continue to play their role of channeling public revenge, we cannot exclude too much of the reality of life—just as we cannot let too much in.<sup>230</sup>

Paul Cassell, a law professor and former federal judge, sums up the self-evident injustice of excluding VIS by quoting a father whose ten-year-old daughter, Staci, was murdered:

What? I’m not getting a chance to talk to the jury? He’s not a defendant anymore. He’s a murderer! . . . His mother’s had her chance all through the trial to sit there and let the jury see her cry for him while I was barred. . . . Now she’s getting another chance? Now she’s going to sit there in that witness chair and cry for her son, that murderer, that murderer who killed my little girl! Who will cry for Staci? Tell me that, who will cry for Staci?<sup>231</sup>

Yet, is this catharsis a valid goal of criminal law? The problems with Nassar’s sentencing demonstrate how VIS can foster a sense of justice that comes at the cost of the actual legitimacy of the criminal system.<sup>232</sup> By encouraging “undifferentiated vengeance[] and the desire to purge collective anger,” the statements tend to inflame emotions in a way that ultimately diminishes the ability of both the court and the public to respond to crime.<sup>233</sup> As Bandes notes, despite the victims’ searing testimony, “the Nassar hearings were incapable of educating the public about the most important aspect of the harm the young gymnasts suffered—the multiagency, multilayered complicity that allowed the assaults to continue for years.”<sup>234</sup> She poignantly observes of the hearings, “[t]heir aim was to ostracize and punish a monster, and one of the functions of naming and ostracizing a monster is to avoid examining the conditions that allow monstrous behavior to flourish.”<sup>235</sup> As the next Section will discuss, the public’s focus on victims and their

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229. Sheley, *supra* note 182, at 161–62, 166, 192.

230. Gewirtz, *supra* note 223, at 892.

231. Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims’ Rights Amendment*, 1999 UTAH L. REV. 479, 495.

232. See *infra* notes 233–236.

233. Bandes, *Empathy*, *supra* note 191, at 395.

234. Bandes, *What Are Victim Impact Statements For?*, *supra* note 182, at 1274.

235. *Id.* at 1274–75.

testimony, particularly in cases of child sexual abuse, can disguise a much deeper ambivalence about violence.<sup>236</sup>

### *B. Rituals of Punishment*

Beyond determining one man's culpability, the Nassar hearings sought to function as a sweeping reckoning with sexual abuse, a verdict on offenders everywhere.<sup>237</sup> This is a common phenomenon; even before the #MeToo Movement, individual criminal cases were often presented as symbolic adjudications of greater social problems.<sup>238</sup> Criminal law has become a prime source of both morality and entertainment, and in this sense, the "community catharsis" of a trial or sentencing is not so different from the catharsis of tragic drama.<sup>239</sup> However, life is less conducive to symbolism than art, and the gratification that the audience finds when an offender is punished can obscure rather than clarify the reality of criminal conduct.<sup>240</sup> Nassar's punishment—proudly described by the judge as a death sentence—was naturally a source of satisfaction and relief.<sup>241</sup> Yet, the sense that justice has been done because a single monster has been punished elides the underlying norms that facilitate such crimes.<sup>242</sup> This Section argues that Nassar was a scapegoat, not because his sentence was undeserved, but because the display of his monstrosity helped the public avoid a deeper reckoning with child sexual abuse.<sup>243</sup>

#### *1. Solidarity and Punishment*

Punishment brings people together.<sup>244</sup> Over 100 years ago, sociologist Emile Durkheim described how penal sanctions create social cohesion through both the formal expression of norms and informal social rituals, like gathering at the gallows to gossip about the criminal.<sup>245</sup> In contemporary America, with the erosion of other sources of morality such as religion and

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236. See *infra* Section II.B.

237. When speaking to the victims, Judge Aquilina repeatedly stressed the symbolic value of the case. E.g., *Kaylee Lorincz*, *supra* note 120 ("You're not just taking down this predator but other predators."); *Christina Barba*, *supra* note 199 ("The methodology of your voices, your stories, each sister survivor is taking him down and . . . all predators.").

238. See *infra* Section II.B.1.

239. See *infra* notes 262–266 and accompanying text.

240. See *infra* Section II.B.2.

241. Scott Cacciola & Victor Mather, *Larry Nassar Sentencing: 'I Just Signed Your Death Warrant'*, N.Y. TIMES (Jan. 24, 2018), <https://www.nytimes.com/2018/01/24/sports/larry-nassar-sentencing.html>.

242. See *infra* notes 248–258 and accompanying text.

243. See *infra* Sections II.B.1–2.

244. See *infra* notes 245–252 and accompanying text.

245. EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 102–03 (George Simpson trans., MacMillan Co. 1933) (1893).

family, the punishment of “monstrous offenders” like Nassar has become a particularly poignant source of collective meaning.<sup>246</sup> Few values are universal in a secular, modern society, and the punishment of the most sickening crimes offers a unique glimpse at principles that remain inviolable even today.<sup>247</sup>

However, as law professor Joseph Kennedy compellingly argues, these individual monsters often “serve[] as [a] scapegoat for problems that are both subtler and far more difficult to deal with.”<sup>248</sup> Particular cases capture the national imagination not simply because of their horrifying content, but because the horror speaks to the anxieties of the time.<sup>249</sup> In this, the punishment of particular offenders can function to ameliorate much deeper fears.<sup>250</sup> Crimes against children are especially likely to inspire such a reaction, providing an outlet for the expression of sprawling concerns about the challenges of protecting youth.<sup>251</sup> But, the catharsis that results from the punishment of a perpetrator like Nassar can create a sense of justice that camouflages society’s disinterest in mounting a more meaningful response.<sup>252</sup>

This problem is particularly apparent in the context of child sexual abuse.<sup>253</sup> The theoretical horror and outrage aroused by the figure of the pedophile clashes sharply with the endemic complicity that characterizes these crimes.<sup>254</sup> Kennedy refers to the child sex predator as the “archetypal scapegoat,” and public attention to these victim narratives can provide an illusion of social change that absolves the community of the need for actual action.<sup>255</sup> Law professor Martha Minow articulated this phenomenon in the 1990s, during the heyday of victims’ rights:

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246. Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829, 830–31 (2000); see Gewirtz, *supra* note 223, at 885 (arguing that the importance of criminal trials has increased due to the decline of other moral institutions).

247. Kennedy, *supra* note 246, at 847–48.

248. *Id.* at 882. In the Old Testament, the scapegoat is the sacrificial animal onto which the community places its sins. God instructs the Israelites to “confess over [the goat] all [their] wickedness and rebellion” then take it far into the wilderness. “The goat will carry on itself all their sins to a remote place.” *Leviticus* 16:20–22 (New International Version).

249. Kennedy, *supra* note 246, at 877–78.

250. See *id.* at 833 (arguing that people “project onto those [monstrous] offenders more basic anxieties about social problems”); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571–72 (1980) (describing how the “community catharsis” of a public trial “reaffirm[s] the temporarily lost feeling of security”).

251. Kennedy, *supra* note 246, at 882.

252. See *id.* at 882–84 (arguing that the focus on “the violent sexual predator” serves to divert attention from more difficult problems related to abuse within families).

253. See *infra* notes 254–258 and accompanying text; *infra* Section II.C.

254. See *infra* Section II.C.

255. Kennedy, *supra* note 246, at 884; see *supra* note 237 and accompanying text.

To purchase the image of the victim is to purchase the opportunity to be privately moved by images of victims and their suffering, but to do nothing about it. The stories of victims are attractive because they arouse attractive emotions. Possessing some aspect of victims' lives can engender a sense of one's capacity to respond, whether or not that capacity is exercised in any practical way.<sup>256</sup>

In this sense, the catharsis of Nassar's sentencing allowed us to take the easy way out, to celebrate the victims' bravery and Nassar's punishment in lieu of truly examining his crimes.<sup>257</sup> As Bandes points out, VIS creates empathy for the victim, but empathy can be empty: "The real challenge is to create actual political equality."<sup>258</sup>

## 2. *Between Life and Art*

Part of the problem is that society expects too much from the criminal system.<sup>259</sup> The determination of an individual's guilt and punishment should not be confused for a broader political project.<sup>260</sup> As political philosopher Hannah Arendt wrote in the context of the Adolf Eichmann trial, "[j]ustice demands that the accused be prosecuted, defended, and judged, and that all the other questions, though they may seem to be of greater import . . . be left in abeyance."<sup>261</sup> Yet, as criminal proceedings have emerged as a source of mass entertainment—regularly filmed and broadcasted across the country—isolated adjudications have become allegories for far-reaching social problems.<sup>262</sup> This dynamic attempts to merge the logic of art with the logic of punishment, turning victims and defendants into characters who symbolize sweeping truths about society.<sup>263</sup> Shoshana Felman, a scholar of law and literature, describes this new paradigm of law as "conceiving of justice not simply as punishment but as a marked symbolic exit from the injuries of a traumatic history: as liberation from violence itself."<sup>264</sup> Judge Aquilina claimed that Nassar was not simply a predator but "all predators."<sup>265</sup> To the

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256. Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411, 1414 (1993).

257. See *supra* Section II.A.3.

258. Bandes, *Empathy*, *supra* note 191, at 382.

259. See *supra* Section II.B.1; *infra* notes 260–278 and accompanying text.

260. See *infra* note 261 and accompanying text.

261. Hannah Arendt, *Eichmann in Jerusalem—I*, NEW YORKER (Feb. 8, 1963), <https://www.newyorker.com/magazine/1963/02/16/eichmann-in-jerusalem-i>.

262. See Gewirtz, *supra* note 223, at 885–86 (arguing that criminal trials have emerged as "a central moral arena for society" and, relatedly, a major source of entertainment).

263. See SHOSHANA FELMAN, *THE JURIDICAL UNCONSCIOUS* 8, 94–97 (2002) (discussing how "literary meaning" has become entangled with "legal meaning").

264. *Id.* at 1.

265. Christina Barba, *supra* note 199.

women and girls who testified, she said, “You are the voice of past victims, today’s victims, and future victims.”<sup>266</sup>

This symbolism is appealing, but it ultimately detracts from the pursuit of justice.<sup>267</sup> As Felman points out, “legal justice”—which she contrasts with “literary justice”—is poorly suited for communicating the deeper nuances and ambiguities of violence.<sup>268</sup> This distinction points to a fundamental difference between the catharsis of tragedy and the catharsis of trials.<sup>269</sup> Philosopher Eva Schaper argues that the catharsis of tragic drama hinges not on the purgation of negative emotions—the most popular interpretation of Aristotle’s passage—but rather the delivery of knowledge.<sup>270</sup> The careful arrangement of art not only involves the audience emotionally in the terrible events depicted, but also renders these events “transparent and intelligible” over the course of the narrative.<sup>271</sup> The pleasure of catharsis, she explains, results from this insight: “the understanding which a work affords whilst yet shaking us profoundly.”<sup>272</sup>

Criminal proceedings seek, in a sense, to similarly illuminate, to attach meaning to the underlying violence and reassert a common moral framework.<sup>273</sup> VIS in particular is a form of storytelling,<sup>274</sup> and the Nassar hearings promised to “shak[e] us profoundly” while affording an understanding of these wrenching crimes.<sup>275</sup> However, the catharsis of VIS unfolds not in the theater but on the all-too-real stage of the courtroom, and life, unlike art, is incapable of providing such clarity.<sup>276</sup> In fiction, the audience’s response, “though terrible and painful and therefore deeply distressing, becomes transparent and articulate.”<sup>277</sup> In the reality of the Nassar sentencing, however, the pleasure of catharsis—the sense of closure at the end of the plot—sharply contradicts the need for deeper examination and collective accountability.<sup>278</sup>

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266. Ashley Erickson, IN OUR OWN WORDS (Aug. 8, 2018), <https://inourownwords.us/2018/08/08/ashley-erickson/>.

267. See *infra* notes 268–278 and accompanying text.

268. FELMAN, *supra* note 263, at 8.

269. See *infra* notes 270–278 and accompanying text.

270. Schaper, *supra* note 140, at 139.

271. *Id.*

272. *Id.*

273. See *supra* Section II.A.3.

274. Bandes, *Empathy*, *supra* note 191, at 392–405.

275. Schaper, *supra* note 140, at 139.

276. See *id.* (arguing that catharsis rests on “the difference between emotional reaction to life and emotional reaction to art”); Kenji Yoshino, *The City and the Poet*, 114 YALE L.J. 1835, 1868–85 (2005) (describing the literary quality of VIS and arguing that it is incompatible with the legal functions of capital sentencing).

277. Schaper, *supra* note 140, at 139.

278. See *infra* Section II.C.

### C. *Monsters and Moral Panics*

Nassar's crimes exemplify the stark dissonance in society's view of sexual abuse.<sup>279</sup> His conduct was unusual in scale—and in the fame of his victims—but sexual violence against children is relatively common.<sup>280</sup> The complicity of those around him—employees at USA Gymnastics and MSU, law enforcement, and sometimes the victims' parents—is also a familiar story.<sup>281</sup> In theory, pedophilia elicits near-universal horror and condemnation.<sup>282</sup> The rape of a child was punishable by death until 2008,<sup>283</sup> and child sex offenders are subject to unique registration requirements, residency restrictions, and the possibility of civil commitment.<sup>284</sup> In practice, however, those confronted by abuse in their institutions, communities, and families very often chose to look the other way.<sup>285</sup> This Section considers how the Nassar hearings can illuminate the paradoxical panic and indifference that defines society's response to these crimes.<sup>286</sup>

#### 1. *Cycles of Panic*

Public concern with child sexual abuse has come in waves.<sup>287</sup> Historian Philip Jenkins argues that the modern concept of the pedophile emerged in the late nineteenth century, part of the broad social reorganization of that era.<sup>288</sup> At the time, the age of consent in most states was ten—seven in Delaware—and older girls who were raped had to prove, like adults, that they

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279. See *infra* notes 280–286 and accompanying text.

280. The prevalence of child sexual abuse is difficult to gauge due to low reporting rates, but experts estimate that 1 in 9 girls and 1 in 53 boys experience abuse, and approximately one-third of victims are under age 12. *Children and Teens: Statistics, RAPE, ABUSE & INCEST NAT'L NETWORK*, <https://www.rainn.org/statistics/children-and-teens> (last visited Apr. 5, 2022) (citing David Finkelhor et al., *The Lifetime Prevalence of Child Sexual Abuse and Sexual Assault Assessed in Late Adolescence*, 55 J. ADOLESCENT HEALTH 329, 329–33 (2014)).

281. E.g., Frank Bruni, *Larry Nassar Is a Familiar Monster*, N.Y. TIMES (Jan. 27, 2018), <https://www.nytimes.com/2018/01/27/opinion/larry-nassar-monster.html>; see *infra* note 285 and accompanying text.

282. PHILIP JENKINS, MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN AMERICA 1–2 (1998).

283. See *Kennedy v. Louisiana*, 554 U.S. 407, 413 (2008) (holding that the death penalty is an unconstitutional punishment for child rape).

284. Margo Kaplan, *Taking Pedophilia Seriously*, 72 WASH. & LEE L. REV. 75, 79, 158 (2015).

285. E.g., Christine Adams, *Mothers Who Fail to Protect Their Children from Sexual Abuse: Addressing the Problem of Denial*, 12 YALE L. & POL'Y REV. 519, 519–24 (1994) (discussing sexual abuse within families); Bruni, *supra* note 281 (discussing institutional complicity in child sexual abuse scandals); Deborah Tuerkheimer, *Ghislaine Maxwell Is Guilty. What Happens Next Is Critical.*, N.Y. TIMES (Dec. 29, 2021), <https://www.nytimes.com/2021/12/29/opinion/maxwell-epstein-sexual-abuse.html> (describing sexual abuse by powerful men like Jeffrey Epstein as “an open secret”).

286. See *infra* Sections II.C.1–2.

287. JENKINS, *supra* note 282, at 2.

288. *Id.* at 26–27.

“resisted until exhaustion or death.”<sup>289</sup> In response to reports about child prostitution and the prevalence of sexually transmitted diseases among young girls, feminists and religious conservatives united to campaign for child protection laws—a harbinger of the alliance behind the victims’ rights movement.<sup>290</sup> Though American criminal law had always tightly regulated sexual conduct, for the first time, the pedophile became a distinct class of criminal—not a behavior but an identity.<sup>291</sup> As it is today, the goal of the criminal system shifted from the punishment of specific sexual acts to the identification and permanent incapacitation of individuals deemed to pose a danger.<sup>292</sup>

Jenkins describes this period in the late 1800s as an early version of the “moral panics” that have characterized the response to child sexual abuse over the past century: waves of “fear that [are] widely exaggerated and wrongly directed.”<sup>293</sup> In the late 1930s and 1940s, and again in the 1980s and 1990s, lawmakers and the public fixated intensely on child sexual abuse, only to return to skepticism and disinterest in the subsequent years.<sup>294</sup> Both periods saw the passage of a host of laws designed to protect children, from the “sex psychopath” laws of the 1930s and 1940s, which allowed for the indefinite commitment of individuals diagnosed as sexually deviant, to the sex offender registries implemented in the 1980s and 1990s.<sup>295</sup> However, these laws—and social attention—remained stubbornly untethered from the reality of the social crisis.<sup>296</sup> Rather than attempting to address forms of abuse that are tragically common, the public focused on horrific but exceedingly rare—sometimes completely fictional—cases of abduction, murder, and torture.<sup>297</sup> In both periods, dubious factual claims and a problematic legal response generated backlash and resurgent skepticism toward abuse allegations.<sup>298</sup>

Presently, the #MeToo era has brought another wave of concern with child sexual abuse.<sup>299</sup> In recent years, the public has reckoned with Larry

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289. *Id.* at 28 (quoting CHARLTON EDHOLM, *TRAFFIC IN GIRLS AND FLORENCE CRITTENTON MISSIONS* 68 (Chicago, The Woman’s Temperance Publishing Ass’n 1893)).

290. *Id.*

291. *Id.* at 26–27.

292. *Id.* at 38–42.

293. *Id.* at 6–7.

294. *Id.* at 215–16.

295. *Id.* at 11–12.

296. *Id.* at 236–37.

297. *Id.* at 237–38. In the eighties and nineties, for instance, people seized on extraordinary stories of satanic abuse and recovered memories, leading to a number of convictions that were later reversed. Fallout from these scandals led to lasting mistrust of less fantastical efforts to address sexual abuse. *Id.* at 164–88.

298. *Id.* at 220–23.

299. *See infra* notes 300–305 and accompanying text.

Nassar,<sup>300</sup> Jeffrey Epstein,<sup>301</sup> Woody Allen,<sup>302</sup> Michael Jackson,<sup>303</sup> and the endless scandals of the Catholic Church.<sup>304</sup> Each painful case was celebrated as an exposure of systemic injustice, of both monstrous individual behavior and institutional complicity.<sup>305</sup> Unlike the “moral panics” described by Jenkins, these modern efforts have been led largely by victims, confront actions of men in power, and address more common and less immediately sensational forms of abuse than the crimes that generated so much attention historically.<sup>306</sup> Yet, as these reckonings occur again and again, we should ask ourselves what they are accomplishing. Five years in retrospect, the watershed events of the Nassar hearings look more like a high-water mark.<sup>307</sup> As *New York Times* columnist Michelle Goldberg recently noted in an article about the faded hopes of the #MeToo Movement, “The Future Isn’t Female Anymore.”<sup>308</sup>

One feature of the “panics” over sexual abuse is a competition for narrative control among different political groups, who each interpret the problem in light of their own agenda.<sup>309</sup> Kennedy describes a long-standing struggle between feminists, who focused on the internal threat of abuse from family members and other intimates, and conservatives, concerned with predatory strangers.<sup>310</sup> This dynamic continues today, with the response to child sexual abuse operating as the site of a broader cultural fight over child-rearing, sexuality, and the regulation of violence.<sup>311</sup> In this context, Nassar presents a sort of ideal offender.<sup>312</sup> He was close enough to the victims to constitute an internal threat—the routine patriarchal brutality stressed by the

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300. See *supra* Section I.A.

301. E.g., Tuerkheimer, *supra* note 285.

302. E.g., Alexis Soloski, *Woody Allen, Mia Farrow and What Popular Culture Wants to Believe*, N.Y. TIMES (July 9, 2021), <https://www.nytimes.com/2021/03/02/arts/television/woody-allen-mia-farrow-documentary.html>.

303. E.g., The Daily, *Reckoning with the Real Michael Jackson*, N.Y. TIMES (Mar. 8, 2019), <https://www.nytimes.com/2019/03/08/podcasts/the-daily/michael-jackson-abuse-leaving-neverland.html>.

304. E.g., Elizabeth Bruenig, *The Catholic Sex Abuse Crisis Is Far from Over*, N.Y. TIMES (Nov. 10, 2020), <https://www.nytimes.com/2020/11/10/opinion/McCarrick-Catholic-sex-abuse.html>.

305. Jodi Kantor & Megan Twohey, *How to Measure the Impact of #MeToo?*, N.Y. TIMES (Oct. 3, 2022), <https://www.nytimes.com/interactive/2022/10/03/us/me-too-five-years.html>.

306. See *supra* notes 293–298 and accompanying text.

307. See *supra* note 7 and accompanying text.

308. Michelle Goldberg, *The Future Isn’t Female Anymore*, N.Y. TIMES (June 17, 2022), <https://www.nytimes.com/2022/06/17/opinion/roe-dobbs-abortion-feminism.html>.

309. Kennedy, *supra* note 246, at 876.

310. *Id.*

311. See *supra* Section II.B.

312. See *supra* notes 248–250 and accompanying text.



feminist movement—but distant and monstrous enough to appeal to the conservative image of the predatory stranger.<sup>313</sup>

Yet, by turning Nassar into a symbol, his sentencing obscured the underlying norms that made his crimes possible.<sup>314</sup> Nassar could spend decades abusing hundreds of girls only because those around him dismissed the victims' allegations as untrue or unimportant—not only the FBI, MSU, and USA Gymnastics, but also often the victims' parents.<sup>315</sup> Though the hearings at times sought to highlight institutional complicity, relatively little attention fell on the way that the victims' individual families and communities failed them.<sup>316</sup> For instance, while many parents genuinely had no reason to know what was happening, there was an unfortunate tendency to also exculpate those who were told of the abuse but refused to believe their children.<sup>317</sup> Numerous other individuals in the gymnastics community had the opportunity to intervene and failed.<sup>318</sup> In this sense, the use of victim impact statements at the hearings, and the community catharsis it engendered, involved the public only to absolve it of its guilt.<sup>319</sup> Nassar could be whatever the audience needed him to be, allowing the community to voice its outrage rather than facing its own role in the abuse that occurred.<sup>320</sup>

## 2. *The Uses of Disgust*

Child sexual abuse implicates some of the most intimate and poorly understood aspects of human life.<sup>321</sup> More so than most other crimes, it begs

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313. See *supra* notes 309–311 and accompanying text. The appeal to conservatives was enhanced by many victims' emphasis on their religious faith. See Morgan Lee, *My Larry Nassar Testimony Went Viral. But There's More to the Gospel Than Forgiveness.*, CHRISTIANITY TODAY (Jan. 31, 2018), [christianitytoday.com/ct/2018/january-web-only/rachael-denhollander-larry-nassar-forgiveness-gospel.html](http://christianitytoday.com/ct/2018/january-web-only/rachael-denhollander-larry-nassar-forgiveness-gospel.html) (interview with Rachel Denhollander).

314. See *infra* notes 315–320 and accompanying text.

315. Bandes, *What Are Victim Impact Statements For?*, *supra* note 182, at 1274–75.

316. *Id.*

317. See David Eggert & Tammy Webber, *Parents of Nassar Victims Haunted by Feelings of Guilt*, PORTLAND PRESS HERALD (Jan. 27, 2018), <https://www.pressherald.com/2018/01/27/parents-of-nassar-victims-haunted-by-feelings-of-guilt/> (describing how some parents “assumed their children were lying or mistaken” and quoting Judge Aquilina's remarks that they should not feel guilty).

318. See Chelsea Markham, IN OUR OWN WORDS (Aug. 6, 2018) <https://inourownwords.us/2018/08/06/chelsea-markham/> (reporting testimony from a victims' mother about how her daughter's gymnastics coach and the parents of other gymnasts dismissed her allegations against Nassar in the 1990s); *supra* notes 46–47 and accompanying text (discussing the roles of gymnastics coach Kathy Klages, MSU president Lou-Anna Simon, and MSU dean William Strampel in covering up Nassar's crimes).

319. See *supra* Section II.A.3.

320. See *supra* Section II.B.

321. See Kennedy, *supra* note 246, at 846–47 (describing the “sacred” role of children in society).

for answers, explanations of how and why and what to do next.<sup>322</sup> The catharsis of victim impact testimony promises this understanding and closure, for both victims and the public.<sup>323</sup> However, for the audience, the emotional satisfaction of the Nassar hearings—the judge’s denunciations, the procession of beautiful young women confronting Nassar as he sat in the witness stand—was largely a distraction from the need for deeper investigation.<sup>324</sup> Even when the hearings sought to take a systemic view—for example, when the victims and judge excoriated the role of institutions in Nassar’s crimes—the sweeping social norms that keep abuse allegations in the shadows remained largely obscured.<sup>325</sup> Kyle Stephens, her mother standing behind her, remarked: “Due to complex details that I won’t get into here, my parents chose to believe Larry Nassar over me.”<sup>326</sup> This is a failure of families, neighbors, and entire communities, not simply greedy or uncaring institutions.<sup>327</sup>

It is worth noting that, in addition to panic, child sexual abuse has attracted an odd mix of disregard and obsession.<sup>328</sup> Influential thinkers in psychology, anthropology, and philosophy have fixated on the prohibition of sex between adults and children while denying that sexual abuse presented an actual social problem.<sup>329</sup> Freud’s theory of the Oedipus Complex—which posited that children have inherently sexual feelings for their parents—was central to psychology for much of the twentieth century and led to the widespread dismissal of abuse allegations as childhood sexual fantasies.<sup>330</sup> A 1936 report by the American Bar Association, for example, warned against believing “the erotic imagination of an abnormal child of attractive appearance.”<sup>331</sup> On the other side of the spectrum, in the 1960s and 1970s, many prominent radical thinkers argued that sex with children was harmless, even beneficial—the last frontier of sexual liberation.<sup>332</sup> Even today, sex

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322. *Id.*

323. *See supra* Sections II.A.2–3.

324. *See supra* Section II.B.2.

325. *See supra* notes 315–317 and accompanying text.

326. Stephens’ parents were close friends with the Nassar family. At the age of twelve, she told her parents that Nassar had been abusing her since she was six. Her parents disbelieved her and forced her to apologize to Nassar. *Kyle Stephens, supra* note 204.

327. *See supra* notes 314–320 and accompanying text.

328. *See infra* notes 329–341 and accompanying text.

329. *See infra* notes 330–332 and accompanying text.

330. Menand, *supra* note 145. As described in Section I.C.1, *supra*, the contemporary conception of catharsis originated largely from psychoanalysis. In light of Freud’s role in shaping society’s dismissal of child sexual abuse, it is a rather Freudian irony that the catharsis of the Nassar hearings garnered so much praise.

331. JENKINS, *supra* note 282, at 78.

332. GAYLE S. RUBIN, *DEVIATIONS: A GAYLE RUBIN READER* 137, 143–61 (2011); Marie Doezema, *France, Where Age of Consent is Up for Debate*, ATLANTIC (Mar. 10, 2018), <https://www.theatlantic.com/international/archive/2018/03/frances-existential-crisis-over-sexual->

crimes against children tend to elicit both outrage and fascination.<sup>333</sup> For instance, despite public anger at offenders like Nassar and Epstein, sexual content involving adolescent girls is common and popular in both pornography and mainstream entertainment.<sup>334</sup>

Many reacted to Nassar's crimes by expressing disgust, a common response when child sexual abuse lands in the news.<sup>335</sup> However, as philosopher Martha Nussbaum argues, disgust is always a suspect emotion.<sup>336</sup> She explains that disgust is a reaction to the threat of contamination rather than the threat of damage—not a way of preventing actual harm, but a strategy for preserving an image of integrity.<sup>337</sup> The way that disgust polices mental and bodily boundaries ultimately serves to avoid confrontation with uncomfortable truths about mortality, physicality, and sexuality.<sup>338</sup> Looking too closely at “disgusting” conduct like Nassar's—at what it means and how it happens—can threaten our own sense of virtue.<sup>339</sup> But for this same reason, disgust also elicits fascination, perhaps explaining why it is so easy to look the other way at these crimes then tune in raptly when the offender is finally caught.<sup>340</sup> Disgust is the easy way out, allowing us to disclaim horrifying criminal conduct as the work of monsters, to tell ourselves:

We are nothing like this, and we could not possibly create anything like this. . . . Our disgust creates the boundary: it says, this contamination is and must remain far from our bodies. We might

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harassment-laws/550700/; Rachel Aviv, *The German Experiment that Placed Foster Children with Pedophiles*, NEW YORKER (July 19, 2021), <https://www.newyorker.com/magazine/2021/07/26/the-german-experiment-that-placed-foster-children-with-pedophiles>.

333. See *infra* notes 334–341 and accompanying text.

334. See Nicholas Kristof, *The Children of Pornhub*, N.Y. TIMES (Dec. 4, 2020), <https://www.nytimes.com/2020/12/04/opinion/sunday/pornhub-rape-trafficking.html> (discussing the popularity of pornography depicting minors).

335. E.g., Colin Dwyer, *Michigan State University to Pay \$4.5 Million Fine Over Larry Nassar Scandal*, NPR (Sept. 5, 2019, 12:03 PM), <https://www.npr.org/2019/09/05/757909245/michigan-state-university-to-pay-4-5-million-fine-over-larry-nassar-scandal> (quoting then-Secretary of Education Betsy DeVos as stating that Nassar's crimes were “disgusting and unimaginable”); Katharyn Krawczyk, *Nassar Victim Says MSU's Interim President Tried to Secretly Pay Her Off*, WEEK (Apr. 13, 2018), <https://theweek.com/speedreads/767464/nassar-victim-says-msu-interim-president-tried-secretly-pay> (“The Larry Nassar scandal continues to disgust.”); *Former Gymnastics Coach to Larry Nassar: ‘Go to Hell’*, NBC NEWS (Jan. 17, 2018), <https://www.nbcnews.com/video/former-gymnastics-coach-slams-colleague-larry-nassar-for-sexual-abuse-1138956355883> (denouncing Nassar's “disgusting” behavior).

336. Martha C. Nussbaum, “*Secret Sewers of Vice*”: *Disgust, Bodies, and the Law*, in THE PASSIONS OF LAW 19, 21–22 (Susan Bandes, ed., 1999). But see Dan M. Kahan, *The Progressive Appropriation of Disgust*, in THE PASSIONS OF LAW, *supra*, at 63, 63 (arguing that disgust is an important source of moral guidance in liberal society).

337. Nussbaum, *supra* note 336, at 25.

338. *Id.* at 25–27.

339. See *supra* notes 336–338 and accompanying text.

340. See Nussbaum, *supra* note 336, at 30, 39 (discussing the fascination associated with “disgusting” content, particularly sexual content).

even say . . . that we call disgust to our aid: by allowing ourselves to see evil people as disgusting, we conveniently distance them from ourselves.<sup>341</sup>

For the audience, the catharsis of the Nassar hearings allowed us to believe that we were on the right side of history.<sup>342</sup> We could learn about the harm of child sexual abuse and the pervasive tendency to sweep it under the rug.<sup>343</sup> We could cry with the victims, vent our outrage and disgust.<sup>344</sup> We could tell ourselves that, if we were the adults in the room, we would have done things differently; we would have listened, believed, acted.<sup>345</sup> Yet would we? History suggests otherwise.<sup>346</sup> For the audience, the Nassar sentencing provided an opportunity to purge the pity, fear, and fascination that surrounds these crimes.<sup>347</sup> But we would be better served by examining our emotions than by expelling them.

#### *D. Alternatives to Victim Impact Statements*

None of this is to imply that punishment is unnecessary, or that Nassar deserved anything less than to spend his life in prison.<sup>348</sup> Incarceration is necessary, sometimes for an offender's lifetime.<sup>349</sup> However, as Arendt observed during the Eichmann trial, "[j]ustice . . . demands seclusion, it permits sorrow rather than anger, and it prescribes the most careful abstention from all the nice pleasures of putting oneself in the limelight."<sup>350</sup> The emotions provoked by VIS undermine the need for "caution, regret, [and] humility" in punishment and raise a host of concerns for victims, defendants, and the criminal system as a whole.<sup>351</sup> But, depriving victims of a forum for addressing the court and the offender also has a fundamental unfairness.<sup>352</sup> The most promising solution is to separate VIS from sentencing.<sup>353</sup> Treating victim impact testimony as part of a parallel, non-criminal proceeding has the

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341. *Id.* at 51.

342. *See supra* notes 299–327 and accompanying text.

343. *See supra* Section II.A.3.

344. *See supra* Section II.A.3.

345. *See text* accompanying *supra* notes 315–320.

346. *See supra* Section II.C.1.

347. *See supra* notes 139–140, 328–341 and accompanying text.

348. *See infra* notes 349–371 and accompanying text.

349. *See infra* notes 350–371 and accompanying text.

350. ARENDT, *supra* note 261.

351. Jeffrie G. Murphy, *Moral Epistemology, the Retributive Emotions, and the "Clumsy Moral Philosophy" of Jesus Christ*, in *THE PASSIONS OF LAW*, *supra* note 336, at 149, 160–61; *see supra* Section II.A.

352. *See supra* notes 228–231 and accompanying text.

353. Bandes, *What Are Victim Impact Statements For?*, *supra* note 182, at 1278–82.

potential to create a more supportive environment for victims, hold individual defendants accountable, and shed light on the culpability of other actors.<sup>354</sup>

In proposing alternatives to VIS, it is crucial to recognize the importance of punishment.<sup>355</sup> In recent years, many progressive scholars and activists have argued for non-carceral restorative justice mechanisms as an alternative to both VIS and the criminal system itself.<sup>356</sup> In contrast to criminal adjudication, which centers on the state's interest and the need for punishment, restorative justice focuses on “repairing harm and restoring losses, allowing offenders to take direct responsibility for their actions, and assisting victims to move beyond vulnerability towards some degree of closure.”<sup>357</sup> Definitions of restorative justice vary, but the process generally employs tools like mediation, healing circles, and conferencing to help victims, offenders, and their communities understand what has happened and find a mutually acceptable resolution.<sup>358</sup> For instance, rather than going to prison, an offender might apologize, provide financial restitution, or make promises regarding his future conduct.<sup>359</sup>

Some argue that this approach is especially valuable in the context of child sexual abuse, where the criminal system often falls appallingly short.<sup>360</sup> Because traditional punishments like incarceration are not a possibility, restorative justice can—at least in theory—center victims' well-being, avoid the issues of proof that arise in the adversarial system, and respond to the broader complicity that often accompanies sexual violence.<sup>361</sup> Advocates further argue that restorative justice holds offenders accountable more effectively than the criminal system by engaging their communities and emphasizing personal responsibility rather than state-imposed punishment.<sup>362</sup>

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354. *Id.*

355. *See infra* notes 356–376 and accompanying text.

356. *E.g.*, Lara Bazelon & Bruce A. Green, *Victims' Rights from a Restorative Perspective*, 17 OHIO ST. J. CRIM. L. 1, 1–7 (2020); Alexa Sardina & Alissa R. Ackerman, *Restorative Justice in Cases of Sexual Harm*, 25 CUNY L. REV. 1, 1–3 (2022).

357. Mark S. Umbreit et al., *Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV. 251, 255 (2005).

358. *Id.* at 269–70.

359. *Id.*

360. Tali Gal & Vered Shidlo-Hezroni, *Restorative Justice as Therapeutic Jurisprudence: The Case of Child Victims*, in THERAPEUTIC JURISPRUDENCE AND VICTIM PARTICIPATION IN JUSTICE 139, 157 (Edna Erez, Michael Kilching, & Jo-Anne Wemmers eds., 2011).

361. *Id.* at 158–59; Barbara Hudson, *Restorative Justice and Gendered Violence*, 42 BRIT. J. CRIMINOLOGY 616, 622 (2002). Hudson admits that advocates tend to praise restorative justice based on its operation in theory while criticizing the criminal system based on its operation in practice.

362. Sardina & Ackerman, *supra* note 356, at 30; Kelly Hayes & Mariame Kaba, *The Sentencing of Larry Nassar Was Not 'Transformative Justice.' Here's Why.*, APPEAL (Feb. 5, 2018), <https://theappeal.org/the-sentencing-of-larry-nassar-was-not-transformative-justice-here-s-why-a2ea323a6645/>.

Some prominent activists and academics make the case that this is a legitimate form of justice even for the most egregious crimes.<sup>363</sup>

The nature of this accountability, however, can be unclear.<sup>364</sup> A great deal is lost when we give up punishment.<sup>365</sup> Beyond immediate benefits like the incapacitation of dangerous individuals, incarceration is a uniquely poignant way of signifying that an offender's conduct is incompatible with collective life.<sup>366</sup> Punishment attaches social meaning to private acts of violence, a function that is particularly important for intimate crimes like sexual abuse.<sup>367</sup> In this context, restorative mechanisms like apology and restitution are a paltry, even obscene, response to a crime like the rape of a child.<sup>368</sup> As Albert Camus wrote in *Reflections on the Guillotine*:

I do not believe . . . that there is no responsibility in this world and that we must give way to that modern tendency to absolve everyone, victim and murderer, in the same confusion. Such purely sentimental confusion is made up of cowardice rather than of generosity and eventually justifies whatever is worst in this world.<sup>369</sup>

Restorative justice argues that it does not absolve, that it somehow holds offenders accountable more deeply than the criminal process.<sup>370</sup> However, there is a point at which the absence of punishment *is* absolution, where even the act of forgiveness can be undignified.<sup>371</sup>

A model of restorative justice that operates parallel to the criminal system has the potential to remedy both the problems of current victims' rights policies and the shortcomings of a pure restorative process.<sup>372</sup> For example, Bandes suggests that mechanisms like victim impact panels, where

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363. Keeanga-Yamahtta Taylor, *The Emerging Movement for Police and Prison Abolition*, NEW YORKER (May 7, 2021), <https://www.newyorker.com/news/our-columnists/the-emerging-movement-for-police-and-prison-abolition>; see Hayes & Kaba, *supra* note 362 (describing Nassar's sentence as "unjust").

364. See *infra* notes 365–371 and accompanying text.

365. See *infra* notes 366–371 and accompanying text.

366. Jean Hampton, *An Expressive Theory of Retribution*, in *RETRIBUTIVISM AND ITS CRITICS* 1, 19–21 (Wesley Cragg, ed., 1992).

367. See Stephen P. Garvey, *Restorative Justice, Punishment, and Atonement*, 2003 UTAH L. REV. 303, 304–11 (arguing that restoration is impossible without punishment). Partly because of the symbolic value of imprisonment, many victims find the idea of giving up punishment untenable. Many of Nassar's victims, for instance, emphasized that they wanted him incarcerated for as long as possible. See *supra* notes 120, 193 and accompanying text.

368. See *supra* note 367 and accompanying text.

369. ALBERT CAMUS, *Reflections on the Guillotine*, in *RESISTANCE, REBELLION, AND DEATH* 131, 177 (Justin O'Brien trans., 1963) (1961).

370. See *supra* notes 362–363 and accompanying text.

371. Jeffrie Murphy, *Forgiveness*, in *JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY* 16 (1988).

372. See *supra* notes 364–371 and accompanying text.

VIS is uncoupled from the criminal trial, and truth-telling commissions could better realize both the therapeutic and educational goals of VIS.<sup>373</sup> By maintaining separate proceedings, victims could speak in a supportive, non-adversarial environment while maintaining the possibility of a punitive response by the state.<sup>374</sup> Moreover, the flexibility of a forum not directly tied to the culpability of an individual offender could address the wider complicity that underlies crimes like Nassar's, illuminating not just an individual monster, but also the "conditions that allow monstrous behavior to flourish."<sup>375</sup> In place of the catharsis of the Nassar hearings, this would provide an opportunity for self-examination and collective responsibility, which is badly needed if we wish to genuinely reckon with the problem of child sexual abuse.<sup>376</sup>

#### CONCLUSION

This Comment has used the Nassar hearings to explore the relationship between victim impact statements, catharsis, and the legal response to child sexual abuse.<sup>377</sup> It has argued that the community catharsis provided by the victims' testimony—the collective outrage and sense of solidarity—functioned as much to absolve the community of its complicity as to illuminate the harm of Nassar's crimes.<sup>378</sup> This tension sheds light on the cycles of panic and disregard that define society's response to child sexual abuse.<sup>379</sup> Rather than reckoning with the social and familial norms that allow abuse to flourish in the shadows, the catharsis of events like the Nassar hearings allows the public to fix its fear, fascination and disgust on a few particularly monstrous offenders.<sup>380</sup> Separating VIS from sentencing into a parallel restorative procedure has the potential to both encourage broader forms of accountability and remedy the sort of due process problems that occurred in Nassar's case. While the women and girls at Nassar's sentencing spoke bravely and powerfully, celebrating the hearings as a manifestation of systemic change risks mistaking prurience for social justice.<sup>381</sup> As Lepore writes: "Some of what happened in the Nassar trial is as new as #MeToo. Much of it is as old as stoning."<sup>382</sup>

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373. Bandes, *What Are Victim Impact Statements For?*, *supra* note 182, at 1278–82.

374. *See supra* notes 360–371 and accompanying text.

375. Bandes, *What Are Victim Impact Statements For?*, *supra* note 182, at 1274–75.

376. *See supra* Sections II.B–C.

377. *See supra* Part II.

378. *See supra* Sections II.A–B.

379. *See supra* Section II.C.

380. *See supra* Section II.C.

381. *See supra* Section II.C.2.

382. Lepore, *supra* note 39.