

# SOUNDS OF SILENCE: A THEMATIC ANALYSIS OF VICTIM IMPACT STATEMENTS

by  
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*The Victim Impact Statement (VIS) is a legal document that crime victims submit to the court as part of the sentencing stage, informing the court about the harms they have suffered. The VIS enhances victims' sense of procedural justice, voice, and inclusion in the process, as well as their overall wellbeing. At the same time, their use raises concern about defendants' due process rights. The Article argues that VISs make a novel contribution to the criminal proceeding, beyond their formal goals of providing information to the court about the impact of the crime on its victims. Using a thematic analysis of 25 VISs that were submitted to Israeli criminal courts by victims of sexual, physical, and property offenses, as well as by relatives of homicide victims, the Article identifies four types of functions that VISs play for the victims who submit them. The VISs we analyzed were used to portray the offense as a life-changing event; to describe the hardships of the criminal justice process; to transform the victim into "more than just a name"; and to deliver a message or request. By bringing this content to the courtroom, the statements expanded the legal discourse and created an integrated therapeutic-legal discourse, which was accepted and formally acknowledged by the justice system. The openness of the legal system to accept and acknowledge exogenous content that is not required by law, even if indirectly, suggests a need to rethink the social function of the court for victims and communities. It is possible that the courts may be more inclusive of and more attentive to non-legal narratives, emotional expression, and interpersonal connectedness than is generally believed.*

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## INTRODUCTION

The past four decades have seen a significant change in the status of crime victims in the criminal justice process following their victimization. From being passive viewers of the criminal process, victims are now considered active parties who are entitled, at certain points, to express their opinion, receive information, and obtain assistance.<sup>1</sup> At the heart of the change in the legal status of victims is a mechanism called a Victim Impact Statement (VIS). A VIS is a written or oral statement delivered by crime victims to the sentencing organ at the sentencing stage, describing the effect of the crime on the victim. This Article argues that VISs make a novel contribution to the criminal proceeding, beyond their formal goals of providing information to the court about the impact of the crime. The Article conducts a thematic analysis of VISs to demonstrate how their use by victims of serious crimes injects a new discourse into the court setting, which integrates the legal and therapeutic frameworks.

The present Article examines the content of 25 VISs submitted to Israeli courts by victims of sexual and violent crimes, as well as statements submitted by relatives of homicide victims. The Israeli criminal justice system faces similar challenges to those of other Anglo-American legal systems. It is overburdened and heavily based on plea agreements. Portrayals of the modern American criminal justice system as “machinery,”<sup>2</sup> “managerial,”<sup>3</sup> and unjust<sup>4</sup> apply to the Israeli system as well. Questions about the role of crime victims in criminal trials and the use of VISs in sentencing emerge in most western legal systems, including Israel. The relevance of the present study, therefore, extends beyond the borders of Israel, and its findings are

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<sup>1</sup> The literature on the transformation in victims’ status in the criminal justice system is vast. For an overview of the philosophical, political, and legal trends regarding victims of crime in the criminal justice system, see *INTEGRATING A VICTIM PERSPECTIVE WITHIN CRIMINAL JUSTICE: INTERNATIONAL DEBATES* (Adam Crawford & Jo Goodey eds., 2000).

<sup>2</sup> STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* (2012).

<sup>3</sup> See generally Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 *STAN. L. REV.* 611 (2014) (discussing the expansion of criminal enforcement regarding misdemeanor crimes, arguing that the criminal justice system transforms from a model that focuses on blameworthiness to a regulating tool).

<sup>4</sup> MICHAEL TONRY, *MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA* (1995).

likely to contribute to the debate about victims' rights, interests, and wellbeing worldwide.

The thematic analysis of the 25 statements revealed that victims bring into the legal setting information, perspectives, and messages that exceed the narrowly prescribed format of how to present the effect of the crime to the court. Four shared themes emerged from the analysis of the written statements: the offense as a life-changing event and the harms reflecting this change; the complicated interaction between victims and the criminal justice process; the victims' wish to be "more than just a name" to the criminal justice system; and the use of VISs as a tool of communication to deliver a message or request. These themes suggest that, in addition to providing detailed information about the ways in which they were affected by the crime, victims also sought to tell a vivid story about who they were (or who the deceased victim was) and how they experienced the criminal justice process. They also wanted to deliver a message to others around them, with the court as the audience. By bringing this content to the courtroom, the statements expanded the legal discourse and created an integrated therapeutic–legal discourse, which was accepted and formally acknowledged by the justice system.

Crime has a detrimental effect on its victims. Victimologists have identified the multiple ways in which victims' lives are shattered by their victimization, including: the loss of trust in others; the development of anxiety, depression, and post-traumatic symptoms; damaged social and familial bonds; decreased sense of safety; reduced academic and professional achievement; and more.<sup>5</sup> The negative implications of crime are greater in female victims and in those belonging to minority groups or low-income communities.<sup>6</sup> Often, victims express a need to be involved in the trial against the person who harmed them, as part of their healing process. When victims are not offered adequate opportunities for involvement, their emotional difficulties increase. Some scholars have argued that when the criminal justice process is experienced as unfair, it retraumatizes the victims.<sup>7</sup>

Although the goal of criminal justice processes is not to heal victims, but rather to determine guilt and mete out appropriate punishment for those who are found guilty beyond a reasonable doubt, there is general agreement today that victims' trauma and harm should be acknowledged in criminal proceedings. VISs are the central instrument by which victims can inform the court about the harms they

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<sup>5</sup> Joanna Shapland & Matthew Hall, *What Do We Know About the Effects of Crime on Victims?*, 14 INT'L REV. VICTIMOLOGY 175, 178 (2007) (reviewing the research into the effects of crime on individuals, households, and business).

<sup>6</sup> ALL. FOR SAFETY & JUST., CRIME SURVIVORS SPEAK: THE FIRST-EVER NATIONAL SURVEY OF VICTIMS' VIEWS ON SAFETY AND JUSTICE (2016), <https://allianceforsafetyandjustice.org/wp-content/uploads/documents/Crime%20Survivors%20Speak%20Report.pdf>.

<sup>7</sup> Jo-Anne Wemmers, *Victims' Experiences in the Criminal Justice System and Their Recovery from Crime*, 19 INT'L REV. VICTIMOLOGY 221, 229 (2013) (discussing the effects of the criminal justice system on victims' psychological recovery from the crime).

endured as a result of their victimization. More broadly, VISs offer victims the possibility to become involved, heard, and acknowledged in the process. The empirical question of whether or not the delivery of a VIS is therapeutic for crime victims is yet to be examined, but scholars agree that when victims experience a sense of control and procedural fairness, they are more likely to experience improved wellbeing.<sup>8</sup>

Outside the victimological debate, the systemic use of VISs has faced numerous difficulties across the globe. Traditional criminal law experts warn against the violation of the due process rights of defendants stemming from the involvement of victims in the process through the submission of VISs.<sup>9</sup> In addition to the normative tension between due process and victims' rights, other constraints, such as time limitations, institutional priorities, and professional norms often prevent the VIS from being a legal mechanism regularly used in criminal trials.

Given the tension between victims' needs and therapeutic goals (such as voice, acknowledgment, and empowerment) on one hand, and the institutional barriers against VISs on the other, it is imperative to look deeper into the content of actual VISs, examine their meaning for victims of serious crimes, and explore the ways in which victims chose to use them. The present Article aims to expose the significance of the practice of the VIS, which is often overshadowed by the legal–therapeutic discursive divide.

The remainder of this Article proceeds as follows: Part I introduces the legal discourse of VISs, focusing on the tension between defendants' and victims' rights. Part II explores the social science discourse of VISs, discussing the goals, benefits, and prevalence of this legal tool. Part III describes the methodology employed in this study. In Part IV we present the findings. Part V contains a discussion of the four main themes and their significance, based on the findings and shaped by the literature on VISs and victimology. The discussion aims to broaden our understand-

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<sup>8</sup> Kim M.E. Lens, Antony Pemberton, Karen Brans, Johan Braeken, Stefan Bogaerts & Esmah Lahlah, *Delivering a Victim Impact Statement: Emotionally Effective or Counter-Productive?*, 12 EUR. J. CRIMINOLOGY 17, 30 (2015) (arguing that victims who experience higher levels of control and procedural justice also experienced decreased feelings of anger and anxiety).

<sup>9</sup> For selected literature, see Amy K. Phillips, Note, *Thou Shalt Not Kill Any Nice People: The Problem of Victim Impact Statements in Capital Sentencing*, 35 AM. CRIM. L. REV. 93, 94–95 (1997); Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 392–410 (1996); Peggy M. Tobolowsky, *Victim Participation in the Criminal Justice Process: Fifteen Years After the President's Task Force on Victims of Crime*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 21, 81 (1999) (reviewing victims' rights and role in the criminal justice system); Kristin Henning, *What's Wrong with Victims' Rights in Juvenile Court?: Retributive Versus Rehabilitative Systems of Justice*, 97 CALIF. L. REV. 1107, 1108–09 (2009) (discussing the effect of VISs on defendants' rights in juvenile courts); Kenji Yoshino, *The City and the Poet*, 114 YALE L.J. 1835, 1836, 1869–73 (2005) (discussing *Payne v. Tennessee*, 501 U.S. 808 (1991), from a “law and literature” perspective).

ing of the use of VISs in the criminal justice system. The Article concludes by suggesting that VISs create a new framework that integrates the legal and therapeutic discourses.

## I. VICTIM IMPACT STATEMENTS IN LEGAL DISCOURSE

### *A. From Outsiders to “Third Parties”: Victim Impact Statements as the Pinnacle of Victim Participation in Justice*

In the past two centuries, criminal justice systems have excluded victims from participation in the legal process and left them outside the “adversarial triangle” that includes the defendant, the state, and the judiciary.<sup>10</sup> The understanding that crime victims are legitimate and deserving stakeholders in the criminal process began to develop in the 1970s, with the emergence of victims’ rights advocacy. The report of the U.S. President’s Task Force on Victims of Crimes, in 1982, provided a significant boost to the victims’ rights movement. It included recommendations to increase victim participation in justice and to take steps to address their coping needs resulting from their victimization.<sup>11</sup> The publication of the report triggered a comprehensive change to state laws. All states passed legislation guaranteeing victims’ rights,<sup>12</sup> and 48 states offered victims the right to be heard at sentencing.<sup>13</sup> Although the laws relating to VISs<sup>14</sup> vary from state to state, VISs are a primary means by which crime victims can explain to the court the various effects of the crime on their life, including its financial, social, psychological, and medical consequences.<sup>15</sup>

At the federal level, in 2004, the Crime Victims’ Rights Act (CVRA) was enacted, creating a “broad and encompassing” victims’ bill of rights<sup>16</sup> and ensuring that crime victims are treated fairly in the criminal process. The Act provided crime victims with “[t]he right to be reasonably heard at any public proceeding in the

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<sup>10</sup> See generally Jonathan Doak, *Victims’ Rights in Criminal Trials: Prospects for Participation*, 32 J.L. & SOC’Y 294 (2005) (considering the transformation in the plight of victims in the criminal justice system, arguing for a more active participation of victims in the system).

<sup>11</sup> PRESIDENT’S TASK FORCE ON VICTIMS OF CRIME, EXEC. OFF. OF THE PRESIDENT, FINAL REPORT 17–18 (1982).

<sup>12</sup> Ida M. Johnson & Etta F. Morgan, *Victim Impact Statements—Fairness to Defendants?*, in CONTROVERSIES IN VICTIMOLOGY 115 (Laura J. Moriarty ed., 2d 2008) (discussing the pros and cons of delivering VISs and the effects of VISs on sentencing decisions).

<sup>13</sup> Douglas E. Beloof, *Constitutional Implications of Crime Victims as Participants*, 88 CORNELL L. REV. 282, 299–305 (2003) (examining the constitutionality of VISs and supporting its delivery in courts).

<sup>14</sup> In some jurisdictions, this legal tool is called a “victim personal statement.”

<sup>15</sup> Damon Pitt, Comment, *No Payne, No Gain?: Revisiting Victim Impact Statements After Twenty Years in Effect*, 16 CHAP. L. REV. 475, 485, 486, 493 (2013) (exploring the changing role of VISs in capital sentencing).

<sup>16</sup> 150 CONG. REC. 7294, 7295 (2004) (statement of Sen. Dianne Feinstein).

district court involving release, plea, sentencing, or any parole proceeding.”<sup>17</sup> The CVRA was the culmination of a victims’ rights “wave,” reflected in numerous federal laws.<sup>18</sup>

Starting from the 1980s and during the first decades of the 21st century, victims’ rights reforms were enacted all over the world.<sup>19</sup> They include: victim compensation schemes; the establishment of national victim assistance programs; a general requirement to keep victims informed of the progress of the criminal process against their offender; provisions regarding victims’ safety and respect; and the provision of various ways for victims to be actively involved in the process, VISs being the central mechanism.<sup>20</sup>

### *B. The Victims’ Rights vs. Defendants’ Rights Debate*

The reforms promoted a debate about the desirability of victims’ procedural rights in criminal processes, VISs being one of the key points of contention. This controversy was reflected vividly in an array of U.S. Supreme Court decisions regarding the use of VISs in capital cases.<sup>21</sup> Some argued that admitting VISs was prejudicial against the defendant,<sup>22</sup> particularly in capital sentencing. Others argued

<sup>17</sup> 18 U.S.C. § 3771(a)(4) (2018).

<sup>18</sup> They include the 1982 Victim and Witness Protection Act, Pub. L. No. 97-291, 96 Stat. 1248 (codified as amended at 18 U.S.C. §§ 1512–15, 3663–64) (regulating victim and witness protection during testimony), the 1984 Victims of Crime Act, Pub. L. No. 98-473, 98 Stat. 2170 (codified as amended at 34 U.S.C. §§ 20101–11, and in scattered sections of 18 U.S.C.) (establishing financial and social support for crime victims), the 1990 Victims’ Rights and Restitution Act, Pub. L. No. 101-647, 104 Stat. 4820 (codified as amended in scattered sections of 34 U.S.C. and 42 U.S.C.) (stipulating a range of victims’ rights), the 1996 Mandatory Victims Restitution Act, Pub. L. No. 104-132, 110 Stat. 1227 (codified as amended in scattered sections of 18 U.S.C.) (requiring federal courts to include victim restitution in sentencing), and the 1997 Victims’ Rights Clarification Act, Pub. L. No. 105-6, 111 Stat. 12 (codified as amended in scattered sections of 18 U.S.C.) (determining victims’ right to be present during court hearings).

<sup>19</sup> See, most recently, Council Directive 2012/29, 2012 O.J. (L315) 57–73 (EU) (establishing minimum standards on the rights, support, and protection of victims of crime) (the Victims’ Rights Directive), and Council Directive 2004/80, 2004 O.J. (L216) 1 (EC) (relating to compensation to crime victims).

<sup>20</sup> JONATHAN DOAK, VICTIMS’ RIGHTS, HUMAN RIGHTS AND CRIMINAL JUSTICE: RECONCEIVING THE ROLE OF THIRD PARTIES (2008).

<sup>21</sup> Madison H. Kempf, Current Development, *Reconsidering the Use of Victim Impact Evidence*, 31 GEO. J. LEGAL ETHICS 673, 675–83 (2018) (describing the views of opponents and proponents of VISs in capital sentencing).

<sup>22</sup> *Id.*; see also *supra* note 9 and accompanying text.

that it provided an important voice for victims and their family members, and that it afforded the jury an opportunity to learn about the victim.<sup>23</sup>

In the case of *Booth v. Maryland*,<sup>24</sup> the defendant was convicted at trial on two counts of first-degree murder and the jury sentenced him to death.<sup>25</sup> At trial, the court approved the admission of a VIS that was based on interviews with the victims' son and daughter, as well as other family members. In their statement, they described the victims' personal qualities and various personal and emotional effects of the crime on the family.<sup>26</sup> The Supreme Court overturned the decision and held that the emotional trauma of the victims' family and the victims' personal attributes were irrelevant to the blameworthiness of the defendant<sup>27</sup> and had the potential to divert the jury from making a non-prejudicial decision regarding the death penalty.<sup>28</sup> Therefore, the admission of the VIS was prohibited under the Eighth Amendment.<sup>29</sup>

The decision in *Booth* was reaffirmed in the case of *South Carolina v. Gathers*,<sup>30</sup> in which the Supreme Court considered whether a prosecutor's closing argument, which included extensive comments on the victim's character, was admissible as a VIS. The Court held that the Eighth Amendment barred admission of a VIS during the penalty phase of a capital trial, emphasizing that the description of the victim's character<sup>31</sup> was prejudicial and did not offer any relevant information regarding the defendant's guilt.<sup>32</sup>

The case of *Payne v. Tennessee*<sup>33</sup> marked a dramatic change in the views of the Supreme Court. Payne was accused of the rape and murder of a woman and her

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<sup>23</sup> Bryan Myers & Edith Greene, *The Prejudicial Nature of Victim Impact Statements: Implications for Capital Sentencing Policy*, 10 PSYCH., PUB. POL'Y, & L. 492 (2004) (examining the main psychological issues in the discourse of VISs).

<sup>24</sup> *Booth v. Maryland*, 482 U.S. 496 (1987).

<sup>25</sup> *Id.* at 498, 501 (featuring a defendant who robbed and murdered an elderly couple in their home).

<sup>26</sup> *Id.* at 499.

<sup>27</sup> *Id.* at 504, 505.

<sup>28</sup> The Court held that admitting VISs about the victim's character "could well distract the sentencing jury from its constitutionally required task [of] determining whether the death penalty is appropriate in light of the background and record of the accused and the particular circumstances of the crime." It added that "it creates an impermissible risk that the capital sentencing decision will be made in an arbitrary manner." *Id.* at 505, 507.

<sup>29</sup> *Id.* at 508–09.

<sup>30</sup> *South Carolina v. Gathers*, 490 U.S. 805 (1989).

<sup>31</sup> The prosecution described the victim's Christian beliefs, community involvement, and mental disability. *Id.* at 808–10.

<sup>32</sup> *Id.* at 811–12. The Court referred to the prosecutor's statement as "wholly unrelated to the blameworthiness of a particular defendant." *Id.* at 810 (quoting *Booth*, 482 U.S. at 496).

<sup>33</sup> *Payne v. Tennessee*, 501 U.S. 808 (1991).

two-year-old daughter. At trial, the Tennessee Supreme Court allowed the state to present the statement of the victim's mother. She described the effect of the death on her life, and particularly on her grandson, the son of the victim, who was left without a mother.<sup>34</sup> In the appeal to the Supreme Court, Payne argued, based on the cases of *Booth* and *Gathers*, that the admission of VIS by the grandmother violated the Eighth Amendment and was highly prejudicial.<sup>35</sup> The majority decision in the Supreme Court upheld the Tennessee Supreme Court decision to admit the VIS and held that "there is nothing unfair about allowing the jury to bear in mind that harm at the same time as it considers the mitigating evidence introduced by the defendant."<sup>36</sup> The Supreme Court rejected the argument that the statement would divert the jury from objective decision and would influence sentencing based on irrelevant factors, such as the victim's gender, social class, race, and role in the community.<sup>37</sup> It further stated that VIS is a legal tool that offers juries information about the harmful results of the crime in question, explaining that this type of evidence is relevant to the sentencing phase and to the question of the death penalty, and in that sense, it is not different from other evidence presented to the court.<sup>38</sup> The *Payne* decision was received by a mere 6–3 majority headed by Chief Justice William Rehnquist and is considered a capstone case in the victims' rights movement.<sup>39</sup> Although Pervis Payne has maintained his claim of innocence ever since his death penalty and it has been recently set aside after the district attorney formally conceded Pervis Payne's intellectual disability,<sup>40</sup> the legacy of this case has changed the role of VIS in capital cases.

The ruling in *Payne* did not allow statements of the victim's family regarding the appropriate sentence or the blameworthiness of the defendant, and in that sense, it upheld the rulings in *Booth* and *Gathers*. The *Payne* decision limited the admissibility of VISs to the emotional effect of the crime and the victim's character.

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<sup>34</sup> *Id.* at 814.

<sup>35</sup> *Id.* at 816–17, 826.

<sup>36</sup> *Id.* at 826–27.

<sup>37</sup> *Id.* at 818–19, 825.

<sup>38</sup> The Court held: "We are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant." *Id.* at 825–27.

<sup>39</sup> *Id.* at 810; Kempf, *supra* note 21, at 677–78.

<sup>40</sup> Dakin Andone, *Judge Vacates Death Sentences of Pervis Payne, Who Was to Be Executed for a Crime He Says He Didn't Commit*, CNN (Nov. 27, 2021, 6:00 AM), <https://edition.cnn.com/2021/11/27/us/pervis-payne-death-sentence-vacated/index.html>.

Following *Payne*, 33 states have allowed some use of VISs in capital trials,<sup>41</sup> in addition to the federal government and the military.<sup>42</sup> The types and extent of VISs vary from state to state.<sup>43</sup> Most VISs contain information about the victim's character<sup>44</sup> and courts allow a description of a range of effects on the victim's family members.

The debate surrounding the use of VISs has extended well beyond the courts. Opponents suggest that victims' statements may lead to harsher, disproportional, and unequal penalties.<sup>45</sup> Addressing this argument, scholars have shown that, in contrast to intuitive assumptions, personal victimization is not associated with more punitive attitudes toward offenders.<sup>46</sup> Moreover, no study has shown that the submission of a VIS led to harsher penalties or to inconsistencies in sentencing.<sup>47</sup>

The dispute about the appropriateness of the use of VISs in criminal cases is part of a broader debate about the mutual relations between law and mental health,

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<sup>41</sup> Joe Frankel, Comment, *Payne, Victim Impact Statements, and Nearly Two Decades of Evolving Standards of Decency*, 12 N.Y.C. L. REV. 87, 107 (2008). For an examination of the different approaches to VISs in capital sentencing, see *id.* at 112–17.

<sup>42</sup> John H. Blume, *Ten Years of Payne: Victim Impact Evidence in Capital Cases*, 88 CORNELL L. REV. 257, 267–68, 281 (2003) (describing the capital jurisprudence and capital litigation of VISs).

<sup>43</sup> The model that shaped the various states' laws is the Victim and Witness Protection Act of 1982, Pub. L. 97-291, 96 Stat. 1248 (codified as amended at 18 U.S.C. §§ 1512–15, 3663–64). Angela P. Harris, *The Jurisprudence of Victimhood*, 1991 SUP. CT. REV. 77, 79, 87 (1991) (arguing that the *Payne* “jurisprudence of victimhood” ignores the broader historical social and cultural context of guilt and innocence in American society).

<sup>44</sup> This is because the *Payne* ruling allowed admission of the victim's personal characteristics and the description of the emotional effect of the murder on family members. *Payne*, 501 U.S. at 827; see also Frankel, *supra* note 41, at 110 (showing that VISs may include information about victim's talents, intelligence, spirituality, work ethic, educational background, and standing in the community).

<sup>45</sup> Anthony Pemberton & Sandra Reynaers, *The Controversial Nature of Victim Participation: Therapeutic Benefits in Victim Impact Statements*, in THERAPEUTIC JURISPRUDENCE AND VICTIM PARTICIPATION IN JUSTICE: INTERNATIONAL PERSPECTIVES 229, 233–34 (Edna Erez, Michael Kilchling & Jo-Anne Wemmers eds., 2011). Pemberton and Reynaers promote the idea of “therapeutic coherence” in relation to VISs and victims' rights, arguing that the use of certain therapeutic constructs (and not others) can reduce the tension between defendant's rights and victims' needs. *Id.* at 237–41.

<sup>46</sup> Shadd Maruna & Anna King, *Public Opinion and Community Penalties*, in ALTERNATIVES TO PRISON: OPTIONS FOR AN INSECURE SOCIETY 83, 92 (Anthony Bottoms, Sue Rex & Gwen Robinson eds., 2004) (examining public attitudes towards punitive and non-punitive approaches focusing on the relations between public opinion and non-custodial punishments).

<sup>47</sup> Edna Erez & Kathy Laster, *Neutralizing Victim Reform: Legal Professionals' Perspectives on Victims and Impact Statements*, 45 CRIME & DELINQ. 530, 531, 536 (1999) (examining the use of VISs by prosecutors, defense lawyers, and judges in south Australia).

and about the appropriateness of injecting therapeutic considerations into legal discretion. Some argue that therapeutic goals jeopardize basic legal principles such as equality and justice, and are foreign to criminal law and therefore belong to platforms outside the courtroom, such as restorative justice settings.<sup>48</sup> An additional risk of assigning therapeutic goals to criminal justice lies in their vagueness: therapeutic assumptions are dynamic and contextual, and it is impossible to safely predict who is likely to benefit from a certain legal policy and who is likely to be disadvantaged by it.<sup>49</sup> By contrast, other scholars argue that therapeutic elements do not necessarily endanger basic criminal justice principles and do not inherently contradict them.<sup>50</sup> Moreover, social science knowledge is often more evidence-based, accurate, and robust than most claims made through legal discourse, as a result of the scientific rigor that underpins social science research. For example, using social science knowledge for reducing anger and anxiety may enhance self-control, a concept that is central in criminal law and law enforcement.<sup>51</sup>

## II. VICTIM IMPACT STATEMENTS IN SOCIAL SCIENCE DISCOURSE

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

Moving beyond the legal controversy about the appropriate balance between victims' and defendants' rights, social science discourse considers the various benefits of VISs for different stakeholders. Scholars argue that the VIS provides victims with the opportunity to describe, in their authentic voice and words, the harms that were inflicted on them.<sup>52</sup> When the statement is delivered by family members of deceased victims, it describes the effect of the death of the victim upon them and reflects their trauma and sense of loss.<sup>53</sup>

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<sup>48</sup> See generally Bas van Stokkom, *The Expressive Function of Restorative Punishment: A 'Public Interest' Perspective*, in *IMAGES OF RESTORATIVE JUSTICE THEORY* (Robert Mackay, Marko Bošnjak, Johan Deklerck, Christa Pelikan, Bas van Stokkom & Martin Wright eds., 2007).

<sup>49</sup> Pemberton & Reynaers, *supra* note 45.

<sup>50</sup> David B. Wexler, *Therapeutic Jurisprudence: An Overview*, 17 T.M. COOLEY L. REV. 125 (2000).

<sup>51</sup> See Pemberton & Reynaers, *supra* note 45, at 237.

<sup>52</sup> Mihael Ami Cole, *Victim Impact Statements—A Matter of Principle*, 15 CANADIAN CRIM. L. REV. 145, 147 (2010) (discussing the implications of the adoption by the Canadian Supreme Court of the so-called principled approach towards the admission of VISs in criminal proceedings); see also Paul G. Cassell & Edna Erez, *Victim Impact Statements and Ancillary Harm: The American Perspective*, 15 CANADIAN CRIM. L. REV. 149, 150–56 (2011) (summarizing criminological and victimological literature on the impact of crime on direct and indirect victims and on their need to tell decision makers how the crime has hurt them).

<sup>53</sup> Tyrone Kirchengast, *Victim Impact Statements and the Previterra Rule: Delimiting the Voice and Representation of Family Victims in New South Wales Homicide Cases*, 24 U. TAS. L. REV. 114,

It is generally accepted that VISs promote three public interests, or social goals: increasing sentencing accuracy, enhancing victims' wellbeing and satisfaction, and promoting public trust in law enforcement.<sup>54</sup> Some argue that VISs promote the additional social goal of reducing reoffending.<sup>55</sup>

Regarding the first social goal, it has been argued that through the VIS, judges and juries gain detailed information about the harms endured by the victims.<sup>56</sup> In this sense, VISs help make the criminal justice system personnel more aware of the needs, feelings, and concerns of victims, and sensitize them to victims' interests,<sup>57</sup> leading to more accurate and higher quality sentencing. The victim may provide information about the true harm of the crime, including information on different physical, financial, psychological, and other aspects.<sup>58</sup> This information may improve sentence outcomes, and enable appropriate compensation or the repair of the physical harm or damage caused.<sup>59</sup>

A second social goal that VISs promote is that of strengthening the victim's role in the legal process. More generally, VISs empower victims as they help them "to regain a sense of dignity and respect rather than feeling powerless and ashamed."<sup>60</sup> VISs, thus, serve as a therapeutic tool,<sup>61</sup> notwithstanding their effects

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114–15 (2005) (discussing the pros and cons of allowing family members of homicide victims to deliver VISs).

<sup>54</sup> Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO STATE J. CRIM. L. 610 (2009).

<sup>55</sup> *Id.* at 623–24.

<sup>56</sup> *Id.* at 619–20 (explaining that victims may provide valuable information about the behavior of the defendant at the scene and the physical and financial harms they have suffered, and thus contribute to the judicial decision regarding the desired sentence).

<sup>57</sup> Ian Edwards, *Victim Participation in Sentencing: The Problems of Incoherence*, 40 HOW. J. CRIM. JUST. 39, 41 (2001) (explaining that under the proportionality rationale, the harm caused by the defendant and the consequences of his or her deeds should be communicated to decision makers to facilitate accurate, proportional sentencing).

<sup>58</sup> Cassell, *supra* note 54, at 620; Julian V. Roberts & Edna Erez, *Communication in Sentencing: Exploring the Expressive Function of Victim Impact Statements*, 10 INT'L REV. VICTIMOLOGY 223, 226, 229 (2004) (citing instructions given to victims in England and Wales as an example for the perception of the VIS as a mechanism for enhancing sentencing accuracy); Edwards, *supra* note 57, at 48; Kirchengast, *supra* note 53, at 114–15.

<sup>59</sup> Edwards, *supra* note 57, at 42; Roberts & Erez, *supra* note 58, at 226.

<sup>60</sup> Christine A. Trueblood, Comment, *Victim Impact Statements: A Balance Between Victim and Defendant Rights*, 3 PHX. L. REV. 605, 634 (2010) (quoting Jayne W. Barnard, *Allocution for Victims of Economic Crimes*, 77 NOTRE DAME L. REV. 39, 41 (2001)).

<sup>61</sup> Cassell, *supra* note 54, at 621, 622; see also Edna Erez, *Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice*, CRIM. L. REV. 545, 550–51 (1999) (arguing that the cumulative knowledge acquired from research indicates that with proper safeguards, the overall experience of victims providing VISs is positive and empowering).

on the sentencing decision. The therapeutic value of VISs has been extensively discussed in the field of therapeutic jurisprudence (TJ). TJ is a school of thought that examines the therapeutic and anti-therapeutic implications of the law on individuals.<sup>62</sup> Studies have consistently revealed that the criminal justice process is often experienced by victims as coercive and painful.<sup>63</sup> Victims often described the process as unfair, abusive, dismissive, and eventually leading to feelings of pain and suffering rather than of justice and closure.<sup>64</sup> TJ scholarship highlights the need and desire of victims and their remaining relatives to be heard, respected, and acknowledged—even when the eventual outcome is not influenced by their statement.<sup>65</sup> Victims who felt that their harm has been acknowledged and that they were able to have a voice in the process were more willing to accept the outcomes and experienced the process more positively.<sup>66</sup>

Kim M.E. Lens and colleagues presented empirical evidence about the therapeutic benefits of VISs in emotional recovery.<sup>67</sup> Their study found that the therapeutic benefits of delivering a VIS were indirect: when the delivery of VISs led to increased perception of procedural justice and control over the recovery process, victims experienced reduced feelings of anger and anxiety and overall improved well-being.<sup>68</sup>

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<sup>62</sup> See generally Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCH., PUB. POL'Y & L. 184 (1997) (elaborating on the theory of TJ and its relationship with other schools of jurisprudence).

<sup>63</sup> Bruce J. Winick, *Foreword: Therapeutic Jurisprudence Perspectives on Dealing with Victims of Crime*, 33 NOVA L. REV. 535, 540–41 (2009) (discussing the anti-therapeutic effects of the criminal justice process on victims); Rachel Condry, *Secondary Victims and Secondary Victimization*, in INTERNATIONAL HANDBOOK OF VICTIMOLOGY 219, 236, 238 (Shlomo Giora Shoham, Paul Knepper & Martin Kett eds., 2010) (arguing that, despite national and international reforms, crime victims continue to suffer from secondary victimization as a result of the system's failure to address their justice needs).

<sup>64</sup> See generally Malini Laxminarayan & Mark Bosmans, *Victim Satisfaction with Criminal Justice: A Systematic Review*, 8 VICTIMS & OFFENDERS 119 (2013).

<sup>65</sup> Jo-Anne Wemmers & Katie Cyr, *Victims' Perspective on Restorative Justice: How Much Involvement Are Victims Looking For?*, 11 INT'L REV. VICTIMOLOGY 229, 268 (2004) (demonstrating that, although victims wanted to express their views and concerns at sentencing, most of them believed that the final decision should be left to the authorities); see also Tracey Booth, *Homicide, Family Victims and Sentencing: Continuing the Debate about Victim Impact Statements*, 15 CURRENT ISSUES IN CRIM. JUST. 253, 255 (2004) (arguing that victims submit VISs for a myriad of reasons, some related to influencing the sentence but others related to the wish to be heard and acknowledged as stakeholders); Winick, *supra* note 63, at 543.

<sup>66</sup> Pemberton & Reynaers, *supra* note 45, at 240.

<sup>67</sup> Lens et al., *supra* note 8, at 30–31.

<sup>68</sup> *Id.* at 21, 30.

The therapeutic value of VISs is closely linked with the theory of procedural justice, the perceived fairness of the procedure by which the outcome was determined, and the perceived treatment people received from the decision maker.<sup>69</sup> Having a voice in the process promotes a sense of procedural fairness and strengthens individuals' sense of belonging and social identity.<sup>70</sup> Following Tom R. Tyler's theory of procedural fairness, scholars have argued that the perceived benefits of participating in the criminal justice process may be defined with reference to participating in the procedure, rather than having control over the sentence.<sup>71</sup> Edna Erez argued that studies of victims' opinions concerning the importance of VISs have confirmed the conclusion that the right to deliver a VIS is viewed as important regardless of its effect on the sentencing outcome.<sup>72</sup> Empirical studies have shown that most victims were interested in participating in the justice process<sup>73</sup> and expected the opportunity to tell their story in their own words.<sup>74</sup> As court procedures rarely provide an opportunity for witnesses to construct their own narrative, VIS represents a means of providing victims with a voice at sentencing.<sup>75</sup>

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<sup>69</sup> TOM R. TYLER, WHY PEOPLE OBEY THE LAW 117–18, 124 (2006).

<sup>70</sup> Tom R. Tyler & Steven L. Blader, *The Group Engagement Model: Procedural Justice, Social Identity, and Cooperative Behavior*, 7 PERSONALITY & SOC. PSYCH. REV. 349, 358 (2003) (explaining that procedural justice enhances people's positive feelings of self-worth, through their connection to the group).

<sup>71</sup> JOANNA SHAPLAND, JON WILLMORE & PETER DUFF, VICTIMS IN THE CRIMINAL JUSTICE SYSTEM 93–96 (A.E. Bottoms ed., 1985); JO-ANNE M. WEMMERS, VICTIMS IN THE CRIMINAL JUSTICE SYSTEM 139–40 (1996) (suggesting that, rather than wanting to control the outcomes, victims want authorities to show an interest and consider their views, to be “taken seriously” by them); Wemmers & Cyr, *supra* note 65 (presenting similar findings among victims who were offered victim-offender mediation).

<sup>72</sup> Edna Erez, *Victim Participation in Sentencing: Rhetoric and Reality*, 18 J. CRIM. JUST. 19, 28–29 (1990) (explaining that, while there is no evidence that including victims in the criminal justice process results in punitiveness, studies show clearly that VISs have an important symbolic value, for specific victims and for the victims' rights movement as a whole).

<sup>73</sup> Dean G. Kilpatrick, David Beatty & Susan Smith Howley, *The Rights of Crime Victims—Does Legal Protection Make a Difference?*, NAT'L INST. JUST.: RSCH IN BRIEF, Dec. 1998, at 1, 4 (presenting findings from a national study involving over 1,300 victims, in which more than three-fourths of the interviewees rated “very important” a range of participatory rights, such as being notified and consulted at certain stages of the criminal justice process).

<sup>74</sup> Roberts & Erez, *supra* note 58, at 236 (demonstrating the importance of direct communication through findings of high satisfaction rate among survivors of intimate violence who were invited to talk about their experience in front of male batterers in victim impact panels).

<sup>75</sup> Judith Lewis Herman, *The Mental Health of Crime Victims: Impact of Legal Intervention*, 16 J. TRAUMATIC STRESS 159, 159–61 (2003) (describing how being interrogated in court or by the police can enhance feelings of disempowerment and trauma among victims, as opposed to delivering a VIS).

Antony Pemberton and colleagues<sup>76</sup> offered an understanding of victims' subjective experiences of justice through the application of the Big Two framework of agency and communion.<sup>77</sup> According to this perspective, agency refers to individuals' motivation to experience competence, achievement, and power, while communion refers to individuals' desires for social relatedness and affiliation. Experiencing victimization impairs individuals' sense of agency and communion.<sup>78</sup> Communion impairment can be viewed literally, as, for example, when the offender is known to the victim,<sup>79</sup> or generalized to the relationship with the wider social surroundings.<sup>80</sup> Agency impairment occurs as a result of the lost sense of control, status, and respect through the victimization experience. The authors argued that the dominant discourse about VISs refers to its instrumental value—its potential in promoting retribution—and thus highlights mainly the agency-related value for victims.<sup>81</sup> Nevertheless, they contended that participating in the justice process through the delivery of a VIS promotes victims' *sense of communion* as well, because through their statement victims communicate their values, the harm they experienced, and their needs, irrespective of the eventual outcome.<sup>82</sup>

Closely related to the concept of communion is the value of VISs as a form of communication between the victim, the offender, the judge, and the community in general.<sup>83</sup> According to this view, the VIS is a mechanism of reciprocal communication that promotes benefits inherent to being heard and listened to, regardless of

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<sup>76</sup> Antony Pemberton, Pauline G.M. Aarten & Eva Mulder, *Beyond Retribution, Restoration & Procedural Justice: The Big Two of Communion and Agency in Victims' Perspectives on Justice*, 23 PSYCH, CRIME & L. 682 (2017).

<sup>77</sup> DAVID BAKAN, *THE DUALITY OF HUMAN EXISTENCE: ISOLATION AND COMMUNION IN WESTERN MAN* 14–15 (1966) (“I have adopted the terms ‘agency’ and ‘communion’ to characterize two fundamental modalities in the existence of living forms, agency for the existence of an organism as an individual, and communion for the participation of the individual in some larger organism of which the individual is a part.”).

<sup>78</sup> Pemberton et al., *supra* note 76, at 683; Andrea E. Abele & Bogdan Wojciszke, *Agency & Communion from the Perspective of Others*, 93 J. PERSONALITY & SOC. PSYCH. 751, 752 (2007).

<sup>79</sup> Judith Lewis Herman, *Justice from the Victim's Perspective*, 11 VIOLENCE AGAINST WOMEN 571 (2005) (presenting findings from her study on the justice needs of 22 survivors of serious crimes, for which most important were denunciation of the crime and validation of their story by the surrounding communities).

<sup>80</sup> Ronnie Janoff-Bulman & Irene Hanson Frieze, *A Theoretical Perspective for Understanding Reactions to Victimization*, 39 J. SOC. ISSUES 1 (1983).

<sup>81</sup> Pemberton et al., *supra* note 76, at 693.

<sup>82</sup> *Id.* at 688 (“Rather than striving for retribution or value restoration, victims' involvement in criminal justice is better seen as involving a mix of agency and communion-based motives that are to be met.”).

<sup>83</sup> Roberts & Erez, *supra* note 58, at 231 (discussing the importance assigned by crime victims to communicating with judges, lawyers, and others involved in the justice process).

the outcome. The communicative role of VISs is multifaceted: through the statement, victims communicate with the court expressing their feelings about the crime;<sup>84</sup> by accepting the statement, the court communicates state recognition of the harm and the wrong that victims have suffered; and the victim communicates with the offender who has the opportunity to accept responsibility and express remorse directly to the victim. Indeed, some have argued that the main purpose of VISs is to give the victims the opportunity to have their feelings heard by the offender, suggesting a condemnatory or shaming function.<sup>85</sup> Studies conducted in Ohio, Australia, and Canada found that many victims cited communicating to the offender a sense of the harm inflicted as a reason for submitting VISs.<sup>86</sup> Tracey Booth's qualitative research identified a consensus among victims' families regarding their appreciation of the opportunity to participate in sentencing by submitting VISs. The families ascribed importance to the ability to express their feelings about the crime to the court, the offender, and the wider community, and making the deceased visible in the court proceedings.<sup>87</sup>

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<sup>84</sup> Kim M.E. Lens, Anthony Pemberton & Stefan Bogaerts, *Heterogeneity in Victim Participation: A New Perspective on Delivering a Victim Impact Statement*, 10 EUR. J. CRIMINOLOGY 479 (2013) (presenting findings from a study with 170 victims about the purpose or the consequences of submitting a VIS, in which victims understood the VIS as both a means to communicate with others *and* an instrument to influence the outcome).

<sup>85</sup> Edwards, *supra* note 57, at 45 (describing the legislative debate on the south Australian Bill, including a statement by one of its supporters that "the purpose of the victim impact statement is to give the victim the opportunity to have their feelings heard by the offender," suggesting a condemnatory or shaming function).

<sup>86</sup> Edna Erez & Pamela Tontodonato, *Victim Participation in Sentencing and Satisfaction with Justice*, 9 JUST. Q. 393 (1992) (presenting findings from a study of 125 felony victims in Ohio about their satisfaction with the sentence and the criminal justice system as a whole, out of which 62% submitted a VIS); EDNA EREZ, LEIGH ROEGER & FRANK MORGAN, OFF. CRIME STAT., S. AUSTL. ATT'Y-GEN.'S DEP'T, VICTIM IMPACT STATEMENTS IN SOUTH AUSTRALIA: AN EVALUATION 52 (1994) (presenting findings from an evaluation study in South Australia, in which the main reason for submitting a VIS was to ensure that justice was done, with an additional reason being to communicate the impact of the offense to the offender); Carolina Giliberti, *Study Probes Effectiveness of Victim Impact Statements*, JUSTICE RESEARCH NOTES 5, CAN. DEP'T OF JUST., Nov. 1990, at 5 (presenting findings from six VIS demonstration projects in Canada) ("When asked to comment on which aspect of the program they considered to be most helpful, victims indicated that it was to be given the opportunity to talk with someone about the offense and its effects and to have this information conveyed to the court, to be given useful information about the case, and to have the opportunity to contact someone in the event of a problem arising.").

<sup>87</sup> See generally Tracey Booth, *Victim Impact Statements, Sentencing and Contemporary Standards of Fairness in the Courtroom*, in CRIME, VICTIMS AND POLICY 161 (Dean Wilson & Stuart Ross eds., 2015) (presenting findings from a study on the participation of family members of homicide victims in the New South Wales Supreme Court).

The effectiveness of VISs in promoting healing in victims, however, is widely debated.<sup>88</sup> Some support the importance of VIS in the recovery process for victims,<sup>89</sup> but others suggest that delivering a VIS may be counterproductive because it may lead to secondary victimization (also known as post-crime victimization).<sup>90</sup> This duality is exemplified in contradictory statements such as VISs “don’t work, can’t work”<sup>91</sup> and VISs “can work, do work (for those who bother to make them).”<sup>92</sup> A study by Lens and colleagues emphasizes the importance of understanding the differences in victims’ characteristics and their needs in examining who and what circumstances will decide to deliver a VIS.<sup>93</sup> Their study of 143 victims of serious crimes or their surviving relatives in Holland shows that victims who chose to deliver a VIS typically displayed a significantly higher degree of psychological complaints following their victimization, and were victimized more severely and more recently than were those who declined the opportunity to do so.<sup>94</sup> Therefore, VISs may be a desired and powerful therapeutic tool for some victims but not for others.

A third social goal of the VIS emerges with its *systemic* use: granting all victims the right to participate in sentencing may lead to increased victim satisfaction with the criminal justice system and thereby to a greater tendency to report crime and cooperate with the prosecution.<sup>95</sup> This, in turn, can enhance overall system efficiency. A systemic use of VISs reflects a recognition that “although crimes are committed against the state, individual victims are the ones who sustain the loss, damage, or injury.”<sup>96</sup> Once citizens trust the criminal justice system to recognize their harms through the criminal process, they are more likely to consider the criminal process as a desirable path for seeking remedy. According to this argument, VISs increase the cooperation and participation of victims in the criminal proceeding and have the potential to increase the perceived fairness of sentencing by victims.<sup>97</sup>

Group-value theory provides an explanation for the significance of a systemic use of VISs. The group-value model assumes that people assign value to their long-

<sup>88</sup> Pemberton & Reynaers, *supra* note 45, at 235; Julian V. Roberts, *Listening to the Crime Victim: Evaluating Victim Input at Sentencing and Parole*, in 38 CRIME & JUSTICE: A REVIEW OF RESEARCH 347 (2009).

<sup>89</sup> Edwards, *supra* note 57, at 43; Roberts & Erez, *supra* note 58, at 226; Cassell, *supra* note 54, at 611–12.

<sup>90</sup> Lens et al., *supra* note 8, at 18.

<sup>91</sup> Andrew Sanders, Carolyn Hoyle, Rod Morgan & Ed Cape, *Victim Impact Statements: Don’t Work, Can’t Work*, CRIM. L. REV. 447 (2001).

<sup>92</sup> James Chalmers, Peter Duff & Fiona Laverick, *Victim Impact Statements: Can Work, Do Work (for Those Who Bother to Make Them)*, CRIM. L. REV. 360 (2007).

<sup>93</sup> Lens et al., *supra* note 8, at 30–31.

<sup>94</sup> *See id.* at 26, 30–31.

<sup>95</sup> Edwards, *supra* note 57, at 43.

<sup>96</sup> Roberts & Erez, *supra* note 58, at 226.

<sup>97</sup> Cassell, *supra* note 54, at 624–25.

term social relationships with the authorities or institutions influencing their lives, and consider them as long-term third parties.<sup>98</sup> The construction of state authorities as third parties provides an explanation why people are concerned with the neutrality of the decision-making procedure, including the use of appropriate information, the trustworthiness of decision-makers' goals, and their own social standing in the decision-making process. When these concerns are addressed, people are more likely to view the process outcomes favorably and to express long-term commitment to the group.<sup>99</sup> Providing victims with the opportunity to deliver a VIS is likely to increase their satisfaction with the outcomes and their commitment to the decision of the court. Delivering a VIS enables them to participate in the legal proceedings that affect their lives. The VIS is to be valued by virtue of the democratic procedure itself, as a manifestation of an open and fair society.<sup>100</sup> Thus, group-value theory highlights the broader benefits of a systemic use of VIS to the public and the legal system. Ensuring that both the defendant and the victim are heard in the process promotes a public perception of fairness at sentencing.<sup>101</sup>

Another public interest that VISs are likely to promote is the reduction of future reoffending. Scholars suggest that recognition of wrongfulness and repentance are more likely outcomes of a sentencing hearing in which the victim directly conveys an idea of the effect of the crime than through the words of a proxy, such as a prosecutor.<sup>102</sup> According to Paul G. Cassell, VISs can help educate defendants about the full consequences of their crime, perhaps leading to greater acceptance of responsibility and rehabilitation.<sup>103</sup> Defendants' appropriate responses to victim statements, in turn, may help dispel stereotypes about offenders, increasing their chances of rehabilitation.<sup>104</sup> Clearly, these are assumptions that require empirical examination.

In sum, supporters of VISs demonstrate that VISs offer various advantages for the victims and for society. They are beneficial to sentencing outcomes, victims' wellbeing, system efficiency, and perhaps even defendants' rehabilitation or reduced future risk.

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<sup>98</sup> Tom R. Tyler, *The Psychology of Procedural Justice: A Test of the Group-Value Model*, 57 J. PERSONALITY & SOC. PSYCH. 830, 831 (1989).

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

<sup>100</sup> Edwards, *supra* note 57, at 44.

<sup>101</sup> Cassell, *supra* note 54, at 625.

<sup>102</sup> See *supra* note 75 and accompanying text; Carrie J. Petrucci, *Apology in the Criminal Justice Setting: Evidence for Including Apology as an Additional Component in the Legal System*, 20 BEHAV. SCI. & L. 337 (2002).

<sup>103</sup> Cassell, *supra* note 54, at 612; see also Edwards, *supra* note 57, at 42; Roberts & Erez, *supra* note 58, at 235.

<sup>104</sup> Roberts & Erez, *supra* note 58, at 227.

*B. The Prevalence and Content of Victim Impact Statements*

Despite their numerous benefits to victims, VISs remain relatively uncommon. This may have to do with the fact that, despite the numerous benefits of VISs for the victims, justice professionals fail to understand their importance. For example, Christine M. Englebrecht conducted in-depth interviews with 28 family members of murder victims who had submitted a VIS, and additional 44 interviews with justice professionals.<sup>105</sup> Examining the reasons provided for the importance of VISs, the study identified a significant gap between families' and professionals' understanding of the submission of a VIS and their expectations from it.<sup>106</sup> Whereas the families believed that their opinions and requests would affect the decisions made in the process, justice professionals viewed the statements as mostly symbolic, designed to provide some emotional release for the families.<sup>107</sup>

Another example is a study by Julian V. Roberts and Marie Manikis<sup>108</sup> that explored the prevalence of VIS submission in Wales. The authors found that many justice agencies failed to inform victims of their right to submit a victim statement.<sup>109</sup> Those who did provided only limited information about its importance and did not encourage victims to submit one.<sup>110</sup> Consequently, only 30% of those who were offered to submit a victim statement did so.<sup>111</sup>

Little is known about the actual content of VISs. Englebrecht and Jorge M. Chavez conducted document analysis of court hearing protocols that included victims' statements in murder trials and supported the analysis with in-depth interviews with the families and justice professionals involved in these cases.<sup>112</sup> Most families used the court as a platform to speak about their grief and to share their sense of sorrow, fear, loss, and lack of trust.<sup>113</sup> Families mentioned their memories of the victim and tried to paint a relatable image of the deceased for the court audience.<sup>114</sup>

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<sup>105</sup> Christine M. Englebrecht, *The Struggle for "Ownership of Conflict": An Exploration of Victim Participation and Voice in the Criminal Justice System*, 36 CRIM. JUST. REV. 129, 133–34 (2011).

<sup>106</sup> *Id.* at 144.

<sup>107</sup> *Id.* at 130, 139, 146.

<sup>108</sup> Julian V. Roberts & Marie Manikis, *Victim Personal Statements in England and Wales: Latest (and Last) Trends from the Witness and Victim Experience Survey*, 13 CRIMINOLOGY & CRIM. JUST. 245 (2012).

<sup>109</sup> *Id.* at 250, 256.

<sup>110</sup> *Id.* at 252.

<sup>111</sup> *Id.* at 250.

<sup>112</sup> Christine M. Englebrecht & Jorge M. Chavez, *Whose Statement Is It? An Examination of Victim Impact Statements Delivered in Court*, 9 VICTIMS & OFFENDERS 386 (2014).

<sup>113</sup> *Id.* at 404.

<sup>114</sup> *Id.* at 395–96.

Some families approached the defendant in an effort to express their anger and denunciation of the crime.<sup>115</sup> Family members stated that for them, the best way to honor the victim's memory would be a just sentence for the defendant.<sup>116</sup>

The current study follows the path outlined by Englebrecht and Chavez,<sup>117</sup> aiming to characterize the message that crime victims choose to make when delivering a VIS, and the narrative they choose to present in their statements. This study went beyond Englebrecht and Chavez's scope by including statements made by victims of sexual and violent crime, in addition to those made by relatives of murder victims.

### III. METHODOLOGY

Considering the great importance that victims ascribe to VISs on one hand, and the scarce use of this instrument in criminal processes on the other, it is important to understand the use that victims make of VISs in practice. The present study aims to map, characterize, and explain the content of VISs.

The study used phenomenological and grounded theory approaches. Phenomenological research describes the meaning several individuals share regarding their lived experience of a concept or phenomenon.<sup>118</sup> Phenomenology as a universal essence is described by Max van Manen as a "grasp of the very nature of the thing."<sup>119</sup> The phenomenon that the current study aims to explore is the VIS and the way in which it is used by crime victims in court.

Grounded theory is a qualitative strategy in which the researcher derives a general, abstract theory of a process, action, or interaction grounded in the data collected in the course of the study.<sup>120</sup> It seeks to move beyond description and generate or discover a theory for a process or action.<sup>121</sup> In the present study, the content analysis of VISs is used to theorize their various components and link them with current knowledge about victims' needs, expectations, and rights in the legal process.

Using content analysis of 25 VISs submitted by victims of sexual, physical, and property offenses, as well as by relatives of homicide victims, we aimed to develop an analysis based on how VISs are used, the types of information and messages delivered through them, and the way in which crime victims perceive them.

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<sup>115</sup> *Id.* at 397–98.

<sup>116</sup> *Id.* at 398–99.

<sup>117</sup> *Id.* at 387.

<sup>118</sup> JOHN W. CRESWELL & CHERYL N. POTH, *QUALITATIVE INQUIRY AND RESEARCH DESIGN: CHOOSING AMONG FIVE APPROACHES* 314 (4th ed. 2018).

<sup>119</sup> MAX VAN MANEN, *RESEARCHING LIVED EXPERIENCE: HUMAN SCIENCE FOR AN ACTION SENSITIVE PEDAGOGY* 177 (1990).

<sup>120</sup> JOHN W. CRESWELL & J. DAVID CRESWELL, *RESEARCH DESIGN: QUALITATIVE, QUANTITATIVE, AND MIXED METHODS APPROACHES* 248 (5th ed. 2018).

<sup>121</sup> CRESWELL & POTH, *supra* note 118, at 317.

*A. Data Collection, Sample, and Recruitment*

We approached victim advocates, public prosecutors, and victims' rights organizations by letter, requesting their support in contacting crime victims and inviting them to share with the researchers the VIS that they had submitted to the court. In addition, we also approached victims directly, through social media groups, with a similar invitation. The convenience sample was based on professional and collegial contacts, and consisted of 25 anonymized VISs.<sup>122</sup> All VISs concerned trials that had already been finalized.

The sample included six statements of victims of violent offenses, nine statements by family members of murder victims, and ten statements made by victims of sexual offenses. Table 1 lists the pseudonyms of the victims, with some details, for the reader's convenience.

TABLE 1.<sup>123</sup>

Pseudonym	Characteristics (Gender, Age, Victim Status)	Offense Type	Direct Victim's Relation to Offender
Mary	Female; age 70; direct victim	Violence	Strangers
Elizabeth	Female; age 78; direct victim	Violence	Strangers
Ron	Male; age 81; direct victim	Violence	Strangers
Sara	Female; age 77; direct victim	Violent theft	Strangers
Rachel	Female; age 65; direct victim	Negligent driving	Strangers
Karin	Female; sister of female deceased victim	Homicide	Spouses
Michelle	Female; widow of deceased victim	Homicide during armed robbery	Strangers
Judith	Female; widow of deceased victim	Homicide during home armed robbery	Strangers

<sup>122</sup> All VISs, written in Hebrew, are on file with the Authors.

<sup>123</sup> Victim impact statements by pseudonym, gender identity, age, offense type, and relations to direct victim and offender. Where requested information was not available in the statements, we left the cell blank.

Jacob	Male; son in law of female deceased victim	Homicide	Strangers
Sharon	Female; daughter of male deceased victim	Homicide (stabbing)	Acquaintances
Ruth	Female; mother of male minor deceased victim	Homicide (stabbing)	
Tanya	Female; widow of male deceased victim	Homicide during armed robbery	Strangers
Shirley (first statement)	Female; widow of male deceased victim	Homicide during street shooting	Strangers
Shirley (second statement)	Female; widow of male deceased victim	Homicide during street shooting	Strangers
Jenny	Female; direct victim	Violent assault at workplace	
Barbara	Female; direct victim	Rape at home	Strangers
Deborah	Female; direct victim	Rape	
Jasmin	Female; direct victim	Online sexual harassment (fake Facebook page)	Acquaintances
Dorothy	Female; age 25; direct victim	Sexual assault	Offender was the victim's tattooist
Tammy	Female; age 13; direct victim	Sexual assault	Offender was a tenant in the victim's family guesthouse
Tammy (second statement)	Female; age 13; direct victim	Sexual assault	Offender was a tenant in the victim's family guesthouse
Nicole	Female; age 17; direct victim	Sexual assault	Offender was a stranger during a bus drive
Lydia	Female; age 46; direct victim	Rape	Coworkers
Dan	Male; age 31; direct victim	Child sexual abuse	Offender was a family acquaintance
Gale	Female; mother of female victim	Child sexual abuse	Offender was the victim's stepfather

### B. *Data Analysis*

Phenomenological data analysis is generally similar to many qualitative interpretive research methods. We conducted an inductive process of decontextualization and reconceptualization.<sup>124</sup> During decontextualization, we separately read each statement and assigned codes to units of meaning in the texts. Next, in an interactive and joint process, we developed clusters of meanings and gathered them into broader themes. During reconceptualization, we examined, organized, and reintegrated the codes in a shared process of meaning making. We then reduced the data around central themes and relationships derived from all the cases and narratives.<sup>125</sup> In organizing the data, we highlighted significant sentences or excerpts that provide an understanding of the various themes.<sup>126</sup>

## IV. FINDINGS

A general and significant finding that became apparent even before starting the data analysis is the scarce use of VISs in Israeli criminal trials. Most professionals with whom we were in contact claimed that they very rarely encouraged victims to submit a VIS. The reasons provided included: fear of the victims being interrogated about their statement and thereby further victimized in the process; a belief that the report made by a designated social worker is an appropriate and preferable method of bringing the victims' perspective to the court;<sup>127</sup> and reluctance to approach, and presumably burden, the victim with an unwelcome request.

Beyond this preliminary finding, four shared themes emerged from the analysis of the written statements: the offense as a life-changing event and the harms reflecting this change; the complicated experience of the criminal justice process; the desire to be "more than just a name"; and using the VIS as a means of communication to deliver a message or request.

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<sup>124</sup> All statements were translated by the Authors.

<sup>125</sup> CRESWELL & POTH, *supra* note 118, at 79; Helene Starks & Susan Brown Trinidad, *Choose Your Method: A Comparison of Phenomenology, Discourse Analysis, and Grounded Theory*, 17 QUALITATIVE HEALTH RSCH. 1372, 1375 (2007).

<sup>126</sup> CRESWELL & POTH, *supra* note 118, at 78–79.

<sup>127</sup> According to Israeli law, a judge may request a designated social worker to submit a "victim report" at the sentencing stage to provide information about the damages suffered by the crime victim as a result of the offense. This mechanism differs from VISs because it does not enable victims to make their own appearance in court at the sentencing hearing. However, the professionalism of the social worker preparing the report and their objective perspective assigned to them make this mechanism highly credible and a central instrument in sentencing, especially in serious violent offenses. Criminal Procedure Law [Combined Version], 5742-1982, SH 1043, 43 (Isr.), [http://www.nevo.co.il/Law\\_word/law14/LAW-1043.pdf](http://www.nevo.co.il/Law_word/law14/LAW-1043.pdf).

### A. *The Offense as a Life-Changing Event*

As noted, the VIS is a primary legal tool by which crime victims convey to the court the various harms caused by the crime, including emotional, financial, social, psychological, and medical ones. All 25 statements contained a detailed description of the various harms caused by the crime and showed how the offense transformed the victims' lives. We divided the harms included in the statements into two categories: first-order harms, such as financial, emotional, and medical; and second-order harms, which include significant changes in the victims' routine, difficulties in their social and family bonds, and struggles to function well. An additional category describes the temporal characteristics of the harms, which refer to the persistent feelings of suffering that the victims endure.

#### 1. *First-Order Harms*

The first category of harms includes emotional and psychological, physical, and economic harms.

##### a. *Emotional and Psychological Harms*

All victims described in detail the negative effects of the crimes on their emotional state. Rachel, an elderly woman who was hurt in an accident, wrote: "Since the accident, I cry all the time. I cry because of the pain and the thoughts." Sharon, a daughter of a murder victim, stated in court: "The crime has caused a lot of crying and suffering." Shirley, a widow of a murder victim, described a similar situation: "Since the event I'm in a bad emotional state and struggling to stay strong for the children." Jasmin, a young woman belonging to a traditional and closed community, had a fake Facebook page created under her name multiple times, suggesting that she was working in the sex industry. She also talked about crying: "I cried all the time. I couldn't speak, and I just cried." As a victim of cyber harassment, Jasmin described severe emotional outcomes: "The defendant ruined my reputation, erased my dignity, hurt my health, and caused me such emotional harm that I started thinking about suicide . . . [every time she reopened the Facebook page] I would feel the bullet in my chest and get hurt even more."

Most of the victims reported struggling with depression and deep suffering. These expressions characterized the victims of all crimes. Ron, an elderly man who was physically attacked, told the court: "Following the event, I was very upset. I felt deeply insulted and hurt. I didn't understand why this had happened to me." Karin, whose brother had been murdered, mentioned "the horrible suffering that we experience." Sharon stated that she suffered from depression and Shirley wrote: "I'm emotionally and physically broken." Jasmin expressed suicidal thoughts. Ruth, a mother of a murder victim, also wrote: "There is no worse suffering than burying your own younger child, who was only 16 and a half." Dan, who had been sexually abused as a child by an older family friend, revealed "multiple depressions, suicidal thoughts, and recurring nightmares."

Fears and anxieties were also common reactions of the victims, according to their statements. Elizabeth, who had been physically attacked during a robbery, stated: “After the incident I felt extremely frightened, and I was suffering from anxiety.” Elizabeth further described a post-traumatic response she experienced several days after the incident: “I saw the defendant in the street, near the grocery shop. I tried to escape instinctively, and without thinking I just ran into the road. Cars started to honk at me, and I didn’t know what to do.” Barbara, a rape victim, reported:

For six months I was extremely frightened and every day I was anxious that he would come to my home and kill me or rape me—either one of those options—and I was extremely worried about my children, so I just didn’t sleep at night out of fear of him. I still suffer from fears and anxiety today.

*b. Physical Harms*

All the victims who had been physically assaulted during the offense described physical harms. Events that are dubbed as trivial and as misdemeanors in the routine work of the court may appear as insignificant. Jenny stated that she experienced “enduring pain in the skull . . . and pain all over the body for about two weeks” following her attack. Mary, an elderly woman who had been robbed, stated that as a result of the crime she had “bruises in both feet and strong pain in both legs. The strong pain lasted for a week.” Ron informed the court:

I suffered from numerous wounds and lost a lot of blood. I had injuries in my feet and hands; the strong beatings in the side of my body created hematomas and pain. I had a large bruise in my knee, which is still red. I felt internal pain in my body. The pain persisted for about a month.

Sara, an elderly woman who was violently robbed, also sustained serious physical harm:

I feel weakness in the hands and feet, and I’m constantly afraid I’m going to fall. My blood pressure is persistently high, and I take medication for it. My body hurts a lot as a result of the incident because all of my muscles contracted. I’m always cold . . .

Rachel told the court:

Immediately after the accident I was taken to the emergency room. I was dizzy and felt pain all over my body. After the incident I started suffering from fibromyalgia, chronic pain . . . My back pain recurred and got worse, and I can’t do basic moves such as bending over, walking, because of the pain.

At times, the physical symptoms were related to the trauma. Sara stated: “I was hospitalized twice, and the doctor told me that all of my medical problems result from the stress that I’m under.” Rachel also noted: “The doctor told me that this disease [fibromyalgia] might be a result of the trauma I suffered.” Jasmin stated: “After the event . . . I suffered from malnutrition problems. I wouldn’t eat for days,

lost eight kilos, and got an intestinal bacterium that will remain in my body forever and will always require medical treatment.”

*c. Economic Harms*

Victims' statements included information about a range of financial harms they sustained. Sara wrote: “My purse which the defendant had taken had personal documents, about 400 shekels [over \$100], and a golden necklace I had from my mother.” Rachel, who started using cabs regularly as a result of the offense, reported: “The cab rides are extremely expensive, and I spend several hundred shekels each month since the accident.” The families of murder victims explained how the death of their loved one created a serious economic burden for them. Michelle, a widow of a homicide victim, stated: “My daughter lost her job . . . and I need to take care of the family income . . . I had to go back to work although I had already retired. The therapy treatments and the daily expenses are extremely burdensome . . . .”

*2. Second-Order Harms*

*a. New Routine*

All victims described a significant change in their lives, which has completely altered their daily routine. The crimes had a massive effect on the victims' daily behavior, acts, and habits. Nine victims talked about their fear of being at home alone or going out by themselves, without someone to accompany them. Mary described her fear of going out:

I don't go outside anymore when it gets dark . . . I used to go for a walk with the dog in the evenings and I don't do it anymore since the incident . . . In winter, I no longer go out alone after five pm because it gets dark early. When I go outside with the dog, I ask my husband to leave the door open so I can come back if anything happens.

Elizabeth described a similar response: “I tried not to go outside. I had to think a few times before I left the house.” Sara said:

For over a year after the incident, I didn't go to the day center because I was afraid to leave the house. I didn't even leave the house unless I had to. I used to sit alone at home all day, until I decided I couldn't live like this, and I decided I had to go back to the day center.

Rachel explained that “because of the fear, I hardly go out.” Although Rachel was not a victim of a violent crime, the traumatic incident in which she was the victim shaped her daily behavior and resulted in fear of leaving her home. Ron, an elderly man who was a victim of a violent act, also stated: “I hardly left home.”

The fear of being alone and the resulting perception of the home as the only safe place are a key theme in the statements. Tammy, a young girl who was sexually assaulted when she was in sixth grade, stated: “I cannot sleep over at a friend's or even at my aunt's house. Even though I'm older now, I go to my mother's bed in

the middle of the night.” Jenny, who was violently attacked, said that after the attack, for four months, she did not get out of the house. Jasmin described a similar case of fear of going out and being with people: “I had exams at the time. For a month I was shut in at home, I didn’t even go out to the staircase. I didn’t go to college, and I didn’t take the exams.”

The crimes have deeply changed the victims’ routine, making them less independent and fearful of going out and being left alone. They adopted new habits and new modes of behavior to cope with these fears. This routine is often frustrating because it is forced upon the victims by their fears. Mary explained that “since the incident, I try to go to places where there are other elderly women, like me. We take care of each other.” Sara, who succeeded to get over her fear and go back to the day center, said: “I take a ride from home [directly to the day center] and directly back home.” Jenny emphasized that she would not walk alone: “I no longer go out except in the company of a familiar person. The independence I had is gone.” Nicole, a young woman who was sexually assaulted during a bus ride, told a similar story: “Because of this difficult trauma, I don’t go on buses alone. I’m afraid of walking alone in the streets. I only go out with friends.” She further wrote:

Anyone passing by is a potential perpetrator for me. On my way to school I’m always afraid that someone is chasing me, and I always look around . . . Ever since the incident, I started carrying self-protection gas in my purse and the phone is always in my hand.

Tammy, who was also sexually assaulted, stated: “I’m constantly afraid of people . . . In the beginning, I was scared of the instructor [at horse riding school] and my mother . . . during therapy sessions as well . . . would sit outside behind the door and wait for me.” Deborah, a rape victim, stated: “Ever since the event I’m afraid that I’m being chased and followed . . . I constantly fear that he’d come to my house because he knows where I live. I’m also afraid for my children who sometimes stay home alone. I’m constantly anxious.” Lydia, also a rape victim, stated that she began taking prescription tranquilizers. Four other victims (Sara, Jasmin, Dan, and Gale’s daughter) revealed that they had been prescribed psychiatric medicine following the offenses, and we do not know whether and how many of the others are being medically treated for their stress, anxiety, and pain.

Judith, whose husband was murdered outside the family home, described the effect of the crime on her children and grandchildren’s routine and the manner in which the fear and anxiety have changed their daily behavior. She said:

The whole family lives in fear, shut in their homes. They installed security systems in the courtyards and houses, put bars to the windows. You don’t let the kids go out and play outside in the yard after 6:00 p.m. Once it’s dark, everyone returns home. They’re placing themselves in jail.

She emphasized the extent to which her family members lost the sense of safety in their own homes: “The sense of security the family had in their pastoral home simply no longer exists.”

Deborah described the change in her sense of safety and in her new daily actions following the rape: “Since the assault I lock the house.” Tammy’s statement also reflects the emotional stress following the sexual assault and the resulting new behavior. The sexual assault took place in her parents’ guest house, where the offender lived: “Even though the guest house is closed, the hardest thing for me is seeing it, and I don’t go near it anymore and keep asking my mom to move far away.” Rachel also described the changes in her habits following the accident:

I haven’t driven on the same road since then. I’m scared when I see cars coming at me, which is also one of the reasons why I haven’t bought a new car since. Because of my fear of driving since the accident, and because of my disability, I only use taxis.

The victims talked about the difficulties in returning to normal life. Sara, for example, wrote: “The thought that he would come and hurt me again worries me a lot and makes it very difficult to get on with my life.” Tammy also wished to get on with her life and described how difficult it was doing so: “I want to forget about all of this. I want to get over it and succeed in my studies and sleep alone and go back to be happy as I always was.”

*b. Social and Family Relationships*

The crimes deeply affected the victims’ relationships with family, friends, and spouses. Victims “pay” a social price for their fear of going out, for staying alone, and for their new routine. They became more frightened, hesitant, suspicious, and less active, and as a result, the way they function socially has changed for the worse. Sara did not get out of her house for over a year. She described the effect of her new routine on her social relationships: “I stopped seeing my group of friends because I’m afraid to get on the bus and afraid of falling. As a result of the incident, I’m very scared when people come to my house without letting me know in advance, and I always ask them to call me first.” Ruth painfully described the effect of the murder on her social connections and those of her family and friends: “My nephews cannot come and stay at my house. My family and friends still don’t have the strength to come to my house and face the painful truth.” Sharon described the family-related price that she pays because of the crime: “The anger and the depression affected our relationship. The frustration has caused continuing fights. Our son, who doesn’t deserve to witness the anger and the tension between us, is exposed to these fights. Our relationships deteriorated since the murder.” Jenny provided a similar description of her relationship with her spouse and the way they were affected by the crime: “This situation caused many problems in the relationships with my spouse, a lot of fights, the personal and intimate relationship with him was harmed. It caused us to think and talk about a divorce.”

Gale, whose young daughter had been sexually assaulted by an acquaintance, described in detail the psychological and emotional effects of the crime on her daughter's personality, and the subsequent implications for her social life: "She stopped going to the youth movement this year, and she didn't sleep over at friends because she experiences panic attacks there as well." Jasmin also talked about the loss of ability to function well and its effect on her social life: "Two months after the incident I went to the college, but I couldn't concentrate in my classes. I'd leave the class and go to the washroom, staying there for half an hour crying. This happened every day. I lost friends." Tammy described her social life and networks following the crime: "I didn't attend the graduation party that was most important to me. During the summer I'd been waiting for, I've been hiding at home thinking about what has happened to me."

*c. Difficulties in Functioning*

Many of the victims talked about difficulties in functioning well. As noted, Jasmin described how she could not concentrate in class. Gale described the difficulties her daughter had functioning at school:

At the beginning of the current school year, the panic attacks have increased and didn't allow her to function at school. As a result, she underwent a psychiatric examination that found that she was suffering from panic attacks due to post-trauma. From a girl who was outstanding in school and was going to classes, she became one who shut herself up a lot in her room. She's late for school because she cannot fall asleep, she has difficulty doing her homework, she has difficulty functioning at school, and often must leave class or return home early because of panic attacks. Whenever she thinks about the challenges she will face in high school she bursts into tears.

Karin also talked about how hard it was to function following the murder, and referred to the difficulties that her father endured: "My father got cancer and we are fighting for my father's life. He has difficulties handling the treatments and the emotional pain." Michelle described the struggle to function well and the way her family grappled with the death of her husband: "The family fell apart. From a happy family we fell to pieces. We lost the pillar of the family. We lost our emotional and economic anchor." Tanya, a widower of a murder victim, described a similar effect on the family: "After the shocking murder, I was left alone . . . . The terrible disaster crushed the family and broke me . . . . The family was destroyed." Jacob, the son-in-law of a murder victim, also mentioned the difficulties of functioning reliably. He wrote: "Since the murder, my ability to concentrate was damaged and I had a hard time going back to work."

Shirley described in detail the harms to the family and wrote about the loss of the family's ability to function and to continue its routine. She depicted the effect on her four children, for example:

My oldest daughter fell into a deep depression and has a hard time returning to routine. My other daughter, who is seventeen, is in a deep depression, she often lashes out at people, and her emotional state is very fragile. There was a deterioration in my youngest son's situation. He is fifteen and doesn't dare sleep alone, he wets his bed at night, is afraid of being alone, cries, and swipes at people a lot.

Gale described the effect of the crime on the family. Although the victim of the sexual assault was her daughter, the assault profoundly affected the entire family: "The whole family has been wounded because of the man we let into our home. I'm suffering from post-trauma, my daughter and son are forced to watch their mother break down, and their sister cries and cries."

*d. A "New" Personality*

The changes in the victims' behaviors and habits entail a change in their character, as some of the excerpts above demonstrate. Some victims felt as if they became "new persons" and talked about the difficulty of being this new person. Deborah wrote: "This incident made me a frightened person, who's afraid of everything and every man I meet." Sara also wrote about a new character: "I became nervous, and often I get mad. I shout a lot at my daughter and get angry with her, which didn't happen before." Sara further elaborated on the person whom she became, from a happy, active woman, a sad and passive one:

Before the incident, I was active: I was laughing, dancing. For years, every day I would come to the Central Station and meet with a group of friends. We used to sit down, eat ice cream, talk, and laugh. I was a healthy woman. I used to come to the day center, participate in activities, do sports. I would go for trips and walk outside at night without fear. As a result of the incident, the situation has changed. I'm often not in a mood and I cry a lot.

Jasmin described the extent to which the crime affected her character and behavior: "To this day, I suffer from mental disorders and fears. I'm afraid to enter the library at my college because the computers are in the library, and I'm afraid of computers. Every time I have to use a computer, I'm badly hurt." Gale wrote: "The innocent, cheerful, mischievous daughter I had was taken away from me and now here is an adolescent who was forced to grow up fast, who witnessed things that no girl who is less than twelve should see and experience." Dan described a transformation in his appearance, which reflected the changes in his personality: "I tried to hide behind a long beard, I grew my hair, and I gained a lot of weight. Because I felt so exposed, I developed an external mask." He went on: "On its surface, I'm a functioning person, but the sexual assault affected my personality." Rachel also described the effect of the crime on her personality: "People who are close to me say that I have become less nice, less patient with the people around me. I don't do it on purpose, and I hurt the people I love most."

### 3. *Temporal Dimensions*

“We experience terrible loss, longing, and unbearable empty space at every moment, 24 hours a day.” This is how Karin described the perpetual pain and suffering she and her family go through since the murder of her sister by her spouse. All the statements made by family members of murder victims conveyed to the court how their pain and suffering were continuous and never-ending. Tanya described these feelings: “The feeling of suffering and sorrow are beyond understanding and don’t stop.” Shirley explained how these feelings are always present: “It is an everyday struggle and it doesn’t leave a single quiet emotional or physical moment.” Sharon wrote: “Everything I have been going through leaves a very big scar in my soul, which cannot be diminished.” Deborah also talked about the continued suffering: “The nightmares and fears will probably never end.”

Time does not heal the pain, as Michelle stated: “I thought that time would heal the pain but days go by, Shabbat and another Shabbat goes by, and holidays go by and I feel that the pain increases.” Dorothy, who had been sexually assaulted by a tattooist, described a similar sense of being trapped in never-ending grief: “The feeling of betrayal accompanied me for a long time, and no matter how much I tried to get rid of it, ignore it or forget about it, the feelings of anger, betrayal, and disgust have only intensified.”

The continuous, persistent nature of the suffering was mentioned in statements by other victims of sexual violence as well. Lydia’s statement introduced a similar narrative: “It has been two and half years and to this day I cannot recover and relax.” Dan also wrote: “It took me many years to be able to say something. When I began, a Pandora box was opened, which has been shaking up my life daily.” Jasmin said: “The fears and the emotional and physical illness will be there for the rest of my life.”

Many statements introduced a dead-end narrative, where participants felt as if they were buried in a hole, with no way out. For example, Karin wrote: “On April the third we got a life sentence. No one can lessen our punishment.” Ruth also used the term life sentence: “Our life has completely changed. The victim’s parents, brother, and we got a life sentence.” Michelle used similar terms: “We’re going down an abyss, a dark deep hole, from which we cannot get out . . . nothing can get us out.” Judith used the same narrative: “They fell into an abyss, an abyss that cannot be filled out.”

## B. *The Complicated Experience of the Criminal Justice Process*

### 1. *Secondary Victimization*

Secondary victimization emerged as a key theme in the analysis of the VISs. The experience in the criminal proceedings was portrayed by most victims as negative, painful, difficult, and frustrating. Some victims felt lost vis-à-vis the procedure, the structure, and the nature of the criminal justice system. The involvement of

victims with the criminal justice system “occurs” suddenly, and is forced upon them without advance preparation. The victims are required to get used to the new system, which is characterized by new and unknown rules and codes of behavior. In their VISs, many victims described the pain and agony they endured as a result of their interaction with the criminal justice system, whether in the encounter with the defendant in court or at the police station, the mere writing of the VIS, or giving a testimony in court.

The narrative of many victims reflects the asymmetry between defendants and victims, which characterizes the criminal justice system. Victims described their frustration and the sense of injustice generated by their unequal role in the adversarial system, compared to defendants.

*a. Loss, Helplessness, and Injustice*

The victims’ sense of loss, helplessness, and injustice is a key element in the formation of secondary victimization. The criminal justice system is described as a strange and unfamiliar world, with unknown rules and procedures. Shirley stated: “I struggle to remain strong in the face of a gigantic legal system, in a world that is not familiar to me.” Dorothy described her experience at the police station, when she came to the interrogation, and her feelings of loneliness, when facing the dynamic of the interrogation and the interaction with the police officers:

I arrived at the police station with my mother, with fears and worries because it was the first time that I saw the defendant since the sexual assault. He arrived at the station and was received with dignity and respect. The officer ordered the other police officers to “treat him well and to take good care of him.” All of this before my eyes, without paying attention to me. I felt loneliness and helplessness, but above all, it was a feeling of injustice. These feelings intensified at the confrontation with the defendant . . . .

In the following statement, Tanya described the dilemmas that she and her family faced when they were notified by the prosecution of the plea agreement with the defendants.<sup>128</sup> Tanya understood the legal reasons for the plea agreement and the legal context of the decision, nevertheless, she expressed the frustration and injustice that accompany the situation. The unfamiliar rules and characteristics of the legal system are difficult to comprehend:

I wish we had not had to deal with the questions and dilemmas that have been presented to us, which only added to the pain, distress, to the sense of fear and loss of personal security that have accompanied us at every moment since the murder. Obviously, this situation is very difficult for us. We have not yet

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<sup>128</sup> According to Article 17 of the Victims’ Rights Law, victims of serious crimes have the right to be informed about the possibility of a plea agreement with the defendant and to provide their opinion about such a possibility to the prosecution. Art. 17, Rights of Crime Victims Law, 5761-2001, SH 2001 183, 186 (Isr.), [http://www.nevo.co.il/Law\\_word/law14/LAW-1782.pdf](http://www.nevo.co.il/Law_word/law14/LAW-1782.pdf).

realized the magnitude of the catastrophe that happened to us as a result of the actions of the two defendants, and we are now required to understand . . . the need to reach a plea bargain with them, which will make it easier for them . . . it is almost inhuman.

*b. The Asymmetry Between the Defendants and the Victims*

The adversarial nature of the criminal justice process has a significant effect on the victims' sense of injustice. Victims described the visible asymmetry between the defendants and the victims, their minor role within the legal framework, and the resulting feelings of unfairness and frustration. Shirley explained: "At one of the court hearings, the defendant's father pointed at us [the victim's family] and said: 'here are the *rock stars*.' Now, I ask the court, who are the rock stars?" She further described her feelings of frustration and injustice resulting from the attention given by the court to the defendants and the focus of the court on them, referring to the defendants as the "real" rock stars, those who enjoy the attention of the court.

Ruth mentioned the short time that the family had with the social worker who prepared an expert report to the court, and compared it to the time that the social workers had with the defendants: "We only got two hours with the social worker, while the defendant got six months." This description reflects the adversarial justice system, which focuses on the defendants' rights to minimize the risk of false confessions, wrong convictions, and disproportional verdicts.<sup>129</sup> Notwithstanding the importance of these procedural safeguards, from the victim's perspective, the nature of the proceeding generates feelings of injustice and frustration. Ruth witnessed the focus of the criminal justice system on the defendants and felt as an insignificant actor in the proceedings.

The feeling of injustice that is generated by this asymmetry is also related to a "reversal of roles" that victims often experience in the criminal justice system. This is exemplified in the following statement by Shirley:

Paradoxically, each of the defendants has a team of experienced defense lawyers, who present legal arguments that portray the defendants as innocent and helpless . . . . We leave the court sessions confused . . . . It seems that we are the defendants, and by contrast, those who are being prosecuted are the victims of the offense.

In another statement, Gale described the ongoing legal proceedings that demand victims, particularly sexual assault victims, to retell the story of the rape to various legal actors in various stages of the criminal proceeding:

She has faced harsh interrogations over and over and over again: at the police, at the Children's Advocacy Center, at the prosecutor's office, here at court,

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<sup>129</sup> Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAP. L. REV. 57, 61 (1998).

and then, when writing this statement. Again and again, she had to dig up the fresh wounds, again and again. I saw her crying, shutting off.

This outcome is inherent in the nature of the justice system, which requires specific and detailed information about the offense. In rape cases, where often there is no physical evidence and where most cases are based on “he says, she says” accounts,<sup>130</sup> this requirement is particularly crucial to ensure due process, but as a result, sexual assault victims are required to redescribe their experience over and over.

*c. Neglected Actors*

Many victims feel neglected in the criminal justice process, feeling that they cannot possibly affect the proceeding or its outcomes.<sup>131</sup> Michelle said: “For two and a half years we sit quietly, holding back, fearing that if we make a wrong comment or a wrong move we will be ordered out of the court, and then who will protect the victim’s honor?” This statement reflects the difficulty victims have in handling the adversarial process, which does not provide victims with a significant standing in the criminal proceeding, and leaves them with a minimal voice and limited tools to affect the process. Ruth, who was present in court during all the trial hearings, stated: “This is the second time that I felt some consideration . . . when the court told the defense attorney not to ask for another postponement.”

*d. Length of the Proceeding*

Secondary victimization of victims in criminal proceedings is not merely the result of the nature of the system but it is also affected by objective or technical characteristics, such as the length of the proceeding. The trial is a serious event in the victims’ lives and has a significant effect on their daily routine, which persists as long as the trial continues. Ruth described the (negative) significance of the trial in her life: “I sit at all the legal proceedings since my son was gone, trying to follow them.” Shirley’s statement also reflects the centrality of the proceedings in her life: “Since the murder, my life revolves around the criminal proceedings and around lawyers.” Jacob explained the importance of the legal proceeding to the family, particularly as an arena where they can have their voice heard: “Since the murder, it was important for us to have our voice heard so we were present in court to represent ourselves.” As long as the proceedings continue, many victims feel that they cannot return to their routine. For example, Michelle described the ongoing proceedings: “Me and my daughter sit in court for two and a half years, day after day . . . and so, for two and a half years the trial continues with postponements and excuses.”

Every direct interaction with the criminal process creates secondary victimization, whether it is the request to write a VIS, the encounter with the defendants in court, or other acts that are part of the routine of the criminal proceedings. Jenny

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<sup>130</sup> Candida Leigh Saunders, *Rape as ‘One Person’s Word Against Another’s’: Challenging the Conventional Wisdom*, 22 INT’L J. EVIDENCE & PROOF 161, 162 (2018).

<sup>131</sup> Doak, *supra* note 10, at 299–300.

described the implications of writing the statement and the resulting renewed victimization: “Even writing this letter causes me frustration and brings back memories of the assault from which I want to escape.” Because of the memories and the renewed victimization, Tammy did not include any details of the sexual assault in the statement and said: “I cannot talk about it again.” Lydia also expressed the difficulties in describing the act in the statement, stating that “I cannot go back to it again.” Similarly, Jasmin felt that she did not have the emotional strength to describe the sexual offense in her statement: “The defendant did other humiliating, embarrassing, and immoral acts related to my sexuality, which are described in the indictment, and I cannot describe them here.”

Seeing the defendants in court or at the police station is a regular part of criminal proceedings but it is described in some statements as a significant source of secondary victimization. It generates fear and anxiety. Shirley wrote about the effect on her son, who lost his father: “He spends most of his time in court, and each time he is horrified by the encounter with the murderers and their families.” Gale described the emotional price that her daughter and she pay after each encounter with the justice system: “Any hearing or investigation of my daughter and mine causes me such a regression I cannot function the next few days.”

## 2. *Positive Elements*

The experience of victims in the system is not entirely negative. Some of the statements referred to the positive features of their involvement in the criminal justice process. These were based either on respectful interactions with prosecutors, or on specific experiences that had some positive effect on their wellbeing. Jacob referred to the importance of reaching the moment when the statement is submitted and the verdict is expected: “Given this reality, which was forced on us, I am happy we reached this stage.” Dorothy acknowledged the importance of the upcoming sentence against her assaulter: “I decided that it is important for the truth to come out . . . . If this will spare other girls the humiliation that I experienced, I have fulfilled my goal.” Tanya included a detailed description of the respectful attitude her family received from the prosecution:

The District Attorney [name], together with the two prosecutors handling the case [names] met with me and with the deceased’s sisters . . . and explained to us the legal and evidential background that were the basis for the plea agreement. The DA explained the legal situation of the case in a detailed, thorough, sensitive, and serious manner. She described to us the chances and risks in holding a full trial against the defendants, and the details of the proposed plea . . . .

## C. *“More than Just a Name”: Victims’ Personal Portrayals*

Most of the VISs included detailed and personalized descriptions of the victims: their lives, personalities, hobbies, and their significance in other people’s lives.

This was true when the victims wrote about themselves, as well as when relatives of homicide victims spoke of their beloved ones. These descriptions were designed to familiarize the “audience” with the victim, to tell a personalized story, perhaps to increase the emotional involvement of the listeners.

1. *“This Is Me”: Victims Introduce Themselves*

Numerous statements begin with the victims introducing themselves. Perhaps the victims want the court to form a certain image of who they are when the decision is made. Perhaps they want to be included in the process and play a more significant role. Perhaps they feel that by representing themselves as normative citizens, with social, academic, or family achievements, they increase the impact of their message and make it easier for decision-makers to relate to them.

For example, Dan began his statement with a description of his place of birth and his current residence. He told the court that he was the youngest of three brothers. He described his service at the military intelligence unit and his educational background, which includes graduate studies. Dan further elaborated on his military rank, perhaps to achieve the status of a credible and respected witness.

Mary told the court that she immigrated to Israel when she was 43 years old. She worked at a factory and was at the time employed as an aid for dependent old people. She also told the court about her family, about being married and having grown-up children.

Michelle, a widow of a homicide victim, provided a detailed description of her family and made a point of stating the full names of her children and of her deceased husband:

Forty-five years ago I met a guy with a golden heart, who became my husband and my children’s father [names specified] . . . his name is [AB]. AB was murdered 34 months ago. He was murdered at his work place because of greed. AB was born to Holocaust survivors. He grew up without grandparents, who were murdered in the Holocaust, and lost his father as a child. AB served in the Israeli army and fought in the wars of Israel.

2. *“This Is My Story”: Providing a Personal Narrative of the Victimization*

The victims also wanted to tell the full story of their victimization, despite the fact that this was not legally necessary, as the documents were delivered to court after the adjudication process. For many of them, this was the first and only opportunity to provide their side of the story to the court, because many of the defendants were found guilty based on a negotiated plea agreement, making the victim’s testimony redundant.

Michelle, for example, provided a detailed description of her husband’s murder, starting from the dramatic phone call delivering the tragic news: “We are suspended between hope and despair for 11 days . . . [upon asking whether the son should be summoned from abroad] the doctor raises his eyes and says: if it were my son I would have told him to come immediately.”

Judith wrote in her statement:

My beloved husband was murdered on a normal day, inside his home, his safe sanctuary at [place of residence]. He was murdered in cold blood while he was doing the one thing he loved most: watching his grandchildren. His daughter . . . was the one who found him, lying at her doorsteps, all hurt and injured, with marks of bludgeoning and stabbing all over his body. She called an ambulance and started to conduct resuscitation, while me and her children are watching in horror and shock.

Dorothy described the events of her sexual victimization:

On that day I arrived at the [tattoo] studio just like on previous occasions, knowing I was in good hands and trusting the man to do his job well. Therefore, when he asked my friends and his assistant to leave the room I didn't have a single thought of what would happen next. When he touched me the way he touched me and asked what he asked, I was left in complete shock and confused. But I mainly felt that my body was desecrated . . . .

Dan wrote two full pages, providing descriptions of the ongoing sexual abuse he suffered from the defendant and the conditions that led to this abusive relationship. Despite the 20 years that had passed since the abuse, his description was detailed and vivid, and it seems that for him, the VIS served as a platform from which to tell his story. Summarizing his statement, he explained:

I decided to write this letter, your honor, so that you understand the depth of my hurt, the immediate damages caused by my relationship with the defendant, and its long-term effect on me. It is also important for me that you understand the context in which the abuse took place.

### 3. *"This Was My Beloved": Remembering the Deceased*

Relatives of deceased victims used the VIS as a "virtual tombstone" for their loved ones: the VIS provides an opportunity to deliver a documented eulogy, which is particularly meaningful for them because the accused and the supporters of the accused are present in court and are required to listen to it (when it is read in court). These portions of the statements appear to address the relatives' need to describe the person whose life was taken, especially the way in which the deceased was meaningful for them. By providing vivid and detailed descriptions of the homicide victim, relatives appeared to include the deceased in the legal discourse not only as "the victim," but also as a human being.

Michelle wrote:

AB had all the traits of a good husband and father, a lovable combination of warmth and gentleness, pleasantness, and humor. He was the center of the family . . . I ask the court to remember that AB was a devoted, beloved man, the center of our family, an anchor for all of us.

Jacob, the son-in-law of a murder victim, wrote:

Rachel's love, commitment, and caring for her family was her most prominent characteristic. Rachel worked hard for many years. Closing her shop was supposed to be a positive turning point in her life . . . . The whole family waited for her to have more time to spend with them. All that was violently interrupted by the murder.

Ruth opened her statement in court by showing a photo of her son:

This is my son, Ron, 1.70 meters tall, and I am his mother . . . . Ron was a charming boy with a beautiful smile. Despite his young age, he knew his future would be in soccer. He was determined, and put all of his time into it . . . . He became a member of one of the leading clubs . . . .

*D. "Please Hear Me": Victims' Attempts to Deliver a Message*

Many of the statements included a direct message the victims wanted to deliver to the court, the offender, and others.

*1. "Please Do Justice": Appeals for Punishment*

Victims' messages to the court included numerous requests regarding the nature of the desired sentence, whether by delivering just deserts reflecting the severity of the crime, rehabilitating the offender, incapacitating the offender to protect others, or deterring the public. Many of the statements delivered a message that an appropriate punishment will help them rebuild their lives and experience some closure.

Ten VISs expressed a request for a punitive, eye-for-an-eye punishment. Shirley said: "Your honors, I ask you, on behalf of myself and my children, please do justice, give the just deserts to the defendants . . . . Allow me and my children to regain our sleep and return to our routine," Shirley stressed that only a severe sentence can balance the suffering that the family has endured: "I appeal to the court to . . . remember who is here the defendant and who the victims are, those whose lives will never be the same, and it is unknown when, if at all, their harms will be repaired."

Karin wrote in her statement: "We would like to see this evil criminal whom we accepted into our home as a son, and who murdered my brother, rot in jail! For such a terrible crime there is no other just punishment but life imprisonment."

Sharon, the daughter of a murder victim, wrote:

We hope this murderer will get the maximum punishment he deserves . . . . The thought that it might not happen will inflict further emotional harm, pain, and anger on us . . . . I want all of us to go on with our lives and be able to sleep at night . . . . Until he gets the maximum punishment this will not happen.

Deborah, a rape victim, said: "I want this pervert to pay for what he did to me." Jasmin wrote in her statement: "I ask the court to sentence him to the most

severe punishment possible, although I believe that no matter how he is punished, the punishment he induced on me will remain greater.”

Dan wrote: “I ask the court to punish him severely . . . . The acknowledgement by the court of the severity of his deeds may help me, even partially, to recover from the harm he has caused me.”

Tanya, who had been informed about a proposed plea agreement with her husband’s killer, realized that she had no choice but to accept the deal. Acknowledging that there are other considerations external to the family’s wishes, she wrote: “We expect that the agreement will involve a harsher penalty [than the one presented before us], one that matches the gravity of the deeds that the defendants admit to having committed.”

Some of the victims stated that a sentence reflecting the perpetrators’ just deserts ensured that such crimes would not happen again, demonstrating its deterrent utility. Shirley stated: “Please do justice . . . for society as a whole, so that other cases like this don’t happen and other families, of victims as well as of offenders, are not ruined.” Nicole, who was sexually assaulted on a bus, stated: “I truly hope that the defendant will be duly punished so that other such cases will not occur.”

Four victims asked the court to make sure that the offender would not hurt other people, suggesting the incapacitating utility of a harsh sentence. Sara said: “I really ask to make sure that he does not hurt other people.” Sharon, whose father was murdered, said: “He should not be allowed, under any circumstances, to walk free. The damage he caused us is huge, and he will probably do the same thing to another family because people like this don’t change.” Michelle said: “In my role as an educational counselor I help people integrate outsiders into society. But those who are dangerous—I wouldn’t want them to walk free.” Gale, whose young daughter had been sexually assaulted by an acquaintance wrote: “I want other girls not to fall victims to his smiles, and I want other mothers to read that he was incarcerated, so that they will be aware of him in the future and prevent him from harming another girl.”

Three victims asked specifically the court to include a restitution order, so that the defendant would be required to pay them compensation. Judith said: “Restitution will not bring [my husband] back to life, but it will help the family members in their journey toward healing.” Tanya said: “We expect . . . the defendants to be required to pay us restitution for our pain and suffering, and for the many harms—monetary and others—that we have endured.” Lydia, a rape victim, asked for “restitution as a victim, for my pain and sorrow.”

One victim, Sara, expressed a wish for a rehabilitating sentence. This was mentioned alongside her request for incapacitation, suggesting that rehabilitation is perceived by her as a way to ensure public safety: “I ask your honor to give him treatment and ensure that he gets education.”

Some statements included appeals to the court to ensure that the offender does not endanger the victim again. Sara wrote: “I really would like to ask to make sure

that he doesn't get close to me, to the community center I attend every day, and to my home."

### 2. *Communicating a Message to Others*

Some statements included a message to the offender, the offender's family, or to society as a whole. Victims perceived the VIS as an opportunity to communicate with these parties, reflecting a broader perception of the court as a communicative setting.

Gale wrote in her statement: "I want the court to hear and pass on my daughter's message: 'Mommy, I want that everyone who called me a liar would know the truth.'" Shirley wrote:

On behalf of my children, I want to approach the defendants' parents, especially their mothers, and ask them: How do you sleep at night knowing that your son took someone's life using a weapon? What caused your children to commit such a heinous crime, or watch their friends committing it without getting help or stopping them?

Ruth's statement ended with her symbolically approaching the deceased son:

My dear son, it is so difficult without you. Instead of tidying your room, I tidy your grave. Instead of attending a parents' meeting at school, I attend court hearings. Instead of kissing you . . . I wipe my tears. Instead of hugging you I hug your tombstone . . .

Karin turned to her deceased sister:

Our beloved [name of the deceased], we ask your forgiveness for not being able to prevent this heinous crime. We promise to try to become stronger and strengthen our father, who you were so worried about and loved. We want to believe that the court will punish the evil man, the murderer who took your life and the child you could have had, and took you from us—to the fullest extent of the law.

Jacob read from his eulogy of his mother-in-law: "[name of the deceased], we were shocked by your death. We will not rest until this heinous murderer is incarcerated."

### 3. *"This Is My Viewpoint": Addressing the Option of a Plea Agreement*

Some of the statements addressed the issue of a proposed plea agreement between the defendant and the prosecution. Most victims reluctantly accepted the deal, stating that they do so because they must trust the prosecution to see the broader picture.

Karin, for example, stated: "Naturally, the investigation materials weren't shared with us, and thus we must accept the general explanation provided to us by the DA. We trust that everything we were told is true and based on her expertise and knowledge, and thus we will not object to the agreement."

Others were more critical. Tanya wrote:

The thought that the defendants are going to receive less than the maximum punishment is vexing and frustrating! If we hadn't been living in a world where vicious murderers can go free because of a flaw in the evidence, I would have objected forcefully to any agreement . . . but this is not the reality . . . therefore we have no choice but to reluctantly accept the professional and moral discretion of the prosecutors.

Dan bluntly objected to the proposed deal with the defendant who had sexually abused him: "The agreement that the DA's office made with the defendant is dangerous to the public." Shirley also expressed her frustration: "I cannot ignore the family's frustration with the plea agreement that was reached with the murderer, despite the many meetings and discussions the prosecution held with us. We are still unable to comprehend it. We wish it were possible to charge him with murder."

## V. DISCUSSION

The academic discourse on VISs has been mainly theoretical so far. It focused on the goals of VISs, the justifications for delivering VISs, their potential risks vis-à-vis defendants' rights, the critique of this tool, and the therapeutic significance of VISs for crime victims. Empirical research examining the use of VISs by victims and the narrative they choose to construct in the statements is scarce.<sup>132</sup> The present research is one of a few studies that offer an empirical qualitative analysis of VISs, delving into the content of the statements and presenting the narratives the victims chose to present.

Using a methodology that is rarely used in the research on VIS, this study furthers our understanding of the experiences and narratives of victims in the criminal justice system. It illuminates the manner in which victims use the right to deliver a statement in court. By analyzing the content of VISs delivered by victims in court, we were able to identify not only the victimization experiences of victims, but also the parts of their experiences that they chose to expose in the legal arena. In doing so, this Article identifies the concrete functions that victims assigned to "their" VIS, which are not always consistent with the theory and legal regulation of VISs. Moreover, unlike most studies that focus on VISs of relatives of murder victims, this research considered the narratives and experiences of victims of a variety of crimes, and was therefore able to offer a broader and more inclusive picture of the use of VISs in the legal process.

The findings demonstrate two pivotal ideas already identified in the research of VIS and victimization in general. The first is the dominant use of the VIS as a means of communication with the court, the defendant, and other actors in the criminal proceeding. This role has been linked to the victims' need for communion—a sense of belonging and interaction with others. Our analysis of VISs provides

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<sup>132</sup> For exceptions, see Englebrecht & Chavez, *supra* note 112.

an empirical basis and concrete examples demonstrating the manner in which VISs are used as a means of communication. The second is the depiction of the crime, whether the murder of a loved one, a sexual assault, or a physical assault, as a life changing event, and the magnitude of the various harms resulting from it. The textual analysis of the statements offers vivid and detailed illustrations of the effects of the crime on the victims.

Our findings also introduce two novel themes that have been largely overlooked to date in the scholarship on VISs. First, significant parts of the statements described the hardships that the victims endured during the criminal process. Although secondary victimization and the justice gap experienced by crime victims are well known, our findings present evidence that these experiences are disclosed not only in interactions with therapists or social science researchers, but also with the legal proceedings, as they are part of the victims' story inside the legal arena. Second, victims also dedicated parts of their statements to provide a personal narrative describing their character and background, above and beyond what was needed in the statements. Discussion of these themes enriches the current discourse on VISs. It also exposes the concrete functions that victims assign to the VIS in the criminal justice process, and its importance in improving the experience of victims in the criminal proceedings.

#### *A. Victim Impact Statements as a Form of Communication*

The intense debate about the retributive characteristics of VISs overshadows their other features, especially their communicational attributes.<sup>133</sup> Our analysis shows how victims seek to engage the court and use the VIS to share their thoughts and emotions, regardless of its potential effect on the sentencing. The statements in our research reflect the perception of the victims that the court is a communicative setting which offers victims an opportunity to share their narrative with the defendants or the defendants' family, with the court, and with other relevant stakeholders. The direct approaches that victims made to others in their statements demonstrate the value of VISs as a form of communication and expression.<sup>134</sup> This is consistent with studies showing the significance ascribed by victims to communicating with the various legal actors.<sup>135</sup> By telling their story and delivering their message to the people present in the court, victims assume that their voice is heard and acknowledged in the legal process as an independent voice, separate from that of the prosecution.

Our analysis reveals the intrinsic significance of *voice* as a means of conveying an original and a personal narrative of the crime and its effects on the victim. Having

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<sup>133</sup> See Roberts & Erez, *supra* note 58, at 223; Pemberton et al., *supra* note 76, at 684.

<sup>134</sup> Roberts & Erez, *supra* note 58, at 225.

<sup>135</sup> See *supra* notes 75–76.

a voice per se is not enough. It is the opportunity of communicating an authentic, unregulated message that the victims, and only them, can deliver—that is considered important for them.<sup>136</sup> Through the VIS, the victims or their surviving relatives wish to be heard, respected, and acknowledged as individuals.<sup>137</sup> This is consistent with studies reporting that most victims were interested in participating in the legal process, regardless of its outcome.<sup>138</sup>

Our analysis also sheds light on the use of the statements by victims as means of connectedness, or communion, to use the framework suggested by Pemberton and colleagues.<sup>139</sup> According to this framework, by delivering their statements, victims have an opportunity to share their thoughts, needs, and harms, and in this way, they connect with key actors in the system.<sup>140</sup> The VIS reflects a relational mechanism that allows victims to overcome adversarial barriers and connect with defendants, attorneys, judges, and the community in general. It is a way of connecting with others through the expression of universal values, emotions, and needs.

The importance of communication and communion with the court and with others in the legal process, as it emerged from the findings, demonstrates the original purpose of the VIS as a communicative tool rather than one that focuses on sentencing. It further shows the contribution of the statements to the procedure, not only to the outcome, in the eyes of victims. Roberts and Erez criticized the transformation made in the scholarship from constructing VISs as a communicative model to a retribution model, arguing that the primary goal and intent of the victims' rights reform was to offer a legal tool for victims to make their voices heard.<sup>141</sup>

### B. *Victim Impact Statements as a Window into the Victims' Shattered Realities*

Victimization studies provide important information about the prevalence and severity of multiple detrimental effects of crime on victims, including the emotional, physical, and financial harms they endure.<sup>142</sup> The current research echoes these studies while adding detail and depth information through the qualitative analysis of

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<sup>136</sup> Ksenia Matthews, Note, *Who Tells Their Stories?: Examining the Role, Duties, and Ethical Constraints of the Victim's Attorney Under Model Rule 3.6*, 90 *FORDHAM L. REV.* 1317, 1336, 1343–44, 1350 (2021).

<sup>137</sup> Jo-Anne Wemmers, *The Meaning of Justice for Victims*, in *INTERNATIONAL HANDBOOK OF VICTIMOLOGY* 27, 29, 39 (Shlomo Giora Shoham, Paul Knepper & Martin Kett. eds., 2010); see also Booth *supra* note 65, at 255; Winick, *supra* note 63, at 543.

<sup>138</sup> Kilpatrick et al., *supra* note 73, at 4; Roberts & Erez, *supra* note 58, at 238.

<sup>139</sup> Pemberton et al., *supra* note 76, at 689.

<sup>140</sup> *Id.* at 684.

<sup>141</sup> Roberts & Erez, *supra* note 58, at 224.

<sup>142</sup> Shapland & Hall, *supra* note 5, at 179–180; Frans Willem Winkel, Prof. of Psychological Victimology, Lecture at Tilburg University: Post Traumatic Anger: Missing Link in the Wheel of Misfortune (Oct. 17, 2007).

texts written by the victims themselves, beyond what usually appears in questionnaire-based quantitative data collected, for example, in victimization surveys. The texts analyzed in the present study provide thorough descriptions of “life following the crime,” which has been significantly altered because of it. The texts describe a range of emotions discussed by the victims, including anxiety, anger, fear, sadness, and loneliness. The statements also describe psychosomatic symptoms in addition to financial and physical harm. The victims’ statements tell a powerful story of the manner in which their lives were shattered, their personality changed, their relationships with friends and family damaged, and their daily routine altered as a result of their victimization. These significant and lasting outcomes were described by those who were physically and sexually assaulted, and by the relatives of murder victims.

Although all the statements in the study present the offense as a life-changing event that caused devastating harms to the victims, the dominant emotion expressed by the victims in the statements was fear and anxiety; anger was hardly mentioned. In view of the grave psychological, physical, and practical effects suffered by the victims, it was striking that the statements were typically written in a succinct, almost detached way. Some of the statements delivered by relatives of murder victims included expressions such as “despicable” and “loathsome” with reference to the murderer, but in most cases the harsh realities of the victims were described in a matter-of-fact manner.

### *C. Victim Impact Statements as a Platform to Convey Secondary Victimization*

A hitherto unmentioned theme that emerged from the analysis is the significance assigned by victims to the experience with the criminal justice system. Most victims in our research chose to use the VIS to describe the criminal proceedings as negative, agonizing, and difficult. They voiced strong expressions of loss, helplessness, and frustration caused by their feeling of injustice. Victims felt alienated because of the asymmetry that characterizes the adversarial criminal justice system, which perpetuates their role as outsiders.

This portrayal is consistent with the experience of victims in the criminal justice system as described in the literature, which is often described as traumatic, coercive, dismissive, and painful—and therefore referred to as “secondary victimization.”<sup>143</sup> Because of the adversarial nature of the criminal justice system, which leaves victims with no formal standing in the process, many victims perceive the process as unfair and unjust. Victims often feel marginalized by the system and unable to influence the criminal proceeding. The inherent focus of the criminal law on defendants’ rights leaves many victims with a sense of injustice and frustration. The

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<sup>143</sup> See generally Uli Orth, *Secondary Victimization of Crime Victims by Criminal Proceedings*, 15 SOC. JUST. RSCH. 313 (2002); see also Negar Katirai, *Retraumatized in Court*, 62 ARIZ. L. REV. 81, 88–91 (2020) (discussing how victims are retraumatized in the criminal justice process).

encounter with the criminal justice system is often overwhelming to victims, and can be frightening and alienating.<sup>144</sup>

Although secondary victimization has been thoroughly studied in the victimology literature, what was revealing in the present study was the victims' choice to make their secondary victimization part of the story they delivered in the VIS, a document designed to convey the harms resulting from the offense to the court. In principle, the encounter with the criminal justice system is not one of the issues that the statement is meant to include. Although judges are not expected to rely on such depictions when deciding on the appropriate sentence for the defendant, almost all of the statements in the study included some descriptions of the difficult experiences the victims endured as a result of their involvement in the criminal process.

Victims were aware of the fact that VISs are vehicles to deliver their narrative of the harms caused by the crime, but they created an additional narrative that reveals their story of "legal victimization." This is a central theme in the statements, and it is evident that victims perceived it as a relevant and significant issue to tell the court about. Why did victims devote an extensive part in their statements to the legal process although they knew that it was not required by law and was not likely to affect the sentencing decision of the court?

During the legal proceedings, victims' narratives are heavily regulated by the prosecution, the defense, and the court, based on criminal procedure and evidentiary rules. Most victims do not have their day in court, as a result of a plea agreement that eliminates the need to hear them as witnesses. Those who are called to the stand may provide only direct (at times only yes-or-no) answers to what they are asked: questions relating to the actions leading to their victimization and during it. Anything outside these boundaries—including how they felt, what happened to them after their victimization, and how their life has been changed—is off limits.<sup>145</sup> Victims on the witness stand are often required to fit their narrative into the "boxes" of legal jargon, which deprives them of the opportunity to tell their story in their own way.<sup>146</sup> For the victims, the VIS is the first and only opportunity within the criminal justice process to choose the type of issues they would like to bring before the court. It is the only stage at which they have some control over what they communicate to the court.

The statements we analyzed were regarded by the victims who wrote them as a platform to create a narrative by delivering to the court not only what was expected

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<sup>144</sup> See, for example, a study on victims in the Spanish criminal justice system, where, despite efforts by victim assistance services, victims were still reporting feelings of rage, shame, and anger during the justice process. J. Tamarit, C. Villacampa & G. Filella, *Secondary Victimization and Victim Assistance*, 18 EUR. J. CRIME, CRIM. L. & CRIM. JUST. 281, 292, 295 (2010).

<sup>145</sup> SUE LEES, CARNAL KNOWLEDGE: RAPE ON TRIAL 31 (1996).

<sup>146</sup> S. CAROLINE TAYLOR, COURT LICENSED ABUSE: PATRIARCHAL LORE AND THE LEGAL RESPONSE TO INTRAFAMILIAL SEXUAL ABUSE OF CHILDREN 289–91 (2004).

of them to say (the harms) but also what they wanted the court to hear and take into consideration.<sup>147</sup> The scholarship on VISs and the TJ literature emphasize the therapeutic value of the statements as tools that offer the victims the possibility to be heard, listened to, and recognized. The depiction of the various harms that victims endured, in their own words, without legal limitations regarding what should and should not be included in the statement, enables victims to express their sense of dignity, meaning, and control, and therefore increases the therapeutic effect of the legal proceeding on the victims.

The use of the statement by the victims to describe their experience in the criminal justice system reflects a path for making their voice heard in the legal process. It is not only the telling of the story, not only *how* to tell their story, but also *what* to include in it. Choosing to focus on their painful experience within the criminal justice system, the victims created a new and original story—a story of their own. As authors of the story, they chose the plot, the topics to include, and the ways to deliver them to the judiciary. On this note, Judith Lewis Herman stated that VISs are means for constructing the victims' narrative.<sup>148</sup> Our research clearly illustrates the original, individual narrative constructed by the victims, which moves beyond statutory regulations and legal expectations.<sup>149</sup>

Procedural justice theories focus on the importance of the process and maintain that individuals' perceptions of the fairness of a decision are strongly affected by the process.<sup>150</sup> The process, in and of itself, has great value for those who participate in it. Research shows that individuals who felt that they were able to fully express their views during the proceeding, were more satisfied with their overall experience in the legal proceeding, even when they received unfavorable outcomes, than were those who received favorable outcomes but had less of an opportunity to have a voice in the process.<sup>151</sup> Using VISs to talk about topics that victims cannot raise during the trial and which are not part of the expected narrative of a criminal trial serves as a mechanism for enhancing victims' visibility in the system. In turn, this may increase their satisfaction with the criminal process, regardless of its effect on the sentencing outcome.

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<sup>147</sup> Jamie Balson, *Therapeutic Jurisprudence: Facilitating Healing in Crime Victims*, 6 PHX. L. REV. 1017, 1031–32 (2013).

<sup>148</sup> Herman, *supra* note 79, at 577.

<sup>149</sup> Lara Bazelon & Bruce A. Green, *Victims' Rights from a Restorative Perspective*, 17 OHIO ST. J. CRIM. L. 293, 309–12 (2020) (arguing that victims may want to choose how and when to share their stories).

<sup>150</sup> TYLER, *supra* note 69, at 124.

<sup>151</sup> Wemmers, *supra* note 7, at 228–29.

*D. Victim Impact Statements as a Personal Instrument*

In the *Payne* decision, a key argument in support of describing the victim's traits in the statement was to portray the victim as more than a "faceless stranger."<sup>152</sup> Our analysis reveals that victims sought to portray a detailed and personal description of their character or of that of their relatives, so that they would be "more than just a name."

The limited research that examined the content of VISs has shown that, contrary to the formal goal of the VIS, which focuses on the harms, victims chose to talk about their character and personality. In our research, the statements included a concrete description of the victims' lives, character, personalities, hobbies, and their significance in other people's lives. Relatives of deceased victims used the VIS as a "virtual tombstone" for their loved ones, telling a documented story about the victims. Why did victims choose to create such an intimate narrative, when they were aware of the stated purpose of the VIS to describe the harms caused by the crime? We argue that the inclusion of such an intimate description has two different appeals for victims: it is therapeutic and utilitarian.

From a therapeutic perspective, it seems that victims' decision to paint a detailed portrait of who they are, or who their relatives were, has to do with the secondary victimization they experienced through their involvement in the legal process. The detailed portrayal of the victims "compensates" for their sense of marginalization and alienation, and offers victims a sense of control over the process. It is as if the detailed and concrete narrative about the life and character of the victims or the deceased served as a means to remedy the victims' negative experience in the proceeding, to transform their sense of alienation into a feeling of familiarization, and their role as outsiders into insiders.<sup>153</sup> The personal descriptions of the victims were meant to provide the court a multidimensional image of a whole person, with a name, character, hobbies, wishes, and thoughts. For relatives of murder victims, the detailed description of the deceased resuscitated their loved ones and allowed them to become part of the process. By delivering these personal descriptions, victims were possibly hoping to change from being "a case name" to "more than just a name," even if this transformation was not likely to influence the outcome.

Additionally, by incorporating detail and subjectivity into their statements, victims may have hoped to shift some of the focus of the court from the defendants to them (or to their loved ones). Echoing previous literature, our analysis demonstrates that the victims felt that throughout the trial process, the criminal justice system

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<sup>152</sup> *Payne v. Tennessee*, 501 U.S. 808, 825 (1991) (quoting *South Carolina v. Gathers*, 490 U.S. 805, 821 (1989)); Bryan Myers, Narina Nuñez, Benjamin Wilkowski, Andre Kehn & Katherine Dunn, *The Heterogeneity of Victim Impact Statements: A Content Analysis of Capital Trial Sentencing Penalty Phase Transcripts*, 24 PSYCH., PUB. POL'Y & L. 474, 484 (2018).

<sup>153</sup> BIBAS, *supra* note 2.

prioritizes defendants' rights over their own needs, interests, and rights.<sup>154</sup> By adding personal and intimate facts about themselves or their loved ones, victims were able to "gain the attention" of the court and enjoy the spotlight, even if only for a short time at the end of the trial. Their attempt may be framed as an effort to break the "adversarial triangle" consisting of the defense, the prosecution, and the judiciary, and acquire a role in the legal proceeding.

In addition to their therapeutic benefits, the intimate narratives provided by the victims also had a utilitarian value. By familiarizing the court with the victims and declaring that they were "more than just a name," the victims also established that they deserved being listened to and considered seriously. A victim stating that he had academic credentials (Dan) or a widow stating that her deceased husband had served in the military in the early years of the State of Israel (Michelle) may have hoped to establish credibility and to add weight to their story and request.

In addition, the detailed descriptions of the victims in the statements may have also been aimed at increasing the emotional involvement of the listeners, to make the judiciary notice the victims, remember their image, and connect with the person behind the name and the formal facts. By making an emotional appeal through their statement, victims may have intended to make their narrative more persuasive.

## CONCLUSION

The discourse of VISs typically focuses on their legal goals and the risks to the defendants' right to due process on one hand, and on their therapeutic value to victims on the other. This Article offers an additional dimension to the discussion by demonstrating how VISs create a new framework that integrates the legal and therapeutic discourses. The analysis reveals how victims insert legally extraneous content into the heavily regulated setting of the criminal justice process. By providing a multidimensional story of who they are, who their loved ones were, and how they have experienced the criminal process, victims extend the legal discourse beyond its common boundaries.

By means of the VIS, this content is formally accepted by the courts and the legal actors, even if only to a limited extent. The openness of the legal system to accept and acknowledge exogenous content that is not required by law, even if indirectly, suggests a need to rethink the social function of the court for victims and communities. It is possible that the courts play an additional role in problem solving and meting out just deserts. They may be more inclusive of and more attentive to non-legal narratives, emotional expression, and interpersonal connectedness than is generally believed.

The VISs analyzed in the present Article were far more detailed, broad in scope, and personal than the format prescribed by law. Yet, all the statements were accepted

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<sup>154</sup> Doak, *supra* note 10, at 296, 299–300.

and acknowledged by the courts to which they were submitted. If VISs in other parts of the world share similar characteristics, the law in action differs substantially from the law on the books regarding the prescribed scope of VISs. Our analysis reveals that in practice, there is room for an integrated therapeutic–legal discourse at the sentencing stage, when considering the victims’ perspective. There is room for more than a laconic list of the damages inflicted by the offense and of the rehabilitative needs of the victims. There is room for a range of narratives and stories, even when they do not aim at affecting the legal outcome. Yet, even if statements in other parts of the world adhere more strictly to the legal instruction concerning the content of the VIS, at least, the analysis demonstrates an authentic need of crime victims to connect, share, and communicate their message to other key players in the legal proceedings on their own terms.