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Action of the Flower:

Understanding Victim-Impact Statements in the Context of Legal Interpretivism and

Restorative Justice

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Abstract

This paper seeks to justify the acceptance of Victim-Impact Statements (VISs) in courts and capital trials by placing them in the context of legal interpretivism. I argue that the current debate among scholars focuses on divergent views on the purpose and impact of the statements, which requires a unifying standard before one can adequately evaluate these arguments.

Applying American legal philosopher Ronald Dworkin's theory of jurisprudence and his "meta-principle"—the principle of integrity, I defend the acceptance of VISs. Because of the increasing importance of victims in both U.S. and international legal proceedings, the use of jury and expert witnesses, and benefits to both the victims and the communities, the VISs pass the acceptability test under the integrity principle. They are arguably valuable additions to the justice system. The successful implementation of VISs, however, needs collaboration between multiple parties and scrutiny of the courts. At the end of the paper, I also survey the relationship between emotions and rational decision-making. The presence of emotions does not necessarily impact logical reasoning but instead implement dominant legal narratives.

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Preface

My interest in the field of law and literature stemmed largely from my study-away year in Paris, reading and watching Molière's comedies. Many people refer to him as the "French Shakespeare," but I think he is far more cynical than Shakespeare. I was first introduced to his play *L'Avare* or *The Miser* in a fieldwork class that studied the gender dynamic in Paris. Since I was not enjoying my study-away experience so much at the time, I turned to literature for escape and comedies for solace. So I started reading him. It was not long before I realized there were much more in these plays and farces. Beneath the witty dialogues and funny punchlines were light-hearted discussions of recurring themes in human lives: family dynamics, arranged marriages, class conflicts, xenophobic mindsets, and law and justice. Looking at the old plays is like holding a mirror; it allows us to draw parallels from them and reflect on some of the most troubling contemporary issues.

As a former lawyer himself, Molière has a lot to say about justice. In *Scapin the Schemer*, he uses the mouth of Scapin to express his distrust of the legal system: "Well, sir, if you will take my advice, you will look to some other way of settling this business. You know what a lawsuit means in this country, and you'll find yourself in the midst of a strange bush of thorns."¹ When the other character insists that he prefers to go to the law, Scapin gives his long speech on the subject of justice: "Ah! sir, what are you talking about, and what a resolution you are going to take! Just cast a glance on the ins and outs of justice, look at the number of appeals, of stages of jurisdiction; how many embarrassing procedures; how many ravening wolves through whose claws you will have to pass... Ah! Sir, save yourself from such a hell, if you can."² As I went to

¹ Moliere. *The Impostures of Scapin*. Edited by Delphine Lettau. Translated by David Widger, EBook #8776, Project Gutenberg Ebook, 2005, *Project Gutenberg*, II. 8.

² *The Impostures of Scapin*, II. 8.

see the performance of *Scapin the Schemer* at La Comedie-Francaise, I felt the actor was speaking as much to his fellow actors on stage as to the audience sitting in the dark. I was shocked by the accurate modern applicability of many of these 17th century conversations. The dialogues could take place on the stage of 17th century Paris; it could as well be heard in the streets of 21st century New York. These conversations are not moot. We still get the irony today.

So I set out thinking I would write about the trials and legal discussions in Molière's plays and how they are relevant to his own time and ours. After completing my overly broad prospectus for the Junior Independent Research Seminar (or as we GLS people call them, "JIRS"), my professor for JIRS, Professor Peter Valenti, who had always appreciated my academic works, expressed some major concerns for the first time. Since I would be using literary works as my primary basis, I would have to make a lot of assumptions and establish weak links that could undermine the academic credibility of the thesis. And although my focus was on one playwright, I wanted to make too many contemporary references which would require me to cover more topics than I was supposed to. The practice of using literary work as analogies for modern issues was also problematic. After all, as compelling as this idea may sound, I was not writing a dissertation for a PhD in Literature, I had to find something more concrete and authentic.

Since then I have been exploring other potential topics but felt like none of those were my calling. In other words, I didn't feel passionate enough to devote five months of my life researching and writing about any of those topics. I still want to stay in the law and literature field. Some people say that the law is both a science and an art, while the "scientific" part is the

statues and printed words, the art lies in their interpretations. The communicative aspect of the law is what attracts me the most and I don't want to give that part up for the "hard science."

An epiphany came when I was on my way home one day from my summer internship at a Chinese Court. I worked at the criminal tribunal at one of the district courts in Shanghai and as an intern, one of my major responsibilities was to write case summary reports after the closure of trials. One of the fraud cases I was assigned to had 16 victims and the documents came with 12 big, heavy boxes. Among the documents were statements from some of the victims, and it was the first time I read something like these. I was touched by many of the statements I read and experienced first-hand how powerful these statements could be. Although the statements would not factor into any official document, knowing that there are real people behind these cases made me think what I did was important. They made me and many others at the court less condescending and more understanding to those who were harmed and turned to the court for justice.

So I started researching statements of the victims. The victim-impact statements seem like a perfect balance between my initial interest in something "literary" and something as concrete as the law. The debate over their usage in court, especially in trials that could have serious consequences has been highly controversial. Both sides have great arguments as we shall see in later chapters.

A popular discussion we hear a lot these days and in a lot of fields is whether we would be replaced by artificial intelligence someday. When it comes to numeric computation and analysis of economic models, humans are no equal to the computers. Is it the same for law? Although the advance of technology has already replaced some human activities in the law (like doing research via databases instead of flipping through case books), I don't think it can

completely replace the human element in law. The law itself is a machine made of words and has its basis on human interaction. There is always something in us human beings that cannot be generalized by rules and formulas. Shakespeare has warned us of the fragility of beauty: “How with this rage shall beauty hold a plea, / Whose action is no stronger than a flower?”³ The VIS is like the flower. It cannot expiate the rage and it is not heavy enough to tip the scale. But nonetheless it has a beauty in its own existence, and we should not underestimate the action of the flower.

I owe a lot to everyone who led me through the thesis-writing process and those who took their precious time to guide me on academics and life throughout my college career. I want to thank Professor Phillip Washburn, who had recommended many interesting sources and helped me tremendously ever since my early exploration stage. And most importantly, I have to thank him for telling me that the goal of education is to “know thyself” and for always being generous in sharing his views and enormous knowledge with me on various topics. I also want to thank my JIRS instructor Professor Peter Valenti, who pushed us to do works that seemed somewhat burdensome at the time but turned out to be very useful once we started writing our thesis. I also have to thank my second reader, Professor James McBride, who offered his insights on my draft.

And last but not least, special thanks go to my thesis advisor Professor Albert Piacente, who not only introduced me to Ronald Dworkin’s works but also indulged his students in working in ways they feel most comfortable. He also encouraged me by telling me that I am a good student, which leaves me no choice but to work extra hard so I can hopefully live up to that statement. Without his guidance, I could never have completed this thesis.

³ William Shakespeare, “Sonnet 65: Since Brass, nor Stone, nor Earth, nor Boundless Sea by William Shakespeare.” *Poetry Foundation*.

Introduction

Victim-impact Statements (hereafter as “VISs”) are statements made to a court by victims of a crime or by their families in the sentencing phase of criminal proceedings, expressing the impact that the crime has had on them. ⁴Although there are no official guidelines on the structure and content of VISs, victims and their families usually use the opportunity to express the emotional damage they suffered from the action of the defendant, inform the court about the outstanding character of the victim, and in some cases, convey their hoped-for verdict to the court. The defense does not have the right to rebut information mentioned in VISs; neither can they cross-examine the person making the statement. A quick search of “victim-impact statement” on YouTube generates thousands of videos of victims reading their statements in courts. And it is not hard to find some shared features: extremely emotional words, shaking voices, dropping tears, and silenced courtrooms.

In the early stages of many major legal systems, because of the absence of codified laws and lack of powerful state enforcement powers, the burden of justice almost always fell on individuals. The Code of Hammurabi stressed the principle of *lex talionis*, or put it in a more colloquial way, “an eye for an eye.” If an individual was hurt, he or she shall seek the same amount of retaliation against those who had imposed the harm. In early Roman Law, the Twelve Tables also reflected the notion that the court functioned only as a medium for individuals to resolve disputes. If someone perpetrated some harm against another person, the victim does not just call 9/11 (or, to be more relevant to the historical background, sends a messenger pigeon to officials) and ask the state to lock up the perpetrator, it’s the victim’s responsibility to make sure the defendant appear in court.

⁴ "Victim Impact Statement." The Macquarie Dictionary, edited by Susan Butler, Macquarie Dictionary Publishers, 7th edition, 2017. *Credo Reference*, Accessed 11 Oct. 2019.

Over the centuries as nation-states were formed and governments made efforts to codify their laws, the view of personal wrongs transformed into crimes against the state. After the industrial revolution, victims had faded into the background in the criminal procedure, and their roles in the process became secondary.⁵ But starting in the 1940s, some researchers and scholars returned back to the crime victims. And as the victim-rights movement gained momentum in the 1970s, attention was given to the passive role of victims in adversarial criminal justice systems. To address this concern and to integrate victims in proceedings, victim-impact statements at the sentencing stage were conceived. The first victim impact statement was introduced in 1976 and a key moment was the passage of the Victim's Rights Bill in 1982. Two Supreme Court cases—*Booth v. Maryland* (1987) and *South Carolina v. Gathers* (1989)—had initially ruled victim-impact statements in the sentencing of capital cases as unconstitutional. But in the subsequent case of *Payne v. Tennessee* (1991), the Court reversed itself, and almost every state in the United States made some effort to include some use of victim-impact statements in the courts.

Many people had expressed their opinions on the VISs. Those who oppose the use of VIS claim that the emotionally charged documents could fuel vengeance, anger, and hatred in court, undermining fairness for the defendant.⁶ And by introducing more mitigating factors, the cases become more complicated and that makes it more difficult for judges and juries to decide appropriate punishment. Social psychologists also appeal to empirical evidence, claiming that the

⁵ Marlene Young and John Stein, "The history of the crime victims' movement in the United States: A component of the Office for Victims of Crime Oral History Project," Office for Victims of Crime, Office of Justice Programs, U.S. Department of Justice.

⁶ Bruce A. Arrigo and Christopher R. Williams, "Victim Vices, Victim Voices, and Impact Statements: On the Place of Emotion and the Role of Restorative Justice in Capital Sentencing," *Crime & Delinquency*, 2003, 603–626.

presence of VIS have huge influence on parole approval rate⁷ and likelihood to vote death penalty.⁸

On the other side, the proponents of VIS argue that VISs have informational value to the courts because they provide new perspectives to the court and have the potential of letting the judge and juries see something they may have missed earlier.⁹ They also challenge the courts' assumptions on criminal cases by letting the judges hear the victims' voices, making them less paternalistic and condescending. Besides, since perpetrators could provide statements from friends and families testifying to their good characters in hope of a lighter sentence, the presence of VIS balances the scale and makes it fairer. Some scholars also focus on the therapeutic effect of the statements and claim that making a VIS in court resembles an emotional catharsis that helps the victims heal.¹⁰

The current debate both in and outside the courtrooms focuses on divergent views on the purpose and impact of the VISs. We will weigh their merits and insufficiencies later in the thesis. In Chapter 1, we will survey the changing status of the group of victims throughout history and witness how they transformed from being backboards in legal debates to groups under the spotlight. The shift of social and political structures around the world gives rise to the different roles of victims. They have gone through the stages of being unduly burdened to relatively relieved, and from relatively relieved to being marginalized. After the two great world wars, however, interests in academia and a series of social movements once again brought them back

⁷ William H. Parsonage et al. "Victim Impact Testimony and Pennsylvania's Parole Decision Making Process: A Pilot Study," *Criminal Justice Policy Review*, 1992, 187–206.

⁸ James Luginbuhl and Michael Burkhead, "Victim impact evidence in a capital trial: Encouraging votes for death," *American Journal of Criminal Justice*, September 1995, 1-16.

⁹ Susan A. Bandes, "Empathy, narrative, and victim impact statements," *The University of Chicago Law Review*, March 1996, 361-412.

¹⁰ Julian V. Roberts, "Listening to the Crime Victim: Evaluating Victim Input at Sentencing and Parole," *Crime and Justice*, 2009, 347-41

to the front of the stage. Although three landmark cases temporarily decided on the admissibility of VISs in the United States, opinions delivered by the court suggested different interpretations of the documents and implied the justices' varying focuses on justice and fairness. The decisions were thus a temporary ceasefire, and the debate is far from settled.

We will first look at the various interpretations of VISs and their underlying logic in Chapter 2. The arguments will be categorized into six groups based on their theoretical commitments. The remainder of the chapter, however, will be devoted to the defense of VISs. I will demonstrate the legitimacy of VISs and hope to balance the different interpretations through a "meta-principle" proposed by American legal philosopher Ronald Dworkin. Dworkin proposes that any decision made in law should follow the principle of integrity. It means that when judges make decisions, they have to make sure that the principle underlying their decisions is consistent with principles reflected or derived from earlier decisions, and at the same time, consistent with societal and legal values. In other words, the judges have to abide by certain authoritative opinions laid down by their predecessors and at the same time, consider what would be good for their community in the future. Using Dworkin's framework, I propose that the VISs should be welcomed, for it is not only a natural product brought forward by the historical movements of victims but also that their acceptance would be beneficial to the greater community. And since the arguments used against the acceptance of VISs are not consistent with the principles justifying other already existing practices in capital trials like expert testimonies and jury verdicts, a denial of VISs would violate the principle of integrity.

Chapter 3 will start with some criticisms against Dworkin. Although these criticisms are not in conflict with our justification of VISs, they direct us to look at aspects of VISs that Dworkin has overlooked. Because real life is far more complicated than the Utopian Law's

Empire where the judge Hercules has unlimited time, patience, and power, our discussion on VISs forces us to look beyond Dworkin. Taking the emotional aspect of VISs into account, I will survey arguments provided by neuroscientist Antonio Damasio, legal philosopher Martha Nussbaum, and other scholars regarding emotions in law. I hope to establish that emotions do not necessarily impact logical reasoning, and the introduction of emotions could sometimes implement dominant legal narratives. At the end of Chapter 3, I will also briefly explore ways that could be done both inside and outside the courts which would accommodate emotional elements and at the same time not impede the goal of fairness.

Chapter I: The Rise of Victims

“He cries for his mom. He doesn’t seem to understand why she doesn’t come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I tell him yes. He says, I’m worried about my Lacie.”¹¹

– Mary Zvolanek, in *Payne v. Tennessee*

The above statement came from Mary Zvolanek, whose daughter Charisse and granddaughter Lacie were brutally murdered in their kitchen. When the police first entered the apartment of the young mother, they were horrified. Blood covered the walls and floors throughout the unit.¹² Charisse’s body was found on the kitchen floor on her back, legs fully extended. She had suffered 42 separate thrusts of a butcher knife and died because of excessive bleeding. Two-year-old Lacie was stabbed in her chest, abdomen, back, and head. The only surviving victim was Charisse’s three-year-old son Nicholas. Despite wounds inflicted by the butcher knife that completely penetrated his body, he bravely “held his intestines in as he was carried to the ambulance”¹³ and miraculously survived after seven hours of surgery.

The tragedy was what brought the landmark case of *Payne v. Tennessee*¹⁴ to the Supreme Court of the United States. As the Court ruled in favor of the use of victim-impact statements in capital trials, debates over whether they should be used in courts had been non-stop since then. But before we dive into the content of victim-impact statements and the controversy surrounding

¹¹ Stephen Bright. “CAPITAL PUNISHMENT: RACE, POVERTY & DISADVANTAGE.” *Class 4: Mitigation and Victim Impact Evidence*, Yale University, <http://campuspress.yale.edu/capitalpunishment/>. P. 6.

¹² Vivian Berger. “Payne v. Tennessee (1991).” *The Encyclopedia of Civil Liberties in America*, edited by David Schultz, and John R. Vile, Routledge, 1st edition, 2005. *Credo Reference*.

¹³ *Ibid.*

¹⁴ 501 U.S. 808 (1991).

their use in Chapter II, it is worth understanding why people like Mary were invited to speak in courts in the first place.

The word “victim” was originally referred to as “a living creature killed and offered as a sacrifice to a deity or supernatural power.”¹⁵ And even if crimes are as old as mankind, the term victim did not appear in the English language until 1497.¹⁶ For the sake of convenience and relevance of my topic, I will assign the term “victim” to both people who were directly harmed by the defendant and those who have invested relationships with those harmed. This broader definition not only recognizes the emotional damage suffered by people who are close to the direct victims, it also allows representation from the victims’ side in situations where direct victims are deceased or could no longer speak for themselves.

The status of the victims has transformed greatly over history. In the early days of human society, justice was a personal and familial matter. When a person or property was harmed, it was up to the victim and the victim’s family to seek justice. In early societies where laws were weak and personal well-being was constantly threatened, one had to take things into one’s own hands. Personal revenge against their attackers happened frequently, and this savage state of justice somehow resembles Thomas Hobbes’s account of the natural state of human beings where we live in constant conflicts—a war of all against all.¹⁷ It is hard to differentiate victims and offenders. When a person was injured and had the means of fighting back, he attacked in turn, and their original positions would be reversed.¹⁸ These personal retaliations were what

¹⁵ Jo-Anne Wemmers. “A Short History of Victimology.” *Social Science Research Network*. August 2014.

¹⁶ *Ibid.*

¹⁷ Douglas Sturm. "Hobbes, Thomas." In *Encyclopedia of Politics and Religion*, edited by Robert Wuthnow. 2nd ed. CQ Press, 2006.

¹⁸ Stephen Schafer. “*The Victim and His Criminal: A Study in Functional Responsibility.*” *Social Forces*, Vol. 47, No. 4. 1969.

Stephen Schafer calls the earliest form of compensation to the victim. They suggested individuals' struggle for survival in a violent environment instead of community punishment.¹⁹

Over the centuries, as communities and early forms of governments started taking shape, the need for order and acceptable behavior between individuals inside communities increased. Because peace and harmony were the central goals of agricultural and tribal societies, compensation was given in the form of monetary awards instead of punishment. Graduated scales of compensation were found in the codes of a number of early societies, including the Torah, the Code of Hammurabi, and the early English codes.²⁰ According to Schafer, besides the need of labor force in primitive societies (if a man is heavily punished or spends too much time in jail, he loses the strength and time to labor), increased statutes on monetary compensation correlated with men's growing recognition of and desire for private property.²¹

However, even if the status of victims were recognized, and they no longer had to take up the swords themselves in most cases, the burden of justice still fell largely on them. For example, in the Twelve Tables—the famous legal work of ancient Roman society composed around 450 BCE, the victim had legal standing only under private law, which concentrated on relations between individuals. If a person stole a cow from another, the one who lost the cow would be responsible for summoning the adverse party to court. According to the law, he is the one who shall ask, threaten, drag, or even bind “with thong or fetter”²² the one he wishes to sue. If the defendant was too weak to move or had an illness that would encumber his travel, the plaintiff was also required to provide a sedan with soft cushions at his own cost for the transport of the

¹⁹ Ibid.

²⁰ Richard E. Laster, *Criminal Restitution: A Survey of Its Past History and An Analysis of Its Present Usefulness*, 5 *U. Rich. L. Rev.* 71 (1970). P. 72.

²¹ Schafer 4-5.

²² John Head, *Great Legal Traditions: Civil Law, Common Law, and Chinese Law in Historical and Operational Perspective* (Durham: Carolina Academic Press, 2011) P. 52.

defendant to court.²³ The Roman state was not involved in this process, and the victim governed by these early statutes had to play multiple roles. Besides subsidizing his assailant, he had to—using today’s terms—act as the plaintiff, the police, the prosecutor, and the plaintiff’s lawyer at the same time.

As much autonomy as the victims may have had, it is not hard to imagine the limitations of this practice. While earlier codes like the Code of Hammurabi stressed restoration of equity between the offender and victim—“an eye for an eye, a tooth for a tooth,” the reward victims received relied heavily on his or her own social status and the circumstances of the crimes. If the other party were “stronger”—in both literal and figurative senses, very likely justice would be denied or delayed for the victims. It is unlikely that a sturdy offender would comply with a slim victim, and it is equally difficult for a commoner to challenge an aristocrat. Because of the hardship involved in bringing the offender in front of judges and the non-binding nature of rulings, dissatisfaction with the judicial process still lead to personal revenge and blood-feuds. In this case, because of the lack of universal punishments for the same offenses and weak local enforcement by the state, powerful individuals overrode the law and once again took things into their own hands. In conclusion, from the earliest form of “compensation” as of revenge to the later “bring-your-own-defendant-to-court,” it is unfair to consider this seeming freedom granted to the victims as a cheerful privilege; these practices were more like a shrug of lacking alternatives.

Historians differ in their views on the exact reasons behind the separation of civil and criminal offenses. Some scholars suggest that fear of retaliation against individuals may play a role in their distinctions. Richard Laster uses the example of community punishment in East

²³ Ibid.

Africa to illustrate why some crimes were regarded as more harmful and punishable by larger communities. In pre-European East Africa, where the fear of witchcraft was prevalent, the community feared that if someone was harmed and sought punishment of a witch, the victim would face retaliation of sorcery.²⁴ It would be better for the community as a whole to enforce the punishment. Other scholars claim that gradually increased centralized forces propelled lawmakers—who are usually close to the centralized forces, if not in them—to consider certain violations severe and treated them crimes against the state. At the end of the Anglo-Saxon period in English history, feudalism strengthened the authority of the king and allowed him to create courts where intentionally harmful acts were defined as disrupting “the king’s peace.”²⁵ And since political environments had shifted from maintaining peace in small agricultural communities to creating an image of respectable central power, law as a device for punishment was needed to deter potential crimes and elicit veneration. Some scholars have also proposed financial incentives as the reason behind the distinction: instead of allowing compensation to go to individuals, the government established a legal system to acquire part of the money previously paid to private citizens. In exchange, the government provided services and raised punishment levels to satisfy the victims.²⁶ On the offender side, by leaving his fate to formal institutions which had no personal grievance against him, “the twofold payment enabled him [the offender] to buy back the security that he had lost”²⁷ in his community. He no longer had to fear harsher retaliation from the victims.

²⁴ Laster 74.

²⁵ Mark Stevens. “Victim Impact Statements Considered in Sentencing: Constitutional Concerns.” *Berkeley Law Review*, Vol. 2, No. 3. 2000.

²⁶ Ibid.

²⁷ Laster 74.

Probably for all of the above reasons, the evolution of treating crimes as a societal interest instead of a matter for individuals gradually took place. As governments started codifying their laws, the notion of personal wrongs transformed into offenses against the state. After the Industrial Revolution, criminal law largely shifted to considering crimes violations against the state rather than the victim. In his book *The Culture of Control*, David Garland referred to this new societal aim as “penal welfarism”²⁸ and noted that in the penal-welfare framework, “individual victims featured hardly at all, other than as members of the public whose complaints triggered state action. Their interests were subsumed under the general public interest, and certainly not counter-posed to the interests of the offender.”²⁹ In court proceedings, “Victim v. Offender” was replaced with “State v. Offender.”³⁰ The role of victims gradually sank to the background and became secondary. Although this transformation seemed to be the product of an historical trend that sought to relocate the burden from victims to legal institutions, this momentum did not continue.

Starting in the 1940s, many researchers and scholars in Europe returned back to the crime victims, and the Victim’s Rights Movement proceeded quickly in the United States in the 1970s.³¹ Even Garland admits that the sudden reemergence of crime victims and scholars’ interest in them are “puzzling” because “they appear to involve a sudden and startling reversal of the settled historical pattern.”³² Just like the creation of formalized codes and legal institutions was a product of time and political environments, the return of crime victims cannot be discussed

²⁸ David Garland, *The Culture of Control: Crime and Social Order in Late Modernity*. (Chicago: University of Chicago Press, 2002). P. 11.

²⁹ Garland 47.

³⁰ Stevens.

³¹ Marlene Young and John Stein, “The history of the crime victims’ movement in the United States: A component of the Office for Victims of Crime Oral History Project,” Office for Victims of Crime, Office of Justice Programs, U.S. Department of Justice.

³² Garland 3.

in a vacuum either. The modern beginnings of the study of victims started with scientific inquiries in the 1940s and 50s when notable criminologists like Hans von Hentig and Benjamin Mendelsohn examined victim-offender relations. The term “victimology” was first used by Benjamin Mendelsohn to describe the scientific study of crime victims.³³ Victimology was first considered as a subfield of criminology, but different from criminology. Whereas the latter involved the study of crime and criminal behavior, victimology focused solely on the study of crime victims.³⁴

In its early days, victimology used to be a relatively niche academic subject which examined how crime victims contribute to their own victimization. Scholars devoted their studies mainly in two areas: victim precipitation, which is defined as the extent to which the victim is responsible for his or her own victimization, and victim facilitation, which is used to describe the ways victims make it easier for offenders to commit crimes.³⁵ As a former attorney himself, Mendelsohn realized that many victims and offenders knew each other before the crimes and had some kind of pre-existing relationship. He was interested in how much these pre-crime interactions contribute to the crimes and the degree of the victim’s blame. He classified victims’ culpability into six categories: completely innocent victim; victim with minor guilt; victim as guilty as offender; victim more guilty than the offender; most guilty victim; and imaginary victim (where victims were not harmed but fabricated a victimization event).³⁶ The classification was based on how much “provocation” victims elicited from their offenders. Von Hentig also created similar categories and grouped victims into 13 categories based on their propensity for

³³ Leah E. Daigle, *Victimology: The Essentials*. (Georgia: SAGE Publications, 2017). P. 1.

³⁴ Ibid.

³⁵ Ibid 3.

³⁶ Ibid 3-4.

victimization.³⁷ He claims that certain groups of people are vulnerable to crimes because of a lack of certain characteristics. For example, the young, the old, and females may be victimized “because of their ignorance or risk taking,”³⁸ immigrants and minorities are vulnerable because they are unable to “activate assistance in the community,”³⁹ and the mentally deranged and depressed individuals are harmed because they “place themselves in dangerous situations”⁴⁰ where they fail to recognize threats.

It is not hard to realize that although victim studies became an academic discipline in social science in the 1940s, the early experts’ approaches could hardly be described as sympathetic. But the emergence of studies on crime victims laid the groundwork for the later more sympathetic attention to victims. Two decades later in the 1960s, concern about crime rates started to climb among the public in the United States and the United Kingdom. People started to regard crimes as a major social problem instead of a source for localized anxiety.⁴¹ In his book, Garland seemed to be somewhat skeptical of whether this “settled assumption”⁴² of an increased crime rate was indeed the truth.⁴³ But he left blank the reasons behind the perceived prevalence of rising crime rates. One supposition is that the advance of technology may have helped to spread the news on crimes quicker and further, creating an impression that crimes were happening everywhere. Another is that after two devastating world wars which resulted in tens of thousands of deaths, people’s insecurities skyrocketed, and they perceived a shorter emotional distance between them and those “victims” harmed in the wars. No matter the true reason, the

³⁷ Ibid 3. The 13 categories are: young; females; old; immigrants; depressed; mentally defective/deranged; the acquisitive; dull normals; minorities; wanton; the lonesome and heartbroken; tormentor; and the blocker, exempted, and fighting.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Garland 10.

⁴² Ibid.

⁴³ Ibid. Garland claims that “crime has been re-dramatized.”

previous “penal welfare” model was based on the assumption that legal institutions are efficient in protecting victims and punishing criminals. This increased sense of doubt and anger among citizens undermined this assumption and led to a change in policymaking.

The increasing concern about crime in America and Europe correlated with a rising interest in victimology. Researchers began to examine the impact of crime on victims as well as their distrust of, and sense of alienation from, the system. In the United States, the President’s Commission on Law Enforcement and the Administration of Justice was formed and conducted the first government-sponsored victimization survey in 1966.⁴⁴ Data collected in the study, called “National Crime Survey,” were based on experiences recalled by victims’ own experiences instead of official records from the police. Victims were also asked whether they reported their victimization to the police, and if not, what prevented them from reporting.⁴⁵ Internationally, victims’ movements started to emerge in the mid-1970s in the United Kingdom, Australia, Canada, and New Zealand.⁴⁶ But the content of their appeals and extent of their recognition varied among countries. In the United States, activists proposed harsher sentences and recognition of victims’ roles in criminal proceedings. On the other side of the ocean, organizations in European countries were more invested in creating and improving victims’ services and support.⁴⁷

Victims’ rights movement in the United States reached its heights in the 1970s and led directly to the introduction of VISs. In Europe, however, victims’ movements became influential only after 1985 when many international initiatives were passed in the area of services and rights

⁴⁴ Jaquier Véronique. "Victims' Rights Movement, International." *Encyclopedia of Victimology and Crime Prevention*, edited by Bonnie S. Fisher, and Steven P. Lab, Sage Publications, 1st edition, 2010. *Credo Reference*.

⁴⁵ Daigle 6.

⁴⁶ Véronique.

⁴⁷ *Ibid*.

provided to victims, including the *1985 United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*. Besides the more aggressive nature of victims' campaign in the United States, political activism from other social movements also gave rise to the acceptance of increasing victim participation in court proceedings. Civil rights movements emphasized the vulnerability of marginalized populations and questioned unjust policies of the government. The feminist movement of the 1960s and 1970s drew public attention to the issue of violence against women and ignorance of domestic violence cases.⁴⁸ Early victim compensation programs were established in California and recognized victims' financial consequences of crimes. Other grass-root victim groups such as Mothers Against Drunk Driving, Parents of Murdered Children all devoted their time to raise publicity of formerly marginalized groups.⁴⁹ The victims had become a symbolic figure, who no longer stood on the unfortunate receiving end of crimes but a more representative character for us all. Their experiences had become "more common and collective, rather than individual and atypical,"⁵⁰ says Garland:

Whoever speaks on behalf of victims speaks on behalf of us all—or so declares the new political wisdom of high crime societies. Publicized images of actual victims serve as the personalized, real-life, it-could-be-you metonym for a problem of security that has become a defining feature of contemporary culture.⁵¹

To address the demand of the public and to integrate victims in proceedings, VISs at the sentencing stage have been conceived along with a series of implementation of other state and federal laws, funding to victim-support groups, and ongoing public education efforts. The first victim impact statement was introduced in 1976 by James Rowland, the chief probation officer

⁴⁸ Fran Danis. "Victims' Rights Movement." *Encyclopedia of Interpersonal Violence*, Claire M. Renzetti, and Jeffrey L. Edleson, Sage Publications, 1st edition, 2008. *Credo Reference*.

⁴⁹ *Ibid.*

⁵⁰ Garland 11.

⁵¹ *Ibid.*

in Fresno County, California.⁵² In 1980, Wisconsin became the first state to enact a Crime Victims Bill of Rights. The Bills of Rights included victims' rights to attend court proceedings and the right to be heard on bail, plea, sentencing, and parole. Many states followed Wisconsin's example, and in 1982, the United States Congress passed the Federal Victim and Witness Protection Act, which propelled states to further improve victims' roles in criminal justice systems. While these newly enacted laws and programs marked a success of victims' increased recognition, different voices started to weigh in.

Controversy over the admissibility of victim-impact statements was set off by a series of vacillating treatment of the United States Supreme Court. The Court first banned VIS in capital trials in the 1987 case *Booth v. Maryland*.⁵³ It later expanded the ban to include statements presented by prosecutors in the 1989 case of *South Carolina v. Gathers*.⁵⁴ However, in 1991, the cases were reversed in *Payne v. Tennessee*⁵⁵ and the decision to allow VIS in capital trials remained unchallenged for almost 30 years now.

Let us look at the three cases briefly one by one and begin with Booth. In 1983, John Booth robbed and murdered his elderly neighbors Irvin Bronstein and Rose Bronstein in their West Baltimore home. The old couple was bound, gagged, and then stabbed repeatedly in the chest.⁵⁶ Under Maryland law at the time, all felony cases at the time had to include VISs. The statements given to the jury detailed the severe emotional impact of the crime on the families, including the pain of thinking their parents were "butchered like animals,"⁵⁷ loss of sleep,

⁵² Rex E. Hammond, and Shannon M. Barton-Bellessa. "Victim Rights and Restitution in Sentencing." *Encyclopedia of Criminal Justice Ethics*, edited by Bruce A. Arrigo, Sage Publications, 1st edition, 2014. *Credo Reference*.

⁵³ 482 U.S. 496 (1987), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991).

⁵⁴ 490 U.S. 805 (1989), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991).

⁵⁵ 501 U.S. 808 (1991).

⁵⁶ Bright 1.

⁵⁷ Ibid 2.

depression, fear, a ruined wedding of the granddaughter who was supposed to enjoy her honeymoon but attended the funeral of her grandparents instead.⁵⁸ The jury was allowed to consider VISs in sentencing and sentenced the defendant to death. Booth appealed, but the Maryland Court of Appeals affirmed the judgment and in doing so, rejected the plea that VISs violated the federal constitution.⁵⁹

By the barest majority of five to four, the Court found that the victim impact statement created “a constitutionally unacceptable risk”⁶⁰ and violated the Eighth Amendment. In his majority opinion, Justice Powell argued that the statements provided the jury two types of information: personal characteristics of the victims and the emotional suffering of the family, and the family’s opinion and characterizations of the defendant.⁶¹ Justice Powell wrote in his opinion that neither type of information was relevant and their admission could create “constitutionally unacceptable risk”⁶² that “the jury may impose the death penalty in an arbitrary and capricious manner.”⁶³ The tendency of conducting a “mini-trial”⁶⁴ on victims’ characters was also unappealing. Furthermore, he stated, emotional testimony in the courtroom tended to favor the socially connected defendant or victim whose relatives and friends were likely to be more articulate in describing their feelings, making it unfair for the defendant and families who are unable or unwilling to express their grief.⁶⁵

Two years after Booth, the Court reiterated its position in *South Carolina v. Gathers*.⁶⁶ Demetrius Gathers was convicted of murdering Richard Haynes, an unemployed homeless man

⁵⁸ “Booth v. Maryland, 482 U.S. 496 (1987).” *Justia Law*, <https://supreme.justia.com/cases/federal/us/482/496/>.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ *Bright 2.*

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ *Ibid 3.*

⁶⁵ *Ibid.*

⁶⁶ 490 U.S. 805 (1989).

who lived in a park. Unlike the victims in *Booth*, Haynes did not have close family members who could make a VIS on his behalf. So the prosecutor took the role. A South Carolina prosecutor quoted a large paragraph from a religious book in his closing argument during the sentencing phase.⁶⁷ He tried to piece together the victim's life and argue for the victim's good character based on the religious books and a voter registration card found in the victim's bag at the time of the murder.⁶⁸

Once again, by a majority of five to four, the Court extended the ban of victim-impact to evidence adduced by prosecutors. The Court held that "punishment must be tailored to ... [the] personal responsibility and moral guilt"⁶⁹ of the accused rather than to the emotional impact of the crime on the victim's family. Dissenting in *Gathers*, Justice Sandra Day O'Connor argued for a rejection of "a rigid Eighth Amendment rule"⁷⁰ which prohibits the sentencing jury from hearing argument or considering evidence concerning the personal characteristics of the victim. Two years later in *Payne v. Tennessee*⁷¹, the Court backtracked and allowed VISs to be introduced into the sentencing phase of a capital case. The defendant, Pervis Payne, was convicted for murdering a young mother and her two-year-old daughter while seriously injuring her son in an attempted rape.⁷² In hopes of avoiding the death penalty, Payne provided four witnesses testifying to his good character, including testimony from his girlfriend that they met each other at church and a statement from his psychologist that he was extremely polite during their sessions.⁷³ On the side of the victims, the prosecution presented a statement from the

⁶⁷ "South Carolina v. Gathers." *Encyclopedia of Capital Punishment in the United States*, Louis J. Palmer, McFarland, 2nd edition, 2008. *Credo Reference*.

⁶⁸ *Ibid*.

⁶⁹ Bright 2.

⁷⁰ *Ibid*.

⁷¹ *Payne*, 501 U.S.

⁷² Berger.

⁷³ Bright 6.

victim's mother stating how the victim's surviving boy "cried for his mom"⁷⁴ and repeatedly ask why his baby sister didn't come home. Although the statement itself was brief, the prosecution continued accounting for the impact of the crime on the young victim and one day he would grow up to "see what kind of justice was done."⁷⁵

In a six to three majority opinion, Chief Justice Rehnquist overruled the two earlier cases and reasoned that VISs were designed to show the jury "specific harm caused by the crime"⁷⁶ and each victim's uniqueness as an individual human being.⁷⁷ He conceded that some emotional content is unavoidable and since "virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances,"⁷⁸ the prosecution must be allowed to submit similar counter evidence as well. O'Connor wrote in her concurrence that since the brutal murder itself was quite poignant, additional statements provided by the victim's mother could not deprive the defendant of due process.⁷⁹

As Justice Marshall correctly observes in his dissent in *Payne*, little had changed since *Booth* except for the composition of the Court—two members of the booth majority had been replaced by two new members. Together with the *Booth* dissenters, they voted for the majority of *Payne*. Marshall accused the Court for "dispatching *Booth* and *Gathers* to their graves"⁸⁰ and held that the Court should be "a source of impersonal and reasoned judgments."⁸¹ He believed that breaking *stare decisis* requires compelling evidence that early judgments were incoherent, but *Payne* failed to justify this principle.⁸²

⁷⁴ Ibid.

⁷⁵ Ibid 7.

⁷⁶ Ibid 8.

⁷⁷ Ibid.

⁷⁸ Ibid 10.

⁷⁹ Ibid 21.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Berger.

Just like Rehnquist referenced and embraced the dissent in *Booth* when he wrote the opinion of the Court, Marshall's dissent may have also buried the seed of a possible reversal in the future if the composition of the Court changes again. It would be too early to consider the use of VISs, which seemed to be decided and remained unchallenged for three decades, as moot. The debate is, in fact, far from settled. At the same time when some sociologists are impressed with the rise of victims and their increasing importance in legal proceedings, other scholars expressed concerns. And indeed, the controversy continued outside the courtroom.

Chapter II: The Current Debate on VISs and A Dworkinian Interpretation

“If two lawyers are actually following different rules in using the word “law,” using different factual criteria to decide when a proposition of law is true or false, then each must mean something different from the other when he says what the law is...Their arguments are pointless in the most trivial and irritating way, like an argument about banks when one person has in mind saving banks and the other riverbanks.”⁸³

–Ronald Dworkin, *Law’s Empire* (1986)

The Debate

The debate over the use of VISs among law professors and legal scholars outside the courtrooms accompanied the arguments delivered in court opinions. However, unlike Supreme Court judges who had to reach a real-life “aye” or “nay” verdict based on the limited facts provided in the case in front of them, scholars enjoy much more freedom in their expressions in terms of outside associations and philosophical applications. In this case, if we simply divide the camps into “those for the VISs” and “those against the VISs,” we would miss a great deal and risk overlooking their real motivations. Those in the same classification could differ a lot in the ways they spell out their rationales. I would roughly categorize them into six groups based on their key arguments.

The first group is the guardians of rationality and sacredness of law. They view the court as a sacred place where the slightest sign of irrationality is intolerable. Any form that may introduce irrationality should be prohibited because it has the potential to “corrupt” the court. Essential actors in court—lawyers, judges, and jury members—are supposed to be unbiased and

⁸³ Ronald Dworkin. *Law’s Empire* (Cambridge: Harvard University Press, 1986). 44.

leave their personal opinions at the security check before entering the courtroom. Different from the next group of fairness advocates, rationality guardians oppose the use of VISs not because the statements could disadvantage the defendants and add moral pressure on the defense lawyers, but because they oppose the use of the VISs for the sake of itself. Whether the outcome of the trials is affected is out of their concern. The use of VISs challenges the fundamental assumption of law as a tool that ought to be applied for maintaining societal order when violations are committed. The statutes are like mathematical equations where certain Xs would produce certain Ys. Introducing VISs is like dripping red ink into a glass of clear water. A few drops may be harmless, but when drops of red ink accumulated to a certain amount, the glass of clear water would change to red. The point at which the color of the water changes its appearance is unpredictable and hard to regulate. So it is better not to drop them at all. Similarly, in order to avoid the dire consequence of changing the appearance of the courts from orderly places where disputes are argued rationally to a theatre where actors exaggerate emotions vying for the audience's attention, it is better not to invite VISs in the house in the first place.

I refer to the second group as advocates of fairness. As much as they also claim VISs could bring exaggerated and even false statements in court, they rest their central claims on the practical consequence of disadvantaging the defendant. This category constitutes the most popular group of VISs opponents as it draws its supporters from a variety of fields, among which includes legal theorists as well as social scientists. They claim that the emotional language in VISs and the recounting of the crime would indirectly characterize, if not reinforce, the image of a cold-blooded monster and distances him from those listening to the document. At the same time, when literary devices employed in the VISs make the documents more appealing, they have the potential to portray the defendants as antagonists. As the selected jury and judges who

hear the case are also all lawful citizens and who might be the next victims of unforeseen harm, it is not hard to imagine with which side they would align themselves. In some cases, giving the defendant harsher sentences may even be envisioned as protecting the future self. Although criminals deserve punishment for their actions, the fairness advocates fear that the defendants are convicted not only for what they have done. Their sentences may also involve the extra emotional harm suffered by victims' families and the negative societal implication of their crimes felt personally by the judge and the jury.

The third group is the process simplifiers. They oppose the use of VISs because the introduction of VISs would add additional procedures in terms of evidence collecting and trial time to an already long and tedious process. The process may also drag in too many players who may not be directly connected to the case but decide they have something to say, causing a waste of time and resources. Their opposition is softer compared to the preceding two groups, for the process simplifiers anchored their arguments on the complication of the trials instead of the content of the VISs. According to the definition, a victim is “a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered.”⁸⁴ This broad definition would allow the victim's employer who suffers losses due to the absence of work or a restaurant owner whose profit decreases because of the loss of a frequent customer to make and read statements during trials.⁸⁵ Although realistically speaking, those who had only crossed paths with the victims are unlikely to take the time and effort to deliver statements regarding a mere acquaintance, it is still possible that the unlimited use of VISs would make the court a crowded place and the trial a lengthy memorial event for the victims.

⁸⁴ “Victim Law and Legal Definition.” *Victim Law and Legal Definition*. US Legal. <definitions.uslegal.com/v/victim/>.

⁸⁵ “Guidelines for Making a Victim Impact Statement.” *Victims Information*. Ministry of Justice. <www.victiminfo.govt.nz/assets/Victim-Impact-Statements-2/Final-adult-jurisdiction-Nov-2014.pdf>.

Transitioning from the ones who generally oppose the introduction of VISs, the fourth group, the perspective expansionists, believes that the statements should be allowed because they give those who are in charge of making decisions a greater perspective. Dissenting to the process simplifiers, they argue that the extra “burden” introduced with the VISs are outweighed by the benefits they bring. Scholars state that by expressing the severity of harm inflicted by a defendant’s criminal behavior, the victim can provide the judge with a better understanding of the defendant’s culpability. Although largely subjective, introducing the victim’s perspective may allow the jury and the judge to see something they may have missed earlier.⁸⁶ Since the defense and the prosecution are each pressured to create narratives that are favorable to their sides while downplaying other facts or merely ignoring them, hearing stories from “third parties” could be beneficial in more comprehensive decision-making.⁸⁷ Counter-narratives could help “to challenge the notion of a non-situated, omniscient narrator, to expose false claims of universality and their web of underlying assumptions, and to open up the legal arena to otherwise silenced or marginalized voices”⁸⁸

The next group focuses on the therapeutic effect of VIS. They claim that VIS helps the victims heal by providing them a sense of empowerment and justice for their suffering. I will call them legal therapists. Literature in this category centers on the interdisciplinary approach to legal scholarship called therapeutic jurisprudence. The practice evolved out of the work of Bruce Winick in mental health law, and the field seems to be prospering as the concept has been picked

⁸⁶ Edna Erez. “Victim Participation in Sentencing: And the Debate Goes On” *International Review of Victimology*. January 1, 1994.

⁸⁷ Susan Bandes. “Empathy, Narrative, and Victim Impact Statements.” *The University of Chicago Law Review*. Spring 1996.

⁸⁸ Bandes 385.

up by scholars in various countries.⁸⁹ According to the definition, therapeutic jurisprudence is “the study of the role of the law as a therapeutic agent, which is a scientific movement that examines the impact of laws and legal procedures on the welfare of those that come into contact with it.”⁹⁰ The central claim of therapeutic jurisprudence is that players in the justice system—police, lawyers, judges—all impose psychological consequences on those with whom they are in contact with. And accordingly, the law should take these emotions into account and strive to bring healing and wellness whenever possible.⁹¹ The practice, however, does not prioritize therapeutic effects. It only asks players in law to maximize positive feelings whenever they could. In this case, the legal therapists believe that letting victims express their emotional sufferings in court not only indicates a form of formal recognition of their sufferings. It also gives them a platform where they can participate in “social sharing.”⁹² The effects of “social sharing” have been found by social scientists to bring positive outcomes and facilitate emotional recovery.⁹³

The sixth and last group’s arguments stem from Justice O’Connor’s concurrence in *Payne*, and I will refer to them as the VIS realists. Justice O’Connor has written on the impact of Mary Zvolanek’s statement: “I do not doubt that the jurors were moved by this testimony—who would not have been?... I cannot conclude that the additional information provided...deprived petitioner of due process.”⁹⁴ The VIS realists believe that the facts communicated to the judge and jury will be digested in their own ways, an extra statement is only “additional,” and the

⁸⁹ “Therapeutic Jurisprudence.” *Therapeutic Jurisprudence*.

<www.sustainablejustice.org/index.php?id=TherapeuticJurisprudence&taal=eng>.

⁹⁰ David Wexler. “Reflections on the Scope of Therapeutic Jurisprudence.” *Psychology, Public Policy, and Law*. 1995. 20.

⁹¹ Ibid.

⁹² Kim Me Lens et al. “Delivering a Victim Impact Statement: Emotionally Effective or Counter-Productive?” *European Journal of Criminology*. October 2014.

⁹³ Ibid.

⁹⁴ “*Payne v. Tennessee*, 501 U.S. 808 (1991).” *Justia Law*. <supreme.justia.com/cases/federal/us/501/808/>.

statements are inherently no different from other documents given to these decision-makers. After all, this is a murder case. It is impossible to erase the negative association of murder from people's minds and expect them to look at two sides equally with loving eyes as if they are invited to hear a college debate on philosophical topics. Mary Zvolanek's suffering is within the imagination of people when they learn about the fact that her daughter and grandchild were brutally murdered. So hearing the statement only serves as a confirmation to the listener's imagination, and the statement does not introduce them to new realities. If the defense and the prosecution each frame the facts and evidence into narratives that are favorable to them, then so should the victims. Since the trigger of emotions by certain descriptions are unavoidable, and people's perception of the nature of certain cases are already set before the beginning of the case, it is better just to accept VISs as if they were just another piece of evidence in the file.

A Dworkian interpretation of evidence

The opening of this chapter sets out a comical scene where two people in the same conversation are not following one another's words. When talking about "banks," one person has in mind the place where the money is stored, and the other is thinking about a place to enjoy the sight of a river and cruises.⁹⁵ The analogy was used to describe the different conclusions reached by two judges after reviewing facts of the same case, *Riggs v. Palmer (1889)*⁹⁶. In August 1880, Francis Palmer made his last will and testament and stated that the majority of his property would go to his beloved grandson Elmer Palmer. And Elmer, who was 16 years old at the time, poisoned his grandfather after learning that the will was favorable to him in fear of revocation of

⁹⁵ Dworkin 44.

⁹⁶ 115 N.Y. 506, 22 N.E. 188 (1889).

such provisions and a desire for immediate enjoyment. The *Palmer* case poses the question of whether a grandson who murdered his grandfather is still entitled to inherit the old man's property, as stated in the old man's will.⁹⁷ The dissenting opinion written by Judge Gary noted that the statute should be interpreted as written, and the method of interpretation should involve no context-dependent information. So Elmer is entitled to the inheritance even if he is a murderer.⁹⁸ On the other side, Judge Earl, who wrote the majority opinion, opposed Gary's interpretation and set out the principle that nobody should profit from his wrongdoings because the principle is supported by the law elsewhere.⁹⁹ According to Dworkin, the 1889 civil case is essential because "the dispute about Elmer was not about whether judges should follow the law or adjust it in the interest of justice...it was a dispute about what the law was, about what the real statute the legislators enacted really said."¹⁰⁰ Dworkin believes that the observed opposition in opinions comes from a deeper difference in their beliefs in law. He believes that when lawyers follow different rules in using the word "law," then each must mean something different from the other.¹⁰¹

The arguments we have heard so far on VISs also seem to use different factual criteria to decide their acceptability in courts. The groups all place emphasis on the "I," or the verb "impact," in VISs. But they differ in the objects of their focus. While some worries about the impact VIS could have on the trial and outcome for the defendant like the guardians of rationality and advocates of fairness, others focus on the impact of VIS on the victims like legal therapists and on trial times like process simplifiers. The conclusions they present reflect

⁹⁷ "Riggs v. Palmer - 115 N.Y. 506, 22 N.E. 188 (1889)." *LexisNexis*. <www.lexisnexis.com/community/casebrief/p/casebrief-riggs-v-palmer>.

⁹⁸ *Ibid*.

⁹⁹ Dworkin 20.

¹⁰⁰ *Ibid*.

¹⁰¹ *Ibid*. 44.

fundamental differences in their interpretation of the function of law and justice. The U.S. Supreme Court's opinions on the VIS also reflected sharply divergent views between the justices on the purpose of punishment.¹⁰² And since they have different interpretations of jurisprudence, it is no surprise that they talk past one another from time to time.

To see whether we can “strike a deal” between these views and integrate them into a broader picture, we need to go back to the original branch of diversion and line everyone up at the same starting point. If we have to decide whether the judges and juries should look at the VISs when deciding a case, we should first discuss what evidence judges should consider when deciding a case. In this section, I will discuss Dworkin's legal interpretive theory and how his fictional character Hercules interprets evidence and see where VISs fit in the discussion. After having this “macro-view” in mind, we could further analyze how VISs impact the systems in which they are produced, from the courtroom to society.

Dworkin's theory starts with criticisms of legal positivism formulated primarily in H.L.A. Hart's work. The legal positivists claim that society's laws are governed by certain structures, and the law is a matter of what has been posited.¹⁰³ That is to say, whether a policy is morally just or efficient is never sufficient to make the policy a law, and a law that is morally unjust or unwise is not sufficient for it to be removed.¹⁰⁴ Earlier legal positivists characterize the theory as a “brute habitual command and obedience”¹⁰⁵ to authority. Hart, however, rejected these strict interpretations and enlarged the concept of “authority” to encompass social norms of a community, judicial decisions laid down by predecessors, and a recognition of society that

¹⁰² Bandes. 395.

¹⁰³ Leslie Green and Thomas Adams. “Legal Positivism.” *Stanford Encyclopedia of Philosophy*. 17 Dec. 2019.

¹⁰⁴ *Ibid.*

¹⁰⁵ Dworkin. 33.

assigns particular groups to make law.¹⁰⁶ Yet this revised version still seems inadequate to Dworkin. For Dworkin, Hart's belief of the law as a set of rules and his doctrine of "strong discretion"¹⁰⁷ entails that when deciding hard cases, judges are bestowed the power to make new laws themselves. This entailment is implausible as it ignores the numerous cases where judges regard themselves as being bound by law even though no rules apply. He believes that the law should be governed by principles instead of rules, for if the law contains only rules according to Hartian positivism, then "when the rules' run out,' so must the law."¹⁰⁸

Dworkin holds that there are principles, or blueprints, which should be used as instructions by judges to decide hard cases. But as much as Dworkin rejects legal positivism, it would be wrong to categorize him as a proponent of the natural law theory either. The theory of natural law claims that the law exists independently of the positive law of any given political order, society, or nation-state.¹⁰⁹ It comes from theories of Thomas Aquinas¹¹⁰ and explicates that the authority of legal standards is, at least in part, based on human nature and morality.¹¹¹ For Dworkin, however, the principles ought to instruct the judges should still derive from some authorities within the law, whether it is prior decisions or principles compatible with prior decisions. Although the law in hard cases does not preexist, it is constructed within definite constraints. To envision this task, Dworkin favors a literary analogy: Judges are like serial novelists, continuing a story begun by earlier writers, attempting to make the story the best that it can be. They have to cooperate with their predecessors and "jointly to create, so far as they can, a

¹⁰⁶ Ibid. 34.

¹⁰⁷ Scott Shapiro. "The 'Hart-Dworkin' Debate: A Short Guide for the Perplexed." *Public Law and Legal Theory Working Paper Series*. Mar 2007. 33.

¹⁰⁸ Ibid. 11.

¹⁰⁹ John Finnis. "Natural Law Theories." *Stanford Encyclopedia of Philosophy*. 4 Nov. 2015.

¹¹⁰ Mark Murphy. "The Natural Law Tradition in Ethics." *Stanford Encyclopedia of Philosophy*. 26 May 2019.

¹¹¹ Finnis.

single unified novel.”¹¹² So the judge has to face traditions laid down by his ancestors and, at the same time, concern morality, but the relevant morality is not personal. It is the political morality of existing law and principles implicit in accepted legal practice.¹¹³

Before the introduction of the Dworkinian “master principle,” Dworkin first discusses two common ideals in politics that many people hold dear: (a) justice as fairness, which claims that whatever result produced through fair procedures are fair; and (b) fairness as justice, which states that no procedure is fair unless it is likely to produce results that can be tested by some independent criteria of justice. Although not explicitly expressed, the two ideals, in their extreme forms, somehow resembles the concept of legal positivism (which stresses the importance of tradition and procedure) and theories of natural law (which relies on moral principles that maximize fairness). But since fair institutions sometimes produce unjust decisions and unfair institutions just ones, Dworkin believes that the two entities are to some degree in conflict with one another.¹¹⁴ This conflicting nature makes neither of the two ideals an adequate master principle because it asks us to be selective between justice and fairness when no higher principle exists to justify the distinction.

Another ideal is thus needed, and the magical word Dworkin introduces is integrity. What Dworkin means by the principle of integrity comes from his understanding of the French revolutionary rhetoric of fraternity, or community.¹¹⁵ Dworkin first introduces three types of community: community of geographical randomness, community by rules, and community by principle. The first type has a low level of cohesiveness, and members tend to be selfish because they treat their associations only as a de facto accident of historical and geographical assignment.

¹¹² Dworkin. 228.

¹¹³ Finnis.

¹¹⁴ Shapiro.

¹¹⁵ Dworkin. 188.

The second type is slightly better as the members accept some general commitments to obey rules that are special to that community, but they assume the content of the rules exhausts their obligation.¹¹⁶ The third type, however, is the “genuine political community”¹¹⁷ in Dworkin’s own words. Members of the third type recognize there are certain rules they need to follow and, at the same time recognize that their fates are linked as “they accept that they are governed by common principles, not just by rules hammered out in political compromise.”¹¹⁸ To construct this ideal community, the principle of integrity is needed when making decisions. Dworkinian integrity means that people are not governed by explicit rules laid down in past decisions, but standards flow from the principles.¹¹⁹ It is different from “consistency” as it is “both more and less.”¹²⁰ The principle of integrity is broader than consistency as it implores the decision-makers to consider broader contexts instead of adhering closely to past decisions,¹²¹ and it is also narrower because it does not require a simple form of consistency in policy even if these policies bring moral and political benefits to some group.¹²²

The concept of integrity explained above is still fairly abstract. How can it better guide political leaders and judges in deciding cases? Dworkin claims that: “law as integrity...insists that legal claims are interpretive judgments and therefore combine backward- and forward-looking elements.”¹²³ Judges have to both “find” and “invent” laws when making decisions. To put the

¹¹⁶ Ibid. 210.

¹¹⁷ 211.

¹¹⁸ Ibid.

¹¹⁹ Ibid. 188.

¹²⁰ Ibid. 219.

¹²¹ Ibid. 221. (“[Integrity] is therefore more demanding and much more radical in circumstances like those of Brown, when the plaintiff succeeds in showing that an important part of what has been thought to be law is inconsistent with more fundamental principles necessary to justify law as a whole.”)

¹²² Ibid. 221. (“The legislature makes many decisions that favor a particular group, not on the ground that the best conception of justice declares that that group has a right to that benefit, but only because benefiting that group happens to work for the general interest.”)

¹²³ Ibid. 227.

principle in concrete forms, Dworkin creates an imaginary judge of “superhuman intellectual power and patience”¹²⁴ and calls him Hercules. In front of Hercules is the case of McLoughlin, which concerns whether Mrs. McLoughlin is entitled to an emotional injury compensation from her neighbor after this neighbor informed and brought her to a hospital where she witnessed the horrible death of her husband and children.¹²⁵ Hercules first sets out candidates for the best interpretation of the precedent cases. The candidates are shortlisted to six: (1) no one has a moral right to compensation other than physical injuries; (2) people have moral right to compensation for emotional injury only suffered at the scene of the accident; (3) people should receive compensation when the compensation would offset the costs of accidents or makes the community richer; (4) people should receive compensation if it is the direct consequence of careless conduct, no matter whether the injury is foreseeable; (5) same as (4) but only if the injury is reasonably foreseeable; and (6) same as (5) but not when the compensation would impose financial burden out of proportion of the moral guilt.¹²⁶

After having the six interpretations, Hercules first looks at past cases “by asking whether a single political official could have given the verdicts of the precedent cases if that official were consciously and coherently enforcing the principles that form the interpretation.”¹²⁷ The examination of precedents on emotional injury cases allows him to quickly eliminate the first two interpretations because if principles in (1) and (2) are held by the legal community, the precedents cited in *McLoughlin* that allowed emotional compensation would not exist. The principle of integrity would be violated in the most obvious way. Dworkin then also asks Hercules to eliminate (3) because although it may fit past decisions, it does not state any

¹²⁴ Ibid.

¹²⁵ “*McLoughlin v O'Brian* – Full Case.” *Law Teacher.net*. Nov. 2013

¹²⁶ Dworkin. 241.

¹²⁷ Ibid. 242.

principle of justice or fairness. (3) allows some kind of trivial discrimination based on economic calculations, which are incoherent with principles judges used when deciding earlier emotional damage cases. Adopting (3) would set an incoherent principle for future decisions as it assumes that people have a right to compensation whenever a rule awarding compensation produces more wealth for the community.¹²⁸

Interpretation (4), (5), and (6) seem to pass the initial tests. Hercules, at the next stage of investigation, has to move beyond cases on emotional injury and examine the rest of the candidates in the context of “the bulk of legal practice.”¹²⁹ Through a “modest expansion”¹³⁰ of Hercules’ inquiry, he would find evidence that earlier cases had given compensation only to somewhat foreseeable injuries, and this allows him to eliminate (4), but not (5) and (6).

Dworkin supposes that Hercules is likely to find a mixed pattern for (5) and (6) after surveying compensation for injuries in other fields, which leaves (5) and (6) a stalemate. But legal decisions would not tolerate stalemates as chess games do, Hercules has to decide on one interpretation between the two. This would qualify as a “hard case.” To rule on the matter, Hercules has to follow the chain-novel example and choose an interpretation that is “pro tanto more satisfactory if it shows less damage to integrity than its rival.”¹³¹ The decision made is not based on the number of past cases that uses (5) or (6), but whether “the decisions expressing one principle seems to be more important and fundamental than another.”¹³² And if Hercules discovers that one principle is mentioned but slightly cuts away integrity while the other was unmentioned, he should consider the political history of the community and find a path that later

¹²⁸ Ibid. 243.

¹²⁹ Ibid. 245.

¹³⁰ Ibid. 246

¹³¹ Ibid. 247.

¹³² Ibid.

judges would follow.¹³³ And if no pattern between two interpretations is discovered, Hercules's answer should depend on his convictions on the virtues considered earlier—justice and fairness:

It will depend, that is, not only on his beliefs about which of these principles is superior as a matter of abstract justice but also about which should be followed, as a matter of political fairness, in a community whose members have the moral convictions his fellow citizens have.¹³⁴

Dworkin is correct to note that “the two judgments will sometimes pull in different directions.”¹³⁵ While Hercules may interpret one better on the grounds of abstract justice, his view may not be shared by a substantial portion of the public and the moral rhetoric of the times. His final decision may contradict his own moral conviction but should nevertheless “reflect a higher-order level of his own political convictions, namely his convictions about how a decent government committed to both fairness and justice should adjudicate between the two in this sort of case.”¹³⁶ The choice or mix between justice and fairness should serve the higher virtue of integrity.

In summary, Hercules' method of interpretation starts from concrete cases to abstract principles. As illustrated by the *McLoughlin* example, he first looks at past decisions on emotional injuries. When those cases are inadequate or insufficient to justify a reasonable interpretation, he enlarges his view and examines other cases that involve general injuries. If two or more interpretations still pass the “backward-looking” stages, Hercules then has to “look forward,” taking account principles used in past decisions and settle on an interpretation that is both coherent and allows “the best constructive interpretation of the political structure and legal doctrine of their community.”¹³⁷

¹³³ Ibid. 248.

¹³⁴ Ibid. 248.

¹³⁵ Ibid. 249.

¹³⁶ Ibid. 250.

¹³⁷ Ibid. 255.

Justifying VISs Using Hercules' Method and the Principle of Integrity

The interpretive framework demands us to first consider both past decisions and principles derived from those decisions. Since the appearance of VISs in the United States in the 1970s, many countries started to incorporate the submission of VISs into their legal proceedings. While many common law countries introduced VISs to criminal codes and others allow informal uses of VISs, legal decisions regarding VISs in capital trials are, at least for now, limited to the United States.¹³⁸ As discussed in Chapter I, the three precedents regarding VISs decided by the United States Supreme Court—*Booth v. Maryland* (1987), *South Carolina v. Gathers* (1989), and *Payne v. Tennessee* (1991) all incorporated different interpretations in their opinions. The interpretations reflected the justices' divergent views on the purposes of punishment,¹³⁹ and selecting either interpretation among the three would result in trivial discrimination, which goes against Hercules' principle.

Moreover, just as Justice Marshall has observed, *Payne* is only separated from *Gathers* by two years, and little had changed since *Booth* except for the composition of the Court. Compared to reversions of precedents in other issues that reached the Supreme Court like equal protection¹⁴⁰ and women's suffrage,¹⁴¹ a two-year gap between *Payne* and *Gathers* seems to be too short to reflect any significant change in societal attitudes and mainstream rhetoric regarding VISs. It would thus be inadequate to explain the reversion of verdicts in terms of fundamental shifts in legal and community values. The decision reached in *Payne* is likely due to technical

¹³⁸ Julian Roberts. "Victims of Crime Research Digest." *Victim Impact Statements: Lessons Learned and Future Priorities - Victims of Crime - Research Digest*. 7 Jan. 2015.

¹³⁹ Bades. 395.

¹⁴⁰ From landmark cases of *Plessy v. Ferguson* (1896) to *Brown v. Board of Education* (1954). The Court takes almost six decades to reverse *Plessy*, in which it ruled that racial segregation laws are constitutional.

¹⁴¹ In *Minor v. Happersett* (1874), the U.S. Supreme Court ruled unanimously that the right of suffrage was not protected by the Fourteenth Amendment to the U.S. Constitution. The decision was upheld until the implementation of the 19th amendment in 1920, which took the Court 46 years.

changes in the Court instead of updated interpretations of VIS—an arbitrary change governed by no principle of fairness or justice. Hercules would reject this distinction, and his reasoning would be similar to his rejection of interpretation (3) in the *McLoughlin* case. If a mere change of personnel in Court could constitute as a principle for reversal of decision, we would not observe the Court’s close adherence to the principle of *stare decisis*, or respecting precedents while ruling, in most cases. So although *Payne* is the new norm in the real world, neither *Payne* nor *Booth* counts as an adequate precedent for the justification of VISs if they are considered in Hercules’ court. Following Hercules’ path, when past decisions could not sufficiently justify the use of VISs, we should then examine the “bulk of legal practice”¹⁴² and see whether practices in other areas within the law could provide satisfying explanations.

In *Booth*, Justice Powell made a clear distinction between reason and emotion and noted that any decision to impose the death sentence must “be, and appear to be, based on reason rather than caprice or emotion.”¹⁴³ Applying this standard, the majority ruled that “the admission of these emotionally charged opinions...is inconsistent with the reasoned decision making we require in capital cases.”¹⁴⁴ What makes these documents unacceptable to Powell and the majority is not only because they contain subjective narrations, but that they bring in different levels of arbitrariness to the trials. Powell pointed out three forms of arbitrariness: “arbitrariness of holding the defendant responsible for matters ‘wholly unrelated to [his] blameworthiness,’”¹⁴⁵ arbitrariness of victims’ ability in articulation, and arbitrariness of letting the deciding parties believe that the victim “was a sterling member of the community rather than someone of

¹⁴² Dworkin. 245.

¹⁴³ Yoshino, Kenji. “The City and the Poet.” *The Yale Law Journal*. June 2005. 1872.

¹⁴⁴ *Ibid*.

¹⁴⁵ *Booth*, qtd in Yoshino 1872.

questionable character.”¹⁴⁶ All these variables introduced by VISs could make sentencing outcomes unpredictable and vary among similar cases, impacting the stability of the equation of law. The *Booth* Court thus reasoned that the narratives in VIS are different from those that make up the law.

But are these seemingly “different narratives” really that different from other narratives in law? To illustrate that the principle of avoiding subjectivity and arbitrariness as reasoned in *Booth* is inconsistent with Dworkin’s integrity principle, I will discuss the practice of expert testimony and jury verdict now widely used and accepted in capital trials. Expert testimony is the provision of facts and opinions to the court by an individual who is believed to be competent in the subject matter. According to Federal Rules 701-706, “a qualified expert may give his opinion to help the court understand the evidence, or to establish a fact in issue.”¹⁴⁷ An expert witness may be qualified through knowledge, skill, practical experience, training, education, or a combination of these factors.¹⁴⁸ The criteria for qualification is very broad, and indeed, the categories of the expert witness could range from laypeople who can testify based on “common sense and life long experience”¹⁴⁹ to practitioners and scientists who display their empirical research results in courts. Counsels can also introduce helpful evidence through experts that is otherwise inadmissible in trials. Since experts are usually introduced as witnesses from either side, their testimonies are very likely to include pre-determined views.¹⁵⁰ But they are different

¹⁴⁶ Ibid.

¹⁴⁷ “Rule 702. Testimony by Expert Witnesses.” *Legal Information Institute*. Cornell Law School. <www.law.cornell.edu/rules/fre/rule_702>.

¹⁴⁸ Margaret Berger. “Expert Testimony: The Supreme Court’s Rules.” *Issues in Science and Technology*. 17 July 2019. <issues.org/berger/>.

¹⁴⁹ Gil Sapir. “Qualifying the Expert Witness: A Practical Voir Dire.” *Forensic Magazine*, FigEducation. [www.figeducation.com/mcp/resources/Qualifying the EW.pdf](http://www.figeducation.com/mcp/resources/Qualifying%20the%20EW.pdf).

¹⁵⁰ “Expert Witness.” *World of Criminal Justice*, Gale, edited by Shirelle Phelps, Gale. 2002. <http://proxy.library.nyu.edu/login?url=https://search.credoreference.com/content/entry/worldcrims/expert_witness/0?institutionId=57>.

from the usually emotionally laden VISs in that expert witnesses tend to censor the emotional elements in their speeches. This is because the more subjective and controversial the expert's inquiry, the more likely the testimony would be ruled by the judge as unreliable and should be disregarded by the jury.¹⁵¹ This "goal-keeping" expectation of the court will be discussed again later in the context of how VISs would not impede the function of the court. But even if the emotional content is removed, the arbitrariness and subjectivity of expert testimonies still linger. They are even more detrimental than inflammatory VISs because they cannot be easily detected. A reasonable expansion of arguments used in *Booth* could easily disqualify the use of expert witnesses as well. Instead, we see that not only are expert testimonies allowed, but multiple legislations and rules are also implemented to instruct their uses.

Similar to the use of expert testimonies, the widespread and standard practice of jury trials in common law countries is another form of lay people's presence in court. The deliberation process of the jury is usually regarded as a black box, and some may argue they are intentionally designed so. In the United States, when the jury arrives at the courthouse for jury duty, they are usually given a brief lecture by the judge on the vital importance of the jury in a democratic society. The jury will be told to treat their responsibilities seriously and informed with practical information about the case. At the end of the trial before jury deliberation, the judge would read aloud instructions on the law. Usually, this is all the guidance the jury gets. The California Instructions, which are fairly typical, advises the jury that they should "consider the evidence for the purpose of reaching a verdict,"¹⁵² they shall not "hesitate to change an

¹⁵¹ Matt Drapcho. "Presenting and Challenging Expert Testimony: Winning the Battle and the War." *Janet Hoffman & Associates LLC*. 24 July 2015. <jhoffman.com/publications/presenting-and-challenging-expert-testimony-winning-the-battle-and-the-war/>.

¹⁵² Qtd in Phoebe Ellsworth and Rose Reginald. "One Inspiring Jury." *Michigan Law Review*. 2003. 1390.

opinion if [they] are convinced it is wrong”¹⁵³ or “decide any issue by the flip of a coin.”¹⁵⁴ Finally, they are reminded that they are not “partisans or advocates in this matter”¹⁵⁵ and that they shall be “impartial judges of the facts.”¹⁵⁶ According to Ellsworth, the guidance is fairly abstract and faintly patronizing. It provides no useful guidance on questions jurors are likely to have, for example, when to start a vote or whether they should go through each charge one by one. The autonomy enjoyed by the jury also introduces forms of arbitrariness and subjectivity. Verdicts like the one reached in O. J. Simpson’s murder case best exemplifies the respect for jury verdicts even when they are controversial. While current literature on how VISs impact sentencing is based on experiments and theories, the unexpected impact of randomly selected jury members on trial outcome has concrete evidence. If we follow the principle outlined in *Booth*, then the use of the jury should be abolished as well. But their legal presence has never been challenged in courts. And as we see in the increasing popularity in courtroom TV dramas and movies, the use of the jury is still treated as a valuable tool in legal proceedings and a great symbol of citizen participation.

It would be unfair to categorize some kinds of arbitrariness as a valued opinion and others as hearsay under the integrity principle. If expert testimonies and rulings by jury are allowed in trials when they are subjected to the courts’ gatekeeping functions, then so should the use of VISs. Just as the judge could instruct the jury to disregard certain information, the courts could also “hear the siren song of the statement yet remain unmoved,”¹⁵⁷ as Justice Rehnquist suggested. If the VISs are treated as an extended form of victim testimony or a third-party jury

¹⁵³ Ibid. 1390.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

¹⁵⁷ Qtd in Yoshino. 1878.

opinion, the Due Process Clause will provide a mechanism for relief and a safety-net of consideration.¹⁵⁸ In other words, if the VISs are regarded as another form of testimony typically used during a trial (as they should), the integrity principle actually accounts for the acceptance of VISs instead of their exclusions.

Having discussed that the grounds for VISs rejection is inadequate and insufficient under the integrity principle, I now propose some evidence that should be considered by Hercules when he seeks to make decisions that best reflect moral convictions of his community. As both the United States and legislation in various countries show a trend of integrating victims in trials, it is reasonable to deduce that the incorporation of victims in trials has gradually become a community value. In the United States, the victims' rights movement gained momentum in the 1970s. In 1982, one of the most important aspects of the victim's rights movement was introduced under the Ronald Reagan administration.¹⁵⁹ Known as the President's Task Force on Victims of Crime, 68 recommendations were made to guarantee that victims have a place in the U.S. criminal justice system. The momentum continued as the Federal Victims Act of 1984 gave federal incentives to states to pass laws to aid victims of crimes, and the Crime Victim Rights Act of 2004¹⁶⁰ further gave victims in federal court the right to be heard at proceedings involving sentencing and parole.¹⁶¹ This trend of integrating victims is also reflected internationally. In 1985 the General Assembly of the United Nations adopted the Declaration on Basic Principles for Justice for Victims and Abuse of Power; In the Netherlands, VISs have been allowed since

¹⁵⁸ Ibid.

¹⁵⁹ Melissa Hook and Anne Seymour. "A Retrospective of the 1982 President's Task Force on Victims of Crime." *OVC Archive*. Dec 2004. <www.ncjrs.gov/ovc_archives/ncvrvw/2005/pg4d.html>.

¹⁶⁰ "Crime Victims' Rights: Laws: OVC." *Office for Victims of Crime (OVC)*. <www.ovc.gov/rights/legislation.html>.

¹⁶¹ "Crime Victims' Rights Act." *The United States Department of Justice*. 22 July 2016. <www.justice.gov/usao/resources/crime-victims-rights-ombudsman/victims-rights-act>.

2005 and may be either written or oral; In 1999, New South Wales instituted the Crime Act, which outlined the use of victim impact statements in criminal justice procedures. The Council Framework Decision of the European Union in 2001 also published a binding decision in which article 2 obliges signatory states to ensure that victims play a significant role in the criminal legal system, and article 3 ensures that victims are heard during proceedings.¹⁶² Allowing VISs would be a continuation of efforts made to include victims in legal proceedings both domestically and internationally.

Recall that the starting point of Dworkin's theory comes from his high regard for the French revolutionary notion of fraternity or community. The interpretive method was partially conceived to serve the goal of achieving the ideal community. But the opportunity for victims to express what they have suffered in a court of law could in fact directly benefit the outcome to the community regardless of whether the VISs have actual influences on the outcome of the sentencing process. When courts refer to victims' impact statements in sentencing remarks and validate victims' harm, victims can experience a sense of recognition by the courts for their suffering, and their satisfaction with justice would increase. In Canada, four out of five victims who submitted a VIS were pleased that they had done so.¹⁶³ And according to pilot studies in Scotland, almost nine victims out of ten expressed the view that the decision to submit an impact statement had been the right one. In India, however, where VISs are not allowed, the victim's concerns as well as the impact of his or her victimization remain unexpressed as they are represented by a prosecutor. By and large, the police, prosecutors and courts do not have any substantive legal obligation towards crime victims. According to Indian Scholar Bajpai,

¹⁶² Rex Hammond and Shannon Barton-Bellessa. "Victim Rights and Restitution in Sentencing." *Encyclopedia of Criminal Justice Ethics*, edited by Bruce A. Arrigo. 2014.

¹⁶³ See Leverick, Chalmers and Duff 2007; Chalmers, Duff and Leverick 2007

indifference to crime victims remains deep-rooted in the accused-centric criminal justice system. ‘Secondary victimization’ takes place when the agencies of the criminal justice system treat victims of crime unfavorably or marginalized them during the trial.¹⁶⁴ And if the victims think they are being treated unfairly and without dignity, they may stop trusting the legal system, undermining the authority and legitimacy of the law of the country, and decrease the aspect of the ideal community.

Dworkin’s interpretation of the law as integrity challenges the backward-looking conventionalists and the forward-looking pragmatists: “he defeats both by becoming both.”¹⁶⁵ Through the application of the principle of integrity and an analysis of other forms of testimonies widely accepted in trials, we found that arguments regarding the VISs’ elimination are not sufficient. And as we take into account the global trend of legislation regarding victims and the positive political implications they bring to communities; the interpretive framework is compatible and justifies the use of VISs.

¹⁶⁴ G.S. Bajpai. “Mainstreaming Victims of Crimes.” *The Hindu*. 31 December 2018. <<https://www.thehindu.com/opinion/op-ed/mainstreaming-victims-of-crimes/article25874475.ece>>.

¹⁶⁵ Shapiro.

Chapter III: VISs Beyond Dworkin

“If we fancy some strong emotion and then try to abstract from our consciousness of it all the feelings of its bodily symptoms, we find we have nothing left behind, no “mind-stuff” out of which the emotion can be constituted, and that a cold and neutral state of intellectual perception is all that remains.”¹⁶⁶

–William James, qtd in Antonio Damasio’s *Descartes’ Error: Emotion, Reason, and the Human Brain*

I think it is worth raising some objections to Dworkin at the beginning of the chapter. Although these criticisms do not directly affect our justification for VISs, they bring up important points that should be carefully considered before the practical application of VIS. One of the major criticisms Dworkin received centers around his theoretical idealism. As Allan Hutchinson noted, “Dworkin gazes at the world and misses much of its sensual resonance and historical complexity. An eclectic balance of the senses is sacrificed to the hegemony of rational sight.”¹⁶⁷ Moreover, Hutchinson also noted that under the guise of liberating discussions, there functions “a subtle regime of oppression.”¹⁶⁸

In Law’s Empire, judges have been elevated to the rank of moral prophets and philosopher monarchs. For citizens, politics has become a spectator sport. Yet, philosophy has no monopoly on truth and justice...Our images of justice should not be the philosopher’s gift, but should be produced through the sweat of our own democratic brows.¹⁶⁹

¹⁶⁶ Antonio Damasio. *Descartes Error: Emotion, Reason and the Human Brain* (New York: Penguin, 2008). 44.

¹⁶⁷ Allan Hutchinson and Ronald Dworkin. “Indiana Dworkin and Laws Empire.” *The Yale Law Journal*. 1987. 655.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

There is no doubt that Hercules is intelligent, patient, and seeks to find the best interpretation for every case presented to him. But he is, after all, a superhuman figure with God-like power and unlimited time in Law's Empire. Judges in our world, however, face significantly more constraints. Not only do they face time limits in deciding cases, but they are also predisposed to fall for their own emotions because they are humans. The rational eye no doubt leads to good judgments, but it also "divests people of their history and their experience...and breeds estrangement and alienation."¹⁷⁰ The decision-makers in real life are not superheroes. They are just people like you and me.

This consideration nevertheless directs our discussion back to human emotions. The usual rationale advanced by those opposing emotional elements in court centers around their retribution tendency. Arrigo and Williams argued that the emotionally laden content of VIS fuels vengeance, anger, and hatred, thereby undermining prospects for a fair and impartial sentence for the defendant.¹⁷¹ Earlier studies on emotions and empathy were invoked, and they conclude that "compassion is a self-generated emotional state."¹⁷² The authors believe that compassion does not represent another's emotional experiences. Instead, they only remind us of our own emotional discomfort and propel us to do whatever we would do in our own emotional states.¹⁷³ Our tendency to punish is thus "reactive," says Arrigo and Williams, and this urge is "responding to the unconscious primitive fears and dark affective undercurrents that are artifacts of the collective human psyche."¹⁷⁴ VISs would surely activate this deep dark fear as the listeners could easily imagine themselves in the shoes of the victims and the sad, helpless state they were

¹⁷⁰ Ibid. 651.

¹⁷¹ Bruce Arrigo and Christopher Williams. "Victim Vices, Victim Voices, and Impact Statements: On the Place of Emotion and the Role of Restorative Justice in Capital Sentencing." *Crime & Delinquency*. 2003. 603–626.

¹⁷² Arrigo and Williams.

¹⁷³ R. Lazarus & B. Lazarus, 1994, p. 125. Qtd in Arrigo and Williams 615.

¹⁷⁴ Ibid.

experiencing. And this, according to some scholars, would manifest itself in an inclination for death rather than a life sentence.¹⁷⁵

Some empirical evidence supports their conclusions that VISs tend to be correlated positively with greater punishment. William and colleagues examined a random sample of 1989 parole cases decided by the Pennsylvania Board of Probation and Parole in which victim testimony was offered (experimental group), and a random sample of cases in which such testimony was not presented (comparison group). The pilot study result shows a higher refusal rate in the victim testimony group despite comparable parole objective guidelines predictions, offender demographics, and offenses.¹⁷⁶ That is to say, given the identical crime committed by two similar prisoners, a difference in the presence of VIS would lead to the denial of one parole case and the grant of the other. Inside the laboratory, Luginbuhl and Burkhead also conducted a study on two groups of mock-jurors: one group read a sample VIS about how a murder impacted an entire family, and the other group was not presented with the VIS. In this study, mock-jurors who were given the VISs to read voted for the death penalty 51% of the time, whereas mock-jurors who were not presented with the VISs voted for the death penalty only 20% of the time.¹⁷⁷

On its face, VISs correlates with the outcome of a case, but whether these statistics validate the claim that VISs create unfairness for defendants is still up for debate. Confounding variables that may have caused a spurious association between the two are hard to identify in these studies, and it is even harder to identify these variables in real-world situations. Other explanations may justify the lower approval rate found in Pennsylvania parole cases with VISs.

¹⁷⁵ Ibid. 622.

¹⁷⁶ James Luginbuhl and Michael Burkhead. "Victim Impact Evidence in a Capital Trial: Encouraging Votes for Death." *American Journal of Criminal Justice*. 1995.

¹⁷⁷ Ray Paternoster and Jerome Deise. "A Heavy Thumb On The Scale: The Effect Of Victim Impact Evidence On Capital Decision Making*." *Criminology*. 2011. 129–161.

The families that took the time and energy to provide a statement were no doubt more emotionally invested. Is it possible that they were also more cooperative in the investigation process and spent more time finding a better attorney that helped with other facts of the case? And since the mock jurors in the psychological experiments were situated in university labs where they know they do not have to undergo the uneasiness of deciding life or death, would they act differently in real-life after reviewing all the facts of the case? These questions are not intended to undermine the findings of these studies. They only raise some other possibilities that are equally debatable and hard to prove.

Social psychologists have noted that cognition and decision making can be affected by an individual's emotional state. The "'cold-to-hot' empathy gap" theory proposed by George Loewenstein suggests that it is hard for us to understand others and sometimes even ourselves. When people are experiencing "cold states," that is, when they are not emotionally aroused, it is difficult to imagine what it would feel like to be in a "hot state" or a state where people are experiencing arousing emotions.¹⁷⁸ The reverse is also true. The "'cold-to-hot' empathy gap" could make physicians who medicate for pain under-appreciate their patients' pain because they are generally in a cold and pain-free state. And according to national studies quoted by Loewenstein, inadequate pain management indeed persists, and it helps to explain "common instances of physician callousness toward patients, such as delivering bad news in an offhand or otherwise thoughtless fashion."¹⁷⁹ The findings also have important implications in other situations of interpersonal interactions, such as end-of-life care and adolescent risk behaviors. Although Loewenstein is equivocal on whether the awareness of the "'cold-to-hot' empathy gap"

¹⁷⁸ George Loewenstein. "Hot-Cold Empathy Gaps and Medical Decision Making." *Health Psychology*. 2005. 49.

¹⁷⁹ *Ibid.* 53.

would assist better decision-making, he is certainly empathetic towards the realization of this emotional gap.

So it is naive to assume that emotions only hinder reasoning. Neurologists like Antonio Damasio have argued that “emotions and feelings may not be intruders in the bastion of reason at all: they may be enmeshed in its networks, for worse and for better.”¹⁸⁰ Emotions not only play a role in communicating meanings to others, but they also play a cognitive guidance role.¹⁸¹ Moral philosophers like Martha Nussbaum have also claimed that emotions have a cognitive dimension that makes ethical thought impossible without them.¹⁸² She claims that “we will have to grapple with the messy material of grief and love, anger and fear, and the role these tumultuous experiences play in thought about the good and the just.”¹⁸³ For Nussbaum, “emotions are not just the fuel that powers the psychological mechanism of a reasoning creature, they are parts, highly complex and messy parts, of this creature’s reasoning itself.”¹⁸⁴ In the *Payne* majority, when Justice Rehnquist agrees with the crime characterized in the VIS as “quite poignantly,”¹⁸⁵ he implicitly agrees with the use of emotional words as a description of the crime. And in Justice O’Connor’s concurrence, her words of “who would not have been [moved by the statement]”¹⁸⁶ also calls for a shared conception of our vulnerability as human beings.¹⁸⁷

As Paul Gewirtz observes, VISs expose a certain hypocrisy in liberal circles. He noted that:

¹⁸⁰ Damasio. 129.

¹⁸¹ Ibid.

¹⁸² Martha Nussbaum. *Upheavals of Thought the Intelligence of Emotions* (Cambridge: Cambridge University Press, 2009).

¹⁸³ Martha Nussbaum. “Upheavals of Thought.” *The New York Times*. 18 Nov 2001.

<www.nytimes.com/2001/11/18/books/chapters/upheavals-of-thought.html>.

¹⁸⁴ Ibid.

¹⁸⁵ *Payne*.

¹⁸⁶ *Payne*.

¹⁸⁷ Yoshino. 1882.

For some in the storytelling movement, the point is not simply to strengthen the place of stories in law, but to strengthen stories making particular political points...some proponents of storytelling in law are not really making a claim about the general value of storytelling as an alternative way of knowing and persuading, but rather a claim about the strategic value of some stories as an alternative way of promoting a particular substantive point of view.¹⁸⁸

Gewirtz opposes the idea that storytelling should be political. The idea that a story can be told only if it can serve certain purposes instead of “another way of knowing and persuading” is not only hypocritical but also sounds dangerously like the modern-day censorship on certain literature and media productions. What functions do and should story serve in the legal field has been debated for a while. In a law review article published in 2009, Kenji Yoshino expressed his attitude on the law-and-literature discipline as “presenting conflicting symptoms of health” and he diagnosed the field as a “schizophrenic discipline.”¹⁸⁹ To explain how law and literature are somewhat perceived as incompatible but, at the same time, mutually inclusive, he made an interesting choice of talking about Plato’s banishment of the poets from the city. In book III of Plato’s *Republic*, Socrates banishes the imitative poets from the city because they may corrupt the citizens of Athens with their superb oral skills. No matter how good and how powerful they are at pretending to be a painter, craftsman or carpenter, they are only “deceiv[ing] children and foolish human beings into thinking that it is truly a carpenter.”¹⁹⁰ According to Plato, there exist abstract and timeless ideals which human souls and states should seek, and he calls these ideals Forms.¹⁹¹ Since the highest aspiration for cities is to push their citizens closer to the Forms, the poets undermine the Platonic aspiration by misrepresenting the truth. They are trying to convince

¹⁸⁸ Peter Brooks and Paul Gewirtz. *Laws Stories: Narrative and Rhetoric in the Law*, Yale University Press, 1998. 135.

¹⁸⁹ Yoshino.

¹⁹⁰ Ibid. 1844.

¹⁹¹ Marc Cohen. “Theory of Forms.” *Theory of Forms*. 15 June 2017. <faculty.washington.edu/smcohen/320/thforms.htm.>.

the citizens that the shadows reflected on the cave wall are the objects themselves. And if the citizens are convinced by the poets' inflammatory yet palatable narrations, they would be shackled to their seats and lose the opportunity to seek the real objects behind the fire.

Accordingly, argues Yoshino, literature has always been "marked by qualities stigmatized within the law, such as falsity, irrationality, and seductiveness."¹⁹² VISs, arguably a form of literature, see parallel arguments under this explanation. Not only could the emotional statements divert the judge and jury from seeking out real facts, but they also impair the rationality the law itself has proudly acclaimed. For some, there also exists a Platonic aspiration for justice that should not be corrupted by any form of potential falseness. The more we love good stories outside the courtroom should be the reason why we should reject them more during trials.

But on the other hand, as Kenji Yoshino had beautifully written: "in its particularized form, literature is marked by qualities stigmatized within the law, but literature has another, more expansive incarnation, a generalized form of which law is a part."¹⁹³ When Plato tried to exclude the poets, he forgot he was a poet himself. His banishment speech is just as exciting and inflammatory as he has accused the poets. In many ways, he and the poets are using the same talent of articulation. The only difference is that he uses it to perpetuate virtue, while the poets use them to disseminate vice. Parallel to the relationship of the city and the poet, storytelling in law is somewhat ineradicable. The cases and precedents are all stories of ordinary citizens who happen to make the case title. Inside the courtroom, different parties all tell stories to make the facts comprehensible to outsiders. Just as Plato said, the imitative poet is "by far the most pleasing to boys and their teachers, and to the great mob."¹⁹⁴ Whether the decision-makers in law

¹⁹² Yoshino. 1838

¹⁹³ Ibid.

¹⁹⁴ Ibid. 1850.

are “teachers and boys” who utilize the additional information for better judgment upon hearing the VISs or the “mob” who loses themselves in words and forget their pursuit of justice is uncertain. But there may be ways that could make storytelling serve the function of law better. Just as Plato “leaves the door open” for the return of poets in Book X by telling the poets that they may be allowed if the poetry does not conflict with core functions of the state and their plays may be produced after being scrutinized by the statesman,¹⁹⁵ VISs may find their ways into the courtrooms under scrutiny as well.

Some scholars also defend these “outsider narratives” in law and claim that these stories both challenge preconceived assumptions about such excluded groups and expose the partiality of the dominant narrative.¹⁹⁶ For example, Susan Bandes claims that “when we tell law stories, then, we may be merely reproducing the conventional narrative, with its implicit, existing norms.”¹⁹⁷ This may have further implications in the restitution process. Instead of letting the court decide what’s best for the victims based on their assumption and sympathy to the victim group, they can hear what the victims say about themselves and make judgments that tailor better to the real needs of the victims.¹⁹⁸

Words and languages are at their cores, intended for better communication. In the tale of the Tower of Babel, all human beings once spoke one single language and, through their cooperation, started building the tower of Babel which they believe could help them reach heaven. God, observing them from above, thinking to himself that these human beings are too

¹⁹⁵ Ibid. 1859. (“Don’t think we’ll let you declaim to women and children and the general public, and talk about the same practices as we do but treat them differently...we should be absolutely daft...to let you go ahead...before the authorities had decided whether your work was fit to be recited and suitable for public performance or not. So, you sons of the charming Muses, first of all show your songs to the authorities for comparison with ours, and if your doctrines seem the same as or better than our own, we’ll let you produce your plays.”)

¹⁹⁶ Bandes.

¹⁹⁷ Ibid. 377.

¹⁹⁸ Erez.

powerful, made people speak different languages and scattered them around the world.¹⁹⁹ In the current adversarial system, much of the communication between state authorities and individuals is indirect. We all see that in TV shows, whenever someone approaches the involved parties in a trial, they immediately keep their guard up and signal others to leave them and instead talk to their lawyers. There seems to be a vacant space between the communication between offenders and victims. By permitting a victim to submit a statement of impact, the sentencing process opens up a possible venue of communication between the victim and the offender. The message delivered in court not only treats the offender as a person capable of moral decisions but also creates the opportunity for the offender to reflect on his behaviors.

Allowing VISs in capital trials has positive political consequences as well. Through the understanding of the relationship between emotions and conceptions of human goodwill, it would “give us especially strong reasons to promote the conditions of emotional well-being in political culture.”²⁰⁰ VISs may provoke thoughts as much for the offender as for someone who is experiencing difficulties in life and is on the verge of committing crimes. Upon the publication or dissemination of these statements, others may have just a little more sympathy and understanding and are less likely to hurt one another. And it is important to note that “to propose that emotions should form a prominent part of the subject matter of moral philosophy is not to say that moral philosophy should give emotions a privileged place of trust.”²⁰¹ The introduction of VISs is not a wholesale replacement of rational analysis. They are still subject to rational criticisms.²⁰²

¹⁹⁹ “The Tower of Babel - Bible Story Verses & Meaning.” *Bible Study Tools*. 11 Feb. 2016. <www.biblestudytools.com/bible-stories/the-tower-of-babel.html>.

²⁰⁰ Nussbaum.

²⁰¹ *Ibid.*

²⁰² *Ibid.*

How do we use VISs in court in a way that would allow the emotional elements while at the same time not impede the goal of fairness? Although it is impossible to provide a comprehensive answer, some procedures could be adopted both inside and outside the court. Among those who expressed dissatisfaction with the VISs, one of the primary reasons was that the victims feel their expectations were not fulfilled.²⁰³ As victims get involved with the sentencing process, they sometimes expect that their words would lead to an increase of the penalty imposed, and feel disappointed when the outcome did not match their expectations. For this reason, it is important to avoid creating expectations that cannot be attained. Upon the victims' requests for submitting VISs, the court may include instructions that direct the victims to avoid "sentence recommendations" in their statements. A report published by the Canadian Department of Justice in 2008 also suggests that victims should discuss the statement's purpose with a legally trained professional and "understand why they are provided with the opportunity to submit the statement to a court."²⁰⁴ The judge may also instruct the jury to disregard such information if they are expressed in courts. Outside the courtroom, multiple organizations and support programs that aid the VISs writing processes could help educate victims about the purpose and nature of VISs. These organizations may also instruct the victims to put their focus on the expression function of VIS, allowing them to write down what they wish the offender to know and to convince them not to think about how their words could impact sentencing.

Provisions on the possible impacts of VISs may also be included in jury selection questionnaires. In voir-dire, a long process when attorneys select and reject individual jurors to hear a case, potential jurors have to complete long surveys and have to be questioned intensively

²⁰³ Colin Meredith and Chantal Paquette. "Victims of Crime Research Series Summary Report on Victim Impact Statement Focus Groups." *Department of Justice*. 7 January 2015.

²⁰⁴ Roberts.

by both the prosecution and the defense. In the 2012 Boston-Marathon Bombing case, for example, which involves a young immigrant bomber, the jurors had to complete a twelve-page questionnaire which was very inclusive and even somewhat personal.²⁰⁵ The surveys ask whether the jury members have some training in psychology, philosophy, or criminology and whether a family member has influenced some of their major life decisions. These questions help the attorneys decide on the appropriate jury and, at the same time, make jury members realize potential biases they may have.²⁰⁶ Similarly, for cases that may involve individuals who are emotionally impacted, questions on how potential jurors may respond to something emotional happening in court can also be helpful to the court and the attorneys. In the realm of social psychology, the technique of “priming” is helpful in exposing subjects to certain stimuli or ideas, without conscious guidance or intention.²⁰⁷ Through the help of science and social scientists, it is also possible to devise reverse-priming procedures that decrease the link between greater emotional harm with harder sentences.

²⁰⁵ Katharine Seelye. “Jurors Chosen for Dzhokhar Tsarnaev's Trial in Boston Marathon Bombings.” *The New York Times*. 3 March 2015.

²⁰⁶ Ellen Barry and Kate Taylor. “Boston Marathon Bomber's Death Sentence May Depend on What His Jurors Tweeted.” *The New York Times*. 12 December 2019. <www.nytimes.com/2019/12/12/us/boston-marathon-bombing-appeal.html>.

²⁰⁷ Kendra Cherry. “How Priming Affects the Psychology of Memory.” *Verywell Mind*. 21 February 2020. <www.verywellmind.com/priming-and-the-psychology-of-memory-4173092>.

Conclusion

As an emotionally charged document, victim-impact statements no doubt face controversy when they are used in the courtroom, especially so when they are used in cases where death penalty could be imposed. Many people had made great arguments on both sides of the debate, but as we have seen earlier, they frequently “talk over one another” by focusing on different aspects of these documents. Beneath the various arguments are, in fact, different interpretations of law and justice, and it requires a unifying standard before we can adequately evaluate these arguments. Ronald Dworkin’s legal interpretivism, although probably insufficient in its own ways, provides a temporary solution. Even if it does not and could not put an end to the thousand-year-old debate on the nature and purpose of law, it encourages us to rise from our seats and look at the law from a higher perspective. The principle of integrity invites us to think about the law’s past and its future, to look at law books and at the same time see our fellow citizens in the community. Because of the increasing importance of victims in both U.S. and international legal proceedings, the use of jury and expert witnesses, and benefits to both the victims and the communities, the VISs pass the acceptability test under the integrity principle and are arguably valuable additions to the justice system.

Emotions are inseparable parts of us human beings, and legal narratives are almost as old as the casebooks. But even if the emotional elements are embedded in the law itself, capital trials should certainly not be a tear-race. I advocate the use of VISs on the condition that they are used narrowly and cautiously. As much as they should enter the courtrooms, VISs are subjected to rational scrutiny like any other documents and testimonies in courts. Judges are still entrusted with the “gate-keeping” role, and they may deny certain VISs on a case-to-case basis to make sure nothing admitted in courts could impede the normal functions of trials and the inspection of

other evidence. The victims are free to express their thoughts, but that freedom is relative, just as Dworkin has said: “Discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction. It is therefore a relative concept. It always makes sense to ask, ‘Discretion under which standards?’ or ‘Discretion as to which authority?’”²⁰⁸ The successful implementation of VISs needs collaboration between those in courts and those outside. Through the implementation of rules regarding VISs’ usages in court, debriefing of expectations from victim-help programs, and studies on emotions and reasoning, a satisfying method of VIS utilization could be developed that would both comfort the victims and ensure the impartiality of the trials.

The weight of a VIS is the weight of the flower. While the judge and jury are responsible for making the legal decisions, the victims are entitled to have their voices heard and their presence respected. They are additions of humanity to the trials, but not heavy thumbs on the scale of justice.

²⁰⁸ Ronald Dworkin. “Taking Rights Seriously.” 2003. 48.

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