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Reverberations of the Victim's "Voice": Victim Impact Statements and the Cultural Project of Punishment

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Reverberations of the Victim's "Voice": Victim Impact Statements and the Cultural Project of Punishment

ERIN SHELEY*

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INTRODUCTION

Ever since the victims' rights movement swept the country in the 1970s, leading to the addition of victims' rights amendments to the constitutions of thirty-two states starting in the 1980s, the victim's "voice" has been a source of great anxiety in debates about criminal sentencing.[1] The victim impact statement (VIS) has been lauded as a means of empowerment,[2] decried as a vehicle for unrestrained vengeance,[3] defended in the interests of truth, healing, and reconciliation,[4] and lambasted as irrelevant to the very purposes of punishment.[5] From cable television

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1. *See* ALA. CONST. art. 1, § 6.01; ALASKA CONST. art. I, § 24; ARIZ. CONST. art. 2, § 2.1; CAL. CONST. art. 1, § 28; COLO. CONST. art. II, § 16a; CONN. CONST. amend. art. XXIX; FLA. CONST. art. I, § 16(b); IDAHO CONST. art. I, § 22; ILL. CONST. art. I, § 8.1; IND. CONST. art. 1, § 13(b); KAN. CONST. art. 15, § 15; LA. CONST. art. I, § 25; MD. CONST. DECLARATION OF RIGHTS art. 47; MICH. CONST. art. I, § 24; MISS. CONST. art. 3, § 26-A; MO. CONST. art. I, § 32; NEB. CONST. art. I, § 28; NEV. CONST. art. 1, § 8; N.J. CONST. art. I, § 22; N.M. CONST. art. II, § 24; N.C. CONST. art. I, § 37; OHIO CONST. art. I, § 10a; OKLA. CONST. art. II, § 34; OR. CONST. art. I, § 42; R.I. CONST. art. I, § 23; S.C. CONST. art. I, § 24; TENN. CONST. art. I, § 35; TEX. CONST. art. 1, § 30; UTAH CONST. art. I, § 28; VA. CONST. art. I, § 8-A; WASH. CONST. art. I, § 35; WIS. CONST. art. I, § 9m. For historical background on the victims' rights movement, see DOUGLAS E. BELOOF, PAUL G. CASSELL & STEVEN J. TWIST, VICTIMS IN CRIMINAL PROCEDURE 3–43 (2d ed. 2006).

2. *See, e.g.*, Edna Erez, *Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice*, 1999 CRIM. L. REV. 545, 551.

3. *See, e.g.*, Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 398 (1996).

4. *See, e.g.*, Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 124 (2004).

5. *See, e.g.*, Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 986–1006 (1985).

coverage of tabloid show trials to testimony at United Nations proceedings, we are surrounded by the voices of victims speaking in judicial settings and those voices have been assigned an ever-increasing significance in punishing crime.[6] The supporters and detractors of victim impact statements tend to face off across a bright line that puts the rights of the defendant and those of the victim into competition with one another, with the vindication of the former frequently conceptualized as a curtailment of the latter, and vice versa. For example, some critics argue that the subjectivity of victim narratives undermines certainty in legal processes, to the detriment of defendants.[7] Others characterize victim impact statements as proceduralizing a base impulse of vengeance *against* the defendant,[8] or an immutable identity of helplessness for the victim.[9] Many critics accept the introduction of subjective narratives into criminal proceedings in general, but object to the specific policy ramifications of including those of the victim at the time of sentencing.[10] Even scholars who discuss the "representative character" of victim testimony conceive of this character as primarily a rhetorical strategy devised by the state to justify increased police power by encouraging an "it-could-be-you" attitude toward victims on the part of jurors.[11] And for their part, supporters of the statements point to "therapeutic" benefits for victims, and the "fairness" of letting three discrete entities—"the State, the defendant *and* the victim"—be heard, as though the three occupy wholly separate spheres.[12]

This article will challenge the terms of the current debate, to show how the narratives of individuals legitimate the inherently collective exercise of punishment.[13] Specifically, I contend that the complexity of a victim narrative

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6. *See* HANS BOUTELLIER, CRIME AND MORALITY: THE SIGNIFICANCE OF CRIMINAL JUSTICE IN POST-MODERN CULTURE 47 (2000) ("Without exaggeration, the reinforced position of the victim is the most important post-war development in the practice of criminal law."); DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 121 (2002) ("[T]he aim of serving victims has become part of the redefined mission of all criminal justice agencies.").

7. *See, e.g.*, Wayne A. Logan, *Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials*, 41 ARIZ. L. REV. 143, 145 (1999).

8. *See, e.g.*, JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 106 (2007); Bandes, *supra* note 3, at 396–98.

9. *See, e.g.*, Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411, 1426 (1993).

10. *See, e.g.*, Bandes, *supra* note 3, at 409 ("[N]ot every story should be told, or every voice heard . . . . We do not need elaborate structures to assist us in feeling fear, pain, and grief for those like us who have suffered violence at the hands of the other. This is already the dominant narrative of the criminal trial." (citation omitted)); Kenji Yoshino, *The City and the Poet*, 114 YALE L.J. 1835, 1884 (2005).

11. GARLAND, *supra* note 6, at 11; *see also* Jonathan Simon, *Fearless Speech in the Killing State: The Power of Capital Crime Victim Speech*, 82 N.C. L. REV. 1377, 1383 (2004).

12. Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611, 611–12 (2009) (emphasis in original).

13. Much of the scholarship on victim statements has focused on the specific context of capital trials, given the heightened scrutiny given to the procedural rights of defendants

effectively conveys the social experience of harm, without which the criminal justice system loses its legitimacy as a penal authority. In other words, we cannot only consider "the victim," "the defendant," and "the state" as three separate entities vying for narrative control over accounts of harm in determining punishment. Rather, the stories of the victims and defendants already circulate through society outside of the courtroom, and the function of "the state" in the trial context is to vindicate the interests of this society. Notions about criminal "harm" enter the culture through the experiences of individuals, as well as through political rhetoric and media representations, and, once there, shape social norms about the assignment of blame. Therefore, if the sentencing process cannot accommodate the stories of actual harm to individual victims it runs the risk of (a) coming to be viewed as illegitimate to a society guided by these norms, or (b) allowing free rein for generic representations of criminal harm produced by political and media actors to take the place of individuated victim accounts in the mind of a fact finder. In the former situation, as empirical research has shown, we run the risk of a system less effective at preventing crime.[14] In the latter, we skew the operative images of victim and criminal even closer toward the crude clichés feared by critics of the statements.

This article will proceed in four parts. Part I will summarize the legal history of victim impact statements and the existing debate over their appropriateness in the sentencing context. I will argue that much of the literature focuses on a tripartite competition between victim, defendant, and state, which has the tendency to ignore the capacity for a victim impact statement to externalize and convey the social harm of a criminal act. In Part II, through textual analysis of how a group of actual victim impact statements convey individual suffering to an institutional audience, I will demonstrate the unique complexity of the harm they narrate. I will show that while critics' concerns over the capacity of subjective narratives to yield undifferentiated antipathy and lapses into trope language of "victimhood" are in fact justified by reality, other features allow these narratives to get at the nuanced truth of suffered harm and its context in the social world protected by the criminal justice system. The model that emerges from this analysis reveals a deep tension between narrative authorities in the structure of victim impact testimony. On the one hand, the victim has the potential to overcome the monopoly on narrative previously held by the trial attorneys, as well as some of the signification problems identified in the theoretical literature, to develop uniquely subjective accounts of harm through some of the techniques I identify. On the other, the victims' sheer

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facing the death penalty. *See* Gregg v. Georgia, 428 U.S. 153, 189 (1976) (plurality opinion) ("*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."). The Supreme Court's original prohibition of victim impact statements was explicitly limited to capital trials because "the considerations that inform the [capital] sentencing decision may be different from those that might be relevant to other liability or punishment determinations." Booth v. Maryland, 482 U.S. 496, 509 n.12 (1987), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991). Because the focus of this article is on the nature of testified suffering in general, my analysis applies to victim statements in capital and non-capital contexts alike; where the distinction is relevant I will so indicate.

14. *See infra* Part III.A.

consciousness of their own bodies and identities as potentially transformed by the defendant, and the continuing consciousness of the court's authority to assign meaning to these transformations, has the tendency to subvert the victims' authority as subjective authors of their own experiences.

From these observations I conclude that a victim impact statement does not function purely as a means of deploying negative emotion toward the defendant, nor as a free-floating platform for empowerment for the victim. Instead, the statement conveys suffering along a temporal trajectory that runs from the original experience of harm to include the relationships between the several parties and the criminal justice process itself, in a way that the other narratives of a criminal trial could not otherwise accomplish. Whether these statements are appropriate vehicles for expressing legally relevant "harm," then, relates to the function of the criminal system as a means of dispersing collective sanctions for violations of communal, as well as individual, welfare. If the victim remains at least partially objectified as an individual by the act of testimony, and if that testimony allows her to represent harm to the fact finder through mutual recourse to culturally circulating objects, then one purpose served by her "voice" must be to provide information about the collective harm flowing from the defendant's acts.

Throughout Part II, I will illustrate my analysis with case studies drawn from victim impact statements made at the 2005 trial of Zayad Al Safarini, one of the perpetrators of the 1986 hijacking of Pan Am Flight 73 in Karachi, Pakistan. Because of the sheer quantity of statements made during the course of Safarini's sentencing, this particular trial provides an opportunity to begin to identify qualities common to testified accounts of suffering. Applying the theoretical materials to these statements, I will show how this group of victim witnesses confronts and seeks to negotiate the challenges of representing their suffering as they felt it, focusing on their tendency to use non-chronological timeframes as a means of expressing visceral experience, their symbolic displacement of suffering onto a variety of external objects, and their centering of the victim's body in an object relationship[15] to both the defendant and the court itself.

In Part III, I will integrate sociological and cultural studies scholarship on the expression of suffering and the relationship between individual and cultural memory to argue that focusing on the balance of interests between victim and defendant ignores the importance of the collective experience of criminal harm to the goals of punishment. I will first discuss the criminal justice system itself as a collective social endeavor, focusing on the philosophical history of criminal harm conceived of as actions against society in general, and the role of that society—especially through the institution of the jury—in punishing it. In thinking about the societal interest and investment in punishment, I will consider both retributivist and utilitarian theories of punishment, drawing upon the recent scholarship demonstrating the utilitarian functions of "empirical desert" in punishment. I will argue that even as individual memories have been found constitutive of cultural

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15. Throughout this article, I will use the Kantian distinction between subject and object—or that which perceives and that which is perceived—as a shorthand to indicate the disparate power relations between the victim and the machinery of the trial process in the production of legal truth.

memory in other contexts such as the experience of war and epidemic, they have a role to play in the cultural memory of criminality, which is an inescapable backdrop to collective decision making about criminal punishment.

I will conclude in Part IV that—regardless of what one thinks of the balance of power between victim and defendant created by the use of victim impact statements—the ways in which they communicate suffering and, through suffering, legal harm, have implications for collective decision making about the criminal law. Policy decisions about the virtues and vices of these statements should not omit the importance of societal experience of criminal harm to the former processes of punishment that—in the absence of the specific content of individual memory—could rely instead on general and stereotypical images of "crime," which subvert the dignity of both victim *and* defendant.

I. THE VICTIM IMPACT STATEMENT AND PUNISHMENT

The Supreme Court has considered the constitutionality of victim testimony in capital criminal sentencing on three occasions, with conflicting outcomes. In *Booth v. Maryland*, a case arising from the slaying of an elderly couple during a burglary, the defendant's probation officer read the jury a prepared statement summarizing the effects of the elderly couple's murder on their children (including their son who had discovered them bound and stabbed to death).[16] In a 5-4 decision the Court found the reading of the statement improper under the Eighth Amendment insofar as its inclusion created an unacceptable risk that the death penalty would be imposed in an arbitrary and capricious manner.[17] In an opinion written by Justice Powell, the Court found that, in its focus on the "character and reputation of the victim and the effect on his family" rather than the defendant's conduct, a victim impact statement introduces factors that "may be wholly unrelated to the blameworthiness of a particular defendant."[18] Because the defendant "often will not know the victim" the Court reasoned, "[the defendant] therefore will have no knowledge about the existence or characteristics of the victim's family."[19]

In *South Carolina v. Gathers*, the Court relied on *Booth* and reversed a death sentence imposed in a case during which the prosecutor, in closing arguments, had mentioned the victim's possession on his person of a religious tract and a voter registration card at the time of his death.[20] Citing the requirement that punishment be tailored to a defendant's "personal responsibility and moral guilt," the Court concluded that where there was no evidence that respondent saw these papers, their possession by the victim could not provide any information relevant to respondent's moral culpability.[21]

In *Payne v. Tennessee*, however, the Court reversed course and overruled *Booth*, affirming the defendant's death sentence for the murder of a woman and her two-

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16. 482 U.S. 496, 497–99 (1987).
17. *Id.* at 508–09.
18. *Id.* at 504.
19. *Id.*
20. 490 U.S. 805, 807–08 (1989), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991).
21. *Id.* at 810–12 (citing Enmund v. Florida, 458 U.S. 782, 801 (1982)).

year-old daughter despite testimony and commentary on the effects of these deaths on a surviving three-year-old child whom the defendant had also attacked.[22] In a 6-3 decision written by Chief Justice Rehnquist, the Court held that the Eighth Amendment created no per se bar on victim impact evidence in a capital trial and that such evidence is simply a means of informing the sentencing authority about the extent of the harm flowing from the defendant's act, the assessment of which has "long been an important factor in determining the appropriate punishment." [23]

One question that emerges in the balance between *Booth* and *Payne* is how we should understand "harm" to inform culpability. *Payne* seems to settle the question in favor of a tort-like principle that a malfeasor must take his victim as he finds him and is liable for even the unanticipated harm flowing from his misconduct.[24] By the reasoning of the *Payne* Court, victim testimony has the capacity to illustrate "quite poignantly some of the harm that Payne's killing had caused" and "there is nothing unfair about allowing the jury to bear in mind that harm at the same time as it considers the mitigating evidence introduced by the defendant."[25] As Paul Cassell points out, "[H]armfulness—including harm to 'the immediate victim' and 'family members'—is obviously and uncontroversially a driving factor in making blameworthiness decisions."[26] The difficulty is whether victim impact statements as given are accurate or appropriate proxies for the underlying harm they purport to convey.[27] The scholarship in the wake of *Payne* has been largely critical of victim impact statements for a number of reasons; to the extent that it has focused on their narrative qualities it has seemed to imagine a kind of competitive relationship between victim and defendant, with the rights of each balanced against one another, and in which we determine the virtues and dangers of the statements by deciding whether this balance is acceptable.[28] These arguments all take into account the

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22. 501 U.S. 808, 808–10 (1991).

23. *Id.* at 808.

24. *See* WILLIAM L. PROSSER, LAW OF TORTS § 50, at 299–300 (3d ed. 1964).

25. *Payne*, 501 U.S. at 826.

26. Cassell, *supra* note 12, at 629.

27. The conveyance of information for sentencing purposes is not the only justification made for the use of VIS. Other common arguments include claims of psychological benefits to both the defendant and victim and the opportunity to increase the defendant's understanding of his crime's effects. *See generally* JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS (Bruce J. Winick & David B. Wexler eds., 2003); Cassell, *supra* note 12, at 621–23; Erez, *supra* note 2, at 550–51. Because the subject of this article is primarily the nature of harm conveyed for the purposes of punishment, I will not dwell on these other effects at length.

28. *See, e.g.*, Susan Bandes, *Reply to Paul Cassell: What We Know About Victim Impact Statements*, 1999 UTAH L. REV. 545 (arguing that, in the capital context, victim impact statements exacerbate the difficulty of a jury's task of humanizing a defendant enough to decide his fate, against the backdrop of pro-prosecution biases likely to exist at that phase in the proceedings); Bandes, *supra* note 3, at 365 (arguing against victim impact statements because they bring into the criminal context "inappropriate" emotions such as "hatred, the desire for undifferentiated vengeance, and even bigotry"); Dina R. Hellerstein, *The Victim Impact Statement: Reform or Reprisal?*, 27 AM. CRIM. L. REV. 391, 428–29 (1989) (arguing that victim impact statements should only be permissible when the defendant had the intent to cause the particular effects described, and when the testimony is not overly prejudicial,

backdrop of the criminal defendant's enshrined Sixth Amendment right to present mitigating information on his own behalf, to which proponents of victim impact statements point in order to argue that "fairness" requires that victims' narratives should also be taken into account.[29]

Professor Paul Gewirtz, for example, says that the defendant's story and the victim's or survivor's story "can be seen as counterstories, which should both be available to the decisionmaker . . . . If particularized storytelling should have a greater place in the law, does not the particularized story of the murder victim and the victim's survivors warrant that place?"[30] In contrast, Susan Bandes argues that the storytelling capacity of victim impact statements make them a vehicle for what she considers lower order emotions directed against the defendant on behalf of the victim. For Bandes, the statements "evoke not merely sympathy, pity, and compassion for the victim, but also a complex set of emotions directed toward the defendant, including hatred, fear, racial animus, vindictiveness, undifferentiated vengeance, and the desire to purge collective anger."[31] Bandes views what she considers a shift away from concern for the moral culpability of the individual as "a thirst for undifferentiated vengeance," characterizing the content of victim impact statements as "irrelevant fortuities such as the social position, articulateness, and race" of victims and their families.[32] Furthermore, she conceives of the narratives developed during the criminal trial as already stacked against the defendant by the time sentencing takes place.[33]

Martha Minow opposes the introduction of victim evidence out of concern for its encouragement of competing narratives of victimhood between the victim and defendant, calling instead for normative standards to evaluate "historical harm" experienced by oppressed groups as opposed to individuals.[34] And Jennifer Culbert sees the use of victim impact statements, in the death penalty context at any rate, as an attempt to take a normative deontological stance on this competing relationship, affirmatively establishing the suffering of the victim as one clear and incontrovertible basis for deciding punishment in an otherwise pluralistic and morally relativistic society.[35] While all of these views highlight legitimate concerns

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requiring that it be "submitted in a straightforward, factual way"); Elizabeth Lynett & Richard Rogers, *Emotions Overriding Forensic Opinions? The Potentially Biasing Effects of Victim Statements*, 28 J. PSYCHIATRY & L. 449 (2000) (suggesting that victim accounts may exert a biasing effect on criminal-forensic opinions).

29. United States v. Degenhardt, 405 F. Supp. 2d 1341, 1347 (D. Utah 2005).

30. Paul Gewirtz, *Victims and Voyeurs: Two Narrative Problems at the Criminal Trial*, *in* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 135, 142–43 (Peter Brooks & Paul Gewirtz eds., 1996); *see also* Mary Margaret Giannini, *Equal Rights for Equal Rites?: Victim Allocution, Defendant Allocution, and the Crime Victims' Rights Act*, 26 YALE L. & POL'Y REV. 431, 452 (2008) ("By giving victims a clear and uninterrupted voice at this moment on par with that of defendants and prosecutors, a right to allocute signals both society's recognition of victims' suffering and their importance to the criminal process.").

31. Bandes, *supra* note 3, at 395 (footnote omitted).

32. *Id.* at 398; *see also* Steven G. Gey, *Justice Scalia's Death Penalty*, 20 FLA. ST. U. L. REV. 67, 123 (1992); Martha C. Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFF. 83, 89–90 (1993).

33. *See* Bandes, *supra* note 3, at 400.

34. Minow, *supra* note 9, at 1437–38.

35. *See* Jennifer L. Culbert, *The Sacred Name of Pain: The Role of Victim Impact*

about the ability of subjective narratives to unfairly prejudice the interests of one party or another, they all focus on a specific view of sentencing as a kind of gamesmanship in which the victim's only function is to oppose the interests of the defendant.

Even scholars who have more explicitly considered the victim's "voice" as implicating some form of collective interest have rejected those interests in the face of powerfully constructed individuated roles. For example, Jonathan Simon has recognized the state's tendency, in recent years, to fetishize the "crime victim" as a justification for conservative criminal legislation.[36] He has explored the dangers of this monolithic victim identity as an excuse for the exercise of state power,[37] but this formulation focuses so closely on a constructed victim that it neglects the relationship between the diversity of *actual* victims and the societies in which they take part (and *against* which this state-constructed victim is deployed).

Likewise, Kenji Yoshino has described victim impact statements as an instance of the law's "failed banishment of literature," which he discusses by engaging Plato's archetypical exclusion of the poet from his ideal city.[38] He accepts Plato's general propositions that "poetry" (or narrative) cannot be permitted to conflict with the core functions of the state, cannot be defended solely on the basis of its "ineradicability" from other textual practices such as law, and must rely on its virtues to demonstrate that it does not conflict with core functions.[39] For Yoshino, victim impact statements cannot rely on the "ineradicability defense" because they are "a discrete genre that can be banished from the trial" and "cannot be purely redundant with other narratives in the trial."[40] And they fail to affirmatively defend their "virtue" because, in the capital context at any rate, they do not serve the ends of "fairness," which Yoshino defines explicitly as allowing the defendant to assume the "narrative posture . . . of a Scheherazade, telling stories to the state so she may live . . . . untrammeled by other voices."[41]

Yoshino's argument is problematic for two reasons. First, his rejection of the ineradicability defense is limited to the much easier functional separability of actual victim statements from a proceeding, without addressing whether it is more "virtuous" to allow the prosecutor-driven narratives that would remain to serve as the final arbiters of truth against the defendant. Second, his rejection of the statements boils down to a preference for a precise individuated role for the defendant—that of Scheherazade. While this claim may well be justified by the interests underlying the defendant-centered nature of criminal procedural protections, particularly in a capital context (with the affirmative protections for criminal defendants immutably enshrined in the Bill of Rights),[42] it dismisses without commentary all other affirmative claims to "virtue" that might be made on behalf of victim impact statements as an instrument of state function (not unlike

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Evidence in Death Penalty Sentencing Decisions, *in* PAIN, DEATH, AND THE LAW 103 (Austin Sarat ed., 2004).

36. Simon, *supra* note 11, at 1383.
37. SIMON, *supra* note 8, at 75–110.
38. Yoshino, *supra* note 10, at 1839.
39. *See id.* at 1839–40, 1884.
40. *Id.* at 1879.
41. *Id.* at 1884 (footnote omitted).
42. *See* Gregg v. Georgia, 428 U.S. 153, 189 (1976).

Plato's casual dismissal of the virtue defense of poetry in general, for which Yoshino criticizes him). I argue, first, that removing victim impact statements from a trial does not solve the "ineradicability problem" because other narratives—even other crudely antidefendant narratives—will remain; they will simply exclude the victim's own more complicated account of her harm. Second, a strong virtue defense exists on the basis that that complicated account of harm has systemic social importance that cannot be wholly trumped by a defendant's assumption of a specific narrative posture.

It should be noted before moving on that, despite the many abstract normative assumptions derived from these various role-driven assessments of victim impact statements, from an empirical standpoint, there is relatively thin evidence of the effects of the statements one way or another on outcomes in actual criminal sentencing. The available empirical evidence on actual capital cases reveals no significant effect.[43] *Simulated* juror studies have shown some evidence of an effect in capital cases,[44] but not consistently,[45] and it is unclear how accurately simulated juries model the behavior of actual juries present for an entire trial and deliberation.[46] Particularly because of the challenges of data collection in any quantitative attempt to study the collective effects of real victim impact statements on any broad scale,[47] it is helpful to drill more deeply into their qualitative structure to consider how they are able to convey information to a fact finder.[48]

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43. *See* Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment*, 1999 UTAH L. REV. 479, 491–92.

44. *See* Edith Greene, Heather Koehring & Melinda Quiat, *Victim Impact Evidence in Capital Cases: Does the Victim's Character Matter?*, 28 J. APPLIED SOC. PSYCHOL. 145 (1998); James Luginbuhl & Michael Burkhead, *Victim Impact Evidence in a Capital Trial: Encouraging Votes for Death*, 20 AM. J. CRIM. JUST. 1 (1995); Bryan Myers, Draven Godwin, Rachel Latter & Scott Winstanley, *Victim Impact Statements and Mock Juror Sentencing: The Impact of Dehumanizing Language on a Death Qualified Sample*, 22 AM. J. FORENSIC PSYCHOL. 39 (2004). *See generally* Bryan Myers, Emalee Weidemann & Gregory Pearce, *Psychology Weighs In on the Debate Surrounding Victim Impact Statements and Capital Sentencing: Are Emotional Jurors Really Irrational?*, 19 FED. SENT'G REP. 13 (2006) [hereinafter Myers et al., *Psychology*] (providing open questions of victim statements, addressed by Myers and his coauthors, based on psychological literature).

45. *See* Ronald Mazzella & Alan Feingold, *The Effects of Physical Attractiveness, Race, Socioeconomic Status, and Gender of Defendants and Victims on Judgments of Mock Jurors: A Meta-Analysis*, 24 J. APPLIED SOC. PSYCHOL. 1315, 1315 (1994) (finding the effects of victim characteristics on jurors' judgments to be inconsequential).

46. *See* Myers et al., *Psychology*, *supra* note 44, at 17 ("The decisions participants in a jury simulation make hold no real consequences, and so it is difficult to extrapolate the findings to real capital trials where the consequences are so grave."); Mark Costanzo & Sally Costanzo, *Jury Decision Making in the Capital Penalty Phase: Legal Assumptions, Empirical Findings, and a Research Agenda*, 16 LAW & HUM. BEHAV. 185, 191 (1992) ("[T]he very nature of the [death] penalty decision may render it an inappropriate topic for jury simulation studies.").

47. Actual victim impact statements are difficult to come by in large numbers. In federal cases, they are included in the presentencing report submitted to the judge, which is sealed to the public. While statements read at trial may be studied if one can obtain a transcript of the sentencing proceedings, the costs associated with such an undertaking are often preventative. *See* Jean M. Callihan, *Victim Impact Statements in Capital Trials: A Selected Bibliography*,

II. THE VICTIM IMPACT STATEMENT AS A NARRATIVE OF SUFFERING

This part will develop a descriptive model for how victim impact statements convey individual harm to an institutional audience, drawing upon the victim statements made during the sentencing of Zayad Al Safarini. On September 5, 1986, Pan American Flight 73, on a layover from Bombay, India to Frankfurt, Germany, was hijacked on a runway in Karachi, Pakistan by four representatives of the Abu Nidal Organization.[49] During the seventeen hours they held the plane, the hijackers killed at least 20 of the 360 passengers, and maimed many others, after opening fire into the cabin and lobbing grenades at the passengers.[50] All of the hijackers, including their leader, Zayad Al Safarini, were arrested and tried in Pakistan where they were sentenced to death (sentences that were subsequently commuted to life in prison).[51] On September 28, 2001, Safarini was captured in Bangkok after being released by Pakistan over the objections of the United States and eventually sentenced in a U.S. district court on May 13, 2004, to a 160-year prison term.[52] The court had ruled that the Federal Death Penalty Act could not be applied retroactively.[53]

Safarani's sentencing is both uniquely useful and uniquely problematic as a source of victim statements. Because the attack created so many victims, it produced a very large number of statements for analysis. However, the sheer cultural notoriety of the attack—and the fact that Safarini's trial took place in the years immediately following the subsequent attacks of September 11, 2001—necessarily exaggerate the relationship between cultural memory and the ways in which victim narratives can be structured and received. Nonetheless, the examples of statements given by Flight 73 victims demonstrate how victim impact statements function to allow a more multidimensional rendition of legal truth in the context of criminal sentencing, and also the extent to which the content of victim impact testimony can be shaped by the fact of its procedural nature—as testimony in a trial setting.

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88 CORNELL L. REV. 569, 569 (2003) (noting the paucity of reported empirical studies of victim impact statements).

48. My analysis in this article will not distinguish between sentencing hearings decided by judges versus those decided by juries. In the classic study of the jury, of course, Kalven and Zeisel demonstrated that juries and judges decide verdicts the same way 75–80% of the time. HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 55–57 (1966). The distinction between judge and jury in the sentencing context—and particularly in the context of victim impact statements where questions of empathy and narrative play such a key role—deserves more attention than the scope of this article affords. Yet given the acknowledged role of narrative even in judicial decisions, and my primary interest in the manner in which victims themselves express harm, my observations are relevant to both contexts.

49. Press Release, Dep't of Justice, *Jordanian Hijacker Sentenced to 160 Years in Prison for Deadly 1986 Hijacking of Pan Am Flight 73 as Victims from Around the World Recount Horrors* (May 13, 2004), *available at* http://www2.fbi.gov/dojpressrel/pressrel04/051304hijacker.htm.

50. *Id.*

51. *Id.*

52. *Id.*

53. United States v. Safarini, 257 F. Supp. 2d 191, 202–203 (D.D.C. 2003).

In the first section of this part, I will survey the role of narrative in the legal context generally, and the functional uniqueness of the victim impact narrative in the trial setting. Second, I will discuss the relationship between suffering and expression, discussing the narrative strategies through which victim impact statements are able to overcome what theorists of pain have identified as a problem of articulation.[54] Through the application of cultural scholarship on pain and emotion to the concrete example of the Safarini sentencing, I hope to demonstrate how victim impact statements narrate the sheer complexity of criminal harm in a way that would be impossible without the victim's "voice," and the ways in which they translate the mechanics of this harm to a third-party listener. Third, I will discuss the impact of the trial setting itself on the content of victim narrative. I will argue that the victims' own tendencies toward self-objectification, while ostensibly justifying some critics' concerns about "victim speak," have the tendency to convey the broader social ramifications of harm as the object of collective redress.

A. Law and Narrative: An Overview

Most obviously, the victim impact statement serves an explicit narrative function: the introduction of a victim's subjective account of her experience of harm flowing from the defendant's crime.[55] The last several decades have seen an increased appreciation for the central role of narrative formation throughout the legal process generally, emphasizing the effects of storytelling—with its incorporation of moral dichotomies, cultural mythologies, heroes, villains, and metaphor—on legal outcomes.[56] Pennington and Hastie famously found that juries,

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54. *See, e.g.*, ELAINE SCARRY, THE BODY IN PAIN (1985).

55. *See* Payne v. Tennessee, 501 U.S. 808, 826 (1991) (noting the testimony in question "illustrated quite poignantly some of the harm that Payne's killing had caused").

56. *See, e.g.*, GUYORA BINDER & ROBERT WEISBERG, LITERARY CRITICISMS OF LAW 202 (2000) ("Rather than denoting similarities between law and narrative, the Law as Narrative trope calls upon the reader to assimilate them *despite their presumed differences*, to make an imaginative leap, to participate in a *fiction*." (emphasis in original)); BERNARD S. JACKSON, LAW, FACT AND NARRATIVE COHERENCE 3 (1988) (arguing that legal rules are "socially-constructed narratives, accompanied by particular (and increasingly institutionalised) forms of approval or disapproval" where "'law' and 'fact' are reduced to the same level—of narrative structures, and the process of 'application' becomes one of comparison"); JAMES BOYD WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 169 (1985) ("The story is the most basic way we have of organizing our experience and claiming meaning for it."); Peter Brooks, *The Law as Narrative and Rhetoric*, *in* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW, *supra* note 30, at 14, 17 ("The study of the modalities of narrative presentation—use of points of view, verb tenses, flashbacks, and the like—induces a sense of the uneasy relations of telling and told, an awareness of how narrative discourse is never innocent, but always presentational, a way of working on story events that is also a way of working on the listener or reader."); Steven L. Winter, *The Cognitive Dimension of the* Agon *Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2228 (1989) (explaining that narrative parallels how "the human mind makes sense of experience"); *see also* PETER L. BERGER, THE SACRED CANOPY: ELEMENTS OF A SOCIOLOGICAL THEORY OF RELIGION 45–47 (1990) (arguing that human civilizations seek to protect themselves from the terrors of the unknown through "plausibility structures"—

deciding upon the guilt or innocence of a defendant, make these decisions by selecting the more appealing of the two narratives placed before them by the prosecution and the defense, rather than simply deciding whether the prosecution has in fact established individual elements of a crime beyond a reasonable doubt.[57] Likewise judicial opinions have been observed to incorporate background cultural narratives into the legal rules they announce.[58]

As Susan Bandes notes, however, subjective narratives cannot enter the legal context until they "pass through yet another filter, this one constructed by the law, and consisting of specific legal rules that govern our ability to understand, structure, and talk about experience."[59] The Federal Rules of Evidence determine the relevance of particular stories to the case at hand and whether their emotional content is excessively prejudicial to the defendant.[60] In delivering instructions to a jury, a judge limits the range of potential stories susceptible of determination. Beyond these overarching framing authorities, during the guilt phase of a criminal trial the attorneys exert a second valence of control over the subjective narratives of the participants, ordering the presentation of information through their chosen lines of questioning. In general, then, lawyers, rather than witnesses or even victims, author the master narratives to which jurors respond in determining guilt.

A brief excerpt from the testimony of Clifford Cagle, victim of the Oklahoma City bombing, is illustrative:

> Q. Were you working on the day of the bombing?
> A. Yes, I was.
> Q. Could you describe for us what you recall about that experience?
> A. What I remember is I was working at my desk; and the next thing I knew, I woke up on the floor soaking in blood; and I rolled over to let it run out, and I heard someone call my name. And I just wiggled my fingers so they knew who I was. And then I felt them come in and put the stretcher under me and carry me downstairs.
> Q. So you were conscious as you were carried out of the building?
> A. No, I was in and out of consciousness the whole time.

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human-created narratives that serve to locate the individual within the context of his social institutions in a manner that is self-justifying).

57. Nancy Pennington & Reid Hastie, *The Story Model for Jury Decision Making*, *in* INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING 192, 218 (Reid Hastie ed., 1993); *see also* Ronald J. Allen, *A Reconceptualization of Civil Trials*, 66 B.U. L. REV. 401 (1986) (drawing upon Pennington and Hastie in arguing for the relative plausibility theory of proof, which posits that liability in a civil matter flows deductively from the formal structure of law, but only after the most plausible account of the relevant events is determined).

58. *See* JACKSON, *supra* note 56, at 104 (explaining apparently contradictory outcomes in three fraudulent representations cases as related to the identities of the plaintiffs); *see also* Erin Sheley, *The "Constable's Blunder" and Other Stories: Narrative Representations of the Police and the Criminal in the Development of the Fourth Amendment Exclusionary Rule*, 2010 MICH. ST. L. REV. 121; Jonathan Yovel, *Running Backs, Wolves, and Other Fatalities: How Manipulations of Narrative Coherence in Legal Opinions Marginalize Violent Death*, 16 LAW & LITERATURE 127, 144 (2004) (arguing that "[i]t is through the narrative framing and structuring of the 'facts' of a case that normativity is introduced and woven with facticity, even when morphologically this appears otherwise").

59. Bandes, *supra* note 3, at 384.

60. FED. R. EVID. 403.

> Q. When you got outside the building, where were you taken on the stretcher?
> A. Out to the plaza, I think; and somebody asked me what hospital. I said VA, and they said no.[61]

In this exchange, the victim moves rapidly through the moment of actual violence, of which we get only that he rolled over and was conscious of his own blood. The narrative developed by the prosecutor—which will continue on to the hospital, the nature of the victim's injuries, the medical care over the years necessary to repair them, and other more measurable material facts[62]—never returns to the lived experience of the trauma itself.

A unique characteristic of victim impact statements, amongst the various other narratives implicated in a criminal trial, is the increased degree of narrative authority they cede to the victim—subject to the oversight of the judge and the objections of opposing counsel, yet released from the regulative authority of questioning attorneys that govern the majority of the proceedings. *Payne* held that victim impact evidence may not be so "unduly prejudicial that it renders the trial fundamentally unfair" under the Fourteenth Amendment,[63] but few states impose formal procedural limitations on victim impact statements. In Oklahoma, Georgia, and Tennessee the prosecution must notify the defendant of its intent to introduce impact evidence and the court must hold an in-camera hearing to determine its admissibility.[64] (In Oklahoma, "the trial court may wish to consider whether a question-and-answer format may be a preferable method of controlling the way relevant victim impact evidence is presented to a jury."[65]) Similarly, Maryland requires that all victim impact evidence be incorporated in a presentencing report to be considered by the judge or jury.[66] New Jersey requires that defendants be notified of the prosecution's intention to use impact evidence and allows testimony from only one family member, on the basis of a written statement that is reviewed in advance by the court for prejudicial content.[67] In most jurisdictions, however, the prosecution can present victim impact information in any way it chooses, which generally allows victims to deliver free-form narratives, or submit them by writing to the court.[68] The narrative freedom of the victim impact statement has, as we will see, implications for the manner in which suffering is articulated in these statements, and also for the subject-object relationship between the victim and defendant and between each of them and the legal system itself.

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61. Transcript of Trial Examination of Gregory Sohn, Michael Lenz, Cynthia Ashwood, Kay Ice, Melissa Webster, Peggy Broxterman, Robbie Maroney, Jeannine Gist, Clifford Cagle, Sharon McCullough, Debbie Pippin & Gary Campbell at 35–36, United States v. McVeigh, 955 F. Supp. 1281 (D. Colo. 1997) (No. 96-CR-68).

62. *Id.* at 36–37.

63. Payne v. Tennessee, 501 U.S. 808, 825 (1991).

64. *See* Livingston v. State, 444 S.E.2d 748, 752 (Ga. 1994); State v. Nesbit, 978 S.W.2d 872, 891 (Tenn. 1998); Cargle v. State, 909 P.2d 806, 828 (Okla. Crim. App. 1995).

65. *Cargle*, 909 P.2d at 828.

66. MD. CODE ANN. CORR. SERVS. § 6-112 (West 1998).

67. State v. Muhammad, 678 A.2d 164, 180 (N.J. 1996).

68. For a survey of the formats in which victim impact testimony has been allowed, see Logan, *supra* note 7, at 153–154.

B. The Narrative Structure of Pain

In this section I will briefly survey the scholarship on the relationship between suffering and narrative and its implications for testimony, emphasizing the relationship between pain, expression, and the external world, all of which bear upon the function and appropriateness of pain narratives in the public context of the criminal trial.

1. Pain and the Problem of Inarticulability

Crucial to any debate over victim impact statements is the nature of the harm rendered by a criminal act and the question of whether victim testimony is an appropriate means of conveying that harm to a fact finder deciding upon a punishment when weighed against competing concerns regarding prejudice to the defendant. Before we can consider the impact of the victim's voice on the institutional structure in which she speaks and the defendant upon whom that structure operates, we must determine its relationship to the victim's actual suffering. This presents a threshold analytical dilemma. Like all texts, a victim impact statement is necessarily removed from the objects it describes. In the context of criminal violence this problem may be exacerbated by the very internal, isolating nature of pain that, as Dr. Johnson tells us,[69] and as contemporary cultural theorists have often noted, complicates its verbal expression.[70] If the victim impact

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69. *See* Samuel Johnson, *The Rambler*, *in* 1 SELECT ESSAYS OF DR. JOHNSON 69 (George Birkbeck Hill ed., 1889) ("[T]hose who do not feel pain, seldom think that it is felt.").

70. A threshold question in theorizing the verbal expression of pain is, of course, whether one means "pain" as the experience of physical or emotional trauma. In *The Body in Pain*, Elaine Scarry explicitly separates the two, emphasizing the uniqueness of "physical" pain in its lack of association with an external object. *See* SCARRY, *supra* note 54, at 165. Unlike, for example, the more quintessentially "emotional" capacity to feel sadness *about* something or fear *of* something external, Scarry argues for the uniquely internal property of physical pain, and that "the more a habitual form of perception is experienced as itself rather than its external object, the closer it lies to pain." *Id.* This distinction between physical and mental suffering has been criticized in the psychological literature. Indeed, the history of conceptualizing pain has a close parallel in the history of thinking about emotion more broadly. In the materialist model associated with Descartes, emotions are sensations caused by objects, or, for Hume, "impressions" made by the outside world. RENÉ DESCARTES, THE PASSIONS OF THE SOUL 7–8 (Jonathan Bennett ed., 2010), *available at* http://www.earlymoderntexts.com/pdf/descpass.pdf; DAVID HUME, 1 A TREATISE OF HUMAN NATURE 316–17 (T.H. Green & T.H. Grose eds., 1898). By contrast, in a "cognitive" model inaugurated by Aristotle, emotions flow from mental attitudes or judgments. *See generally* ARISTOTLE, THE ART OF RHETORIC (Hugh Lawson-Tancred ed., 1991). Recent scholarship by neurologist Antonio Damasio and others suggests that rationality is in fact guided by emotional input. *See, e.g.*, ANTONIO R. DAMASIO, DESCARTES' ERROR: EMOTION, REASON, AND THE HUMAN BRAIN (1994). In *The Culture of Pain*, David Morris traces a similar dichotomy in historical understandings of what we normally term "physical" pain. He argues that nineteenth-century science, and in particular the work of Bell, Magendie, Muller, Weber, Von Frey, and Shiff, developed a purely mechanistic view of pain as "no more than an electrical impulse speeding along the nerves." DAVID B. MORRIS, THE CULTURE OF PAIN 4

statement is a flawed means of expressing the harm we seek to punish, it becomes all the more vulnerable to criticisms that it serves only to convey legally irrelevant information and prejudicial feelings of anger and disgust toward the defendant.

In one of the first major works on the nature of physical pain, Elaine Scarry identifies what she deems to be its essential inexpressibility. She argues that it is destructive of language and, thus, articulation: "[W]hen one hears about another person's physical pain, the events happening within the interior of that person's body may seem to have the remote character of some deep subterranean fact, belonging to an invisible geography that . . . has no reality."[71] Her discussion on torture suggests how such language destruction plays out in the context of criminal violence: for the victim of torture the fact of his agony will render the questions he is asked or the world to which they refer insignificant; the nonverbal screams of physical suffering are only one symptom of the undoing of articulate meaning in the face of pain. Like the tortured prisoner, the victim of criminal violence—at the moment of its infliction—is related to her assailant through an economy of pain and meaning: "the absence of pain is a presence of world; the presence of pain is the absence of world" and "[a]cross this set of inversions pain becomes power."[72] In other words, the author of a violent crime derives his power from the ability to collapse a victim's reality into the single fact of his agency. A victim impact statement may be read as an attempt at world re-creation. Frequently described as "empowering,"[73] the victim impact statement can be understood structurally as, at one level, a reversal of this agent-object relationship. In imposing verbal meaning on the set of events that has turned the assailant into the object—as the defendant in

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(1991). Morris himself urges that biochemistry is "inextricably bound up with the personal and cultural meanings that we carve out of pain," citing the work of contemporary pain clinics in identifying psychogenic pain and a variety of other cultural sources as evidence against a purely bodily conception of pain. *Id.* at 5.

In considering the various types of suffering that can be narrated in a victim impact statement—from the wounds to flesh rendered by an explosion to the emotional wounds inflicted on the parent of someone killed in the same blast—it is important to remember that the slippery relationship between mind and body that has complicated understanding of both pain and emotion over time necessarily orients the two in relation to one another. The experience of pain to the body is shaped by the emotions that accompany it and the social conditions that help produce them, and physical pain generates emotions of its own. While Scarry is certainly correct that instances of extreme physical suffering can approach the obliteration of externality—can create a world for the sufferer in which the only emotion *is* bodily pain—for the purposes of discussing victim narratives in the social context of a trial—necessarily separated by time from the immediate sensations of even the most consuming physical pain—it is not helpful to speak of "physical" and "emotional" as distinct categories. Both categories may be subsumed into the broader category of "suffering," or even the clinical category of "trauma," which, in the context of criminal punishment, must then be measured as harm done to the victim for the purposes of determining and punishing the defendant's fault.

71. SCARRY, *supra* note 54, at 3; *see also* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1603 (1986) (agreeing with Scarry's destructive rendition of pain and noting that "[w]henever the normative world of a community survives fear, pain, and death in their more extreme forms, that very survival is understood to be literally miraculous").

72. SCARRY, *supra* note 54, at 37.

73. *See, e.g.*, Erez, *supra* note 2.

a criminal trial with its inherent threats to his own bodily agency—the victim's narrated "presence of world" acts to collapse her assailant's. It must do so, however, through a temporal removal and through the structures of the legal system, with their inherent limits on agency.

These removals contribute to Scarry's problem of inarticulability. She describes a tort case involving pain and suffering, for an example, as a situation requiring that the "impediments to expressing pain be overcome," and that "built into the very structure of the case is a dispute about the correspondence between language and material reality: the accuracy of the descriptions of suffering given by the plaintiff's lawyer may be contested."[74] The same linguistic problems apply in the criminal case, as illustrated by various victim witnesses during the *Safarini* sentencing.

One witness, recalling her earlier testimony during the defendant's prior trial in Karachi, says, "when I started testifying, they started glaring at me to such an extent the judge had to stop the proceeding and ask them to stop because I was stuttering so much I could barely speak."[75] Her language, in that case, had remained inaccessible, still in the power of the defendant and—in a different manner—of the court.

Later, flight attendant Madhvi Bahaguna urges the judge to "pause and acknowledge [the] spirits that I hear," noting, "the photographs of each and every one of them we saw this morning, they all spoke to us. And I'm hoping and wishing they spoke to you to convey in their own words other than the sorrow felt by each and every one of us for their loss."[76] Bahaguna—particularly in her recourse to the visual props of the photographs to access "spoken" suffering—expresses the insufficiency of third-party sorrow *for* another being to articulate the actual experience of physical annihilation and loss of self.

Yet witness Michael Thexton explains the difficulties of explaining the experience of individual "terror" against an external socially shared signifier:

> The word "terrorism" is used so much to describe a global news issue that I think people forget what it means individually and in detail. To me, I was deprived of the capacity for rational thought. I was convinced that there was a man with a gun right behind me watching my every move.[77]

For him, the threat of violence was as world destroying as the material absorption of violence Scarry theorizes. The external context of "terrorism" had no meaning and could not be incorporated rationally into his experience. What mattered was the local externality of the gun, and its totality of meaning for a prisoner. It is this individual state of mind that he struggles to convey against a background social context to which he himself has returned. The same passenger refers to the difficulty in expressing the pain of being forced to hold one's hands in the air for

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74. SCARRY, *supra* note 54, at 10.

75. Transcript of a Sentencing, May 12, 2004 at 45, United States v. Safarini, 257 F. Supp. 2d 191 (D.D.C. 2003) (No. CR-91-504) [hereinafter *Safarini*, Official Trial Transcript May 12].

76. *Id.* at 80–81.

77. *Id.* at 107.

hours on end to listeners after the fact whom he perceived as "disappointed" when he explained that he hadn't been beaten.[78] Another witness, members of whose family had been on the plane but who had not been herself, notes that the attack was "not something we spoke of normally"[79] and her mother testifies to the fact that the inherent nonsharable nature of what happened put a gap between the members of the family who had suffered it and those who had not.[80] And yet another witness opens his statement by thanking the prosecutors, the court, and the FBI because he feared he "may not have the courage to thank you after I finish my statement."[81] His fear suggests dual benevolent and intimidating connotations for the system that regulates and stages his speech.

Critics of victim impact statements perhaps refer in part to such linguistic limitations in arguing that victim statements may not in fact be "true to the victim's experience," failing to allow us "to know the victim in his or her particularity" but drawing instead on "stock 'victim' imagery."[82] Additional examples from the *Safarini* sentencing, however, demonstrate how a victim may overcome difficulties of expression to access pain and deliver a highly specific account of harm through idiosyncratic temporal organization of her narrative. Indeed, the space for free-flowing narrative control afforded by the victim statement may in fact provide the only means for certain types of harm to be conveyed in the trial setting.

One victim, a child of fourteen at the time of the incident, moves through the events of the experience in chronological order, starting with her hyperventilation when the hijackers stormed the plane, remembering the man sitting next to her mother urging them not to show their fear, and noting she commenced a fifteen-year period of emotional numbness from then on.[83] Yet at the moment in her narrative at which the hijackers' gunfire should have begun, the witness does not discuss it explicitly, but focuses her entire attention on the loss of a set of rings the mother and the witness made for her sister.[84] Instead of the violence, she traces the history of these objects forward in time—how she felt awful for losing them, how she gave her sister a set of rings that had been made for herself, lying to her "as if they were hers in the first place," and finally, how in 2000, she told her sister the truth and her sister returned the rings to her.[85] It is only later in her statement, during a free associative sequence, in which she reflects on her life since the event, that we get actual testimony of her sensory experience of the violence of the attack:

> I watched The Fisher King in the movie theatre. There was one scene where the character, played by Robin Williams, is having lunch in a restaurant with his wife. They are sitting at a table near a window when

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78. *Id.* at 106.

79. Transcript of a Sentencing, May 13, 2004 at 14, United States v. Safarini, 257 F. Supp. 292 (D.D.C. 2003) (No. CR-92-504) [hereinafter *Safarini*, Official Trial Transcript May 13].

80. *Id.*

81. *Id.* at 15.

82. Bandes, *supra* note 3, at 405–06; *see also* Minow, *supra* note 9, at 1432.

83. *Safarini*, Official Trial Transcript May 12, *supra* note 75, at 98–99.

84. *See id.* at 100.

85. *Id.*

> someone opens fire into the restaurant and shoots her head. Her flesh is spewed on Robin Williams' face and glasses. It was at that very moment I realized what had been on my seat when I put my hand down to get up off the floor after the gunfire that stopped. It was the flesh and blood of someone on the plane. It took five years before that connection was made for me and I was absolutely horrified and visibly upset.[86]

With the victim allowed to approach the traumatic experience through a temporal organization of her own devising, the fact finder now has access to a deeper version of truth about the event, in this case a tactile response to the physical carnage around her, which had otherwise been narratively supplanted by a story about losing her sister's rings.[87]

Likewise, one of the surviving flight attendants starts her narrative by speaking of the aftereffects of the attack—how it "took years to sleep without nightmares," her difficulty in trusting others, and the difficulty of finding the courage to have a baby.[88] Her narrative leaps back and forth in time, from her decision to have a baby, to her youthfulness and that of her fellow flight attendants before the hijacking, to the scene of the terrorists' first trial in Karachi, to the immediate present in which she cannot watch movies with violence or handle her children holding her around the neck.[89] Only through this disordered temporality does she finally relate her first deeply sensory memory of the attack itself, this time an aural one: "I'll never, ever forget the noise of 400 passengers howling. They were howling and they were crying, 'Oh God, oh God, oh God.' And they were howling. They sounded like animals. All of us did. We were so scared."[90] She then remains in the scene of the hijacking to discuss the deaths of certain specific hostages before abruptly leaping ahead again to a specific unrealized future scene, about the planned birthday party of one of the murdered flight attendants: "Neerja had the rest of her life ahead of her. We were all going. We had all carried food and snacks and alcohol to have a party in Frankfurt to celebrate her birthday. . . . She never got to have children."[91]

Not only does the victim's nonchronological organization allow her to translate the aural experience of the attack for the sentencing authority, but it also lets her convey the damage of the crime on simultaneous temporal lines. We can experience the unexperienced birthday party for Neerja simultaneous to the reality of her death without children, again simultaneous to the victim's own tortuous path toward motherhood. This complex interconnection of immediate experience with altered histories reflects the reality of the complexity of the violence itself.

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86. *Id.* at 102–03.

87. The tendency toward narrative disorder in victim statements may actually have quantitative implications that could weaken concerns that the harm they convey is arbitrary or unrelated to the actual harm of the offense. In the field of psychology, attachment theory measures the coherence of narratives given by adult subjects during interviews to measure emotional disorder. *See* ADULT ATTACHMENT: THEORY, RESEARCH, AND CLINICAL IMPLICATIONS (W. Steven Rholes & Jeffry A. Simpson eds., 2006).

88. *Safarini*, Official Trial Transcript May 12, *supra* note 75, at 44–45.

89. *Id.* at 45–46.

90. *Id.* at 46.

91. *Id.* at 48.

Witness Prabhat Krishnaswamy's short chronology of the remaining unlived life of his dead father follows a more orderly trajectory to similar effect:

> What might have been would include a father's pride at the commencement ceremonies at two doctoral degrees awarded to his children. What might have been is his majestic presence as his children got married. What might have been is the simple and sublime joy on his face at the sight of his beautiful grandchildren, none of whom he ever saw. What might have been is the sweetness of companionship for my mother in her advancing years. What might have been is an opportunity to perpetuate the values and culture he so dearly held to another generation in the family.[92]

It is important to note, however, that this list of counterfactuals contains an embedded factual history of the victim's family, one of upper-middle-class professional and domestic accomplishment, which is suggested to have unfolded as described in the absence of the patriarch. This sort of narrative, with its suffering linked to claims of prestige and breeding, is a type of the "privileged" accounts of which Bandes and other critics of victim impact statements are suspicious. Yet to the extent that professional accomplishment and traditional values in their own right elicit irrelevant sympathy on the part of the fact finder, they form the particularized surface disrupted by the defendant's harm. This pain—especially as felt over time and increasingly removed from its initial absorption—is inextricable from the social and cultural context of this family, which clearly prides education and the stewardship of a father as a repository of culture.

The temporal control ceded to the victim in the context of his statement can, however, expand even into the past to organize storytelling around facts that preceded the defendant's acts entirely. Witness Tushar Nagar, whose sister Trupti had died in the attack, notes that his own story is "parallel to her son's," introducing details about the death of their mother when he was ten years old and the remarriage of their father to "a typical stepmother, who, in the typical sense, was and is not a very nice person," noting that Trupti, "being the younger one than me, and the girl, had suffered a lot through her hands."[93] By fitting his sister's story into a kind of Cinderella narrative—the deserved happy ending usurped by a return to the maternal loss at the beginning—the witness is able to marshal pre-existing cultural narratives into the service of his own personal story of loss. This use of time frames, however, clearly expands the testimony beyond the limits of the harm attributable to Safarini. (He reinforces the narrative impact of the subverted fairy tale when he later mentions the fact that he had also missed Trupti's wedding in 1973 because he was a student at the time and could not afford the trip; again he creates a parallel between pre-incident and post-incident hurt—he missed the happy ending of a wedding back in 1973 and likewise missed his sister on the tragic 1986 trip, when he would have seen her for the first time in five years.[94]) The harms are

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92. *Id.* at 53.
93. *Id.* at 64.
94. *Id.* at 65.

clearly distinct—and only one attributable to the attack—yet they reinforce each other and doubtless shape Nagar's own understanding of his suffering.

While these examples show how the challenges to articulating harm may be circumvented through narrative freedom, to the extent that they remain one might ask whether the problem of inarticulability should dull the concerns of the statements' opponents that they will result in excessively high sentences. But perhaps these concerns could be restated. If the "harm-as-expressed" in an emotional victim statement is in fact distinct from "harm-as-experienced," does that illegitimate it as a factor in punishment? Does expressed harm, in other words, convey only animus toward the defendant, or positive yet irrelevant qualities about the victim in the moment of testimony, instead of the actual harm experienced by the victim at the defendant's hands? To answer these questions we must consider the models of narrated suffering that account for its relationship to a listener.

2. Suffering in Relation to the Social World

Critics of Scarry's emphasis on the internality of pain have focused on the nonmaterial effects of its annunciation. Veena Das describes the communicability of material pain as "an articulation of the world in which the strangeness of the world revealed by death, by its non-inhabitability, can be transformed into a world in which one can dwell again."[95] Sara Ahmed argues that the very solitariness of pain is tied up with its implication in relation to others, but pain, like other emotions, possesses an inherent sociality derived in part from its relation to external objects.[96] For Ahmed, objects—including people—are read as the cause of emotions such as pain in the very process of an individual's taking orientation towards them.[97] Yet because objects themselves circulate through society, orientations toward them are formed socially, not only internally.[98] In the context of criminal violence, the qualities of a trial that are inherently objectifying toward the defendant render the victim's pain socially shared. While recognizing that confrontation of another's pain entails a certain degree of what she terms "aboutness" (the sufferer's remaining the object of our feeling rather than a co-sufferer), she concludes that the sociality of pain carries an ethical demand that "I must act that which I cannot know, rather than act insofar as I know."[99] A listener to a pain narrative cannot simply hide on the other side of the chasm of ignorance, Scarry theorizes: instead the incomprehensibility of one's *own* potential for pain must serve as a point of access for the incomprehensibility of someone else's. In the case of violent acts against an individual, as Ahmed puts it, the body of the community has been damaged.[100] The danger, for her, becomes "the fetishisation the wound" as a commodity, securing the narrative of injury to the more privileged

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95. Veena Das, *Language and Body: Transactions in the Construction of Pain*, *in* SOCIAL SUFFERING 67, 68 (Arthur Kleinman, Veena Das & Margaret Lock eds., 1997).

96. SARA AHMED, THE CULTURAL POLITICS OF EMOTION 5–7 (2004).

97. *Id.* at 8.

98. *Id.*

99. *Id.* at 31.

100. *Id.* at 33.

members of a community.[101] In the political use of the "victim voice" to justify a particular political agenda, as observed by Simon and other critics,[102] we may see a kind of fetishization at work. But to critique this cultural practice does not justify a categorical exclusion of the true claims of an individual victim narrative to the extent that they are susceptible of translation to a jury.

Many of the victim statements during the *Safarini* sentencing demonstrate the capacity to generate material symbols to convey broader spatial and temporal effects through the experience of an individual. Krishnaswamy, for example, opened his statement about the death of his father with the fact that

> [t]here is still a small suitcase that sits in the corner of my basement just like any other that is carried on board an airplane and fits neatly under the seat. It was bright green and brand new 17 years ago when it was first used for the only time. It is rarely opened because of the flood of memories associated with it.[103]

In a single object, with its particular temporal history and physical space, a listener may simultaneously, and intuitively, apprehend a number of individual and collective truths about the violence. Most simplistically, the suitcase—riddled, as he goes on to say, with shrapnel—symbolizes the death of his father.

Yet the language he chooses expands its significance. "It fits neatly under the seat," we are told—after the testimony of numerous other victims revealed the efforts of the parents on board the plane to force their children under the seats during the assault. This space of violence and fear can now be accessed through the suitcase itself. Yet the suitcase is still in the corner of the son's basement; his father's murder and the horrors of the space under the seat now exist in the physical present. A listener can experience more directly the presence of this pain—this constantly threatening "flood of memories"—for the grown son in the present. In the suitcase's lack of use for seventeen years we may apprehend a stagnant fear of travel, which points the listener less to the individual family (who we have no reason to believe have not themselves traveled for those seventeen years) but to the shared social reality altered by the attack: a pervasive fear of air travel in the late '80s which culminated itself in Pan Am going bankrupt.[104] This power of an individually significant object to serve as an access point to so many concentric realities would be lost in the traditional questioning of a witness, in which the attorney-as-narrator would be unlikely to think the contents of the victim's basement relevant to the overall story being established.

A male victim, who was on Flight 73 with his wife, who was murdered, indicated at the outset that the couple had believed her to be pregnant. He goes on:

> After the hours in the plane, after they had tossed all their hand grenades and fired all the bullets, I saw my wife's beautiful tranquil

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101. *Id*.

102. SIMON, *supra* note 8, at 105–106.

103. *Safarini*, Official Trial Transcript May 12, *supra* note 75, at 49–50.

104. Dan Reed, *Pan Am About to Make Its Final Exit: It's Taken 15 Years to Tie Up Defunct Airline's Loose Ends*, USA TODAY, Oct. 31, 2006, at 1B.

> face. I tried to wake her up. She looked as if she was asleep. I pulled her towards me, only to recoil in horror. She was missing the entire right side of her body from the neck up. I saw a gaping hole, a skull. Each and every day I wake up to that horrendous site [sic] of my wife's skull etched into my memory. Like that picture, a serene face on one half and the scarred skeleton on the other, my life is divided.[105]

In this one image, the victim has conflated the conjugal space of the bedroom—in which his wife had become pregnant and in which she now seemed merely to be sleeping—with the space of carnage on the plane, in which his wife has become an object of terror—a mere "skull" or "skeleton." This simultaneity of past and present in one object, like that effected by the green suitcase in the basement, allows a listener to experience the distorting effects of violence along its entire temporal axis. The tendency of a traumatic event like a wife's murder to escape articulation seems reflected by the victim's dichotomy between "serene face" and "scarred skeleton," but in this case the simultaneous narrative experience of his wife alive and dead provides a more thorough account of the defendant's actions against the past, present, and future of these individuals. These examples demonstrate how the free format of a victim impact statement and the space it allows for idiosyncratic use of external symbol overcome the internal constraints of expressing suffering. Many of these narratives seem to reach for the external objects that Scarry argues pain seeks to assist in signification, yet they do so in a manner that is temporally complex, using the visual surface of these objects as a point of access for the listener and overlaying them with multiple iterations of harm experienced over time.

It is clear, however, that even the sometimes-idiosyncratic objects selected by particular victims to accomplish this import other valences of cultural meaning. Ahmed's argument about the relationship between emotion and objects is helpful in considering the effects of these narratives in the fact-finding context. She argues that feelings—even presumptively shared feelings (here, for example, a courtroom horrified at evidence of a bloody crime) are always in tension, as no two parties share the same relationship to the feeling. (The contrast between the positions of judge and victim, in this case, could not make this clearer.) Emotion circulates, then, through the objects of emotion, which become "sticky, or saturated with affect, as sites of personal and social tension."[106] Attachment, Ahmed argues, takes place through being moved by the proximity of others, sometimes by fixing others as having certain characteristics.

Indeed, many of Safarini's victims focused on the varying degrees of their material "woundedness," conceived of differently by all of them but establishing them collectively as sites of emotion over the wounding of society in general.[107]

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105. *Safarini*, Official Trial Transcript May 12, *supra* note 75, at 73.

106. AHMED, *supra* note 96, at 11.

107. The purely material body of the victim is, of course, center stage in a criminal proceeding, and several of the statements express rhetorical resistance to this embodiment. Anesh Bhanot, brother of murdered flight attendant Neerja Bhanot, states that Safarini "killed Neerja's body, but he may not be so happy to know that her spirit is still alive." *Safarini*, Official Trial Transcript May 12, *supra* note 75, at 62–63. Witness Michael

But their wounds were not the only objects recurred to throughout the testimony; most strikingly, the example of the green suitcase had the potential to translate numerous levels of individual and collective harm to listeners whose own approach to it was filtered by the events of September 11, 2001. Whether this could be read as an unfair importation of irrelevant information into the process or merely an effective means of overcoming the internality of pain through recourse to socially circulating emotion is open for debate.

In his cultural history of pain, David Morris, like Ahmed, recognizes that pain is deeply social, "constructed or shaped by the culture from which we now feel excluded or cut off."[108] He uses the Tolstoy story *The Death of Ivan Ilych*—involving the inexplicable and agonizing illness and death of a middle class bureaucrat who, at the end, embraces death as a form of spiritual awakening—to demonstrate how "pain inescapably absorbs the scent and feel of its social life."[109] In Morris' reading, Ilych's physical agony reflected his struggle to retain a belief in the value of his "secular, self-centered, commonplace, bourgeois existence," which was finally sublimated into a spiritual tranquility contingent upon the nineteenth-century utopian Christian social viewpoint from which Tolstoy was writing.[110] Morris traces the idea of pain as an experience in search of meaning throughout history. From the ecstasies of the Catholic martyrs, to the Enlightenment materialism of the Marquis de Sade, to the reports of Holocaust victims who attributed their survival to successful attempts to find meaning in their suffering, pain is shaped—and alleviated—through engagement with external context. In the case of a criminal trial, the external context implicates the legal system as a more or

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Thexton, who was for some period of time held at the front of the plane as the intended second passenger to be executed testifies that Safarini threatened the officials on the ground that "If anyone comes near the plane . . . we will kill one body immediately" and notes "[o]ne body, that's what I was." *Id.* at 110. Nine of the twenty two victims use explicit variations on the theme of emotional suffering expressed in the language of material injury, some linking this injury to the injury of society at large. For example, Anesh Bhanot describes Safarini as "a person who with a scar on the face of mankind is now facing just retribution." *Id.* at 63. Antusa Dasgupta says her entire family was "scarred for life" after living through the attack. *Id.* at 134. Farhat Hussain, who suffered from lifelong chronic back pain as a result of the attack, recurs to the falseness of the mind/body duality noted in much of the literature on pain in describing her difficulties in getting others to understand the nature of her suffering:

> This is the human nature to understand only the physical disabilities and feel compassionate towards you or be helpful to you. But we have scars on our hearts and minds and our brains. They are engraved. Each and every word in our statements and the words that we heard from yesterday morning are engraved in our brains and they will never be taken out.

Safarini, Official Trial Transcript May 13, at 36–37. Yet Dasgupta's account indicates a role for testimonial expression that differs from both the Scarry model of inarticuability and the social models of Ahmed and others. For Dasgupta, the words themselves—far from failing in their capacities as signifiers—*are* the pain; the experience as transfigured into words has placed scars directly onto the body, yet on the inside, where they can only be felt, rather than expressed.

108. MORRIS, *supra* note 70, at 38.

109. *Id.*

110. *Id*.

less successful vehicle of justice and the very economies of world destruction identified by Scarry in her internal model.

Writing in the context of personal injury litigation and utilizing semiotic analysis, Jody Madeira has developed a model for pain as a dual construct in which "pain expressed" serves as a signifier for the signified of "pain embodied."[111] She explains the implications of this formulation with recourse to the work of Charles Peirce, who theorized the system formed by signifier and signified as a sign standing in relation to an "interpretant," or the (distinct) sign created in the mind of a second party.[112] She isolates three relationships between sign and interpretant that get to the heart of the interpersonal dynamics of pain testimony in law:

> An interpretant can be emotional, "a feeling," as in the thrill of an empathic connection that we form with a sufferer; it can be energetic, involving effort, as in attempts to comprehend the significance of an expression of pain; or it can be logical in the sense of invoking future implications, as in gauging how the long-term consequences of an injury may affect an award of damages.[113]

The various trajectories along which pain as a sign-system interacts with external auditors demonstrate the interpersonal capabilities of pain and the social potential of enunciation. As Madeira notes in the personal injury context, "[e]xpressions of pain attain the height of desirability in a legal sense when the meaning of the pain whose tale they tell is particularly upsetting—that is, when it is most culturally undesirable."[114] Yet, as do all sign systems, this model involves construction of the underlying signified; the process of communication necessarily shapes that which is communicated.

Madeira describes a two-part process of construction, in which the existence of pain embodied (that which is experienced in Scarry's dark chasm during the harmful incident) must be established through pain expressed (the testimony of the plaintiff) and then to be accessed/empathized with by a listening juror. Because the

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111. Jody Lynee Madeira, *Recognizing Odysseus' Scar: Reconceptualizing Pain and Its Empathic Role in Civil Adjudication*, 34 FLA. ST. U. L. REV. 41 (2006). Semiotic theory studies how ideas are represented and transmitted socially, and takes as its basic premise that a "sign," as a unit of meaning, consists of "everything that, on the grounds of a previously established social convention, can be taken as something standing for something else." UMBERTO ECO, A THEORY OF SEMIOTICS 16 (1976) (emphasis omitted). In this system a "sign" is the relationship of a "signifier" sitting over a "signified." The signifier is visible or otherwise ascertainably present (a picture of a tree, for example), and the signified is absent but invoked by reference (an actual tree). *See generally* ROLAND BARTHES, ELEMENTS OF SEMIOLOGY (Annette Lavers & Colin Smith trans., 1967).

112. Madeira also applies the work of Ludwig Wittgenstein on the public meaning of "private" sensations such as pain, once expressed. Madeira, *supra* note 111, at 64–67. She concludes that "each instantiation of pain is public: pain embodied in that it is understood and made meaningfully in public and not private space, and pain expressed in that it is a manifestly public acknowledgement of a sensation predetermined to be publicly meaningful." *Id.* at 70.

113. *Id.* at 61–62 (citations omitted).

114. *Id.* at 73.

purpose of a criminal trial is to vindicate society for a criminal wrong inflicted through the specific occasion of harm to an individual, Madeira's account of how the tort system captures suffering for the purposes of compensating a victim is equally relevant to our consideration of the criminal context. (I will discuss the precise relationship between individual harm and the societal experience of criminal harm at greater length in Part III.) For Madeira, "[t]he focus on the plaintiff's body now widens to encompass not only a body in pain but a person, including not only the interpretation of the physical symptoms of pain but also its causation and consequences."[115] Therefore, "pain expressed is again tied back to the suffering body that it afflicts so that it may be 'cured' through compensation."[116] Amongst the requisite attributes of narrated pain that Madeira deems likely to achieve this return include: 1) the enunciation of a "sentimentalized body" that a juror will desire to "cure," 2) the moral authority of the expressed pain (derived from the perceived truthfulness of the representation relative to the actual suffering), and 3) the trajectory of its interpretive consequences in terms of the legal precedents created through a particular verdict.[117] Madeira concludes with the claim that "the least we can do for the sufferer is to see her pain not as an unascertainable condition locked away from our understanding in her physical body but as a condition that we can publicly recognize, probe, and perhaps cure."[118] Madeira's use of the medical language of "probing" and "curing," however, points to a pervasive dynamic running throughout the legal system, particularly relevant in the criminal context, which any model for understanding the transmission of harm in a victim statement must incorporate: the victim's relationship to the institutional authority of the system that facilitates her "voice."

The examples from the *Safarini* sentencing collected in note 105 demonstrate how one attribute of successfully narrated pain which Madeira identifies in the personal injury context is at work in the criminal. The constant recurrence to the language of physical injury to self—even when expressed to convey "emotional" suffering—repeatedly brought the focus of the proceedings back to the site of the victim's body. Unlike a tort context in which the potential "cure" the listener may grant is simply a payout for the plaintiff, however, here the potential cures sought by the various witnesses varied dramatically, from the legally impossible sentence of death,[119] to solitary confinement,[120] to more benign prison conditions, as Gargi Dave and Michael Thexton urge.[121] Indeed, the sheer diversity of sentences

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115. *Id.* at 74.

116. *Id.*

117. *Id.* at 79.

118. *Id.* at 96.

119. *See, e.g.*, Testimony of Prabhat Krishnaswamy, *Safarini*, Official Trial Transcript May 12, *supra* note 75, at 55–56 ("What would the victims like to do about it? The victims would like to charge the defendant, tear him into pieces, one limb at a time, and feed his remains as a feast for hyenas and vultures. But in spite of that pain and anger, the victims do subscribe to the dignity of law . . . . He deserves three forms of death penalty, not three consecutive life sentences.").

120. Testimony of Tushar Nagar, *id.* at 70 ("I would request you to at least recommend, you know . . . [t]hat he would never see daylight again.").

121. Testimony of Gargi Dave, *id.* at 90 ("I'm not saying that I don't want a hard

proposed by victims for even a crime as dramatic as this act of terrorism undercuts the assumptions made by critics of victim impact statements that "question[s] whether there is room for complex, compassionate, and politically liberal narratives . . . in the *Payne* lexicon."[122]

Even Dave, however, links her request for mercy to the image of her own, now-healthy body; through the "healing" she describes she has metamorphosed from the broken child body in a coma to a new whole body.[123] Yet in many other of these statements we have seen how the victim's ability to control the temporal organization of her narrative allows her to transcend the symbolism of her own material body and articulate the unique experience of intangible suffering over time, to articulate what Madeira would call the "causation and consequences" of the material harm suffered.

C. The Victim in Her Object-Relationship to the Court

The state, by way of its legal procedures, sits over the embodied victim, exerting agency and objectifying her through scrutiny and analysis as the defendant objectified her materially. In her concurrence in *Payne*, Justice O'Connor unintentionally reveals this dynamic, declaring that "[murder] transforms a living person with hopes, dreams and fears into a corpse, thereby taking away all that is special and unique about the person" and that "[t]he Constitution does not preclude a State from deciding to give some of that back."[124] In O'Connor's rendition, the victim—now a corpse by the defendant's hand—may be reanimated if the state "decides" she may; this reanimation may only occur in the form of testimony in a forum the state may choose to "give." It is not only the defendant that becomes, in Ahmed's formulation, an object-moving-in society for the purposes of translating pain, but the victim, whose suffering has a communicative purpose in the judicial system outside of her own intention. The "interpretive consequences" Madeira identifies as the third factor in well-narrated pain are even more important in the criminal context: a criminal jury does not consider harm to a victim in isolation for the purposes of remunerating her, but as a particular case of a general harm to

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punishment, but I don't believe in people treating people inhumanely. I don't. I don't know what solitary confinement is like, but I can imagine. And no matter how vile a person is, I just don't believe in treating people inhumanely."); Testimony of Michael Thexton, *id.* at 116–19 ("I suppose I forgave him on that day and cannot now unforgive him for myself . . . . I know that this Court will bring justice for everyone and I don't think justice has any business forgiving him . . . . Just for myself and one or two other people I'm glad that this is not about the death penalty. . . . [D]on't put him necessarily in solitary confinement, but . . . get a tape made of some of the statements that we've heard today and . . . play some of those to him every day . . . [a]nd if, when he does feel some remorse, he could go out and try and tell somebody else who might otherwise hijack a plane . . . what a senseless, useless, evil waste it is.").

122. Bandes, *supra* note 3, at 406.

123. Testimony of Gargi Dave, *Safarini*, Official Trial Transcript May 12, *supra* note 75, at 81–82 ("Even though it is hard to relive and to reexperience and to talk, I think it's healing."); *id.* at 88 ("I managed to get into law school despite the problems I had. And, you know, I plan to become an attorney. And I'm not going to let this dominate who I am. . . . But it's made me, in some ways, I hope, a better human being.").

124. Payne v. Tennessee, 501 U.S. 808, 832 (1991).

society inflicted by criminality. If the court can speak of the victim as an object to be reanimated, it is because she—aside from the claims of her individual identity—serves a functional purpose in the overall cultural project of criminal punishment, with its broader goals.

This systemic objectifying tendency has been documented in a number of varied contexts. In a 1999 analysis of interviews with judges, prosecutors, and defense attorneys responsible for implementing the victim impact statement program in South Australia, Edna Erez and Kathy Laster concluded that these actors "routinely objectify and thereby minimize the victim's injuries and impose an implicit 'reasonable victim' test to assess [victim impact statements]."[125] Essayist and Holocaust survivor Jean Améry resisted the work of truth commissions and their "lofty ethical flights" precisely because he believed their institutional aspirations towards narrating historical truth subsumed and utilized his individual need as a victim, saying:

> It is impossible for me to accept a parallelism that would have my path run beside that of the fellows who flogged me with a horsewhip. I do not want to become the accomplice of my torturers, rather I demand that they negate themselves and in the negation coordinate with me.[126]

And, as Stacy Caplow notes, the special section of the Model Rules of Professional Conduct dealing with the duties of prosecutors mention nothing about prosecutors' duties toward victims or witnesses of any kind,[127] which she claims "perpetuate[s] the traditional form of decision making in which the prosecutor assumes many noble roles: gatekeeper protecting the defendant from false accusation or unprovable charges; conservator of the law and the criminal justice system; representative of the community; and defender of justice," while undertaking to act as a "benevolent guardian" for the victim, to whom he has no legal responsibility for the decisions he makes in that capacity.[128] It is the appropriateness of the legal system's structuring of a victim's participation in the process at the heart of recent controversies surrounding prohibitions against victims using the word "rape" to describe their experience in rape prosecutions.[129]

In making these observations, I do not intend to suggest that the inherent objectification of victim witnesses implicit in the institutional criminal justice context is in some way blameworthy or unnecessary to the goals these institutions

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125. Edna Erez & Kathy Laster, *Neutralizing Victim Reform: Legal Professionals' Perspectives on Victims and Impact Statements*, 45 CRIME & DELINQ. 530, 530 (1999).

126. Jean Améry, *Jenseits von Schuld und Sühne*, *in* 2 JEAN AMÉRY: WERKE 128 (Irene Heidelberger-Leonard ed., 2002), translated and discussed in Panu Minkkinen, Ressentiment *as Suffering: On Transitional Justice and the Impossibility of Forgiveness*, 19 LAW & LITERATURE 513, 524 (2007).

127. MODEL RULES OF PROF'L CONDUCT R. 3.8 (amended 1996).

128. Stacy Caplow, *What if There Is No Client? Prosecutors as "Counselors" of Crime Victims*, 5 CLINICAL L. REV. 1, 20 (1998). Caplow also discusses the extent to which victims are objectified as "types" in a manner that affects a prosecutor's pursuit of a certain severity of charge. *Id.* at 25.

129. *See* Randah Atassi, Comment, *Silencing Tory Bowen: The Legal Implications of Word Bans in Rape Trials*, 43 J. MARSHALL L. REV. 215 (2009).

are designed to serve. I merely note its existence for the purposes of understanding the responses to institutional objectification potentially enfolded into such narratives and the dual harms—individual and systemic—received by the institutional listener of victim testimony.

For example, returning to the *Safarini* trial, Krishnaswamy's testimony—which he describes as reliving a nightmare which he had previously been unwilling to do—also points to a critical feature of the structure of the violence and the system in place to address it: the concentric objectifications and embodiments occasioned first by Safarini and second by the act of testimony in a legal proceeding: "We have amidst us," he notes, "the 21 bodies that he slaughtered and over 100 were wounded. Amongst the dead is my father."[130] Speaking to the court in this setting he reduces his own father to a body rendered physically present by the need to discuss the crime. "[T]hose bodies," he continues, "now beg the two questions of us: Why was my life so uselessly terminated or destroyed, and what are you and the system going to do about it?"[131] While opposing the defendant and the court as the author of the harm and its possible remedy, it sets the victims into simultaneous object-relationships with each of them.

Indeed, quite a few of the witnesses hint at the re-objectification entailed by the fact of giving testimony. Sherene Pavan echoes this theme, noting "[w]hen Judge Emmet Sullivan recently asked us to hand in victim impact statements, I wondered why he wanted to put everyone through that harrowing experience of reliving that day in public again. . . . [W]hy did he not let the matter rest without having us all go through this," and describes her participation as an attempt to honor the other victims.[132] By contrast, Gargi Dave, who was in law school herself at the time of the trial—despite initially viewing the request to write a statement as like having the carpet pulled out from under her—describes the testimony itself as ultimately "healing" and says that "acknowledging how terrible, how intense the pain is . . . really acknowledges how human we are."[133] She also describes her act of narrating and participating in the hearing as her first-order experience of the event itself, despite having suffered physical injury at the time: "I'm experiencing the intense emotions of what it's actually like to see what I didn't experience then of people being killed . . . the agony and the screaming that was described. People howling and saying, 'oh my God.'"[134]

Though frequently divided as to the purposes served by the pain of testimony, most of the victim witnesses construct their roles in the trial as objects acted upon by these two levels of agency. One victim suggests parity between her own objectification and that of the defendant by noting that all of the media attention on the victims immediately after the attacks "made us feel like criminals."[135] Krishnaswamy expresses his distress at the unavailability of the death penalty in systemic terms: "From the viewpoint of the victim, it appears that clever lawyering prevailed over common sense. In this case the facts are irrefutable, the evidence is

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130. *Safarini*, Official Trial Transcript May 12, *supra* note 75, at 54.
131. *Id.*
132. *Id.* at 76.
133. *Id.* at 82.
134. *Id.* at 87.
135. *Id.* at 46.

uncontrovertible [sic], the suffering immeasurable. But the Court seems to have succumbed to legal maneuvering."[136] Another victim states belief that "[i]t was a quirk of the law and that really your hands were tied. I was relieved to hear that, but I still wanted to see you in action to see just exactly what kind of person you were."[137] Viraf Daroga likewise describes himself as at the mercy of the judicial system itself: "The thought that some day they may be released from prison and that they may extract revenge or vendetta from my family worries me. Can I not help feeling that?"[138] Dasgupta's husband states that "[w]riting this statement has brought all the memories back. . . . I got so emotional many times and had to stop. After more than 17 years it's very, very painful," and tells the court that he would like to talk again to the psychologist who had treated his family immediately after the attack while they were in Washington, D.C.[139] Multiple victims attributed their feelings of objectification to constant media surveillance, one describing her physical deterioration as a result of that stress, and cites her marriage to a reporter many years later as a return to autonomy.[140] And multiple victims expressed in general terms the difficulty of testifying at all.[141]

Related to the objectifying effects of wounding and testimony—and therefore central to a great number of the narratives, unsurprisingly—was the question of self-identification: to what extent the experience of the attack had produced a fundamental shift of self into the identity of victim. Gopal Dadhirao puts it in the starkest terms:

> My name is Gopal Dadhirao. My wife was Krishna Gadde and I am a victim. For 29 years, until the day of hijacking I worked hard to become a scientist, a doctor, a husband, a father. These were the titles I was working hard to. All that changed when this man changed that day with his actions and I got a new title, the title of a victim.[142]

Later he explicitly states that he is "not a doctor . . . not a father . . . not a scientist, but a victim."[143] Yet he also describes this identity as at least partially fluid, something to be resisted, if not successfully, and that "[f]or the last 18 years I have been working to get past the title 'victim.' When I wake up in the morning and I look at my feet with three of the toes missing I'm reminded that I'm a victim."[144] He also rhetorically endows the court and himself with the capacity to preserve self-identifications of future victims, expanding his narrative into the broader social

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136. *Id.* at 56.

137. *Safarini*, Official Trial Transcript May 13, *supra* note 79, at 63.

138. *Safarini*, Official Trial Transcript May 12, *supra* note 75. at 44.

139. *Safarini*, Official Trial Transcript May 13, *supra* note 79, at 52.

140. *Safarini*, Official Trial Transcript May 13, *supra* note 79, at 8; *Safarini*, Official Trial Transcript May 12, *supra* note 75, at 43, 101–104, 125, 131.

141. *Safarini*, Official Trial Transcript May 13, *supra* note 79, at 27 (describing the act of talking to the media as "something horrifying happening" with "the questions and answers and lights and flashes"); *see also id.* at 37; *Safarini*, Official Trial Transcript May 12, *supra* note 75, at 54.

142. *Safarini*, Official Trial Transcript May 12, *supra* note 75, at 72.

143. *Id.* at 74.

144. *Id.* at 72.

context, urging that while "there is nothing you or this court can do to this man that will ever make things right or normal again" for himself,

> if it could prevent a future Lockerbie, if it could prevent another World Trade Center, we owe it to that 29 year old somewhere in the world who is working hard to become a good doctor, a good scientist, to become a good father and a husband from becoming yet another victim.[145]

Similarly, Dwijal Dave describes himself as "a different person altogether" after the attacks.[146]

By contrast Madhvi Bahaguna, who was the second witness after Dadhirao, seems to explicitly challenge the negations of his testimony: "I did to continue to live on until today," she says, "And I got to become a mother of two beautiful children. I was a daughter, and I am a daughter to my parents and a sister to my brothers. I have continued from that date and I'm still a flight attendant."[147] Anu Nemivant says she has "a real distaste for the word 'victim,' so I'll call myself one of the lucky passengers."[148] (She links this distinction, however, to the fact that she "suffered no physical injury" and "unlike others, I did not lose anyone dear to me.")[149] Gargi Dave says "yes, we can call ourselves victims, but we're survivors and we're overcoming it. . . . I managed to get into law school despite the problems I had. . . . And I'm not going to let this dominate who I am. It's definitely a part of who I am. But it's made me . . . a better human being."[150]

These examples underscore the role of the court as an arbiter of events—with power to further wound or to allow healing—which came through powerfully in the numerous references to the wounding nature of testimony itself, against the backdrop of a rhetorical debate over self-identification as subject or object engaged in by many of the victims. Though witnesses may direct large amounts of hostile emotion at the defendant, they repeatedly do so against an awareness of themselves as reacting to a system of institutional authority that acts upon them along with the defendant himself. It is the collective represented by that system to which I will turn in the next section.

Before doing so it is also worth noting that critical concerns over abstract ideas like "victim talk"[151] and "undifferentiated vengeance"[152] fail to account for the sheer complexity of harm as narrated in a victim impact statement. As the previous examples demonstrate, the "victim identity" plays an important role in the impact narratives, but witnesses confront and challenge this identity in a wide range of ways. The judicial proceeding already inevitably objectifies victims in a host of ways and the impact statement stages the tension between this objectification and

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145. *Id.* at 74.
146. *Id.* at 96.
147. *Id.* at 80.
148. *Id.* at 97.
149. *Id.* at 97–98.
150. *Id.* at 88.
151. *See, e.g.*, Minow, *supra* note 9.
152. *See, e.g.*, Bandes, *supra* note 3.

resistance to it. Furthermore, the parallelism between defendant and victim as objects of the system serves as a reminder of the communal concerns it is the criminal sentencer's duty to take into account.

III. CRIMINAL LAW AS A CULTURAL PRODUCT

A. The Notion of Communal Harm

In summarizing the sea change that occurred between *Booth* and *Payne*, Kenjii Yoshino says, "[t]he *Booth* Court believes that the function of capital sentencing is to truncate the triangular relationship between the state, the defendant, and the victim so that it is a direct confrontation between the defendant and the state. The *Payne* Court, in contrast, believes that the victim cannot be excluded from that confrontation."[153] In separating the identity of the victim from the state so sharply, arguments like these neglect the constitutive role of individual citizens—including victims—in the "state" as it acts through the mechanism of the criminal justice system. In reality, the harm felt by individual bodies implicates the collective "body politic" both in a legal sense and in the sense that individual experience shapes cultural experience, in ways that in turn affect the legal system.

With regard to the first claim, the role of the criminal law as a collective expression of blameworthiness is enshrined in the Anglo-American tradition. Though the nature of what constitutes "harm" has been a centuries-old debate,[154] a basic difference between a criminal and a civil wrong is that the focus of the former is on condemnation through public sanction and the harm committed by the defendant in and of itself, not simply an allocation of costs between private parties as in civil actions.[155] Intrinsic to the nature of condemnation is a communal

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153. Yoshino, *supra* note 10, at 1883.

154. In *On Liberty*, John Stuart Mill famously offered the classical liberal formulation for the conditions under which a government may assert coercive authority over its subjects: "the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is . . . . to prevent harm to others." *On Liberty*, *in* J.S. MILL, ON LIBERTY AND OTHER WRITINGS 13 (Stefan Collini ed., 1989). Mill's formulation has been extremely influential across centuries of academic and legal debate, famously invoked, for example, by H.L.A. Hart in his debate with Patrick Devlin on the use of the laws to enforce morality. PATRICK DEVLIN, THE ENFORCEMENT OF MORALS (1965); H.L.A. HART, LAW, LIBERTY, AND MORALITY (1963). For a discussion of the impact of the harm principle on American jurisprudence, see Steven D. Smith, *Is the Harm Principle Illiberal?*, 51 AM. J. JURIS. 1, 11–14 (2006).

155. *See, e.g.*, 3 WILLIAM BLACKSTONE, COMMENTARIES at *2–3 ("[Private wrongs] are an infringement or privation of the private or civil rights belonging to individuals, con[s]idered as individuals; and are thereupon frequently termed *civil injuries:* [public wrongs] are a breach and violation of public rights and duties, which affect the whole community, considered as a community; and are di[s]tingui[s]hed by the har[sh]er appellation of *crimes* and *mi[s]deme[a]nors.*" (emphasis in original)); G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT § 220, at 252 (Allen W. Wood ed., H.B. Nisbet trans., 1991) (arguing that, while revenge vindicates a victim's subjective interest in "right," only a criminal prosecution in a court vindicates the "universal" moral interest); Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal*

understanding of what constitutes a "wrong." More specifically, as Henry Hart put it, "it is necessary to be able to say in good conscience in *each* instance in which a criminal sanction is imposed for a violation of law that the violation was blameworthy and, hence, deserving of the moral condemnation of the community."[156] According to Hart a penal code serves as a "statement of those minimum obligations of conduct which the conditions of community life impose upon every participating member if community life is to be maintained and to prosper . . . ."[157] It should be noted that the role of the community in determining the extent of punishment is crucial under both retributivist and utilitarian theories of punishment. While the utilitarian position rejects moral blameworthiness as the justification for punishment, it nonetheless takes it into account as a limiting principle.[158] Furthermore, the focus of a utilitarian system of punishment is improvement of the overall welfare of the community through a reduction in crime through means such as deterrence.[159]

When determining the character of an offense as either criminal or civil, courts turn to the democratic branch to discern legislative intent,[160] and when drafting legislation, lawmakers in turn often solicit communal input on issues of moral harm and wrongdoing.[161] In the context of capital crimes, the Court's landmark test for the appropriateness of the death penalty in a given case turns on "community values" and "evolving standards of human decency,"[162] and has stated that "capital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered

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and Moral Accountability, 39 UCLA L. REV. 1511, 1622 (1992) ("Criminal punishment can be justified as a community act of self-defense that also expresses our moral condemnation of what the criminal has done."); John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1329, 1337 (noting that the criminal sanction may "be used to address only truly public harms-harms that damage a collective, societal interest as opposed to a purely private interest that can be adequately vindicated via civil liability"); Peggy Sasso, *Criminal Responsibility in the Age of "Mind-Reading,"* 46 AM. CRIM. L. REV. 1191, 1194 (2009) ("Only when its norms have been rejected is a community justified in imposing punishment."). *But see* Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 GEO. L.J. 1, 3 (2005) (arguing that "it is no exaggeration to rank the distinction [between civil and criminal punishment] among the least well-considered and principled in American legal theory").

156. Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 412 (1958) (emphasis in original).

157. *Id.* at 413.

158. *See, e.g.*, JEREMY BENTHAM, THE RATIONALE OF PUNISHMENT (1836); HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 36 (1968).

159. *See also* Geraldine Szott Moohr, *Defining Overcriminalization Through Cost-Benefit Analysis: The Example of Criminal Copyright Laws*, 54 AM. U. L. REV. 783, 786 (2005) (formulating the utilitarian conception of criminal punishment by positing "if the conduct is a crime, the entire community should be better off by treating it as such. The community benefits by the prevention of harm that is effected by punishing and stigmatizing those who break the law").

160. *See, e.g.*, Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).

161. *See, e.g.*, MODEL PENAL CODE § 1.02(2) cmt. C (suggesting that sentencing commissions will gain a "unique credibility" if they solicit a range of opinions from the community at large).

162. Furman v. Georgia, 408 U.S. 238, 241–42 (1972) (Douglas, J., concurring).

society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs."[163] And of course the protection to a defendant provided by a jury of his peers turns on the notion of justice being best discerned by a "fair cross section of the community."[164] The Court has repeatedly recognized the link between the jury and the community it represents in setting it up as a safeguard against disproportionate punishment. In *Gregg*, it observed that "jury sentencing has been considered desirable in capital cases in order to 'maintain a link between contemporary community values and the penal system'"[165] and in *Witherspoon v. Illinois*,[166] it concluded that "a jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death."[167]

The particular content of community norms to the function of criminal law is far more than symbolically or even morally important, however. Marion Smiley argues that even the concept of an individual's causal responsibility for an action (which she theorizes as itself a product of political and social considerations) varies according to whether the victims of the action are viewed as members of the individual's community, "which is of course a relative matter."[168] Furthermore, social science has demonstrated that people obey the law less due to fear of criminal punishment than to a combination of normative social influence and internal moral rules, the latter of which can be shaped by the former as children are shaped as moral actors in part by their social worlds.[169] And empirical work has shown that intuitions about just punishment are in fact shared among common citizens at an extremely nuanced level.[170] Robinson and Kurzban argue that these intuitions generate specific determinations of deserved punishment for particularized crime, not simply floor or ceiling generalities about extremities of justice and injustice.[171] Robinson and Darley have demonstrated that, due to the

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163. Gregg v. Georgia, 428 U.S. 153, 183 (1976); s*ee also* Stephen Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 54–56 (1980) (theorizing the retributive motivation behind the death penalty as achieving not only "revenge" for the victim but a statement of society's displeasure at the defendant's actions).

164. Taylor v. Louisiana, 419 U.S. 522, 528 (1975).

165. *Gregg,* 428 U.S. at 190.

166. 391 U.S. 510, 519 (1968).

167. *Id.*

168. MARION SMILEY, MORAL RESPONSIBILITY AND THE BOUNDARIES OF COMMUNITY: POWER AND ACCOUNTABILITY FROM A PRAGMATIC POINT OF VIEW 12 (1992).

169. *See, e.g.*, Harold G. Grasmick & Robert J. Bursik, Jr., *Conscience, Significant Others, and Rational Choice: Extending the Deterrence Model*, 24 LAW & SOC'Y REV. 837, 854 (1990); Harold G. Grasmick & Donald E. Green, *Legal Punishment, Social Disapproval and Internalization as Inhibitors of Illegal Behavior*, 71 J. CRIM. L. & CRIMINOLOGY 325 (1980); Raymond Paternoster & LeeAnn Iovanni, *The Deterrent Effect of Perceived Severity: A Reexamination*, 64 SOC. FORCES 751, 769 (1986).

170. *See generally* Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829 (2007).

171. *Id.* at 1832–46. The authors note that these concepts of desert are not absolute but relative, meaning that notions of desert do not flow from an understanding of a "magical" connection between a certain act and an appropriate amount of punishment in the abstract, but from a shared understanding of "the amount needed to set the offender in his appropriate

strength of these shared intuitions about guilt, the deviation from these institutions in assigning punishment comes with great systemic risks even according to utilitarian models of punishment. These intuitions become even more effective at preventing crime when it is perceived by the community to assign liability in "just" proportion to the moral blameworthiness of the offender.[172] Marshaling a great deal of social science research, they assert that this is because "the ability of the criminal justice system to harness the power of stigmatization, to avoid subversion and vigilantism, to gain compliance in borderline cases, and to have a role in shaping societal norms is directly related to its ability to gain moral credibility from those to whom it applies."[173]

This body of scholarship is critical to the discussion of victim narratives for two reasons. First, it suggests that juries can handle determinations of guilt, and may even consider nuanced differences in harm, such as those narrated by victim impact statements, based on more or less communally shared understandings of harm—and even across a range of social and racial perspectives.[174] Second, it suggests that to be systemically effective at preventing crime and instilling a sense of justice, the law needs to accommodate the norm-generating social reality against which it operates. As victim narratives exist in and shape this reality, the criminal justice system must take them into account in order to serve its purposes.[175]

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relative position on the continuum of deserved punishment." *Id.* at 1835. Certain societies may allow for more severe maximum or minimum punishments, but the intuitions about the relative personal blameworthiness of offenders across whatever spectrum exists will not change.

172. Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy* 81 S. CAL. L. REV. 1, 30–31 (2007).

173. *Id.* at 29–31 (citing, among other evidence, RICHARD E. PETTY & JOHN T. CACIOPPO, ATTITUDES AND PERSUASION: CLASSIC AND CONTEMPORARY APPROACHES 62–69 (1996); Tilmann Betsch, Henning Plessner & Elke Schallies, *The Value-Account Model of Attitude Formation*, *in* CONTEMPORARY PERSPECTIVES ON THE PSYCHOLOGY OF ATTITUDES 251, 251–52 (Geoffrey Haddock & Gregory R. Maio eds., 2004); Richard E. Petty & John T. Cacioppo, *The Elaboration Likelihood Model of Persuasion*, *in* 19 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 123, 125 (Leonard Berkowitz ed., 1986)).

174. Robinson & Kurzban, *supra* note 170, at 1857–65 (reviewing empirical literature that suggests strongly shared intuitions of justice about punishment even across racial demographic divides).

175. The restorative justice movement, of course, has argued for achieving community healing after a crime by involving a plurality of stakeholders—defendants, victims, and the community itself—in the process of punishment. The processes of restorative justice include victim-offender mediation, sentencing circles, and group conferencing. *See generally* JOHN BRAITHWAITE, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION (2002). Some of the principles of restorative justice have been used to support the inclusion of victim impact evidence in a traditional sentencing hearing and some courts have been willing to take very broad views of who constitutes a "victim" entitled to give testimony, sometimes allowing, for example community members unrelated to the deceased victim to speak. *See* Logan, *supra* note 7, at 161–64 (discussing examples of "community" impact evidence courts have allowed, including testimony of callers to a local radio talk show). Whatever the merits and liabilities of direct community participation in sentencing, I am more concerned here with the relationship between *particularized* victim accounts of *directly traceable* harm and the background community norms they shape, as opposed to allowing unrestrained community input directly into the trial process.

B. Individual and Cultural Memory of Crime

The remaining question is whether and how victim narratives do enter the culture and affect the generation of social norms. This question turns in part on what sociologists call "collective" or "cultural" memory, a concept first theorized by early twentieth-century French sociologist Maurice Halbwachs. Halbwachs argued that the content of individual memory is dependent upon the social framework within which it is constructed—that an individual memory of a subjective experience will inevitably become shaped by its group context.[176] Many contemporary theorists go so far as to entirely reject the significance of individual memory as such since it can be expressed only through the "cultural construction of language . . . [in] socially structured patterns of recall."[177] For example, in an analysis of women's oral narratives about life during World War II, Penny Summerfield examines the ways in which the narratives of individual women's experiences relate to public representations about women's lives at the time, fitting them into cultural frameworks such as "heroic" and "stoic" narratives.[178] While it has become uncontroversial to assume the social context in which a memory is rehearsed has an impact on its content, this extreme collectivist view has come under attack. Critics argue that this view neglects the extent to which "individual and collective memories are often in tension" and that "the recollections of individuals frequently challenge the construction of partial accounts designed primarily to achieve collective unity."[179] A more complete model accounts for the extent to which the memories of individuals, while shaped by collective memory, reciprocally shape it in turn. It is this model that demonstrates the relevance of individual victim's stories to the cultural experience of crime.

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176. MAURICE HALBWACHS, THE COLLECTIVE MEMORY (Francis J. Ditter, Jr. & Vida Yazdi Ditter trans., 1980).

177. Michael Schudson, *Dynamics of Distortion in Collective Memory*, *in* MEMORY DISTORTION: HOW MINDS, BRAINS AND SOCIETIES RECONSTRUCT THE PAST 346, 347 (Daniel L. Schacter ed., 1995); *see also* Wulf Kansteiner, *Finding Meaning in Memory: A Methodological Critique of Collective Memory Studies*, 41 HISTORY & THEORY 179, 185 (2002) ("The very language and narrative patterns that we use to express memories, even autobiographical memories, are inseparable from the social standards of plausibility and authenticity that they embody.").

178. *See generally* PENNY SUMMERFIELD, RECONSTRUCTING WOMEN'S WARTIME LIVES (1998).

179. Anna Green, *Individual Remembering and 'Collective Memory': Theoretical Presuppositions and Contemporary Debates*, ORAL HISTORY, Autumn 2004, at 35, 41; *see also* Susan A. Crane, *Writing the Individual Back into Collective Memory*, 102 AM. HISTORICAL REV. 1372, 1381 (1997) (arguing that "collective memory is itself an expression of historical consciousness that derives from individuals, and has only recently . . . found one kind of expression in national or collective histories—this being only one possibility, not an exhaustive depletion of the concept"); Michael G. Kenny, *A Place for Memory: The Interface Between Individual and Collective History*, 41 COMP. STUD. IN SOC'Y & HISTORY 420, 431 (1999) ("Awareness of [the history of Native Canadians forced into the Residential School System] both derives from and helps to create the memories of individuals. It was, after all, individuals who . . . enjoyed, survived, or simply endured the schools.").

Utilizing case studies ranging from the colonial experiences of Australian aborigines to the notion of the "survivor syndrome" first developed to describe Holocaust victims, Michael Kenny has brought psychological and historical literature together to chart the interaction between personal and collective history "whereby autobiography becomes articulated to influential cultural narratives."[180] Jeffrey Olick theorizes that once "memory of . . . personally traumatic experiences is externalized and objectified as narrative . . . it is no longer a purely individual psychological matter" and therefore, for example, the trauma of what happened at Auschwitz "will not disappear with the death of the last survivor; . . . Auschwitz remains a trauma for the narratives of modernity and morality, among others."[181] Individual memories may shape cultural memory in ways that endure, though their individuality may be threatened by the press of cultural narratives already in place.

Pierre Nora distinguished the concept of cultural memory as a repository of shared experience from that of "history" insofar as the former relates to facts as they happened and the latter to a subjective account of the details historians privilege.[182] Theorists of cultural memory have noted the importance of tangible and visual objects such as memorials existing in the present, as a means of accessing the factual past, which produces a problem similar to the signification problems faced by an individual witness testifying to past pain. Because memory extends beyond its present artifacts it is necessarily in flux; when we reproduce it we wind up with only, as Richard Terdiman calls it, "a present past."[183]

The duality between cultural memory and history has an obvious coordinate in the realm of legal discourse: upholding the freedoms guaranteed by the rule of law depends upon adherence to a history of "legal truth" that—in order to protect the procedural rights of defendants and for various other reasons—must at times part ways with "factual truth." (A majority of the population, for example, believes the outcome of the O.J. Simpson trial to exemplify this dynamic.)[184] Yet the two valences are interdependent in important ways. As Marita Sturken notes,

> Personal memory, cultural memory, and history do not exist within neatly defined boundaries. Rather, memories and memory objects can move from one realm to another, shifting meaning and context. Thus, personal memories can sometimes be subsumed into history, and elements of cultural memory can exist in concert with historical narratives.[185]

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180. Kenny, *supra* note 179, at 437.

181. Jeffrey K. Olick, *Collective Memory: The Two Cultures*, 17 SOCIOLOGICAL THEORY 333, 345 (1999) (citation omitted).

182. Pierre Nora, *Between Memory and History: Les Lieux de Mémoire*, REPRESENTATIONS, Spring 1989, at 7, 7–24.

183. RICHARD TERDIMAN, PRESENT PAST: MODERNITY AND THE MEMORY CRISIS 3 (1993).

184. *See, e.g.*, *10 Years After Simpson Verdict: Issues of Race Still Figure Prominently in Public Opinion*, NBC NEWS (June 6, 2004), http://www.msnbc.msn.com/id/5139346/ns/dateline_nbc/ (finding that 77% of respondents believed Simpson guilty of murder).

185. MARITA STURKEN, TANGLED MEMORIES: THE VIETNAM WAR, THE AIDS EPIDEMIC, AND THE POLITICS OF REMEMBERING 5–6 (1997).

A particular striking example of this effect, which Sturken provides, is the extent to which World War II movies have subsumed the stories of individual soldiers into a "general script."[186]

In her work on cultural memory in the context of the Vietnam War and the AIDS epidemic, Sturken discusses how the instability of memory "allows for renewal and redemption without letting the tension of the past in the present fade away."[187] Constitutive of this process are individual testimonial acts—patches contributed to the AIDS quilt, individual memorials left by the Vietnam Memorial on the National Mall, and so forth. Sturken emphasizes the prominence of trauma in producing cultural memory as a mutually reinforcing cycle: on the one hand memory functions as a tool for healing, yet the site of the wounded body becomes an important means of generating memory.[188]

The relevant cultural memory of trauma that forms the backdrop for the criminal justice system, then, is the shared memory of crime itself, frequently discussed at particular historical moments in the material, phenomenological language of "epidemic."[189] In the late 1970s an increase in crime was accompanied by a corresponding increase in fear of crime, but at the national level this fear did not drop at the same rate as crime levels themselves.[190] Through the proliferation of

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186. For further discussion of the relationship between scripted memory and actual memory in a World War II context, see Marita Sturken, *Absent Images of Memory: Remembering and Reenacting the Japanese Internment, in* PERILOUS MEMORIES: THE ASIA-PACIFIC WARS 35–36 (T. Fujitani, Geoffrey M. White & Lisa Yoneyam eds., 2001) ("For Americans, the Asia Pacific War produced several image-icons, most notably the raising by U.S. soldiers of the American flag at Iwo Jima . . . and the image of the mushroom cloud from the atomic blast rising over Hiroshima. Other images are generic: men running as boats smoke and sink at Pearl Harbor, American soldiers in the trenches in tropical locations, and Japanese planes crashing into the sea. The sources of these images of history are many and are as likely to be the screen images of Hollywood films such as *Thirty Seconds over Tokyo* (1944), *Guadalcanal Diary* (1943), *Sands of Iwo Jima* (1949), or *From Here to Eternity* (1953) as documentary footage." (citations omitted)).

187. STURKEN, *supra* note 185, at 17.

188. Sturken claims, for instance, that

> [a]ttempts to rescript the Vietnam War have been as much about healing, with its bodily metaphors, as they have been about smoothing over the disruptions of the war's narratives. At the same time, the desire to memorialize the AIDS epidemic while it is still occurring reveals the need to find healing amid death.

Id. at 16.

189. *See, e.g.*, WILLIAM BRATTON WITH PETER KNOBLER, TURNAROUND: HOW AMERICA'S TOP COP REVERSED THE CRIME EPIDEMIC (1998); Faye Bowers, *U.S. Fights a Border-Crime 'Epidemic': Law-Enforcement Agencies Find New Ways to Coordinate Their Efforts to Stem the Rise of Violence on the Border with Mexico*, CHRISTIAN SCI. MONITOR (Apr. 25 2007), http://www.csmonitor.com/2007/0425/p02s01-ussc.html; Mark Scheer, *Crime 'Epidemic' Decried in City of Niagara Falls*, NIAGARA GAZETTE (Oct. 4, 2010), http://niagara-gazette.com/local/x145227969/Crime-epidemic-decried-in-city-of-Niagara-Falls.

190. FRED DUBOW, EDWARD MCCABE & GAIL KAPLAN, REACTIONS TO CRIME: A CRITICAL REVIEW OF THE LITERATURE (U.S. Dep't of Justice 1979); *see also* FRANKLIN E. ZIMRING, AMERICAN YOUTH VIOLENCE (1998) (arguing that legislative and popular perceptions of youth violence created a crisis where none existed); Ralph B. Taylor & Margaret Hale, *Criminology: Testing Alternative Models of Fear of Crime*, 77 J. CRIM. L. &

"true crime" stories throughout the culture, the media capitalizes on and shapes this shared sense of vulnerability.[191] Jonathan Simon makes the case that governance since the 1960s has used this disembodied cultural fear to make dramatic encroachments into the day-to-day lives of citizens at all levels of society by drawing analogies to crime in its regulation of schools, families, workplaces, and communities.[192] He argues that this resulted in the redefinition of the "ideal citizen" as a crime victim and calls for citizens to become more actively engaged in the management of risk, to free themselves from what he considers a pattern of domination by the government.[193]

Simon briefly addresses the novel role for actual crime victims in this new era, criticizing the 1994 amendment to the Federal Rules of Criminal Procedure allowing victims to speak at sentencing hearings. Simon derides these measures as

> state-sponsored ways to reproduce a certain kind of victim voice that has been promoted by the victim's rights movement, one of extremity, anger, and vengeance. . . . To the extent that activist victims define the victim subject position more generally, lawmaking will systematically favor vengeance and ritualized rage over crime prevention and fear reduction.[194]

What Simon does not clarify, however, is how—even if we accept the overarching thrust of his thesis concerning the policy motivations behind the act—a general right for victims to be heard privileges a "certain kind of victim voice." Simon, along with many other critics of victim impact statements, makes the assumption that the individual victim's voice necessarily enfolds into a state-generated collective narrative that seeks to gain power through instilling fear. He seems to ignore the potential effects of individual memories in disrupting collective narrative, imposing on all victims the seemingly immutable identity of "activist victim" whose motivations must be aligned with that of the state. Indeed, if he is correct that the state has consciously constructed a false "victim voice" as an agent of its own power, it becomes all the more important to hear individual voices of legitimate victims.

To be sure, the evidence suggests a traumatic cultural experience of crime that seems to exceed the sum of individual experiences—at least insofar as it persists in the imagination disproportionate to the extent of its recurrence in reality. Furthermore, the shaping of this fear by various external authorities such as lawmakers and the media creates a kind of "history" of crime of the sort that theorists oppose to the more diversified composite of cultural memory. These selective histories have the capacity to generate biased and stereotypical assumptions about what crime looks like and one-dimensional ideas about the

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CRIMINOLOGY 151, 188 (1986) (measuring the loose linkage between crime and fear and finding that "[c]rime was weaker as a predictor of fear of crime than perceptions of locale and sociodemographics").

191. ZIMRING, *supra* note 190.

192. *See generally* SIMON, *supra* note 8.

193. *Id.* at 136.

194. *Id.* at 106.

identity of the "criminal."[195] To the extent that the criminal justice system allows for more individuated expressions of victimization, however, it actually allows for some counterbalance to these forces, and for some of the salutary benefits of participatory cultural memory. Furthermore, to the extent that individual narratives have the potential to shape cultural memory outside of formal legal institutions, those institutions become increasingly likely to enforce a "history" even farther removed from the shared experience of the culture at large.

CONCLUSION

If it is true that the legitimacy of the criminal justice system to a given populace flows from its representation of socially shared norms of justice, then formal criminal law institutions, if they are to do their job, cannot be selective about the narratives they consider in the vindication of these shared norms. Personal memories of individual harms, in their aggregate, already combine to shape the collective memory of a culture. I have shown how the structural features of the victim impact statement enable these harms to be translated to institutional listeners in the context of a sentencing hearing. Through strategies such as the idiosyncratic use of chronology and symbolic objects, victims can negotiate some of the barriers to articulation and render their suffering "present" as an object for the sentencing body to consider, in a manner otherwise impossible. Furthermore, the *Safarini* sentencing demonstrates that diversity of victim "voices" in existence. Rather than speaking about these voices as monolithic cries for "vengeance" or exercises in "victim speak," it is more useful to scrutinize them on an individual basis to ensure the relevance of the harm they narrate for the purposes of sentencing. By continuing to include these narratives in its proceedings the legal system—though inescapably and, to a large degree, necessarily objectifying to its participants—can

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195. *See* Anthony V. Alfieri, *Lynching Ethics: Toward a Theory of Racialized Defenses*, 95 MICH. L. REV. 1063, 1066 (1997) (criticizing the "engraft[ing of] an essentialist dichotomy of good-bad moral character on the racial identity of young black men"); Debra Lyn Bassett, *The Rural Venue,* 57 ALA. L. REV. 941, 944 (2006) ("[I]nstead of viewing someone as a complex whole, complete with inconsistencies and ambiguities, stereotyping permits instant slotting—people are slotted into little boxes and ascribed particular characteristics and qualities without examination, reflection, or analysis. . . . If left unchecked, these biases can result in erroneous and unfair impressions, and in the legal system, can result in injustice." (footnotes omitted)); Zanita E. Fenton, *Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence*, 8 COLUM. J. GENDER & L. 1, 32 (1998) (noting "stereotype dichotomies (e.g., white/black; good/bad)"); Stephanie Lasker, *Sex and the City: Zoning "Pornography Peddlers and Live Nude Shows,"* 49 UCLA L. REV. 1139, 1181 (2002) (noting dichotomies of "madonna/whore, white/dark," and "good/bad"); Caroline Rogus, *Conflating Women's Biological and Sociological Roles: The Ideals of Motherhood, Equal Protection, and the Implications of the* Nguyen v. INS *Opinion*, 5 U. PA. J. CONST. L. 803, 823 (2003) ("[P]rosecutors and defense attorneys rely on the dichotomy of good/bad mother . . . in their portrayals of female defendants who have abused or killed their children."); Sherrine M. Walker & Christopher D. Wall, *Feminist Jurisprudence: Justice and Care*, 11 BYU J. PUB. L. 255, 264 (1997) (noting such dichotomies as "male/female, good/bad, right/wrong" and that "[l]aw is particularly susceptible to this polarized way of thinking").

nonetheless bring before its sentencing bodies a rendition of harm that resembles and engages the harm as experienced in the non-legal social settings from which our moral norms emerge. This approach will retain narratives of *actual* harm as a buttress *against* the constructed stereotypes that offend the dignity of all actors in the system.