Taiwan Lega Aid conference talk: The multifaceted benefits of VIS

Professor Edna Erez, LL.B., MA, PhD
University of Illinois, Chicago

Introduction

To appreciate the importance of Victim Impact Statements (VIS), namely, the right to provide input into sentencing about the harm someone has suffered as a result of crime victimization, one needs to experience its absence. This is true whether one lives in the USA, Israel, or Taiwan, because victimization experiences, and their psychic sequelae, are universal.

I was "lucky" to have this experience in the early 1970s when I first arrived in the USA for my doctoral studies. Being unaware of the local behavioral safety rules, one late night, I rashly admitted a stranger into my apartment who claimed to be a police officer investigating a crime in the area. When he tried to grab me, I managed to run out of the apartment screaming at the top of my lungs for help. My neighbors called the police who showed up instantly, (Philadelphia police response times are known to be swift). A few days later, I was taken by the detective assigned to the case to arraignment, to identify the intruder in court. When I did not hear any updates from the detective or from the court, after six months and as I was leaving town for the summer break, I called the detective to advise him not to schedule the case during my absence. To my astonishment, he informed me that the person had pleaded guilty five months ago and had been placed on probation.

I well remember the anger, frustration, and feeling of lack of control that consumed me. This experience of being marginalized, insignificant, and irrelevant after such a traumatic event shook me to the core. It made me determined to research the problem, with the hope of bringing a change in the justice system's handling of victims. After all, the criminal justice system exists because victims have sustained harm. According to criminal law, the offender's penalty is determined by the offender's intent (*mens rea*) and the resultant harm of the act (*actus reus),* and

who is better suited to describing to the court the harm and how the crime has affected his or her life than the victim?

When I first embarked on this research project and read the testimony of the rape victim who appeared before the 1982 President Task Force for Victims of Crime, I easily identified with her exasperation, “I was the victim of rape, not the state of Virginia,” when she vented her frustration with not being asked to provide input about her experiences at the trial of her rapist.

Today, most adversarial legal systems. including all the USA states and the federal system, the United Kingdom, Canada, Australia, New Zealand, India, and others, as well as continental (inquisitorial) systems in European countries such as the Netherlands and Belgium, along with Asian countries like Thailand, China, and Japan, all include some kinds of legal right to victim input into proceedings. Some employ victim impact statements (VIS) that the victim authors and delivers in court, others use victim personal statements, which are put together by the prosecutor based on a conversation with the victim and presented who then presents it in court. Taiwan joining legal systems that allow for victim input is welcome news! Congratulations!

The dilemmas of victim input

Victim participation in the criminal justice process has gone a considerable way to recognizing victims’ needs and agency. Generally, it has restored victims’ dignity and increased their sense of control. Attendance and recognition at court proceedings provide many victims with symbolic validation. A violator being referred to as ‘the accused’ or appearing in prison garb or handcuffs, for example, graphically highlights that their victimization is being dealt with seriously. The opportunity to prepare a VIS, knowing that the account of their experience will form part of the court record, has been another significant form of validation for many victims.

At the same time, victim participation and input rights represent a radical departure from adversarial legal theory and practice. Victim integration reforms over the last four decades, often conducted in an abrupt and ad hoc manner, attempted to graft a host of victim rights onto a

system which, by design and express ideology, had denied victims standing and deliberately excluded them from proceedings. It is therefore not surprising that 'added on' victim rights to a tight adversarial legal structure, remain problematic and their purpose and benefits are still debated.

While some victim rights advocates view the new privileges and powers of the victim as evidence of progress, for many in the criminal justice system, victim rights still represent a major threat to the core values of the adversarial model.

VIS practices around the world

VIS is designed to convey the emotional, psychological, physical, social, and financial impact, both short- and long-term, that victims and their families have suffered due to a crime. In some states in the USA and some countries elsewhere (e.g., Finland), victims also have the right to recommend the form or level of punishment, referred to as a 'victim opinion statement.' Judges, however, are not obligated to impose the suggested penalty.

In the USA and other adversarial legal systems, the right to provide victim input or to be consulted extends to other stages in the criminal justice system, ranging from bail decisions, through charging, plea negotiations or acceptance, sentencing, and parole decisions.

The right to submit a VIS applies to all crimes for which there are victim rights, but some jurisdictions exclude low-level crimes such as misdemeanors, and some states limit victims' rights to violent and/or serious crimes.

The question of who is defined as a victim entitled to submit a VIS is determined by the specific law applicable in a given jurisdiction. In the U.S., the ambit is wide. The presiding judges allow persons who are not primary or secondary victims but who sustained harm, whether intended or unintended, to submit VIS, if they are "directly and proximately" harmed by the crime (i.e., 'but for' causation and foreseeability rules). In other words, the right is conferred on those who suffered harm that resulted from an illegal act, even though the perpetrator did not specifically target them. Thus, first responders, such as police officers or firefighters, who

sustained physical or mental harm while rescuing primary victims, have the right to submit VIS. This was the case with the police officers who responded to the Oklahoma City bombing by Timothy McVeigh and his associates. Persons who were victimized while committing a crime themselves, however, are not eligible to submit a VIS, although if they are victimized in a separate event at a later point, they are considered victims with all victim rights including submission of VIS.

Countries differ in the way the VIS can be presented, ranging from written to oral presentations, or both, to delivering VIS via videos or other audio forms. Victims or survivors also use various presentation means designed to highlight their point, for instance, the picture of a smiling young victim whose life was taken, or the picture of a girl – a female athlete – to show how young and innocent she was at the time her sports doctor molested her under the guise of treating her sport-related injuries.

Often, the right to submit victim input extends to criminal justice stages before and beyond sentencing, whether in bail decisions, early release from prison or parole, or to influence the conditions of release. This right is often part of a victim rights package that addresses victim notification of proceedings, victim protection inside and outside court, and restitution, without which the VIS is meaningless – victims need to be aware of their option to provide input, know the date and location in which they can exercise this right, and need to be protected when delivering their VIS. The information they provide, often delivered while they are stressed and in turmoil, should be considered by the judge, who can then respond with relevant court orders, whether restitution, no contact with the victim, participation in a treatment program, or a penalty commensurate with the harm sustained. Fitting the punishment to all aspects of the crime/victimization, and providing suitable remedies to victims, renders their efforts and the emotional cost of composing and delivering the VIS in open court, in the presence of their violator, worth the effort.

The debates about the merits and liabilities of VIS

It is important to note that the road to accepting the idea of victim input rights into proceedings was not easy, and there still remain, pockets of resistance to victim input options, particularly the VIS. Legal purists generally, most notably defense lawyers, emphasize that the system allows for only two participants/adversaries-- the state and the defendant. Victims, it is argued, are outsiders, not insiders, and as such not eligible to provide input beyond testimony as witnesses.

The modern criminal trial in adversarial legal systems is now a (verbal) battle between two presumed equal adversaries—the state and the defendant—presided over by an impartial adjudicator—the judge. The prosecutor, as the authorized representative of the state, is required to bring the offender to justice, standing in the stead of the individual victim. Critics of adversarial justice have long contended that the development of modern criminal adjudication allowed the state to 'steal' conflicts away from the victims. In adversarial theory, crime is conceptualized as harm perpetrated against the state rather than an individual.

Victims, as non-parties to proceedings, were confined to testifying at trial as witnesses. They were only permitted to answer questions put to them by the prosecution and the defense during examination and cross-examination, where incivility and hostility have become 'normal', (some say, pathological) occurrences.

There is also an implicit assumption, actually myth, that victims are vindictive, vengeful, and punitive, and may use their input rights to denigrate and disparage the defendant or make negative statements about him or her, which may result in harsher punishment. Opponents of VIS argue that such statements undermine defendants' rights, and are subjective, and often prejudicial to the accused. The VIS are also deemed to be emotional and non-probative, prolong proceedings, without adding any new information beyond what is already known from the trial.

Research that challenged the arguments against VIS

While legal scholars and practitioners have objected to the use of VIS, fearing its potential to bias legal decisions about guilt and punishment or to contaminate the presumed rationality and objectivity of legal process with emotionality and subjectivity, their objections were mostly based on intuition or conjecture, not empirical research.

Research has shown that victims most commonly seek validation rather than retribution. Victims also wish to be accorded dignity, respect, and recognition, rather than to lobby for harsher punishment of their offenders. Studies that evaluated the impact of VIS on proceedings and court outcomes did not find support for any of the arguments against the VIS. Delivering VIS does not substantially prolong proceedings. Moreover, extant research has documented that the benefits produced by the practice of VIS far outweigh any adverse impact it may have on proceedings, court outcomes, and victim satisfaction with justice.

Thus, early studies that have examined the validity of this criticism showed that victims as a group are not necessarily retributive, vengeful, or punitive. Their recommendations for punishment or their requests for court orders are often reasonable, rational, and constructive, and do not deviate from what the general public wants or perceive as commensurate punishment.

Early qualitative research conducted in Australia in the 1990s also suggested that in the few cases where the victim input in VIS caused judges to change their sentencing decisions, the change was as just as likely to result in a more lenient punishment as in harsher sentences. Generally, the judges interviewed noted that VISs rarely have an impact on sentencing outcomes in either direction. In other words, in the overwhelming majority of cases, the VIS does not cause judges to revise the sentence they had in mind before listening to the victim's VIS.

A more recent (2023) quantitative study conducted in Canada analyzed 1,332 sentencing rulings from 2016 to 2018. It found, perhaps unsurprisingly, that VISs are more likely to be delivered in cases in which the crime is more severe. Controlled for the type of crime, the researchers also found that the presence of a VIS was not associated with a longer sentencing outcome for the defendant, confirming that delivering a VIS in court is not associated with more severe penalties.

While VIS does not result in any of the "negative" impacts on proceedings and court outcomes warned by critics, research has confirmed that the delivery of VIS does provide victims various benefits. It also has a beneficial impact on perceptions of justice in the community.

Twenty-five years ago, my colleague and coauthor, the Honorable Paul Cassell, a professor of law who was selected to be a federal judge and after five and half years of serving on the bench returned to academia to become a distinguished law professor, published a seminal law review defending the VIS. In this 2009 law review, Professor Cassell laid out the four main justifications for victim impact statements. First, he claimed, they provide information to the sentencing judge or jury about the nature of the harm the victim sustained --information that the sentencer can use to craft an appropriate penalty. Second, delivering VIS may have therapeutic aspects, helping crime victims recover from their victimization. Third, they educate the defendant about the full consequences of his crime, perhaps leading to acceptance of responsibility and so further the prospect of rehabilitation. And finally, the VISs create a perception of fairness at sentencing, by ensuring that all relevant parties—the State, the defendant, and the victim—are heard. Procedural justice scholars have long taught us that litigants and parties (formal or informal) who are affected by court decisions should have the opportunity to be heard before decisions are made.

At the time, the evidence and support that Professor Cassell offered for his arguments and claims were anecdotal, impressionistic, and tentative. Twenty-five years later, Prof. Cassell and I had a unique opportunity to empirically examine some of his early assertions, about the assumed virtues of victim impact statements as well as prevailing myths about victims.

Our study, which was published last month in the Marquette Law Review, examined the 168 VISs that sexual abuse victims delivered at the sentencing of Larry Nassar—the sports doctor of the USA Gymnastics and Michigan State University athletes who over two decades, under the guise of medical treatment, sexually assaulted young athletes who were injured during sports. The victims, all of whom were young girls at the time they were assaulted, requested to make a victim impact statement, even though they knew Nassar would spend the rest of his life

in prison because of other crimes for which he was sentenced in a federal court. This case riveted the American public, who could watch it being broadcast over a whole week from the Michigan court.

I should note that this data opportunity was unique as there is limited research on actual VISs. Historically, the focus of research about VISs has been on the effect of the statements on the judge/jury decision or sentencing, rather than on the victims. Because crimes and victims vary greatly, it is difficult to describe what a "typical" VIS includes or excludes. To that extent, it has not previously been possible to design a rigorous study that controls for variations in the offense and offender. The database that became available in this case however included a large number of VISs by women who were subjected to the same type of crime/victimization by the same person, under the same circumstances and conditions.

In their VISs, the victims provided information that judges may not know or be aware of when defendants plead guilty, without a trial. For instance, their loss of innocence because of the assaults. Most victims began their VIS by showing pictures of themselves as young girls at the time of the abuse or by describing young girl interests. They described not only the physical pain from injuries that brought them to Nassar, pain which his treatment did not address but rather caused them further pain and embarrassment. They described in detail not only the sexual abuse but also the grooming and manipulation that preceded it. Nasar tried to win their trust, and presented himself as their best friend, not just their doctor. They also talked about the mental anguish they suffered when they were not believed by the authorities, and their loss of trust in people – in persons in authority, particularly doctors. They also lost trust in institutions, including Michigan State University, the Michigan police department, and USA Gymnastics because these bodies did not believe some of their early complaints. Their failure enabled the abuse and allowed it to continue. These effects would not have become known publicly if not for their VISs. About a third of the victims requested permission to address the defendant directly, and a third of those then expressed their wish to forgive him. In sum, Nassar's sentencing demonstrates the potential of delivering VIS to satisfy victims' need to speak and be heard, and the importance

of providing victims an opportunity to address the defendant. The judge's supportive responses to the VIS presentations highlight the critical role that judges have in dealing appropriately with victims and restoring their trust in the legal system. Judge's facilitation of victims empowers them and increases their satisfaction with justice -- all objectives of the recently established *Therapeutic Jurisprudence* ("TJ") movement. It underlines the importance of training judges (and other court participants) in victim-related concerns to maximize the benefits of sentencing hearings for victims, who often find participation and delivering VISs a difficult and demanding endeavor.

Victimology has taught us that there are "Big Two" purposes to why people choose to tell their stories of victimization -- one is *agency,* namely, victims seek to gain control over their life or capacity to affect their behavior and thoughts, and second, *communion* – namely, the sharing of intimate experiences and feelings. Telling their story, and delivering the VIS empowers them and increases their satisfaction with justice, particularly when the judge positively responds to their VIS. Insights from *Therapeutic Jurisprudence* – a relatively novel approach to law that calls for proceedings and court decisions that provide therapeutic rather than harmful or adverse anti-therapeutic outcomes, also supports this quest. We now know that the language of the court and its responses to victims can be empowering and helpful for victims' sense of self, and can also bring about some closure.

The Nasar case highlights the advantages that VIS delivery provides not just for victims but justice generally. It provides useful information to the sentencer and confronts the defendant with the reality of the harm they have caused. It also has a public educative function, improving the perceived fairness of sentencing. At a time when institutions, including the courts, are experiencing a crisis of legitimacy, restoring community trust in law and legal institutions is even more vital to a healthy and robust democracy.

A recent (2023) study of VISs conducted in Israel documents that these statements were used to portray the offense as a life-changing event; to describe the hardships of the criminal

justice process; to transform the victim into 'more than just a name'; and to deliver a message or request. The statements also created an integrated therapeutic-legal discourse, which the justice system accepted and formally acknowledged. The openness of the legal system to accept and acknowledge content that is not required by law, even if indirectly, suggests a need to rethink the social function of the court for victims and communities.

In summarizing the research on VIS for the government of Canada, Professor Julian Roberts of Oxford University reminds us that only a minority of all victims submit impact statements, and few of them request oral delivery of the statement. But those who do so find it beneficial, and most victims who submit a VIS, report being more satisfied with the sentencing. As noted before, research has shown that VIS are more likely to be submitted in serious offenses, involving personal injury or unexpected great financial loss. Research also tells us that VIS are submitted when the victim wishes to communicate a message to the offender; if the victims have intensive repeated contact with victim services or the prosecutor; when victims have a clear and realistic expectation of the purpose of the VIS; when victims have more positive attitudes towards the criminal justice system; and when the prosecutor is particularly motivated to enter a VIS at the sentencing hearing. Prof. Roberts confirms that there is little evidence that VIS adversely affects sentencing and reiterates what most of us who have studied VISs have cautioned-- that it is important to avoid creating expectations in victims that cannot be fulfilled.

Concluding thoughts

Granted, the attempt to graft victim rights onto the adversarial system remains controversial and its smooth implementation continues to be challenging. Legislative fiat alone cannot change legal culture from its historic exclusion of victims to their inclusion. Despite the extensive legislative efforts in recent times in many countries, and I suspect Taiwan is no different, some victims continue to remain frustrated and dissatisfied with their experience and treatment.

In conclusion, I want to return to my personal story at the beginning of this talk and remind you that providing crime victims with this right is not merely a legal issue – it is a human

rights issue. Victimized persons want and deserve to be heard, carefully listened to, and respected. The VIS is one way to make sure it happens.

Thank you for listening and best wishes for your VIS endeavors. I am happy to respond to any questions you may have.

References

Paul G. Cassell (2009) In Defense of Victim Impact Statements. *Ohio State Journal of Criminal Law*, 6: 611-648.

Paul G. Cassell and Edna Erez (2011) Victim Impact Statements and Ancillary Harm: The American Perspective. *Canadian Law Review,* 15(2): 150-204.

Paul G. Cassell and Michael Morris (2023) Defining 'Victim' Through Harm: Crime Victim Status in the Crime Victims' Rights Act and Other Victims' Rights Enactments, *American Criminal Law Review*, 60

Paul G. Cassell and Edna Erez (2024) How victim impact statements promote justice: evidence from the content of statements delivered in Larry Nassar's sentencing. *Marquette Law Review,* 107 (Barrock Lecture), forthcoming, July

Nils Christie (1977) Conflict as property. *British Journal of Criminology,* 17(1): 1-15.

Gena K. Dufour, Marguerite Ternes & Veronica Stinson (2023) *The Relationship Between Victim Impact Statements and Judicial Decision Making: An Archival Analysis of Sentencing Outcomes*, Law & Human Behavior, 47(4): 484-498

Edna Erez and Leigh Roeger (1995) The Effect of Victim Impact Statements on Sentencing Patterns and Outcomes: The Australian Experience. *Journal of Criminal Justice* 23(4): 363-375

Edna Erez (1999) Who is Afraid of the Big Bad Victim: Victim Impact Statements as Victim Empowerment and Enhancement of Justice. *Criminal Law Review*, (July), 545-556

Edna Erez and Linda Rogers (1999) Victim Impact Statements and Sentencing Outcomes and Processes: The Perspectives of Legal Professionals. *British Journal of Criminology*, 39(2): 216-239

Tali Gal and Ruthy Lowenstein Lazar (2023) Sounds of Silence: A Thematic Analysis of Victim Impact Statements. *Lewis & Clark L. Review* 27: 147-195

Julian V. Roberts (2014/2021) Victim Impact Statements: Lessons Learned and Future Priorities. *Victims of Crime Research Digest*, pp. 3-14. At: https://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr07_vic4/toc-tdm.html