

The Dangers of a Punitive Approach to Victim Participation in Sentencing: Victim Impact Statements after the *Victims Bill of Rights Act*

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ABSTRACT

This paper examines the Canadian regime governing the participation of victims in sentencing through the use of victim impact statements, with a focus on the regime following the 2015 amendments implemented through the *Victims Bill of Rights Act*. It argues that an approach to victim impact statements that focuses on their expressive and communicative uses best aligns with both Canadian sentencing principles and respect for victims. The current regime, in prioritizing the use of victim impact statements as a means to compile evidence of harm, sends a dangerous message by equating respect for victims with harsher sentences. An analysis of case law demonstrates that the current legislative regime for victim impact statements has the potential not only to cause further harm to victims, but also to unnecessarily increase the severity of sentences at a time in which courts are struggling to resist an increasingly punitive sentencing regime.

Keywords: sentencing; victims; victim impact statements

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I. INTRODUCTION

The participation of victims in the sentencing process recently received significant media attention with the high-profile sentencing of Jaskirat Singh Sidhu, the driver of the semi-tractor unit that collided with the bus carrying the Humboldt Broncos hockey team.¹ Mr. Sidhu pleaded guilty to 16 counts of dangerous driving causing death and 13 counts of dangerous driving causing bodily harm.² Ninety victim impact statements were filed at his sentencing.³ The sentencing judge had the unenviable task of crafting a sentence that reflected the harm caused by the loss of so many lives, but that also reflected the many mitigating factors in Mr. Sidhu's case, such as his early acceptance of responsibility and his sincere remorse.⁴ Although few cases receive the media scrutiny that surrounded Mr. Sidhu's sentencing, the difficult task faced by the sentencing judge involved an issue that judges must grapple with on a regular basis: how should victim impact statements be used in the formulation of a fit sentence?

The proper use of victim impact statements in sentencing is not a new issue, despite the recent surge in media attention. Commentators have generally fallen on one of two sides of the debate: those who see victim impact statements as providing a source of evidence about the harm caused by the offence that should properly be used to impact the sentence imposed (the "instrumental" approach), and those who see victim impact statements as a means of promoting victim expression and providing a chance for victims to communicate with other actors in the sentencing process (the "expressive" or "communicative" approach).⁵ Although Parliament made some reforms to the victim impact statement regime in the early years

¹ *R v Sidhu*, 2019 SKPC 19 [Sidhu]. Another high-profile sentencing in which victim participation was widely reported on was that of serial killer Bruce McArthur. See *R v McArthur*, 2019 ONSC 963 at paras 70-76, for the sentencing judge's consideration of the victim impact statements in that decision.

² *Sidhu*, *supra* note 1 at para 2.

³ *Ibid* at para 24.

⁴ Further discussion of this case can be found in Part D, *below*.

⁵ Julian V Roberts & Edna Erez, "Communication at Sentencing: The Expressive Function of Victim Impact Statements" in Anthony Bottoms & Julian V Roberts, eds, *Hearing the Victim: Adversarial Justice, Crime Victims and the State* (Portland: Willan Publishing, 2010) 232 at 233-34.

following its introduction to the *Criminal Code*⁶ in 1989,⁷ it provided its most substantial contribution to the debate when it introduced significant reforms to the victim impact statement regime in 2015 through the *Victims Bill of Rights Act (VBRA)*.⁸ While some commentators see these reforms as a positive step towards promoting greater respect for victims in the criminal justice system,⁹ others argue that they fail to provide any real clarity on the use of victim impact statements in sentencing¹⁰ and that their claim to promote victims' rights is misguided and even harmful for victims.¹¹

This paper considers the use of victim impact statements in sentencing, particularly in the context of the Canadian regime as it stands after the VBRA amendments. While the legislation makes some surface-level attempts to improve communication and victim expression, its focus is on emphasizing the use of victim impact statements as a means to compile evidence of harm, which is used to increase the severity of sentences. This approach sends a dangerous message to Canadians by equating respect for victims with harsher sentences, and it fails to truly respect victims because it uses their participation as a means to the end goal of implementing a more punitive sentencing regime.

I argue that the use of victim impact statements that best aligns with both Canadian sentencing principles and respect for victims is one that focuses on expressive and communicative uses, rather than one that sees victim impact statements as a tool for gathering evidence of harm. An analysis of recent case law demonstrates that the critiques raised by opponents to the instrumental use of victim impact statements are significant and that the current regime has the potential not only to cause further harm to victims, but also to unnecessarily increase the severity of sentences at a time in which courts are already having difficulty applying a restrained approach to sentencing.¹²

⁶ *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*].

⁷ *An Act to amend the Criminal Code (victims of crime)*, SC 1988, c 30, consolidated in RSC 1985, c 23 (4th supp) [*The 1988 Act*].

⁸ *Victims Bill of Rights Act*, SC 2015, c 13 [*VBRA*].

⁹ Benjamin Perrin, *Victim Law: The Law of Victims of Crime in Canada* (Toronto: Thomson Reuters Canada, 2017) at 37-38, 141-66.

¹⁰ Marie Manikis, "Victim Impact Statements at Sentencing: Towards a Clearer Understanding of their Aims" (2015) 65:2 UTLJ 85 at 116-19.

¹¹ Teagan Markin, "Victim Rights in Sentencing: An Examination of Victim Impact Statements" (2017) 22:1 Can Crim L Rev 95 at 109-19.

¹² See Marie-Andree Denis-Boileau & Marie-Eve Sylvestre, "*Ipeelee* and the Duty to Resist" (2018) 51:2 UBC L Rev 548 for an examination of how courts have failed to apply the

II. VICTIM IMPACT STATEMENTS AND THE PURPOSES AND PRINCIPLES OF SENTENCING

In order to evaluate the appropriate use of victim impact statements in sentencing, it is first necessary to consider the outcomes the criminal justice system aims to achieve by sentencing individuals who commit crimes, and the principles that judges are directed to follow in doing so. This section outlines the sentencing principles and purposes found in the *Criminal Code*, including the amendments introduced by the VBRA, and considers the extent to which victim impact statements may be relevant to achieving them.

The fundamental principle of sentencing requires that a sentence imposed be proportionate to the gravity of the offence and the degree of responsibility of the offender.¹³ This principle reflects a retributive model of sentencing in which punishment should be measured in proportion to an offender's "just deserts."¹⁴ Victim impact statements may be relevant to assessing a proportionate sentence by providing evidence of the harm caused by the offence.¹⁵ Where the harm caused by an offence is greater, the offence itself is more serious, which means that – all other factors being equal – a more severe sentence is required.¹⁶

The retributive model is also reflected in the subordinate sentencing principle found in s. 718.2(a), which requires a sentencing judge to increase or reduce a sentence to account for aggravating or mitigating circumstances relating to the offence or the offender. In particular, s. 718.2(a)(iii.1) provides that evidence that an "offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation," is an aggravating circumstance, and

principle of restraint for Indigenous offenders as mandated in the *Criminal Code*, *supra* note 6, s 718.2(e).

¹³ *Criminal Code*, *supra* note 6, s 718.1.

¹⁴ *R v M(CA)*, [1996] 1 SCR 500 at 554–58, [1996] SCJ No 28; Susan Ann Cornille, "Retribution's Harm Component and the Victim Impact Statement: Finding a Workable Model" (1993) 18:2 U Dayton L Rev 389 at 398; Julian V Roberts, "Victim Impact Statements and the Sentencing Process: Recent Developments and Research Findings" (2003) 47:3 Crim LQ 365 at 374.

¹⁵ Julian V Roberts & Marie Manikis, "Victim Impact Statements at Sentencing: The Relevance of Ancillary Harm" (2010) 15:1 Can Crim L Rev 1 at 1; Perrin, *supra* note 9 at 148–49.

¹⁶ Cornille, *supra* note 14 at 416; Roberts, *supra* note 14 at 374; Perrin, *supra* note 9 at 150.

that sentence severity must be increased in order to account for it.¹⁷ Under the current sentencing regime, victim impact statements may be used as a source of evidence to prove the existence of such circumstances.¹⁸

In addition to providing evidence of harm, victim impact statements may assist in achieving the objective of promoting responsibility in offenders and acknowledgement of the harm inflicted, codified in s. 718(f), by introducing communication between the victim and the offender rather than having this information described by the prosecutor.¹⁹ Unlike when they are used to provide evidence of harm, using victim impact statements to introduce communication between the parties achieves sentencing objectives without impacting the offender's liberty interest, which allows for more relaxed rules of evidence to apply with respect to the admissibility of the statement's contents.

In addition to revising the victim impact statement regime, the VBRA modified several sentencing principles to emphasize the role of victims. For example, the denunciation provision in s. 718(a) was amended so that the objective is not only to denounce unlawful conduct itself, but also "the harm done to victims or to the community that is caused by the unlawful conduct."²⁰ This suggests that the harm to victims caused by the offence –

¹⁷ I note that the definition of "victim" in s. 2 of the *Criminal Code* is different for the purpose of submitting victim impact statements than it is for other *Criminal Code* provisions, including the engagement of the mandatory aggravating factor of significant victim impact in s. 718.2(a)(iii.1). "Victim" is generally defined as a person against whom an offence has been committed who has suffered physical or emotional harm, property damage, or economic loss as a result of the offence. For the purpose of submitting a victim impact statement, however, "victim" is defined as "a person who has suffered physical or emotional harm, property damage or economic loss as the result of the commission of an offence against any other person" (*Criminal Code*, *supra* note 6, s 2 [emphasis added]). Thus, the definition of those who qualify as a "victim" for the purpose of submitting a statement is very broad and includes not only a person against whom a crime was committed directly, but also anyone who experienced harm or loss indirectly as the result of crimes committed against any other person, without requiring sufficient proximity to the direct victim of the offence or the commission of the offence itself. Although the harm suffered by these indirect victims does not come within the scope of the mandatory aggravating factor in s. 718.2(a)(iii.1), as it does for direct victims, this does not limit a sentencing judge's discretion to consider significant evidence of harm experienced by indirect victims to also be an aggravating circumstance for sentencing purposes.

¹⁸ See Part D, *below*, for further discussion on the use of victim impact statements to provide evidence of harm as an aggravating circumstance.

¹⁹ Roberts, *supra* note 14 at 374–75. See also *R v Fisher*, 2019 BCCA 33 at para 70 [Fisher].

²⁰ VBRA, *supra* note 8, s 23(1) [emphasis added].

the very same material Parliament has directed should be contained in victim impact statements²¹ — should lead sentencing judges to place a greater emphasis on denunciation in sentencing, an objective which tends to align with a more punitive approach and with harsher sentences.

The VBRA also amended the principle of restraint in s. 718.2(e) to state that “all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.”²² This re-emphasis on harm is unnecessary because the provision already required the sanction to be “reasonable in the circumstances,” which includes a consideration of harm to victims required by the sentencing principles discussed above.²³ Re-emphasizing harm directs sentencing judges to consider punitive factors in a provision that was enacted to emphasize restraint in sentencing as a response to the problem of over-incarceration, particularly of Indigenous people, in Canada.²⁴ This is especially troublesome considering the difficulties that courts have already demonstrated in giving meaning to s. 718.2(e),²⁵ and the fact that the over-incarceration of Indigenous people in Canada has only been worsening in recent years.²⁶

²¹ *Criminal Code*, *supra* note 6, s 722(1). I also note that the VBRA introduced “community impact statements” in s. 722.2 of the *Code*, which contain information describing the harm and loss suffered by the community as a result of the offence. The reference in s. 718(a) to the harm done to the community is likely a call to the information contained in these statements.

²² VBRA, *supra* note 8, s 24 [emphasis added].

²³ See *R v Proulx*, 2000 SCC 5 at para 96, confirming that “a determination of when less restrictive sanctions are ‘appropriate’ and alternatives to incarceration are ‘reasonable’ in the circumstances requires a consideration of the other principles of sentencing set out in ss 718 to 718.2.”

²⁴ *R v Gladue*, [1999] 1 SCR 688 at paras 50–51, 57, 1999 CanLII 679.

²⁵ Denis-Boileau & Sylvestre, *supra* note 12.

²⁶ The Office of the Correctional Investigator reports that in the ten-year period from March 2009 to March 2018, the population of Indigenous inmates in federal institutions increased by 42.8%, compared to a less than 1% overall growth of the inmate population during the same period. The situation is even worse for Indigenous women, whose population increased 60% during the same period such that by March 2018, Indigenous women made up 40% of incarcerated women in Canada. See Canada, *Office of the Correctional Investigator Annual Report 2017-2018*, by Ivan Zinger (Ottawa: Office of the Correctional Investigator, 29 June 2018), online: <www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20172018-eng.aspx> [perma.cc/Z5TE-8LX7].

III. APPROACHES TO THE USE OF VICTIM IMPACT STATEMENTS IN SENTENCING

In this section, I examine the various models proposed for the use of victim impact statements in sentencing. I conclude that a model that prioritizes the use of victim impact statements as a method of introducing communication between the victim and the offender, rather than as a means of introducing evidence of harm, is both in line with sentencing objectives and demonstrates respect for victims without pitting their rights against those of offenders.

Three general models for the use of victim impact statements have been suggested in the literature. The two primary models were labelled by Roberts and Erez as the “instrumental model” and the “expressive model”.²⁷ The instrumental model sees the dominant use of victim impact statements as providing evidence to assist courts in formulating an appropriate sentence. The expressive model (also sometimes referred to as the communicative model) sees the primary purpose as the promotion of victim expression and the introduction of communication between the victim and different actors in the sentencing process. A third model has also been suggested, incorporating a mix of these two approaches.²⁸

Under the instrumental model, victim impact statements provide information to sentencing judges about the harm resulting from an offence.²⁹ Among other sentencing goals, as discussed above, harm is considered an aggravating factor having a direct impact on the seriousness of the sentence imposed.³⁰ This conception of victim impact statements is often associated with what Roach terms a “punitive model” of victims’ rights, which tends to pit the rights of victims against those of offenders and may increase the severity of sentences.³¹

Roberts and Manikis argue that victim impact statements should also be used to prove ancillary harm, or harm beyond that caused to the individual victim, as an aggravating factor in sentencing.³² Because greater

²⁷ Roberts & Erez, *supra* note 5 at 233–34.

²⁸ Manikis, *supra* note 10 at 109–16.

²⁹ Roberts & Manikis, *supra* note 15 at 1; Perrin, *supra* note 9 at 148–49.

³⁰ Cornille, *supra* note 14 at 420–21; Perrin, *supra* note 9 at 148–50.

³¹ Kent Roach, *Due Process and Victims’ Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999) at 29–31, 292; Roberts & Erez, *supra* note 5 at 233–34.

³² Roberts & Manikis, *supra* note 15 at 8.

harm is inflicted overall, the offence itself is more serious and the offender is more blameworthy. Therefore, they argue, failing to put forward evidence of ancillary harm means that the court is denied important evidence of aggravation.³³

The use of victim impact statements as evidence of harm in sentencing has been criticized as generally being unnecessary to the evaluation of harm on a model of retribution-based sentencing because the nature and circumstances of the crime itself are sufficient to assess the seriousness and likely effect on the victim.³⁴ Further, so long as victim participation in sentencing remains optional, the use of ancillary harm as an aggravating factor may undermine sentence parity, as the amount of ancillary harm evidence that is introduced in a given proceeding will depend on the preferences of the indirect victims.³⁵ As the contemporary criminal justice system imposes punishment for offences committed against the state in the public interest, of which victims are only one part, the state should aim for consistency and fairness among defendants and proportionality with regard to the seriousness of the offence rather than the circumstances of the individual victim.³⁶

Where victim impact statements are used as evidence of harm, certain procedural requirements must be introduced in order to preserve the rights of the offender. Because aggravating factors in sentencing must be proven beyond a reasonable doubt where disputed,³⁷ a right to cross-examine the victim must be available in order to assess the reliability of the content.³⁸ In addition, defence counsel must seek disclosure of the statement and assess it to ensure it does not include prejudicial evidence that lacks probative

³³ *Ibid* at 12–14. Roberts and Manikis suggest limiting the consideration of ancillary harm to that which is objectively foreseeable and to accord less weight to ancillary harm as the relationship between the ancillary and direct victim becomes more remote in order to avoid escalating the sentence to an excessive degree.

³⁴ Sam Garkawe, “Victim Impact Statements and Sentencing” (2007) 33:1 *Monash UL Rev* 90 at 93–94.

³⁵ Tim Quigley, “Comment: The Dangers of Victim Impact Statements: A Brief Reply to Roberts and Manikis” (2010) 15:1 *Can Crim L Rev* 39 at 41.

³⁶ Andrew Ashworth, “Victim Impact Statements and Sentencing” (1993) *Crim L Rev* 498 at 503.

³⁷ *Criminal Code*, *supra* note 6, s 724(3); *R v Gardiner*, [1982] 2 SCR 368 at 415, 140 DLR (3d) 612.

³⁸ Roberts & Manikis, *supra* note 15 at 15–19; Perrin, *supra* note 9 at 154, 160–61; Manikis, *supra* note 10 at 113–16; *R v W(V)*, 2008 ONCA 55 at para 27.

value and that the account of the harm is not exaggerated.³⁹ Opponents suggest that the instrumental use of victim impact statements may lead to secondary victimization because of these necessary procedural requirements, and because they may raise the expectations of the victim as to the severity of the sentence.⁴⁰

The expressive or communicative approach, by contrast, promotes the use of victim impact statements as a way for victims to communicate with the judge and the offender. This is associated with a restorative model of sentencing⁴¹ and with achieving the sentencing objective in s. 718(f). It may also assist the judge in contextualizing the crime and its effects without requiring the judge to evaluate the harm experienced or compare it to that which would be appropriate for a “typical” victim.⁴²

Some commentators who support an expressive model point to the potential therapeutic effects for victims.⁴³ Others argue that it may help to dispel stereotypes about both offenders and victims,⁴⁴ and may assist judges in coming to a more balanced notion of what a “normal” victim experience is like. Erez explains that a victim’s statement may help judges to understand that what they may have thought to be an exaggerated or unbelievable experience is in fact a common one.⁴⁵

Despite these potential benefits, Ruparelia argues that the consideration of victim impact statements – particularly in cases involving sexual offences – could exacerbate the problem of judges reasoning using myths and stereotypes about the “ideal victim.”⁴⁶ This ideal victim is seen as being blameless and pure, especially in comparison to the offender.⁴⁷ Thus, the experiences of victims who do not fit these unrealistic understandings of victimhood risk being discredited.⁴⁸

³⁹ Roberts & Manikis, *supra* note 15 at 3.

⁴⁰ Ashworth, *supra* note 36 at 505–07; Markin, *supra* note 11 at 104, 107.

⁴¹ Roberts & Erez, *supra* note 5 at 233–34, 240–42.

⁴² Markin, *supra* note 11 at 108–09.

⁴³ 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 at 555.

⁴⁴ Roberts & Erez, *supra* note 5 at 236.

⁴⁵ Erez, *supra* note 43 at 553–55.

⁴⁶ Rakhi Ruparelia, “All that Glitters is Not Gold: The False Promise of Victim Impact Statements” in Elizabeth A Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism* (Ottawa: University of Ottawa Press, 2012) at 665.

⁴⁷ *Ibid* at 671–72.

⁴⁸ *Ibid* at 667, 671–74.

Ruparelia notes that the problem is particularly evident for racialized victims and offenders. Citing studies from the United States (where more empirical research has been done on the impact of race in criminal law), she demonstrates that racialized victims are less likely to be seen as fitting the image of the ideal victim and are more likely to have their experiences devalued, while racialized offenders are more likely to be seen to fit stereotypes about violence and dangerousness and, therefore, to receive harsher punishment.⁴⁹

Further, Ruparelia argues that the therapeutic effects of victim impact statements are only available to a limited number of victims, as the idea that public description of one's harm is healing is tied to a specific cultural conception that may be seen as improper, stigmatizing, and even dangerous to some women.⁵⁰ Exposing one's vulnerability publicly involves a level of trust in the justice system that many people who have had negative experiences with the system likely do not enjoy, leading to even greater fear of re-victimization during the "healing" process.⁵¹ These victims could choose not to participate. However, if it is true that the goal of victim participation in sentencing is to promote victims' rights (as the title of the VBRA would suggest), it should be a cause for concern that the method selected for doing so is not only possibly unhelpful to many victims, but also has the potential to cause them further harm and thereby perpetuate distrust with the criminal justice system.

Finally, some commentators have suggested a mixed approach to the use of victim impact statements in sentencing, highlighting the importance of both the expressive and the instrumental models. Manikis argues that prominence should be given to the instrumental function, as facilitating a more accurate and informed assessment of harm and the gravity of the offence best serves the sentencing objectives of retribution, denunciation,

⁴⁹ *Ibid* at 678–87.

⁵⁰ *Ibid* at 688.

⁵¹ *Ibid* at 689–91. See e.g. "Chapter 8: Confronting Oppression: Right to Justice" in *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol 1a (2019) 621 at 621–34, 648–54, 693–700 [MMIWG Report], providing many examples of the ways in which Indigenous victims and their families experienced mistrust, stereotyping, victim blaming, and numerous other systemic failures when attempting to engage with the criminal justice system, and the impact of these failures on their confidence in the system. As the authors note, "Indigenous Peoples have had little reason to be confident that the justice system is working for them".

and reparation.⁵² Expressive content that is not directly relevant would not be filtered by prosecutors, but it would be made clear to the victim that only actual harm suffered would be taken into account by the judge in crafting the sentence.⁵³ It would be up to the judge to discard irrelevant aspects.⁵⁴ Options as to the method of delivering the statement would be given, and the victim would be informed of possible cross-examination on the statement in order to assess the reliability of the content.⁵⁵

Erez also argues that victim impact statements are properly used both for their therapeutic functions for victims and for determining an appropriate sentence.⁵⁶ She argues that the impact of the offence on a victim as articulated in a victim impact statement assists the judge in crafting a more proportionate sentence rather than a more severe one. To support this claim, she notes that where the harm suffered by victims is in fact less than would usually be expected, it could actually make the sentence less severe.⁵⁷

Although initially appealing, the mixed approach ultimately incorporates the negative aspects of both models. It is impossible to include an instrumental purpose of victim impact statements that allows their content to be used as evidence of aggravating circumstances without subjecting victims to potential exposure to cross-examination and having aspects of their statement deemed irrelevant by a sentencing judge. Even in a system in which victims are permitted to compose their statement without editing and are warned of the fact that only certain portions will be considered by the judge, a message is still sent to the victim that judges are only concerned with hearing what they have to say to the extent that it helps to craft a fit sentence, rather than recognizing that having their story heard has value in itself.

Even if it is correct that victim impact statements could, in certain circumstances, make the sentence less severe where the harm experienced is less than that experienced by the average victim, it would be undesirable for a victim to be told by a judge that their loss was, relatively speaking, not so severe as the typical case. Inviting judges to measure the relative loss experienced by different victims is especially problematic due to the above-

⁵² Manikis, *supra* note 10 at 109-11.

⁵³ *Ibid* at 112.

⁵⁴ *Ibid* at 113.

⁵⁵ *Ibid* at 113-16.

⁵⁶ Erez, *supra* note 43.

⁵⁷ *Ibid* at 548.

mentioned concerns about reasoning that engages with harmful stereotypes, particularly for a process that is purportedly designed to promote respect.

A potential critique of a model in which victim impact statements are permitted for communicative purposes but are not used to increase sentence severity is that it sends a message to victims that their harm or loss is being trivialized or not taken seriously. However, such a critique relies on an assumption that victims will perceive the justice system as better representing their needs by imposing more severe sentences on offenders, measured in terms of how long or harsh the sentence is. This is a problematic assumption about the needs of victims and it promotes a dangerous vision of the criminal justice system as a “zero-sum game” between the interests of victims and offenders.⁵⁸ It also takes an overly narrow approach to understanding sentencing outcomes by focusing only on the term of imprisonment as a measure of “success”⁵⁹ and ignoring other sentencing objectives, such as those promoted in a restorative justice model. Restorative justice may in fact have a greater ability to assist in rehabilitation and reduce recidivism rates⁶⁰ – perhaps the ultimate way to achieve the fundamental sentencing purpose of contributing to a just, peaceful, and safe society.⁶¹

In advocating for an expressive use of victim impact statements, I am not arguing that harm is not relevant to sentencing or that the experience of victims will never influence a sentencing judge’s decision as to the appropriate sanction. As discussed in Part B, Parliament has made it clear that the impact on victims must be considered by sentencing judges in crafting a proportionate sentence, and a discussion of the merits of this approach is beyond the scope of this paper. What this paper does argue is that when the Crown wishes to rely on evidence of victim harm as an aggravating factor, it is undesirable for both the victim and the accused to use victim impact statements as proof of this fact. If the Crown wishes to rely on evidence from a victim to prove an aggravating circumstance at sentencing, it should be a part of their role, which encompasses a duty to

⁵⁸ Markin, *supra* note 11 at 106.

⁵⁹ For a critique of the tendency in both sentencing and punishment theory to focus on the length of incarceration without considering qualitative factors such as prison conditions and administration, see Lisa Kerr, “How the Prison is a Black Box in Punishment Theory” (2019) 69:1 UTLJ 85.

⁶⁰ Jeff Latimer, Craig Dowden & Danielle Muise, “The Effectiveness of Restorative Justice Practices: A Meta-Analysis” (2005) 85:2 Prison J 127.

⁶¹ *Criminal Code*, *supra* note 6, s 718.

act in the public interest, to make this decision after having weighed the costs and benefits of doing so, rather than having such evidence introduced furtively under the guise of a participatory right for victims.

In the following section, I begin by providing an overview of the post-VBRA victim impact statement provisions. Then, by examining recent cases, including the sentencing of Mr. Sidhu, I demonstrate why, by focusing on an instrumental use of victim impact statements, the current regime has the potential to cause harm to both victims and offenders.

IV. THE CURRENT REGIME: RISKS OF AN INSTRUMENTAL USE OF VICTIM IMPACT STATEMENTS

A. Overview of the VBRA Amendments to the Victim Impact Statement Regime

When first codified, the victim impact statement regime was significantly narrower than that found in the *Criminal Code* today. The original provision was discretionary, providing that a court “may” consider a statement describing the harm or loss arising from the offence for the purpose of determining the sentence to be imposed.⁶² This was modified in 1996 to make the consideration of victim impact statements mandatory.⁶³ The amendments introduced by the VBRA continue the mandatory consideration of victim impact statements in sentencing, but provide a more specific description of the content the statements are permitted to contain and how judges should deal with content that does not comply with these requirements.⁶⁴

The *Criminal Code* now specifies under s. 722(1) that when determining the sentence, the court must consider a victim impact statement describing the “physical or emotional harm, property damage or economic loss suffered by the victim as the result of the commission of the offence and the impact of the offence on the victim.” The VBRA also introduced a new subsection in s. 722(8), which specifies that when the court considers a victim impact statement, it “shall take into account the portions of the statement that it considers relevant to the determination referred to in [s. 722(1)] and disregard any other portion.” This addition suggests that even where a

⁶² The 1988 Act, *supra* note 7, s 7(1).

⁶³ Bill C-10, *An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*, 1st Sess, 38th Parl, 2004-2005 (assented to 19 May 2005), SC 1995, c 22.

⁶⁴ VBRA, *supra* note 8, s 25.

victim impact statement includes impermissible content, the court may still accept it as evidence and simply disregard irrelevant portions rather than excluding it completely or requiring it be redacted or rewritten.⁶⁵ However, it still sends the message that only “relevant” content, defined as evidence of harm or loss – i.e., information which would tend to increase the severity of the sentence – is of use to the sentencing decision.

As the following analysis demonstrates, the critiques of the instrumental use of victim impact statements canvassed in Part C – in particular, those concerning the potential for secondary victimization and for evidence of harm to overwhelm the sentencing analysis – are not just speculative but can have real impact in sentencing proceedings.

B. Cross-Examination of Victims

A recent decision from the BC Court of Appeal demonstrates the potential danger of prioritizing the use of victim impact statements to provide evidence of harm. In *R v Fisher*,⁶⁶ the offender was a former police officer who had worked with individuals leaving the sex trade. He pleaded guilty to sexual exploitation of a young person and breach of trust against two girls, referred to as “A” and “B” (aged 17 and 16, respectively). The sentencing judge considered the impact on the victims to be a significant aggravating factor based on the impact statements they submitted to the court.⁶⁷ In B’s victim impact statement, she explained that after the offence, she relapsed into substance abuse and twice attempted suicide.⁶⁸ The sentencing judge rejected the defence argument that her statement should be read with a critical view because a judge in a previous trial had made adverse credibility findings about her.

On appeal, the defence argued that the sentencing judge erred in accepting B’s statement without properly scrutinizing it, and also suggested that B had a financial motive to exaggerate the offence in order to claim restitution or sue the police department.⁶⁹ The BC Court of Appeal held that it was not an error to accept B’s evidence absent cross-examination. If the offender wished to remove the victim impact statement from the

⁶⁵ Perrin, *supra* note 9 at 158.

⁶⁶ *Supra* note 19.

⁶⁷ *Ibid* at para 45.

⁶⁸ *Ibid*.

⁶⁹ *Ibid* at para 65.

sentencing judge's consideration, he should have challenged its admissibility or cross-examined B at the sentencing hearing.⁷⁰

Although the defence in this case chose not to cross-examine the victim at sentencing, a lesson that can be taken from this case for future defence counsel who have concerns that a victim's statement could significantly impact their client's sentence – a concern that is very real given the mandatory aggravating factor in s. 718.2(a)(iii.1) – is that they should do so. This leaves the dilemma of choosing between forcing sexual assault victims to face cross-examination on their statements and sacrificing the defence interest in putting the Crown to its burden of proof. Both of these are undesirable options that could be avoided if statements were not used to directly influence the sentence.⁷¹

C. Vetting Statements

Another potential for secondary victimization arises where statements are scrutinized for inappropriate content. Perrin suggests that the addition of s. 722(8) should have the effect of changing the practice of having victim impact statements vetted by Crown counsel.⁷² Now that judges can simply disregard any irrelevant content, Crown counsel and the courts do not need to act in a gatekeeper role and risk the perception by victims that they are being censored or silenced.⁷³ However, since this subsection was introduced, courts have continued to be concerned with vetting statements for improper content in post-VBRA cases.

In *R v BP*,⁷⁴ the Court considered the impact of the VBRA on the victim impact statement regime even though it had not yet come into force at the

⁷⁰ *Ibid* at para 73.

⁷¹ In sentencing proceedings in which a communicative approach to victim impact statements is used, there will still be circumstances requiring a victim to testify, and possibly be cross-examined, at sentencing – for example, where the accused has entered a guilty plea and no findings of fact have been made at trial. However, the cross-examination in these circumstances arises from the court's fact-finding process rather than as a consequence of the participatory right granted to victims through the use of victim impact statements. If victim impact statements are included in sentencing to provide a channel for victim expression and communication, their use should not give rise to cross-examination, even if it is possible that a victim could face cross-examination through other means.

⁷² Perrin, *supra* note 9 at 158. See *R v Berner*, 2013 BCCA 188 at para 27 [*Berner*], discussing the Crown's responsibility to vet statements.

⁷³ Perrin, *supra* note 9 at 158.

⁷⁴ 2015 NSPC 34.

time of the decision.⁷⁵ Judge Derrick, as she then was, held that the VBRA did not change the foundational legal principles governing victim impact statements, which require inappropriate content to be redacted or the statement to be redrafted.⁷⁶ Similarly, in *R v CC*, the Court held that the VBRA amendments were, for the most part, a mere codification of current principles, and that even though judges are presumed to be able to disabuse themselves of inadmissible parts of a victim impact statement, statements may still be subject to judicial scrutiny.⁷⁷ The Court in *CC* continued to be concerned that the Crown be vigilant in vetting statements for inappropriate content prior to their use in court.⁷⁸ Justice Green indicated she would disregard aspects of the statements that included any reference to facts not in the written ruling, statements about the appropriate sanction, or “what the victims think of [the offender] or his crimes.”⁷⁹

Although s. 722(8) may have been aimed at improving victim expression, it fails to successfully do so while embedded in an instrumentally driven framework. The decision to prioritize “relevant” information for sentencing means that a judge will need to scrutinize the statement to sift out the information that is “irrelevant.” This amendment merely shifts the moment in which the statement is scrutinized from the initial submission to the prosecutor to the moment the judge delivers a decision stating that the aspects of the statement that do not enumerate elements of harm or loss are irrelevant and will not be considered.⁸⁰ The decisions in *BP* and *CC* also demonstrate that courts are still concerned with vetting victim impact statements at each stage of the process despite the direction in s. 722(8).

While scrutinizing victim impact statements for content that is merely irrelevant (i.e., any content that is not harm or loss as described in s. 722(1)) should be avoided, judges and prosecutors may still play a role in vetting statements for inappropriate content. In an expressive or communicative

⁷⁵ *Ibid* at para 29.

⁷⁶ *Ibid.*

⁷⁷ 2018 ONCJ 542 at para 22 [*CC*].

⁷⁸ *Ibid* at para 27. See also *R v Browne*, 2017 ONSC 5064 at para 10, where the Court accepted victim impact statements that had already been prepared containing inadmissible content pursuant to s. 722(8) but advised that Crown counsel should continue to vet statements in advance of the hearing.

⁷⁹ *CC*, *supra* note 77 at para 28.

⁸⁰ See *R v Adamko*, 2019 SKPC 27 at para 35, in which Judge Stang expressed concern that disregarding certain content contained in victim impact statements pursuant to s. 722(8) would contribute to the loss of confidence in the criminal justice system expressed by several victims in their statements.

framework, the need for the judge to evaluate the statement for “relevance” will not arise because the purpose of the statement is not to impact the sentence. However, in certain cases, the content may be sufficiently inappropriate that the prosecutor or judge would need to vet the statement; for example, if the statement included comments that invoke stereotypes about offenders or racist sentiments. Victims should be notified that inappropriate material should not be included before they are given the opportunity to write the statement, and that any such material contained in the statement will be redacted or disregarded. While this does limit victim expression to a certain extent and thereby may pose a risk of secondary victimization, this limit is reasonable and necessary to preserve fairness to the offender and the integrity of the criminal justice system.

D. Victim Comparison and the Ideal Victim

The concern about secondary victimization arising from judges evaluating victim impact statements is also relevant to the critique that using harm described in victim impact statements as an aggravating factor invites judges to compare the relative harm experienced by victims. This is particularly problematic because it has the potential to invite reasoning that engages with stereotypes about the “ideal victim” and about how victims experience and demonstrate harm.

This issue arose in *R v PES*.⁸¹ In that case, the accused appealed his three-and-a-half-year sentence for sexual exploitation of a young person. The sentencing judge had used information contained in a statement submitted by the victim’s mother to find that the victim experienced serious emotional and psychological harm. On appeal, the defence argued that the harm experienced by the young person in this case was not as bad as it had been in another sexual exploitation case where the victim had engaged in self-harm after the offence. The Manitoba Court of Appeal, quite rightly, ruled that, “[i]t is impossible to compare in minutiae the harm occasioned to child victims of sexual abuse nor is it desirable to do so.”⁸²

The Court of Appeal came to the correct decision in refusing to engage in such a comparative exercise in this case. Nonetheless, it is concerning that judges are being invited to compare the relative harm experienced by victims of sexual abuse, especially when such an invitation relies on assumptions about how victims who have experienced “worse” harm will

⁸¹ 2018 MBCA 124.

⁸² *Ibid* at para 32.

react. Sentencing is an inherently comparative exercise in certain respects, but this comparison should not be extended to how victims demonstrate having experienced harm. The invitation to use the information contained in victim impact statements to do so must continue to be rejected.

Problematic aspects of victim comparison are also raised in the sentencing of Mr. Sidhu, the man who drove a truck through a stop sign and collided with the bus carrying the Humboldt Broncos hockey team, introduced earlier in this paper. His sentencing demonstrates concerns about idealizing certain victims and about creating a victim hierarchy.

In Mr. Sidhu's case, the direct victims of the offence – those who were killed and injured as a result of the collision – appeared to be primarily young, white athletes who had strong family support and community connections.⁸³ In part because of their status in society, the Court heard from dozens of individuals relating that the victims' bright future plans would never be realized and describing how the many friends and families of the victims suffered because of the incident. Days of court time and national media attention were devoted to the reading of the victim impact statements.⁸⁴

The fact that the Court in Mr. Sidhu's sentencing likely heard more evidence of harm and loss because of who the victims were is concerning not only because it contributes to the idea of a victim hierarchy in the criminal justice system where more value is attributed to certain lives than others,⁸⁵ but also because it may impact the formulation of a fit and proportionate sentence, which I consider in the next section.

⁸³ See also the sentencing hearing for Nicholas Bell-Wright, who pleaded guilty to second degree murder in the shooting of 17-year-old Cooper Nemeth. Justice Joyal ruled that all 96 victim impact statements submitted were admissible, but that only 16 of those statements, submitted by family members and close friends, would be permitted to be read aloud in court: The Canadian Press, "96 victim impact statements entered in sentencing of Winnipeg man convicted of killing teen", *The Toronto Star* (22 Jan 2018), online: <www.thestar.com/news/canada/2018/01/22/96-victim-impact-statements-entered-in-sentencing-of-winnipeg-man-convicted-of-killing-teen.html> [perma.cc/DDT3-W4QP].

⁸⁴ This stands in stark contrast to the experience of many Indigenous families documented in the MMIWG Report, *supra* note 51 at 621-717, who described being ignored, disbelieved, and subject to mistrust and stereotyping by actors in the criminal justice system (although not necessarily in the sentencing context).

⁸⁵ See *Berner*, *supra* note 72 at para 25: "[t]he personal characteristics of the victim should play no part in crafting a fit sentence, however tragic the circumstances. It is in the public interest to deter and denounce all unlawful deaths."

E. Overwhelming Evidence of Harm

Another critique of using victim impact statements to impact sentences is that it risks evidence of harm overwhelming the sentencing analysis, leading to a disproportionate or unfit sentence. At Mr. Sidhu's sentencing hearing, 90 victim impact statements were filed and a majority of these were read aloud in court.⁸⁶ In her discussion of the aggravating factors, the sentencing judge considered most significant to be the fact that Mr. Sidhu's actions caused the death of 16 people and injured 13 people, and also cited the impact of the offence on the survivors and their friends and families.⁸⁷

Mr. Sidhu ultimately received a global sentence of eight years' incarceration.⁸⁸ The judge acknowledged that this sentence was "clearly outside" the range "for these offences in Saskatchewan or Canada," but justified it on the basis that the case cited by counsel with the longest period of incarceration (of six years) had only caused four deaths and nine injuries. She found that in Mr. Sidhu's case, "more than six years is mandated due to the horrific consequences of his actions."⁸⁹

Although the consequences of Mr. Sidhu's actions were unquestionably tragic, his sentence exemplifies problems both with the instrumental use of victim impact statements to compile evidence of harm, and with the direction provided to sentencing judges through the VBRA amendments to the principles and purposes of sentencing that align consideration of victims with punitive sentencing principles. In this case, the overwhelming evidence of harm presented to the sentencing judge may have caused her to over-emphasize this consideration at the expense of significant mitigating factors, leading to an excessively harsh sentence.

Mr. Sidhu is a young man who made a tragic error that caused devastating harm to many families. However, he also conducted himself in the ideal manner in the eyes of the criminal justice system by accepting full responsibility, pleading guilty at the earliest opportunity, and demonstrating real remorse. He had no criminal or driving record, and as a permanent resident of Canada, he will face a removal order as a result of his

⁸⁶ *Sidhu*, *supra* note 1 at para 24.

⁸⁷ *Ibid* at para 69.

⁸⁸ *Ibid* at paras 105–09. He also received a ten-year driving prohibition, an order for DNA analysis, and a ten-year firearms prohibition. The Crown had asked for a sentence of ten years' imprisonment.

⁸⁹ *Ibid* at para 103.

convictions.⁹⁰ While the amount of harm evidence in this case was apparently unprecedented,⁹¹ Mr. Sidhu was also an ideal candidate for a sentence prioritizing rehabilitation, as almost every other aspect of his case pointed towards a more lenient sentence.⁹²

Sentencing Mr. Sidhu to a harsh sentence of incarceration in these circumstances was not necessary to fulfill the fundamental sentencing purpose of protecting society and contributing to respect for the law. Instead, our criminal law would do better to recognize that having heard directly from victims about how his conduct impacted their lives in itself helps to achieve the purposes of denouncing his conduct, promoting responsibility for his offence, and acknowledging the harm he caused. By using information contained in victim impact statements as evidence of harm and mandating that such harm increase the sentence, the current victim impact statement regime promotes a punitive approach and a narrow understanding of sentencing outcomes that puts both victims and offenders in unnecessary harmful circumstances.

V. CONCLUSION

This paper has examined the Canadian victim impact statement regime and argued that the legislation currently promotes a punitive approach by using victim impact statements to compile evidence of harm. Recent case law demonstrates the misgivings of this model. It subjects victims to potential secondary victimization through cross-examination and by raising

⁹⁰ *Ibid* at para 76.

⁹¹ *Ibid* at para 41.

⁹² While there is nothing to suggest that his race played a role in influencing the content of the victim impact statements or the sentence imposed, it should also be recognized that Mr. Sidhu, as a racialized man, is more likely to be characterized as fitting the “dangerous offender” stereotype recognized by Ruparelia, especially in contrast with the victims in this case. Implicit prejudice based on stereotypes about race is rarely motivated by outright prejudice or hostility, and is instead usually “unwitting, unintentional, and uncontrollable” (Emma Cunliffe, “Judging, Fast and Slow: Using Decision-making Theory to Explore Judicial Fact Determination” (2014) 18:2 *Intl J Evidence & Proof* 139 at 152–53, citing CD Hardin and MR Banaji, “The Nature of Implicit Prejudice: Implications for Personal and Public Policy” in E Shafir, ed, *Policy Implications of Behavioural Research* (Princeton, NJ: Princeton University Press, 2012) 1 at 2–3). For this reason, it is especially important to be aware of the potential for implicit prejudice to influence decision-making in any sentencing decision involving offenders who are racialized.

their expectations as to the sentencing outcome, sends a message that victims' stories are only useful to the extent that they provide relevant information to the crafting of a proportionate sentence, and promotes a hierarchy of victims based on their personal attributes. It invites judges to measure the relative harm experienced by victims, and it risks evidence of harm overwhelming the sentencing analysis at the expense of the principles of restraint and rehabilitation.

The Canadian regime should be modified to promote an expressive approach to victim participation in sentencing. In one possible version of such a model, victims would be informed before submitting their (optional) statement that the purpose of the statement is to provide an opportunity for them to express themselves about their experience and to inform the offender about the full consequences of the offence, with the goal of promoting responsibility and acknowledgement of the harm done. Victims would be told that inappropriate content, such as content that criticizes personal characteristics of the offender or engages with stereotypes, is not permitted and will be redacted if included. It would be made clear both to victims and judges that the information contained in the statement would not be used to influence the sentence imposed. In this way, there would not be a need for judges to sift out "irrelevant" information, to evaluate the harm, or to compare it to other cases. It would also eliminate the need for the defence to cross-examine victims on their statements.

An instrumental approach is problematic because it tends to use victims as a means to a specific end – increasing sentence severity – which promotes an unfortunate and dangerous "victim versus offender" conception of demonstrating respect for victims. A model prioritizing victim expression avoids these problems while still furthering the purpose of sentencing in s. 718(f) of promoting a sense of responsibility in offenders and acknowledging the harm done to victims and the community, even if it does not do so by impacting the actual sentence imposed.

At the same time, it is important under any model of victim impact statements to recognize that the inclusion of victims in sentencing is not an ultimate solution to the problems faced by victims in the criminal justice system. As Ruparelia warns:

[T]his approach carries with it the danger that the state, believing its duty to victims discharged, will fail to pursue more meaningful action to remedy the systemic problems that persist.⁹³

⁹³ Ruparelia, *supra* note 46 at 699.

As I have argued in this paper, it is necessary to be critical of the methods of being inclusive to victims that are already being implemented. It is equally important going forward to pay attention to what victims themselves are calling for in order to make the criminal justice system more responsive to their needs – not only in sentencing proceedings, but at every stage of the administration of criminal justice.⁹⁴

⁹⁴ For one place to start, see the findings with respect to the justice system in the MMIWG Report, *supra* note 51 at 717–19, which the Commissioners made after hearing from families and survivors of violence against Indigenous women and girls (among other community members, expert witnesses, elders and knowledge keepers, front-line workers, and officials). See also the Calls for Justice in *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol 1b (2019) at 183–86 (in particular, those dealing with the justice system).