Victim Impact Statements and Ancillary Harm: The American Perspective

By Paul G. Cassell* and Edna Erez**

A recent thoughtful article by Julian V. Roberts and Marie Manikis in this journal argues that the concept of "ancillary harm" explains the utility of victim impact statements at sentencing.[1] Roberts and Manikis draw on a recent decision from the Quebec Court of Appeal: *R. c. Cook*.[2] They contend that the appellate court's decision to affirm a trial judge's use of victim impact evidence fits comfortably within retributive principles of punishment because such impact statements helped the judge assess the harm caused by a crime. One of the harms a sentencer must consider, they suggest, is foreseeable harm caused to a victim's family member and others — "ancillary harm" — for which a defendant is properly held accountable. They also conclude that in Canada victims should have a right to present their impact statement not merely in writing but also orally to the sentencing judge. At the same time, however, Roberts and Manikis believe that because a victim impact statement may lengthen the defendant's sentence, a defendant should have a right to cross-examine any victim delivering an impact statement.

In this response, we try to bring an American perspective to bear on these important issues. We find much in the American crime victims' literature and decided court decisions to support many of Roberts and Manikis' general conclusions. We first draw on criminological and victimological literature, which bolsters the Robert-Manikis thesis that ancillary harm is properly considered at sentencing. Second, we provide a concrete illustration from a well-known American case of the proper use of victim impact evidence, including evidence of ancillary harm: victim impact evidence from the recent sentencing of Bernard Madoff for a massive fraud. Third, we turn to American jurisprudence on the scope of victim impact evidence. American cases make clear that a trial judge may properly consider both direct and ancillary harms from a crime in imposing sentence and that victim impact statements are an appropriate means for collecting information about such harms. Fourth, we find that American principles on victims having a right to deliver an impact statement orally are congruent with the principles that Robert-Manikis identify as applicable in Canada. Fifth and finally, we raise some questions about the

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1 J.V. Roberts and M. Manikis, "Victim Impact Statements at Sentencing: The Relevance of Ancillary Harm" (2010) 15 Can. Crim. L. Rev. at 1.

2 2009 QCCA 2423, 2009 CarswellQue 12692, 250 C.C.C. (3d) 248, 71 C.R. (6th) 369; leave to appeal refused 2010 CarswellQue 5650, 2010 CarswellQue 5651 (S.C.C.).

transferability to America of idea that defendants should be able to cross-examine victims giving victim impact statements. Whatever the merits of that position may be under Canadian law or related common law, it would not stand on firm footing under American legal principles or public policy concerns.

1. ANCILLARY HARM AS A PROPER FACTOR AT SENTENCING: INSIGHTS FROM CRIMINOLOGY AND VICTIMOLOGY

(a) "Primary" Victims and "Ancillary" Harm

Any discussion of victim impact statements raises an initial question of who is the "victim" that might present such a statement. Such issues have been discussed in American criminological and victimological circles for some time. A review of American criminal law shows that definitions of victims and victimizations are dynamic, being influenced by cultural and socio-political forces, technological advances, and expanding understanding about the effects of crime.[3] Typically under American victims' rights statutes, recognized victims are those persons who have been directly harmed by commission of a criminal offense recognized in the criminal code.[4] Because these definitions revolve around the criminal code, changes in the code produce changes in who is recognized as a victim. For instance, feminist campaigns have led to recognition of stalking as an independent criminal offense (separate from domestic violence, which is often the context in which stalking occurs) thereby creating newly recognized "victims" of the new crime of stalking. As another example, advances in technology can create new crimes (i.e., cyber crimes) and thus new victims (i.e., cyber victims).

Increasing understanding of the harmful effects of crime can also lead to expanded recognition of victims. For example, as psychological knowledge about the psychic harm sustained by first responders witnessing terrorist crimes has developed — that is, understanding of "compassion fatigue" they suffer in cases of mass victimization — the willingness of the judicial system to recognize them as victims has expanded as well. Thus, in the trial of Timothy McVeigh for the April 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City, the participating firefighters who rescued hundreds of victims (many of whom were children) were given the opportunity to inform the court how the rescue work had affected them.

The field of victimology differentiates between types of victims or victimizations by their proximity to the "primary" or "direct" victim.[5] Victims are usually divided into groups, based on tracing ever widening circles of the harms that flow

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3 See generally Douglas E. Beloof, Paul G. Cassell and Steven J. Twist, *Victims in Criminal Procedure,* 2d ed. (Durham, NC: Carolina Academic Press, 2006) at 102–27 (reviewing this issue in the context of domestic violence cases).

4 See, e.g., 18 U.S.C. §3771(e) (defining "crime victim" as a person "directly and proximately harmed as a result of the commission of a Federal offense"). See generally Beloof *et al., supra* note 3 at 49–72.

5 The term "recipient" victim is also sometimes used to describe direct victims of a crime. See Roberts & Manikis, *supra* note 1 at 10 (discussing *R. v. Duffus*, 2000 CarswellOnt 4891, 40 C.R. (5th) 350 (S.C.J.)).

from crimes. Primary or direct victims are those directly harmed by a crime: those who directly suffer physical, psychological, emotional, or financial harm at the hands of the defendant. For instance, primary victims would include persons who are murdered, raped, assaulted, or defrauded out of their money.[6]

Secondary victims — referred to by Roberts and Manikis as "ancillary" victims — are those occupying the second circle of persons victimized by a crime: those who indirectly suffer victimization due to their special relationships with direct victims (e.g., close familial, friendship, professional, or other ties to direct victims). Secondary victims experience harm as a consequence of harm inflicted on a primary victim. In the *Cook* case discussed by Roberts and Manikis, for example, the secondary victims were the family members who suffered emotional harm as the result of the murder of their loved one. Other examples of secondary victims are family members and friends who are forced to provide care or otherwise respond to the needs of primary victims as a consequence of the crime. Research has long established that primary victims turn first to family and friends before appealing to agencies and institutional services for help.[7] The closer the relationship, the more intensive is the harm secondary victims experience. For instance, women who take care of injured intimate partners or children often experience extensive harm as secondary victims, compared to more distant relatives or friends who are not in daily contact with the primary victim.[8] It is therefore expected, indeed foreseeable, that crimes committed against victims having close personal relationships would translate into increased number of victims who will bear the cost, burden and pain suffered because of the crime. As we will demonstrate later in the article, American law has recognized the harm inflicted on such family members as within the ambit of harm from a crime appropriately part of the sentencing calculation.[9]

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6 Direct victims can stem from all types of crimes. In the context of international crime, for example, direct victims would include those who are enslaved, kidnapped, tortured, or used as human shields. These examples can obviously be multiplied, with the definitional question being whether the person was directly harmed by the crime's effects on them rather than indirectly harmed by effects on someone else.

7 Robert C. Davis, "The Key Contributions of Family, Friends, and Neighbors," in Robert C. Davis, Arthur J. Lurigio, & Susan Herman. eds., *Victims of Crime*, 3rd ed. (Thousand Oaks, CA: Sage Publications, 2007) at 267–76. In some jurisdictions victim impact statements in cases of homicide are called family impact statement. See Paul Rock, "'Hearing Victims of Crime:' The Delivery of Impact Statements as Ritual Behaviour in Four London Trials for Murder and Manslaughter," in Anthony Bottoms & Julian V. Roberts eds., *Hearing the Victim: Adversarial Justice, Crime Victims and the State* (Portland and Devon: Willan Publishing, 2010) at 200-31.

8 The impact of primary victim harm on secondary victims and vice versa is also a function of cultural factors such as the character of the society/community in which one lives (e.g. collective or individualistic), which in turn affect the nature of social-familial relationships within a society.

9 In this article we address only the two circles that have been clearly recognized as falling within the harm properly considered in American law, namely primary and secondary (or ancillary) victims. American commentators and jurists are only beginning to consider a third circle of victimization, which comprises the broader community of those exposed to the reporting of victimization by mass communication. See, e.g., Ka-

The interrelationship between primary and ancillary harm can have a bearing on the harm sustained by primary victims, as well as the way in which ancillary harm evidence is presented in court. Primary victims suffer increased harm from a crime when their own victimization damages those they are close to when, for example, the crime prevents them from being able to provide financial support for family members. Such circumstances translate into higher level of harm suffered by the primary victims (who can no longer attend to the needs of their family) as well as additional harm suffered by the ancillary victims (impoverished financial circumstance). In court, the harm can be presented through input from the primary victims, who cannot fulfill their obligations, or through the ancillary victims, who can no longer depend on the help of primary victims. In short, direct victims' level of harm and the scope of the circle of legitimate victims are interrelated.

(b) Victims and Impact Statements at Sentencing

Discussions about the relevance of crime victims' reports of harm for determining the quantum of punishment — and whether victims should have the rights to submit such reports — can be traced back several decades in American criminological and victimological literature.[10] The discussions developed from several sources. In the criminology literature of the 1970s, American disenchantment with the idea of rehabilitation as the basis for punishment, along with the realization that it resulted in significant sentence disparity, led to calls to replace rehabilitative theories of punished with (among others) a "just deserts" philosophy. Speaking broadly, the just deserts theory (also referred to as retribution) stipulates that punishment should be proportional to the criminal's culpable wrongdoing.[11] Determin-

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tie Long, Note, "Community Input at Sentencing: Victim's Right or Victim's Revenge?" (1995) 75 B.U. L. Rev. 195 (arguing for community impact statements at sentencing). *Cf.* Paul H. Robinson, "Should the Victims' Rights Movement Have Influence Over Criminal Law Formulation and Adjudication?" (2002) 33 McGeorge L. Rev. 749 (arguing against individual victim impact statements but in favor of community impact statements).

10 For the arguments for and against victim integration in sentencing, see, e.g., Edna Erez, "Victim Participation in Sentencing: Rhetoric and Reality" (1990) 18 J. Crim. Just. 19; Edna Erez, "Victim Participation in Sentencing: And the Debate Goes on. . . ." (1994) 3 Int'l Rev. of Victimology 17; Edna Erez, "Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice" (July 1999) Crim L. Rev.; Edna Erez, "Victim Voice, Impact statements and Sentencing: Integrating Restorative Justice and Therapeutic Jurisprudence Principles in Adversarial Proceedings" (Sept.-Oct. 2004) Crim. L. Bulletin at 483–500; Paul G. Cassell, "Barbarians at the Gates? A Reply to Critics of the Victims' Rights Amendment" 1999 Utah L. Rev. 479; Paul G. Cassell, "In Defense of Victim Impact Statements" (2009) 6 Ohio St. J. Crim. L. 611.

11 See, e.g., Martin R. Gardner, "The Renaissance of Retribution: An Examination of Doing Justice" 1976 Wis. L. Rev. 781; A. von Hirsch, *Doing Justice: The Choice of Punishments: A Report of the Committee for the Study of Incarceration* (New York: Hill and Wang, 1976); Robinson & Darley, "The Utility of Desert" (1997) 91 Nw. U.L. Rev. 453; A von Hirsch and A. Shworh, *Proportionate Sentencing* (Oxford: Oxford University Press, 2005).

ing a criminal's culpability requires consideration of the harm the criminal's crime has caused. A common example differentiates between a shooter who kills someone and and a shooter whose gun misfires. Even if both shooters have the same malicious mental state, the shooter who kills will be punished more severely, as a murderer, while the shooter who did not kill be punished less severely, as an attempted murder.

Victim input, it was argued, could help in providing full details on the extent of that harm, by revealing the injury that the victim had suffered at the hands of the defendant. In an influential report, the President's Task Force on Victims of Crime contended that "[a] judge cannot evaluate the seriousness of a defendant's conduct without knowing how the crime haas burdened the victim."[12] The Task Force therefore argued for victim impact statements to become a regular feature of the American criminal justice system.

During the same period, extensive evidence accumulated in the field of victimology on victims' "secondary victimization." Victimologists and others documented victims' frustration and alienation from a justice system in which they had no voice, except as witnesses in the trial.[13] The later emergence of an American school of jurists and legal scholars dedicated to understanding the role of the law as a therapeutic agent — so-called therapeutic jurisprudence or TJ[14] — helped in solidifying the idea that victims should have a voice in legal proceedings generally and criminal sentencing proceedings in particular. TJ scholars and practitioners highlighted the potential of legal practices to affect litigants, both positively and negatively. They called for legal rules and remedies maximizing therapeutic effects and minimize adverse impact on litgants, provided that the fundamentals of justice were preserved. Proponents of the TJ approach noted that crime victim input may have also positive effect on defendants: a crime victim's description of the full extent and types of harms suffered from the defendant's crime (both anticipated and unanticipated) may help defendants appreciate the full impact of their acts, thus promoting rehabilitation and deterrence.

As a result of all these converging influences, legislatures in numerous U.S. states began passing laws providing victims a voice in sentencing proceedings, allowing victims to allocute at sentencing. Within a short period of time, virtually all American states had laws or court rules allowing victims to provide victim impact statements to sentencing judges, either in written or oral form. These laws were aimed at fulfilling two independent but interrelated goals: first, to inform the court about the harm sustained by the victim for determining the quantum of punishment at sentencing; and second, to increase victim welfare during the sentencing process.

Subsequent research on the effects of these laws suggests that victim impact evidence has had a nuanced effect on sentencing decisions. Interestingly, victim impact statements have not (as some had feared) dramatically increased defendants' sentences. For example, a study in California concluded that "[t]he right to

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12 President's Task Force on Victims of Crime, *Final Report* (1982) at 77.

13 William F. McDonald, "Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim" (1976) 13 Am. Crim. L. Rev. 649.

14 D. B. Wexler, *Therapeutic Jurisprudence: The Law as a Therapeutic Agent* (Durham, NC: Carolina Academic Press, 1990).

allocution at sentencing has had little net effect . . . on sentences in general."[15] A study in New York similarly reported "no support for those who argue against [victim impact] statements on the grounds that their use places defendants in jeopardy."[16] Indeed, in a few cases, victim impact evidence has reduced sentence severity by showing than the harm of the crime was less substantial that argued by the prosecution.[17] One of us reviewed all of the available evidence in this country and elsewhere, and concluded that "sentence severity has not increased following the passage of [victim impact] legislation."[18]

Even though victim impact statements have not caused a detectable, system-wide increase in sentence severity, in individual cases impact statements can affect outcomes. Indeed, as we will show shortly in our discussion of the Madoff case, individual judges have sometimes imposed longer prison sentences as the result of victim impact statements. Moreover, apart from incarceration, victim impact statements has been associated with other changes in sentences, such as "affect[ing] the conditions of probation, causing the judge to order anger-management treatment, drug and alcohol supervision, domestic violence counseling, or such."[19] In other words, victim impact statements have a nuanced effect on sentencing — an effect that in our view is best described as helping judges tailor individual sentences to the particular circumstances of a case.

Apart from any ultimate effect on the sentence, victim impact statements also appear to have had noteworthy beneficial effects on the victims delivering them. The evidence shows that crime victims, particularly those harmed by serious crimes, feel a need to tell decisionmakers how the crime has hurt them.[20] Research

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15 Edwin Villmoare and Virginia N. Neto, *National Institute Of Justice, U.S. Dept of Justice, Executive Summary, Victim Appearances at Sentencing Hearings Under the California Victims' Bill of Rights* (1987) at 61 [hereinafter NIJ Sentencing Study].

16 Robert C. Davis and Barbara E. Smith, "The Effects of Victim Impact Statements on Sentencing Decisions: A Test in an Urban Setting" (1994) 11 Just. Q. 453, 466; *accord.* Robert C. Davis *et al., Victim Impact Statements: Their Effects on Court Outcomes and Victim Satisfaction in New York, 1988–1990* (New York City, NY: Victim Services Agency, 1990) at 68 (concluding that the result of the study "lend[s] support to advocates of victim impact statements" since no evidence indicates that these statements "put defendants in jeopardy [or] result in harsher sentences").

17 See Edna Erez and Linda Rogers, "Victim Impact Statements and Sentencing Outcomes and Processes: The Perspectives of Legal Professionals" (1999) 39 Brit. J. of Criminology 216. Roberts and Marikis seem to suggest that victim input has potential of aggravating the sentence, but not reducing it. Some skillful defense advocates have recognized, however, that victim information can sometimes be a mitigating factor at sentencing. See Benji McMurray, "The Mitigating Power of a Victim Focus at Sentencing" (2006) 19 Fed. Sent'g Rep. 125 at 127.

18 Erez (1999), *supra* note 10 at 545, 548; see also Erez (1994), *supra* note 10 at 22.

19 Amy Propen and Mary Lay Schuster, "Making Academic Work Advocacy Work: Technologies of Power in the Public Arena" (2008) 22 J. Bus. & Tech. Comm. 299 at 315.

20 S. Szmania and M. Gracyalny, "Addressing the Court, the Offender and the Community: A Communiction Analysis of Victim Impact Statements in a Non-Capital Sentencing Hearing" (2006) Int'l Rev. of Criminology 13 at 231–49; Julian V. Roberts and

has documented that victims who choose to participate (directly or indirectly[21]) tend to be those who sustained serious harm and that having the opportunity to present a victim impact statement is associated with *greater* satisfaction with the ultimate outcome of the case.[22]

Granted, not all victims wish to discuss their harm or convey their feelings to the judge or to the offender who is present at sentencing. Indeed, the limited participation of victims has been used by some legal scholars as an argument against allowing victim input, suggesting that when only a small portion of victims provide input, inequality or presumed sentence disparity ensue.[23] Other persistent objections to victim input revolve around fears that victim voice would contaminate proceedings with "sloppy emotional stuff" and negatively affect court outcomes.[24] If indeed, some have argued, the reason for allowing victim input is victim well-being, then victims should exercise their right to speak *after* the court has determined the sentence.[25]

In our view, such arguments against victim input in sentencing hearings ignore the relevance of the details in a victim impact statement for a judge's appreciation of the extent of harm sustained directly and indirectly by victims as well as the therapeutic benefits of victims conveying their harm directly to decisionmakers at a time when the information is meaningful and relevant (i.e., when it can make a difference at sentencing).[26] The Bernard Madoff case discussed below illustrates this interrelation between primary and ancillary harm, and also demonstrates the functions that victim input can play not only for the court but also for crime victims. Because most of the persisting objections to victim input in the U.S. focus on capital murder cases,[27] it also useful to step outside of that relatively unusual type

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Edna Erez, "Communication in Sentencing: Exploring the Expressive Function of Victim Impact Statements" (2004) 10 Int'l Rev. of Victimology 223.

21 In many states, victims can provide victim impact evidence indirectly to the judge, by passing along information to a probation officer who includes it in the pre-sentence report prepared for the judge.

22 Ellen K. Alexander and Janice Harris Lord, *Impact Statements: A Victim's Right to Speak, A Nation's Responsibility to Listen* (Arlington, VA: National Center for Victims of Crime, 1994); Erez and Rogers, *supra* note 17.

23 Andrew Sanders and Imogen Jones, "The Victim in Court," in Sandra Walklate ed., *Handbook of Victims and Victimology* (Portland and Devon: Willan Publishing, 2007) at 282-308; Markus Dirk Dubber, *Victims in the War on Crime: The Use and Abuse of Victims' Rights* (New York: New York University Press, 2002).

24 Susan Bandes, "Empathy, Narrative and Victim Impact Statements" (1996) 63 U. Chi. L. Rev. 361; Susan Bandes, "Victims, "Closure," and the Sociology of Emotion" (2009) 72 Law & Contemp. Probs. 1; Carolyn Hoyle, "Empowerment through Emotion: The Use and Abuse of Victim Impact Evidence," in Edna Erez, Michael Kilching, and Joanne Wemmers (eds.), *Therapeutic Jurisprudence and Victim Participation in Justice: International Perspectives* (Durham, NC: Carolina Academic Press, 2011).

25 Hoyle, *supra* note 24.

26 American law provides victims the opportunity to convey the harm in their own words and directly to the judge. In some countries (e.g. England) victim input is presented (and possibly rewritten) by some mediating body such as the prosecution.

27 See, e.g., Bandes (1996) and Bandes (2009), *supra* note 24.

of crime to consider the role of victim impact evidence for a a crime that that involves financial victimization. We turn, then, to the Madoff case.

2. AN ILLUSTRATION OF VICTIM IMPACT STATEMENTS AND ANCILLARY HARM: THE BERNARD MADOFF CASE

Just as Roberts and Manikis use a Canadian case as the springboard of their discussion, we believe that reviewing a recent and prominent American case may be helpful. The case we will discuss is *United States v. Madoff*, a financial crime — , one of the largest financial crimes in American history.[28] At sentencing the judge made considerable use of the victim impact statements that were provided to him, including statements that provided information about the ancillary harm that resulted from Madoff's fraud. This case provides a good illustration of proper uses of victim impact evidence to determine a sentence proportionate to the offense.

Bernard Madoff ran a $60 billion-dollar Ponzi scheme for more than twenty years, causing thousands of investors to lose large sums, in many instances their life savings. Because thousands of victims lost money to Madoff's fraud, the prosecutors developed a website to provide information about the case to the victims.[29] The website also explained to victims the procedure for providing victim impact statements in writing. More than one hundred wrote letters or e-mails to the presiding judge in the case, Judge Danny Chin.[30] During Madoff's sentencing hearing, ten victims spoke: eight of whom had also submitted written statements and two of whom had not. The victims had various reasons for speaking. For example, one of the victims said she felt particularly vulnerable because she had no children or other substantial social connections and Madoff's crime left her with no money left to live on. Another victim asked to speak because she knew Madoff personally and thought the defendant would not be able to ignore what she had to tell him.[31]

In describing the harm they suffered from the crime, the primary victims testified about the enormous shock of discovering that what they thought was a safe

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28 *United States v. Madoff* (April 20, 2009), Doc. 09 Cr. 213(DC) (U.S. Dist. Ct. S.D. N.Y.).

29 Online: <http://www.justice.gov/usao/nys/madoff.html>. While federal law generally guarantees victims of crime the right to individualized notice of court hearings, the law also provides for a "reasonable procedure" to be used in cases involving large numbers of victims. 18 U.S.C. §3771(d)(2). Thus, the website was used rather than mailing individual notices to victims.

30 The letters can be conveniently found online: <http://www.cbsnews.com/htdocs/pdf/Madoff — Victim_Impact_Statements.pdf>. To reduce the number of footnotes in this article, we have not footnoted each individual quotation from a letter.

31 One letter was received from an employee of Madoff's firm who lost his job and benefits after two decades of working for it. Another letter was written by a person who noted that he did not invest money with Madoff, but as a citizen was nonetheless enraged by the scheme, the negligence of the Securities and Exchange Commission (SEC), and the devastating loss that the scheme caused to so many investors. Several letters were comprised of copies of requests addressed to U.S. Senators about the need to enact legislation so that indirect victims of frauds would also be compensated by the Securities Investor Protection Corporation (SIPC).

investment turned out to be a fraud and that they had lost their hard-earned life savings as a consequence. Many referred to it as a continuous nightmare. They felt robbed, raped, violated, or "assaulted with intangible weapon." They described in detail how they lost their "freedom to do things," or to "go out or travel." They also talked about how the crime caused them to lose trust in people, in the system that was supposed to protect them, and in the government that assured them that their investments were safe. They revealed the physical and mental symptoms they suffered because of the crime: depression, stress, despair, anxiety, resultant illnesses, or aggravation of existing ones, and an inability to get up in the morning to face their new impoverished existence. Some stated they had lost weight, did not want to go out of the house, and lost any interest in life. Several victims equated their lives with being in prison. Many of the victims described themselves as elderly or sick, without family or other support networks. They talked about being unable to afford the medicine they needed, new reading glasses, or airfare to present their harm in court. For several victims, the loss of ability to donate money to charitable organizations or to help the needy was highly painful. They all talked about brutally shattered plans for their own lives.

But the victims described not only the consequences for themselves, but also the devastating impact Madoff's crime had on the significant others in their lives — the ancillary victims. The harm suffered by these ancillary victims — children, grandchildren, and other family members of the primary victims — was most often presented by the primary victims as part of their own suffering. Indeed, much of the suffering the primary victims described stemmed from the harm they sustained because of the significant others in their lives. Many primary victims presented as part of their pain their inability to fulfill various parental expectations or family obligations toward relatives: they could no longer pay for their children's college education, airfare to visit their grandchildren and be part of their lives, or to help ailing parents or elderly siblings who relied on their financial assistance. Some described how they had to sell their homes and move in with their children, thereby victimizing them. They also felt ashamed and embarrassed that they were transformed from providers for their offspring into their dependents.

In some cases, the ancillary victims themselves wrote letters in which they detailed how Madoff's fraudulent schemes hurt them. One letter was written by a son of a couple who had lost their life savings; he lamented that his parents could no longer afford paying for the special needs of his disabled twin brother and expressed his pain that his brother would have to be moved out of his parents' home. Others wrote about how the loss of their parents' savings forced them to change long-standing plans concerning college, postpone their education, or even to leave school altogether.

Madoff's victims also used their victim impact statements for purposes other than describing their harm, including expressing their feelings toward the defendant and his relatives, as well as various authorities or regulating agencies.[32] Some expressed their anger with Madoff for continuously deceiving them with bogus

32 The use of victim impact statements to convey messages to different audiences has been previously noted in victimological analyses of the content of these statements. See, e.g., Szmania and Gracyalny, *supra* note 20; Roberts and Erez, *supra* note 20.

monthly earning statements. Several letters included remarks addressed to the defendant (directly or in the third person) abhorring his heinous acts, arrogance, lack of remorse, and absence of any genuine compassion toward his victims. Some victims reported being flabbergasted by the claims Madoff's wife Ruth made to the scant remaining funds, or they expressed surprise that Madoff was allowed to await his sentence in his plush apartment in New York while they had lost their homes. Those who knew Madoff personally elaborated on the sense of betrayal they felt from being deceived for decades.

For many victims, the victim impact statements provided an opportunity to challenge what they perceived as incorrect images, promoted by the media, that portrayed Madoff's victims as rich, socialites, or greedy. Many of the writers presented themselves as ordinary citizens who played by the rules and lived within (or below) their means so that they could save for their retirement. They were hard-working wage earners who deposited their life saving with Madoff based on what they thought was sound advice they received from friends, family, or investment professionals. They described how they paid taxes for years on what Madoff had led them to believe was their income, when in reality there was nothing there. Many emphasized that they were not affluent but came from modest economic backgrounds and frugal lifestyles. At the same time, many commented on Madoff's deceptive practices that allowed him, his family, and his friends to live so lavishly at their expense. Expressing displeasure with the government agencies that failed to protect them, they requested that laws be passed to compensate indirect investors or to expedite the insurance payments that they were due from Securities Investor Protection Corporation.

Several victims commented that they were disappointed that Madoff showed no remorse or genuine repentance and that his behaviour caused them to lose faith in human nature. Many victims requested the court to impose a penalty proportionate to the harm Madoff caused to so many people, which in their view meant that he should spend the rest of his life in prison.

At the sentencing hearing, the judge noted that he had read the letters and that he agreed with many of the sentiments expressed by the victims.[33] He also used victim allocution for various sentencing purposes, to determine the extent of harm from Madoff's fraud, to rebut the defense plea for leniency, and ultimately to determine the sentence proportionate to the crime. The judge flatly rejected the defense contention that the letters reflected nothing more than mob vengeance. According to Judge Chin, just because many of the letters sounded similar themes did not mean that the victims acted together as a mob. He agreed that "a just and proportionate sentence must be determined objectively, and without hysteria or undue emotion,"[34] and went on to discuss the various factors he was taking into consider-

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33 A full transcript of the hearing can be found online: <http://www.justice.gov/usao/nys/madoff/20090629sentencingtranscriptcorrected.pdf>.

34 This idea that a sentencing court engages in dispassionate or objective determination of sentence — or in "dry-eyed justice" as one recent Canadian case put it, *R. v. Steeves*, 2010 NBCA 57, 2010 CarswellNB 378, 2010 CarswellNB 379 — and practices a "clinical approach," one that is devoid of emotion, is a common theme sounded by judges in cases where emotions seem high. See Erez and Rogers, *supra* note 17.

ation in determining the penalty, facts which included the harms victims described in their written and oral input.

Analyzing "objectively" the harm that Madoff caused his victims, Judge Chin noted the massive breach of trust perpetrated by the defendant and how he had repeatedly lied to individuals, charities, pension funds, and institutional clients about their money. Judge Chin referred to victims' letters that demonstrated how investors made important life decisions based on the fictitious account statements, resulting in severe primary and ancillary harm: delayed retirements, difficulty in caring for elderly parents, problems in buying a car, having to sell their home, or issues in saving for children's college educations.

In rejecting the defense request that Madoff be sentenced to only twelve years' imprisonment (or, at most, fifteen to twenty years), the judge noted the various forms and types of harm the victims had described in their impact statements and rejected the defense's request. He held that the defense request was not commensurate with the level of harm inflicted by the crime and instead imposed 150 years of prison. The judge noted that the long sentence serves "as symbolism" to reflect the devastating harm the defendant caused so many victims. The judge also validated victims' claims that they were neither rich nor famous, but came from all walks of life:

> I received letters, and we have heard from a retired forest worker, a corrections officer, an auto mechanic, a physical therapist, a retired New York City school secretary who is now 86 years old and widowed, who must deal with the loss of her retirement funds. Their money is gone, leaving only a sense of betrayal. I was particularly struck by one story I read in the letters. A man invested his family's life savings with Mr. Madoff. Tragically, he died of a heart attack just two weeks later. The widow eventually went to see Mr. Madoff. He put his arm around her, as she describes it, and in a kindly manner told her not to worry the money is safe with me. And so not only did the widow leave the money with him, she eventually deposited more funds with him, her 402(K), her pension fund. Now, all the money is gone. She will have to sell her home and she will not be able to keep her promise to help her granddaughter pay for college.

In his conclusion, the judge noted that the substantial sentence would not compensate the victims for their losses, nor would it undo the enormous harm they sustained as primary or ancillary victims. He reiterated that the submission of victim input did not indicate victims' were succumbing to the temptation of mob vengeance; instead, "the victims were doing what they were supposed to be doing — placing their trust in our justice system." He then commented: "The knowledge that Mr. Madoff has been punished to the fullest extent of the law may, in some small measure, help these victims in their healing process."

In our view, the Judge Chin followed a proper, indeed, uncontroversially proper approach to determining the sentence for Madoff. Judge Chin evaluated the full sweep of the harms from the crime; that is, the effect it had on both primary and ancillary victims. Any other approach would have meant that the sentence would have not have given Madoff his just deserts by failing to reflect all of the harms that Madoff had caused. To be sure, reasonable people can disagree about what sentence is proper once a judge has determined all of the harms from a crime. But the first step is crucial: assaying all the harms that the defendant has inflicted. The Madoff sentencing hearing thus illustrates the importance of victim input for

judges' appreciation of the extent of victim harm (both direct and ancillary) for arriving at a commensurate punishment. It also illustrates how victim input is used in the determination of penalty, in this case, as a basis to decline request for leniency.

The Madoff hearing also highlights the various functions that sentencing input serves for victims. In addition to providing information for the judge to determine sentence, the mere opportunity for victims to express feelings toward the defendant and the relevant authorities, to make various requests for remedial action, and to challenge prevailing myths about who are the victims of a crime can serve valuable functions. Even if Judge Chin had not used the victim information to calculate sentencing, the process would have been intrinsically valuable for these reasons alone.

3. AMERICAN CASELAW ON ANCILLARY HARM

Judge Chin's decision to use victim impact statements, including statements about ancillary harm, is no outlier in American jurisprudence. American courts are now widely accepting the propriety of using victim impact evidence (including impact ancillary harm) to determine the harm from a crime. American caselaw is thus moving in the same direction as the Canadian caselaw described by Roberts and Manikis. On this issue, at least, American and Canadian law appears to coincide.

Developed American caselaw on victim impact statements can be traced back to the 1987 decision of *Booth v. Maryland*, when the United States Supreme Court considered a capital defendant's challenge to the use of a victim impact statement.[35] In that death penalty case, the Court concluded that a prosecutor's use of a victim impact statement to explain the impact of the murder on the family of the victim violated the Eighth Amendment's Cruel and Unusual Punishment Clause. The Court found it objectionable that the jury would consider such impact evidence when the defendant might not have ever known the victim's family or have ever considered whether the murder would have an effect on anyone other than the person he murdered.[36] The Court also expressed concern about possible disparate impact that use of impact statements might create, given that family members of murder victims differ in their articulateness and their willingness to describe their feelings.[37] Finally, the Court was concerned that allowing victim impact testimony might result in a mini-trial on the victim's character.[38] Accordingly, the Court barred any evidence and argument relating to the victim and the victim's family, as well as any opinion evidence from the victim's family members about the crime, the defendant, or the appropriate sentence.

Just four years later, however, the Court reversed itself in *Payne v. Tennessee*.[39] In *Payne*, the Court specifically overturned its holding in *Booth*, at least to the extent that *Booth* had held that "evidence and argument relating to the victim and the impact of the victim's death on the victim's family are inadmissible at a

35 482 U.S. 496 (1987).

36 *Ibid* at 505.

37 *Ibid* at 505-06.

38 *Ibid* at 506.

39 501 U.S. 808 (1991).

capital sentencing hearing" under the Eighth Amendment.[40] The *Payne* Court held instead that the jury should have before it, at the sentencing phase, "evidence of the specific harm caused by the defendant."[41] *Payne* explained that "[t]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentence that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family."[42]

While the *Payne* decision did not contain Roberts and Manikis' term "ancillary harm," the Court left no doubt that a jury could constitutionally consider this type of harm. For example, the Court referred generally to allowing the introduction of evidence of "the human cost of the crime of which the defendant stands convicted."[43] And, more specifically, the Court directly stated that "[a] State may legitimately conclude that evidence about the victim *and about the impact of the murder on the victim's family* is relevant to the jury's decision."[44]

The Court did add a cautionary note about extreme cases, explaining that while allowing victim impact evidence would not normally violate the Eighth Amendment, unusual cases might arise where evidence would be introduced that is "so unduly prejudicial that it renders the trial fundamentally unfair."[45] In such an instance, the due process clause of the Fourteenth Amendment would bar such evidence.[46] Also, while allowing evidence of the specific harm caused by the defendant, the Court did not specifically overturn *Booth*'s earlier holding that "the victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence" may violate the Eighth Amendment.[47] Nonetheless, *Payne* clearly holds that, if a State so desires, the Constitution does not bar introduction of ancillary harm evidence as part of the sentencing process.[48]

In the two decades since the Supreme Court's decision in *Payne*, state cases have explicated the Supreme Court's holding, making clear that victims and family members may present victim impact statements at sentencing describing the impact the crime has had on them. A few illustrations from capital homicide cases may helpfully demonstrate the point. The Arkansas Supreme Court has held that victim

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40 *Ibid* at 830 n.2.

41 *Ibid* at 838.

42 *Ibid* at 825 (internal quotation omitted).

43 *Ibid* at 827.

44 *Ibid* at 827 (emphasis added).

45 *Ibid.*

46 *Ibid.*

47 *Ibid.* The extent to which *Payne* implicitly overturned this holding in *Booth* is an issue on which the lower courts are currently divided. See petition for *certiorari*, *State v. Ott*, No. 10-499 (U.S. Nov. 2010) (discussing conflicting authority on this question). [Note: The petition was denied February 22, 2011.]

48 *Payne* also suggested that, in some situations, admission of victim impact evidence would be "so unduly prejudicial that it renders the trial fundamentally unfair." *Payne*, 501 U.S. 808 at p. 825. The precise dimensions of that limitation have yet to be determined. See, e.g., *Kelly v. California*, 129 S.Ct. 564 (U.S. 2008) (Steven J., dissenting from denial of *certiorari*).

impact evidence is "relevant evidence which informs the jury of the toll the murder has taken on the victim's family" and it did not violate the Eighth Amendment or the Due Process Clause to allow it.[49] The Arizona Supreme Court has agreed that "[s]tatements regarding impact on family members and information about the murdered person do not violate the Eighth Amendment because they are relevant to the issue of harm caused by the defendant."[50] The Florida Supreme Court has affirmed a trial judge who had allowed the testimony of four family members of a murder victim: the victim's uncle, sister, first wife and mother of his two children, and current wife and mother of his stepchildren. The Court explained that it had never "drawn a bright line holding that a certain number of victim impact witnesses are or are not permissible" and that the testimony properly showed how the victims "death had cause a loss to both his family members and to the community."[51]

State courts have likewise found such ancillary harm evidence admissible in non-capital cases. Here again, a few illustrative cases may be informative. The Kansas Supreme Court held that a trial judge had properly based a decision to impose consecutive sentences, in part, on a victim impact statement from the sister-in-law of murder victim that included some "inflammatory" statements. The Court concluded that the judge "was required to consider the extent of the harm committed by the defendant," and that testimony by the victim's family may be relevant to that determination.[52] The Louisiana Court of Appeals upheld a maximum sentence of 40 years in manslaughter case after considering the impact of the crime on the victim's family, including the facts that the victim "was part of close-knit family and was much missed" and "after the mother learned of the killing, she never spoke again."[53] Also, the Colorado Court of Appeals upheld a restitution award of counseling to victim and victim's family because, based on the victim impact statement, "the effects of defendant's [extortion] extended to the family of the victim in that both the victim and her family sustained psychological trauma from the defendant's conduct."[54]

The few state cases that have excluded what might be described as ancillary harm evidence have generally done so on the basis that the evidence went beyond the confines of the *Payne* holding and thus did not bear directly on the harm caused by the defendant. For example, the Utah Supreme Court recently reversed a sentence imposed on a murderer where the victim's family members had offered specific recommendations on sentencing and opined on the defendant's character.[55] A few other cases have also limited the weight to be given to ancillary harm evidence. The Indiana Supreme Court, for instance, has held that under its sentencing scheme, the fact that a murder had an impact on the victim's family was not an automatic aggravating factor. The court explained that "[t]he impact on others may

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49 See, *e.g.*, *Thomas v. State*, 257 S.W.3d 92 at p. 100 (Ark. 2007).

50 *State v. Bocharski*, 189 P.3d 403 at p. 415 (Ariz. 2008).

51 *Wheeler v. State*, 4 So.3d 599 at p. 608 (Fla. 2009).

52 *State v. Parks*, 962 P.2d 486 at p. 490 (Kan. 1998).

53 *State v. Givens*, No. 45,354 KA, 2010 La. App. LEXIS 943 (La. App. Jun. 23, 2010).

54 *People v. Estes*, 923 P.2d 358 (Colo. App. 1996).

55 *State v. Ott*, 2010 UT 1 (2010). The State filed a petition for *certiorari* with the U.S. Supreme Court on this case. See *supra* note 47.

qualify as an aggravator in certain cases but 'the defendant's actions must have had an impact on . . . other persons of a destructive nature that is not normally associated with the commission of the offense in question and this impact must be foreseeable to the defendant.'"[56]

Under this caselaw, it is clear that ancillary harm evidence is firmly entrenched in the American criminal justice system. What is more unsettled, however, are procedural questions surrounding the presentation of such evidence. A brief look at two procedural questions is instructive, as it sheds light on how American courts treat victim impact evidence in light of crime victims' concerns about presenting such evidence in the most powerful way and defendants' concerns about challenging in inaccuracies in such evidence. The next section, therefore, looks at whether victims and their families are entitled to present victim impact evidence orally, while the concluding section looks at the defendants' ability to cross-examine such evidence.

4. AMERICAN CASELAW ON THE VICTIM'S RIGHT TO PRESENT A VICTIM IMPACT STATEMENT ORALLY

Courts in both Canada and America have considered the issue of whether a crime victim can present a victim impact statement orally. In the *Cook* decision discussed by Roberts and Manikis, the sentencing judge exercised discretion to allow the victim's daughter to read a written victim impact statement at sentencing.[57] Apparently hearing the statement directly had a significant effect on the judge, as he ultimately referenced the impact statement as a reason for imposing a significant prison sentence. American judges, too, have considered whether a crime victim is entitled to present a victim impact orally, or whether the victim can be confined to a purely written submission.

In overview, the federal courts and most states give a crime victim the option of presenting a victim impact statement orally. Federal law is clear that victims have a right to present an impact statement orally, as several victims did in the *Madoff* case.[58] At the state level, approximately 39 of the 50 states allow victims to choose between making an oral or written victim impact statement, although in a few states certain conditions must be met before a victim can make either an oral or written statement. We collect these laws in an appendix at the end of this article. A handful of states are less clear in regards to the type of victim impact statement that victims can make. Three states, California, Nevada, and Rhode Island, allow for the victim to "appear" or "address" the court without spelling out how they would accomplish this task.[59] Other states give victims the right "to be heard" or to make a

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56 *Bacher v. State*, 686 N.E.2d 791 (Ind. 1997) (citing *State v. Johnson*, 873 P.2d 514 at p. 525 (Wash. 1994).

57 *R. c. Cook*, 2006 QCCS 3632, 2006 CarswellQue 6724 at para. 21; leave to appeal allowed 2009 QCCA 2423, 2009 CarswellQue 12692, 250 C.C.C. (3d) 248, 71 C.R. (6th) 369; leave to appeal refused 2010 CarswellQue 5650, 2010 CarswellQue 5651 (S.C.C.).

58 See *U.S. v. Degenhardt*, 405 F.Supp.2d 1341 (D. Utah 2005) (victims have the right to personally address the court).

59 Cal. Penal Code §1191.1, Nev. Rev. Stat. §176.015, R.I. Gen. Laws §12-28-4.

"statement" without giving further details.[60] One state (Kentucky) is apparently the only state that seemingly confines victims to giving a written impact statement.[61]

A right to speak orally also seems to be the intent of the legislatures that have passed allocution statutes. A convenient illustration comes from the federal *Crime Victims Rights Act*, passed by Congress in 2004. The Act gave victims a right to "be reasonably heard" at sentencing, which the drafters specifically intent to confer a right to directly address the Court. As the Senate sponsors of the legislation explained: "The very purpose of this section is to allow the victim to appear personally and directly address the court. This section would fail in its intent if courts determined that written, rather than oral communication, could generally satisfy this right. On the other hand, the term 'reasonably' is meant to allow for alternative methods of communicating a victim's views to the court when the victim is unable to attend the proceedings. Such circumstances might arise, for example, if the victim is incarcerated on unrelated matters at the time of the proceedings or if a victim cannot afford to travel to a courthouse. In such cases, communication by the victim to the court is permitted by other reasonable means."[62]

As a matter of sound public policy, the best approach to the issue is to give crime victims the option to deliver an oral impact statement. Allowing an oral statement is supported by "rite-based" theories of victim allocution.[63] As noted at the outset of this article, one of the concepts underlying victim impact statements is dignity and fair treatment for victims. Defendants are given a right to allocute orally, which as matter of even-handed treatment should likewise extend to victims. As the President's Task Force on Victims of Crime concluded: "The victim, no less than the defendant, comes to court seeking justice. When the court hears, as it may, from the defendant, his lawyer, his family and friends, his minister, and others, simple fairness dictates that the person who has borne the brunt of the defendant's crime be allowed to speak."[64]

Giving victims a chance to participate in the rite of allocution can have important benefits for the victim. Professor Mary Giannini explains that by delivering a victim impact statement orally to a judge,

> [. . .] the victim gains access to a forum that directly and individually acknowledges her victimhood.
>
> The moment of sentencing is among the most public, formalized, and ritualistic parts of a criminal case. By giving victims a clear and uninterrupted

60 See Idaho Code Ann. §19-5306(e) and Kan. Const. art 15, §15 (stating only that victims have a right to be "heard"); N.M. Stat. Ann. §31-26-4, N.Y. C.P.L.R. §380.50, and Wis. Stat. §950.04(iv)(m) (providing that victims have a right to make a "statement"); N. C. Gen. Stat. §15-A-825 (stating that a victim can have a victim impact statement prepared for "consideration by the court"); Or. Rev. Stat. §163.150 (stating that a victim may present "victim impact evidence").

61 Ky. Rev. Stat. Ann. §421.520.

62 150 Cong. Rec. S10,911 (Oct. 9, 2004) (statement of Senator Kyl).

63 See Mary Margaret Giannini, "Equal Rights for Equal Rites?: Victim Allocution, Defendant Allocution, and the Crime Victims' Rights Act" (2008) 26 Yale L. & Pol'y Rev. 431.

64 President's Task Force on Victims of Crime, *Final Report* (1982) at 77-78.

> 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.[65]

When a victim speaks in court, certain therapeutic benefits may occur. As one victim explained the process, "The Victim Impact Statement allowed me to construct what had happened in my mind. I could read my thoughts. . . . It helped me to know that I could deal with this terrible thing."[66] Another victim said, "[W]hen I read [the victim impact statement] [in court] it healed a part of me — to speak to [the defendant] and tell him how much he hurt me."[67] And still another victim explained that "I believe that I was helped by the victim impact statement. I got to tell my step-father what he did to me. Now I can get on with my life."[68] And, if the judge acknowledges what the victim has said in the statement, the judge's words can be (as one victim put it) "balm for her soul."[69]

These healing effects are far from unusual. As one of us has written elsewhere, "The cumulative knowledge acquired from research in various jurisdictions, in countries with different legal systems, suggests that victims often benefit from participation and input. With proper safeguards, the overall experience of providing input can be positive and empowering."[70] Thus, the consensus appears to be that victim impact statements allow the victim "to regain a sense of dignity and respect rather than feeling powerless and ashamed."[71]

It is true that not every crime victim will benefit from being involved in the court process.[72] But no crime victim is required to deliver such a statement. Instead, the right to speak is one that the victim can choose to exercise, or not to exercise. The benefits that victims derive from delivering a victim impact statement thus parallel the benefits that have been identified for other participants in the legal process by the "therapeutic jurisprudence" movement.[73]

The benefits that may come from an oral victim impact statement should not be overstated. Occasionally the claim is made that victim impact statements will

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65 Giannini, *supra* note 63 at 452 (quoting Richard A. Bierschbach, "Allocution and the Purposes of Victim Participation Under the CVRA" (2006)19 Fed. Sent'g Rep. 44 at 46-47).

66 Ellen K. Alexander & Janice Harris Lord, *Impact Statements: A Victim's Right to Speak, A Nation's Responsibility to Listen* (1994) at 22 (quoting victim).

67 Paul G. Cassell, "Balancing the Scales of Justice: The Case for and Effects of Utah's Victims' Rights Amendment" 1994 Utah L. Rev. 1371 at 1395 n.107.

68 *Ibid.*

69 Amy Propen & Mary Lay Schuster, "Making Academic Work Advocacy Work: Technologies of Power in the Public Arena" (2008) 22 J. Bus. & Tech. Comm. 299 at 318.

70 Erez (1999), *supra* note 10 at 545, 550-51.

71 *Kenna v. U.S. Dist. Court for C.D.Cal.*, 435 F.3d 1011 at p. 1016 (9th Cir. 2006) (quoting Barnard, *supra* note 40 at 41).

72 See Markus Dirk Dubber, *Victims in the War on Crime: The Use and Abuse of Victims' Rights* (2002) at 336 (raising the possibility that victims may be traumatized from the experience of delivering a victim impact statement).

73 See *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Bruce J. Winick & David B. Wexler eds., 2003) at 6–8.

somehow automatically bring "closure" to victims from a crime. But "closure" may never really occur after a crime, especially when extreme violence is at issue.[74] And, in any event, victim impact statements need not deliver total closure to nonetheless be a desirable part of the criminal justice process. Victims may desire to give a victim impact statement for a variety of reasons.[75] Unless there is some compelling reason not to honour this desire, the criminal justice system ought to accommodate crime victims.

Finally, while American and Canadian law appear to converge on the right for crime victims to deliver a victim impact orally, one small point of divergence is interesting. Under Canadian procedures, it appears that victims are generally required to provide a written impact statement in advance to the Court.[76] The reason for this requirement appears to be to give notice to defendants of the information that they will be expected to respond to at sentencing. In contrast, prevailing American law does not require advance notice to defendants of the contents of a victim impact statement or that a court might impose a different sentence based on information in the statement. The rationale for this approach was explained by the Third Circuit:

> The right of victims to be heard is guaranteed by the *Crime Victims' Rights Act*. The right is in the nature of an independent right of allocution at sentencing. Under the CVRA, courts may not limit victims to a written statement. Given that it would be impossible to predict what statements victims might offer at sentencing, it would be unworkable to require district courts to provide advance notice of their intent to vary their discretionary sentence based on victim statements that had not yet been made.[77]

Thus, as mentioned earlier, in the *Madoff* case several victims spoke at the sentencing hearing even though they had not provided a prior written impact statement.

Here again, sound public policy supports the American approach. Requiring crime victims to place all of their thoughts down in writing before speaking to the Court makes the victim impact process unnecessarily cumbersome. In the rare case where there is some sort of true "surprise" to the defense, the Court can take appropriate corrective steps, such as allowing defense counsel to proffer contrary infor-

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74 See generally Michelle Goldberg, "The 'Closure' Myth," *Salon* (Jan. 21, 2003), online: http://dir.salon.com/story/news/feature/2003/01/21/closure/print.html:"No psychological study has ever concluded that the death penalty brings 'closure' to anyone except the person who dies . . ."; "Rethinking 'Closure,'" *Article 3 (Murder Victims' Families for Human Rights, Cambridge, M.A.)* (Fall 2008/Winter 2009) at 1-2 (arguing that "closure" does not come from executing death row inmates).

75 See, e.g., Cassell (2009), *supra* note 10 at 616–19 (giving example of victims desiring to give such a statement).

76 See *R. c. Cook*, *supra* note 57 at paras. 58–62 (discussing Canadian *Criminal Code s.* 722).

77 *U.S. v. Vampire Nation*, 451 F.3d 189 at p. 197 (3rd Cir. 2006) (internal citations and quotations omitted). See also *Irizarry v. U.S.*, 553 U.S. 708 (2008) (advance notice not required at sentencing in other contexts for "variances" from sentencing guidelines).

mation or perhaps to get a continuance to address the question.[78]

5. CROSS-EXAMINING VICTIMS DELIVERING VICTIM IMPACT STATEMENTS

A final issue worth reviewing is the extent to which defense counsel are entitled to cross-examine crime victims offering victim impact statements. In the *Cook* case, the victim's daughter was not cross-examined when she presented her testimony (although the testimony, as just discussed, had previously been provided in writing to the defense).[79] Roberts and Manikis, however, suggest that Canadian law would give criminal defendants a right to cross-examine victims who deliver a victim impact statement, at least where the victim testifies about a disputed factual point. In contrast, American law is evolving on this subject, but the weight of authority does not appear to force victims to undergo cross-examination. In the *Madoff* case, for example, the victims were not cross-examined, although whether this was a legal decision by the judge that the defendant had no such right or a tactical decision by defense counsel not to antagonize the victims is not immediately clear. In our view, victims should not be compelled to face questioning at the hands of defense attorneys; defense concerns about responding to victim impact information can be handled satisfactorily in other ways.

American law on the subject of cross-examining victims is not uniform, although it inclines against cross-examination. Most state laws are silent on the issue of cross-examination at sentencing. By way of overview, only a few states expressly prohibit cross-examination of the victim at sentencing, and only a few states expressly allow for cross-examination of the victim at sentencing. While also largely silent on the issue, case law suggests that a number of federal and state courts are becoming increasingly opposed to cross-examination of a victim at sentencing, although a number of states still allow for cross-examination, and even more states are silent on the issue.

Turning to specifics, currently only two states (North Dakota and Georgia) have statutory authority allowing defendants an unrestricted right to cross-examine victims at sentencing,[80] while two additional states (Maryland and Oklahoma) pro-

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78 We discuss some steps that courts can take to protect defendant's interests in the next section. Research in jurisdictions that allow cross examination of victim on their impact statements found that defense attorneys have mentioned that they avoid it as such questioning often lead to increased sympathy for the victim. Instead, they just ignore the statement or contradict it in their concluding remarks. See Erez and Rogers, *supra* note 19.

79 *R. c. Cook*, 2006 QCCS 3632, 2006 CarswellQue 6724; leave to appeal allowed 2009 QCCA 2423, 2009 CarswellQue 12692, 250 C.C.C. (3d) 248, 71 C.R. (6th) 369 (Que. C.A.); leave to appeal refused 2010 CarswellQue 5650, 2010 CarswellQue 5651 at para. 21 (S.C.C.).

80 See N.D. Cent. Code §12.1-34-02(14) (Amend. 1987) ("The victim of a violent crime may appear in court to make an oral crime impact statement at the sentencing of the defendant . . . The oral statement must be made under oath and is subject to cross-examination."); Ga. Code Ann. §17-10-1.2(a)(2) (Amend. 1993) ("[T]he court . . . may allow evidence [at sentencing in a capital case] from the victim . . . Such evidence shall be given in the presence of the defendant and shall be subject to cross-examination").

vide for cross-examination of the victim only in certain situations revolving around factual disputes.[81] A handful of additional state courts have allowed cross-examination of victims at sentencing without express statutory authority.[82] And an appellate court in Texas has tried to avoid the problem entirely by indicating that a victim should deliver an impact statement only *after* the judge has pronounced a sentence "when it is not possible for anyone to think that unsworn, uncross-examined testimony could affect the trial judge's sentencing."[83]

The Texas court's "solution" to the issue is obviously predicated on the idea that the victim impact statement should not have any real-world effect. This essentially relegates victim impact statements into a meaningless charade, contrary to what legislatures have intended. As the American Bar Association explained in endorsing victim impact statements, "good decisions require good — and complete — information. . . . [I]t is axiomatic that just punishment cannot be meted out unless the scope and nature of the deed to be punished is before the decision-maker."[84]

Even proceeding on the basis that the victim impact statement might change real-world sentencing outcomes, a greater number of states and federal courts none-

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81 See Md. Crim. Proc. Code Ann. §11-403 (providing that "cross-examination is limited to the factual statements made to the court."); 22 Okl. St. §984.1 ("Any victim or any member of the immediate family . . . who appears personally at the formal sentence proceeding shall not be cross-examined by opposing counsel; provided, however, such cross-examination shall not be prohibited in a proceeding before a jury or a judge acting as a finder of fact."). *Cf. Ball v. State*, 699 A.2d 1170 at p. 1191 (Md. 1997) (suggesting that constitutional confrontation right does not require cross-examination of author of pre-sentence report). One other state may give trial courts discretion to allow cross-examination of victims. See Tenn. Code Ann. §40-35-209(b) (giving trial court discretion to allow parties to subpoena witness and cross-examine witnesses at sentencing).

82 See *Com. v. Nawn*, 474 N.E.2d 545 at p. 550 (Mass. 1985) (finding that while determining restitution at sentencing, it was error not to allow defendant to cross-examine victim or present rebuttal evidence); *Conover v. State*, 933 P.2d 904 at p. 922 (Okla. Crim. App. 1997) (finding, in death sentence case, it was error not to allow cross-examination of family). Other courts have favored a balancing approach. See *State v. Johnson*, Case No. CR-92-44, 1993 Mont. Dist. LEXIS 628, *7 (Mont. Dist. Ct., Feb. 2, 1993) (stating "[t]he Court finds that to allow such disclosure and cross-examination would be highly invasive of the minor's privacy and could be counter-productive to her recovery from the harm that was, in fact, caused by the Defendant's criminal act upon her," but permitting cross of the minor's mother, and leaving the minor victim out of the victim impact statement); *Buschauer v. State*, 804 P.2d 1046 at 1048 (Nev. 1990) (finding that if statements refer to facts of the crime, impact on the victim, or restitution, victim must be sworn but no cross-examination; if statements include references to specific prior acts of the defendant, victim should be under oath, and defendant should be given notice and opportunity to cross).

83 *Johnson v. State*, 286 S.W.3d 346 at 349 (Tex. Crim. App. 2009).

84 "A.B.A. Guidelines for Fair Treatment of Crime Victims and Witnesses" 1983 A.B.A. Sec. Crim. Just. 18 at 21. See generally Cassell (2009), *supra* note 12 at 619–21 (explaining that victim impact statements are justified, among other reasons, because they convey information to sentencers).

theless bar cross examination of victims giving victim impact statements. The general justification for such restrictions is that sentencing proceedings are not trials and that the reliability of information, including victim impact information, can be assured in other ways. For example, a Wisconsin appellate court found it "remarkable" that a defendant had appealed, in part, based on limited ability to cross-examine victim at sentencing: "A convicted defendant has no absolute right to present his own witnesses at sentencing, since such proceedings are not designed to be full-blown evidentiary hearings or mini-trials."[85]

Federal courts have consistently held that full confrontation rights do not extend to sentencing,[86] a ruling that would implicitly block cross-examination of victims at federal sentencing hearings. The *Federal Rules of Criminal Procedure* make no provision for cross-examining victims, but instead only require the sentencing judge to allow the victim to be "reasonably heard."[87] At least other eight state courts have likewise prohibited cross-examination of victims at sentencing through case law.[88] Three states have also recent amended their statutes so as to actively prohibit cross-examination of victims at sentencing.[89] Two other states effectively prevent cross-examination of victims, provided that they give their victim

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85 *State v. Kempf*, 474 N.W.2d 529 (Table), No. 90-2632-CR, 1991 Wisc. App. LEXIS 1068, *10 (Wis. Ct. App. Jul. 3, 1991).

86 See, e.g., *U.S. v. Navarro*, 169 F.3d 228 at p. 236 (5th Cir. 1999); *U.S. v. Kirby*, 418 F.3d 621 at p. 627-28 (6th Cir. 2005); *Szabo v. Walls*, 313 F.3d 392 at p. 398 (7th Cir. 2002); *U.S. v. Fleck*, 413 F.3d 883 at p. 894 (8th Cir. 2005); *U.S. v. Powell*, 973 F.2d 885 at p. 893 (10th Cir. 1992); *U.S. v. Cantellano*, 430 F.3d 1142 at p. 1146 (11th Cir. 2005). *But cf.* Benjamin C. McMurray, "Challenging Untested Facts at Sentencing: The Applicability of Crawford at Sentencing After Booker" (2006) 37 McGeorge L. Rev. 589 (arguing these cases are wrongly decided).

87 Fed. R. Crim. P. 32(i)(4).

88 See, e.g., *Michael v. State*, Case Nos. A-7890, 4665, 2003 Ak. App. LEXIS 21, *8 (Alaska Ct. App. Feb. 12, 2003) (finding where witness gave oral victim impact statement not under oath describing impact of defendant's conduct, defendant's right to confrontation was not violated); *In re N.R.*, 2008 WL 4496465 (Cal. App. 1st Dist. 2008) (defendant denied opportunity to subpoena and cross-examine victim about damage to her purse; court of appeals affirms, because defendant does not have a due process confrontation right at sentencing); *People v. Zikorus*, 197 Cal.Rptr. 509 at p. 514 (Cal. App. 4th Dist. 1983) (stating because the defendant was already sentenced, cross-examination and confrontation was not necessary — although proceeding must be fundamentally fair); *State v. DeJesus*, 524 A.2d 1156 at p. 1160 (Conn. App. Ct. 1987) (finding defendant was not entitled to cross-examine a witness in a sentencing hearing under the due process clause) (citing *Williams v. People of State of N.Y.*, 337 U.S. 241 (1949)).

89 See Ariz. Rev. Stat. §13-4426.01 (Amend. 2003) (providing that a victim giving victim impact statements at sentencing "is not subject to cross-examination."); *Smith v. Schriro*, 2009 WL 1457015 (D. Ariz. 2009) (upholding Arizona procedures against constitutional attack because there is no right of confrontation at sentencing); Iowa Code §915.21.3 (Amend. 2002) ("A victim shall not be placed under oath and subjected to cross-examination at the sentencing hearing."); N.H. Rev. Stat. Ann. §21-M:8-k (II)(p) (Amend. 2007) ("No victim shall be subject to questioning by counsel when giving when giving an impact statement.").

impact statement without providing sworn, in-court testimony.[90] Thus, it appears that the weight of authority in United States weighs against a right to cross-examine victims who give victim impact statements at sentencing.

Here again, we think that the prevailing American view makes considerable sense, at least in the context of American sentencing procedures. As the foregoing cases demonstrate, there is clearly no constitutional requirement that defendants be able to cross-examine victims. The Supreme Court has long held that a defendant's due process rights[91] are not violated by a court's refusal to allow cross-examination of a victim at sentencing.[92] And many courts have found that rules of evidence are not even applicable to sentencing.[93]

Part of the sensible public policy rationale underlying these constitutional cases is that a sentencing court should have as much information as possible in order to craft the appropriate sentence, particularly in light of the broad discretion that judges possess at sentencing.[94] Forcing victims to undergo the ordeal of cross-examination might lead some of those victims never to provide victim impact information to the sentencing judge. Moreover, there are ample ways in which a defen-

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90 See *People v. Abrams*, 562 N.E.2d 613 (Ill. App. 1st Dist. 1990) (finding that any sworn testimony is subject to cross, but the oral presentation of the victim's statement that was presented only as a written statement did not constitute sworn testimony and thus was not necessarily subject to cross); *State v. Feela*, C6-93-102, 1993 Minn. App. LEXIS 1161 (Minn. Ct. App. Nov. 30, 1993) (finding cross-examination not allowed because victim did not take oath and her statement was not testimony subject to cross).

91 The Court decided *Williams* on due process grounds because the Sixth Amendment's Confrontation Clause did not apply to states until 1965, when made applicable by *Pointer v. Texas*, 380 U.S. 400 (1965).

92 *Williams v. People of State of N.Y.*, 337 U.S. 241 at p. 246 (1949) (finding defendant does not have a due process right to cross-examine witnesses in a sentencing hearing).

93 See, e.g., *Fryer v. State*, 68 S.W.3d 628 at p. 631 (Tex. Crim. App. 2002) (finding rules of evidence generally do not apply to the contents of a pre-sentencing report); *People v. Webb*, No. 231978, 2002 Mich. App. LEXIS 889, *9-*10 (Mich. App. Jun. 18, 2002) (stating rules of evidence do not apply to sentencing hearing, and courts may consider unsworn, un-cross-examined testimony of victim without violating due process); *State v. Bell*, 116 Wash.App. 678 at p. 684 (Wash. App. 2003) (noting rules of evidence do not apply to sentencing and allowing consideration of victim's argument, which had not been subject to cross). See also Fed. R. Evid. 1101(d)(3) ("The rules (other than with respect to privileges) do not apply in the following situations: . . . sentencing . . .").

94 See, e.g., *Williams v. People of State of N.Y.*, 337 U.S. 241 at p. 247 (1949) ("[M]odern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial."); *State v. Guerrero*, 130 Idaho 311 at p. 312 (1997) (noting "the belief that modern penalogical policies, which favor sentencing based upon the maximum amount of information about the defendant, would be thwarted by restrictive procedural and evidentiary rules."); *Smith v. Commonwealth*, 660 S.W.2d 691, 693 (Va. App. 2008) ("[W]hen exercising the wide discretion inherent in sentencing, a judge should not be denied an opportunity to obtain pertinent information by a rigid adherence to restrictive rules of evidence properly applicable to the trial.").

dant can respond to factual information contained in a victim impact statement without the intrusiveness of full blown cross-examination. Less invasive means of rebuttal, such as giving the defendant the opportunity to comment or put forward witnesses of his own, are the standard way to respond to adverse victim information.[95] Defendants are also typically on notice that victim impact statements will address the effect of the crime on the victim and thus can be prepared well in advance of sentencing to response to this issue.[96] Some statutes even carve out additional time for rebuttal if a court relies upon the victim's impact evidence in sentencing. Finally, if a victim goes beyond the bounds of a proper impact statement to such an extent that the sentencing would become fundamentally unfair, the defendant would have a remedy under the Due Process Clause of the Constitution.[97] Defendants' interests at sentencing are thus well protected without the need to cross-examine victims.

On the other side of the scales, allowing cross-examination of victims could severely undermine one of the very purposes for which they are allowed. As discussed previously, although there are many rationales for allowing victim impact statements,[98] one of the most important rationales is the empowerment of the victim.[99] Criminal victimization can undermine a victim's dignity and respect in at least two ways: "First, through the primary harm caused by the crime, such as feelings of powerlessness, fear, and anxiety; second, through the secondary harm caused by the court process "by making victims feel as if society doesn't value them enough to take their views and concerns into account."[100] Allowing a victim to speak at sentencing can directly respond to both of these harms. First, appearing in open court and confronting their aggressor helps victims overcome some feelings of powerlessness and weakness.[101] Second, "giving victims a clear and uninterrupted voice [at sentencing] on par with that of defendants and prosecutors . . . signals both society's recognition of victims' suffering and their importance to the

95 See, *e.g.*, *State v. Guerrero*, 940 P.2d 419 at p. 420 (1997) (defendant need not cross-examine victim delivering impact statement because he had the opportunity to rebut the information by calling responsive witnesses); Mass. A.L.M. GL Ch. 279, §4B (providing that the defendant must have the opportunity to rebut if the court relies on the victim's statement in imposing sentence); Mont. Code. Ann. §46-18-115 (stating that the court shall allow defendant adequate opportunity to respond to the victim's impact statement if new material facts are presented upon which the court intends to rely).

96 See *Buschauer v. State*, 106 Nev. 890 at p. 893 (1990) (finding that, when victim impact statement is limited to facts of the crime, impact on victim, and restitution, "the defendant and defense counsel should already be aware of, and able to rebut" a victim impact statement).

97 See *Payne v. Tennessee*, 501 U.S. 808 at p. 824 (1991).

98 See generally Cassell (2009), *supra* note 10 at 619-25 (collecting rationales for victim impact statements); Erez (1994), *supra* note 10 at 18-19.

99 Cassell, *supra* note 10 at 621–23; Erez (1999), *supra* note 10 at 619; Giannini, *supra* note 63 at 444.

100 Richard Bierschbach, "Allocution and the Purposes of Victim Participation under the CVRA" (Oct. 1, 2006) 19 Fed. Sent. Rep. 1 at 4.

101 *Ibid* at 5.

criminal process."[102] The Indiana Court of Appeals summarized these objectives nicely, and noted how cross-examination might impair these objectives, when it explained:

> [The Victim Impact Statement] allows for a degree of catharsis by the victim or the victim's representative, permitting him or her to express their recommendation as to sentence, the impact the crime had, and their feelings toward the defendant, all in judicial setting. As such, we would not want to require victims or victim representatives to have to make their statement under oath with the ever-present threat of a perjury charge limiting their ability to speak freely; nor would it be wise, in our view, to subject a victim or victim's representative to defense cross-examination regarding comments made in a victim impact statement as a general rule.[103]

To subject victims to cross-examination following their impact statement would severely undermine their sense of empowerment in both the primary and secondary sense. In the primary sense, the victim's feelings of authority and empowerment derived by looking the defendant in the eye and confronting him at sentencing would likely be destroyed by having to sit through cross-examination. It must be remembered that at sentencing the defendant stands convicted of having harmed the victim. Allowing the defendant to cross-examine, and potentially harass, the victim when the defendant is the one who has caused the victimization would truly add insult to injury.[104]

In the secondary sense, subjecting victims to cross-examination would likely eradicate any sense of empowerment through the judicial process because the victim would be singled out for disparate treatment.[105] Defendants are given a right to allocute at sentencing, which is not typically subject to cross-examination.[106] To

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102 *Ibid* at 4. See *Kenna v. U.S. Dist. Court for C.D.Cal.*, 435 F.3d 1011 (9th Cir. 2006) at p. 1016 (noting one of the purposes of allowing a victim to speak at sentencing is to allow the victim "to regain a sense of dignity and respect rather than feeling powerless and ashamed" and that the CVRA gives victims the right, at sentencing, to look the defendant "in the eye and let him know the suffering his misconduct caused."); *U.S. v. Degenhardt*, 405 F.Supp.2d 1341 (D. Utah 2005) at p. 1348 ("[S]ome victims want an opportunity to force defendants to confront the human toll of their crimes. Such confrontation is only possible in open court, where the victim has an opportunity to stand face-to-face with her victimizer and explain the pain that flowed from the crime.").

103 *Cloum v. State*, 779 N.E.2d 84 at p. 98 (Ind. App. 2002).

104 See *State v. Johnson*, CR-92-44, 1993 Mont. Dist. LEXIS 628, *7 (Mont. Dist. Feb. 2, 1993) (noting that allowing cross-examination of minor-witness would be "highly invasive of the minor's privacy and could be counter-productive to her recovery from the harm that was, in fact, caused by the Defendant's criminal act upon her."); *State v. Kempf*, 163 Ws. 2d 1093 (Wis. App. 1993) (noting that victims have the right to be treated with dignity, fairness and respect, and that defendant's cross-examination of victim at sentencing "bordered on harassment" and was properly cut off by the trial court).

105 See, e.g., *U.S. v. Degenhardt*, 405 F.Supp.2d 1341 at p. 1348 (D. Utah 2005).

106 See, e.g., Fed. R. Crim. P. 32(i). See also *U.S. v. Whitten*, 610 F.3d 168 (2d Cir. 2010) at p. 198–200 (recognizing defendant's right to allocute in a capital case without cross-examination).

allow a defendant to allocute without being subjected to cross-examination, but not the victim, would be manifestly unfair. As the New Jersey Supreme Court has explained:

> [W]e recognized the right of a capital defendant to make a brief statement in mitigation to the jury at the close of the presentation of evidence in the penalty phase without exposing himself to cross-examination. We observed that a brief statement by the defendant would be unlikely to inject a fatal emotionalism into the jury's deliberations. We believe that a similar brief statement from the victim's family about how the killing has impacted their lives is also unlikely to inflame the jury. Justice, though due to the accused, is due to the accuser also.[107]

A victim's right to allocute should be interpreted similarly to that of the defendant's:[108] a victim should be free from cross-examination.

On a final note, in addition to victim empowerment, as discussed above, another rationale for allowing victim impact statements is providing the court with as much pertinent information as possible so that it may decide the appropriate sentence for the defendant. To require a victim to be subject to cross-examination, often for the second time if the victim were called in the case-in-chief, would likely have a chilling effect on the victim's willingness to provide an impact statement.

For all these reasons, at least in United States, crime victims should not be cross-examined after presenting a victim impact statement to the court.

6. CONCLUSION

The article by Roberts and Manikis usefully highlights the way in which Canadian courts use victim impact statements at sentencing, including use of information about ancillary harm found in these statements. In this article, we have tried to demonstrate that American courts, too, are expanding the use of victim statements in similar ways, and offer our view that as a matter of public policy this makes good sense. Ancillary harm is clearly an appropriate factor for sentencing courts and juries to consider when imposing a sentence. And a victim impact statement is the best way in which to bring that information to their attention.

While American and Canadian law appear to largely converge on the substantive issue of using ancillary harm information, there are both similarities and differences on procedural points. Both American and Canadian law allow victims to deliver victim impact statements orally in court, properly so in our view. However, Canadian law allows victims to be cross-examined after delivering an impact statement. We suggest that the prevailing American view on this subject is to bar cross-examination of victims, a view that we think makes considerable good sense. Exposing a victim to cross-examination (while at the same time shielding the defendant from such questioning) can subject the victim to harassment and undercut the

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107 *State v. Muhammad*, 145 N.J. 23 (1996) at p. 45 (internal citations omitted).

108 See *U.S. v. Degenhardt*, 405 F.Supp.2d 1341 (D. Utah 2005) at p. 1348 ("[T]he CVRA commands that victims should be treated equally with the defendant, defense counsel, and the prosecutor, rather than turned into a 'faceless stranger.'"); *Kenna v. U.S. Dist. Court for C.D.Cal.*, 435 F.3d 1011 (9th Cir. 2006) at p. 1016 ("Victims now have an indefeasible right to speak, similar to that of the defendant. . . .").

therapeutic benefits that may come from delivering an impact statement. And defendants' interests in countering possibly inaccurate factual information provided by victims can be clearly satisfied by several other less intrusive devices.

One overarching fact is clear from comparing and contrasting American and Canadian law on the important subject of victim impact statements: Crime victims are playing an increasingly important role in criminal justice proceedings. All who are interested in criminal justice issues would do well to bear in mind the growing prominence of crime victims' concerns and issues.

Appendix : Fifty-State Survey of Victim Impact Statement Law

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State	Right to Cross: Statute	Right to Cross: Case/Other	Oral/Written VIS
Alabama	Silent Ala. Code §15-23-73: victim can make a VIS to probation officer for use in pre-sentence report; Ala. Code §15-23-74: victim can present evidence, impact statement, or information that concerns the criminal offense during sentencing. No mention of cross.	Implied right to cross: Right to rebut, which case law seems to interpret as right to cross. *McWilliams v. State*, 640 So.2d 982 (Ala. Crim. App. 1991) (stating appellant would have been entitled to call any person who could give information about the presentencing report, including its author, but chose not to).	Ala. Code §15-23-73: oral or written statement to probation officer for use in pre-sentence report; Ala. Code §15-23-74: "right to present evidence, an impact statement, or information that concerns the criminal offense"
Alaska	Silent Alaska Stat. §12.55.023: victim may give sworn or unsworn testimony.	No cross *Michael v. State*, No. A-7890, 2003 Alas. App. LEXIS 21 (Alas. App. Feb. 12, 2003) — where witness gave oral victim impact statement not under oath describing impact of defendant's conduct, defendant's right to confrontation was not violated. Court authorized to consider the evidence unless defendant took oath and submitted to cross.	Alaska Stat. §12.55.023: written statement, sworn testimony, or unsworn oral presentation.
Arizona	No cross Ariz. Rev. Stat. §13-4426.01 (passed 2003)	No cross *State ex rel. Thomas v. Foreman*, 211 Ariz. 153 (Div. 1, 2005)	Ariz. Rev. Stat. §13-4434: written impact statement or make an oral impact statement to the probation officer for the officer's use in preparing a presentence report.

			Ariz. Rev. Stat. §13-4426: victim may present evidence; right to be present and to address the court. Ariz. Rev. Stat. §13-4426: right to address the sentencing authority and present any information or opinions.
Arkansas	Silent, but D must be given opportunity to respond if new factual info; Ark. Code Ann. §16-90-1112: Victim may make a statement in writing or orally under oath. The court shall consider the statement, but if it includes new factual information, the court must allow defendant adequate opportunity to respond.	Unclear. Case law: *Copeland v. State*, 343 Ark. 327 (2001): Cross would have been allowed had defendant raised it at trial level	Ark. Code Ann. §16-90-1112: written or oral under oath.
California	Silent Cal *Penal Code* §1191.1: victim can make statement, silent as to cross. But, under §1191.15, can also submit recorded statement. (see also Cal *Penal Code* §679.02, giving victims right to reasonably express views and have the court consider statements)	No cross *People v. Zikorus*, 150 Cal.App.3d 324 (4th Dist. 1983). Defendant already sentenced, so cross-examination and confrontation not necessary, although proceeding must be fundamentally fair. *People v. Sanders*, 11 Cal.4th 475 (1995) at n. 33: Not factual testimony subject to cross	Cal. *Penal Code* §1191: right to appear, personally or by counsel. Cal. *Penal Code* §1191.15: recorded statement. Cal. *Penal Code* §679.02: right to reasonably express views
Colorado	Silent Victim can make statement, no mention of cross Colo. Rev. Stat. §§24-4.1-303; 24-4-1-302.5; 16-11-601	Couldn't find case law	Colo. Rev. Stat. §24-4-1-302.5: written, oral, or both.

Connecticut	Silent Conn. Gen. Stat. §54-91c — Victim can make statement limited to facts of the case, appropriateness of penalty, extent of injuries, financial losses and loss of earnings directly resulting from crime for which D is being sentenced.	No cross *State v. DeJesus*, 10 Conn.App. 591 (1991): Citing Sup. Ct. precedent — *Williams v. NY*, defendant is not entitled to cross examine a witness in a sentencing hearing under the DPC — rests in discretion of sentencing court. — additional reasons in this case where victim was young and wanted to be kept away from defendant.	Conn. Gen. Stat. §54-91c — appear before the court or make in writing.
Delaware	Silent Del Code. Ann. Tit. 11 sec 4331 — requires victim impact statements. Del. Rules of Ct 32 — Upon request of AG, must afford victim opportunity to submit written statement or give oral statement	Couldn't find case law.	Del. Rules of Ct 32 — oral or written. (Del Code. Ann. Tit. 11 sec 4331 doesn't specify)
Florida	Silent, but statement must be under oath. Fla Stat §921.143 —	Couldn't find case law	Fla Stat §960.002: oral or written
Georgia	Can cross Ga. Code Ann. §17-10-1.2 (amended 2010) — evidence must be given in presence of defendant and subject to cross.		Ga. Code Ann. §17-10-1.2: "evidence" allowed from the victim/family — oral. But if court finds that v would not be able to testify in person without showing undue emotion or causing severe distress, may be in the form of written statement, prerecorded audio or video statement.
Hawaii	Silent Haw. Rev. Stat. §706-669 (this is for something called a "minimum term hearing"); see also §706-604, allowing victim to be heard before sentencing.	Couldn't find case law	Haw. Rev. Stat. §706-669 (minimum term hearing): oral or written; Haw. Rev. Stat. §706-604 — right to be "heard"

Idaho	Silent Idaho Code Ann. §19-5306(e)	No cross *State v. Guerrero*, 130 Idaho 311 (1997) • Rationale: favors sentencing based on max amount of info about the defendant — to require cross would thwart this goal. • Defendant should be allowed to rebut	Idaho Code Ann. §19-5306(e): right to be "heard"
Illinois	Silent 725 Ill. Comp. Stat. 120/6 Statement must be submitted in writing first	No cross if not sworn *People v. Abrams*, 205 Ill.App.3d 295 (1990). Any sworn testimony is subject to cross. The oral presentation of the victim's statement is permissive rather than mandatory. Because the statement was presented only as a written statement, it did not constitute sworn testimony and thus was not necessarily subject to cross.	725 Ill. Comp. Stat. 120/6: Statement must be prepared in writing in conjunction with office of State's Attorney before it can be presented orally or in writing
Indiana	Silent Burns Ind. Code §35-38-1-8 See also Burns Ind. Code Ann §35-35-3-5: allowing victim to make a statement concerning the crime and the sentence.	Depends:if substantive, should be able to cross; otherwise, no *Cloum v. State*, 779 N.E.2d 84 (Ind. App. 2002) • Purpose of VIS is to guarantee interests of victim are fully and effectively represented • Statement allows for catharsis	Ind. Code Ann. §35-35-3-5: Allows victim who is present to make a statement concerning the crime and the sentence. If unable to attend, may mail a written statement to the court

		• Would not want to require victims to make statement under oath with threat of perjury limiting ability to speak, "nor would it be wise, in our view, to subject a victim to cross-examination regarding comments made in a victim impact statement as a general rule." • But, when victim makes substantive statements, defendant should be able to rebut	
Iowa	No cross Iowa Code §915.21.3 (1998, amended 2002)	Couldn't find case law	Iowa Code §915.21.1: written, oral, audio, video
Kansas	No explicit statutory provision. Kansas Victims' Rights Amendment, Art 15 of §15 of Kansas's Constitution, provides victim with right to be heard at sentencing. Kans. Stat. Ann. §74-7333 requires that victims be told of their rights to participate and that "when the personal interests are affected, the views or concerns of the victim should, when appropriate and consistent with criminal law and procedure, be brought to the attention of the court."	No case law directly on point, but *State v. Parks*, 265 Kan. 644 (1998) shows sympathy toward victims (and relatives of victims) who give impact statements.	Art 15 of §15 of Kansas's Constitution: right to be "heard."

Kentucky	Silent Ky. Rev. Stat. Ann. §421.520 allows for written victim impact statement — no mention of oral; no mention of cross. §421.500: allows for victim to make impact statement at sentencing	Case law suggests only written — no cross concerns *Phillips v. Com.*, 297 S.W.3d 593 (Ky. App. 2009) — trial court denieregarding accuracy of statements in VIS. Held no error b/c "nothing in either statute suggests that the rules governing challenges to PSI reports also apply to VIS." And no indication court relied on misinformation.d D's motion for an evidentiary hearing	Ky. Rev. Stat. Ann. §421.520: written victim impact statement (which goes to the probation officer for the PSI, or to the court if no PSI b/c it was waived).
Louisiana	Silent, but defendant given opportunity to comment La. Rev. Stat. §46:1844(k) gives right to make oral statement, with certain limitations as to number, relevance, and topics. Defendant is given opportunity to comment. No explicit mention of cross in statute.	*State v. Behrnes*, 706 So.2d 179 (La. App. 1st Cir. 1997): error not to allow D to rebut when other crime evidence came in through victim impact in the form of D's statement — but no mention of cross.	La. Rev. Stat. Ann. §46:1844:written and oral
Maine	Silent 17-A Me. Rev. Stat. §1174: victim must be provided with an opportunity to make an oral statement in open court in connection with sentencing. No mention of cross.	*Griffin v. State*, No. CR-02-610, 2001 Me. Super LEXIS 289 (Jul. 16, 2001): D not given a chance to rebut statement; D did not object to statements at trial so no error.	Me. Rev. Stat. Ann. tit. 17-A, §1174:oral or written
Maryland	Yes, as to factual statements Md. Crim. Proc. Code Ann. §11-403 (amended 2001)	Right to cross, but not in error to refuse cross *Grandison v. State*, 341 Md. 175 (1995) — "The right of a defendant to cross-examine witnesses against him extends to the sentencing phase of a capital trial and applies to victim impact witnesses as well as factual witnesses." But not limitless- discovery of irrelevant info not proper.	Md. Code Ann., Crim. Proc. §11-1002: allowed to address the court or jury or have a VIS read by the court or jury

Massachusetts	Silent, but defendant must be able to rebut Mass. Gen. Laws ch. 279, §4B: victim may make oral or written statement. Defendant must have the opportunity to rebut if the court relies upon such statements in imposing sentence.	Case law seems to allow cross. *Com. v. Nawn*, 394 Mass. 1 (1985) In determining restitution at sentencing, it was error to not allow defendant to cross-examine victim or present rebuttal evidence — only as it related to restitution, not guilt or innocence.	Mass. Gen. Laws ch. 279: oral or written
Michigan	Silent Mich. Comp. Laws §780.764: victim can make or submit oral or written statement, which is given to probation officer for inclusion in PSI report. See also §780.765: victim has right to appear and make oral impact statement at sentencing	No cross *People v. Webb*, No. 231978, 2002 Mich. App. LEXIS 889 (Mich. App. Jun. 18, 2002): Argument that victim's impact statement (unsworn, not subject to cross) without merit. Rules of evidence don't apply to sentencing. Defendant had opportunity to rebut.	Mich. Comp. Laws §780.764 — oral or written.
Minnesota	Silent Minn. Stat. 611A.038	No cross *State v. Feela*, C6-93-102, 1993 Minn. App. LEXIS 1161 (Minn. App. Nov. 30, 1993): no cross because she did not take the oath and her statement was not testimony subject to cross.	Minn. Stat. §611A.038: oral or written
Mississippi	Silent Miss. Code Ann. §99-19-157: allows for written report that includes statement made by victim — but no oral statements explicitly called for, no cross mentioned, etc. Miss Code. Ann. 99-19-157(2) allows for oral statement.	Silent *Branch v. State*, 882 So.2d 36 (Miss. 2004)	Miss. Code Ann. §99-19-157: written; Miss. Code Ann. §99-19-157 (2): oral.

Missouri	Silent Mo Stat. §557.041.2 provides that at sentencing, the victim may appear before the court to make a statement. The statement can only relate to the facts of the case and any personal injuries or financial loss incurred by the victim. See also §§595.209, stating that victims have right to be heard at sentencing and providing "To the extent reasonably possible and subject to available resources, victims and witnesses of crime . . . shall be afforded the right . . . to appear personally . . . at the sentencing proceeding and to reasonably express his or her views concerning the seriousness of the crime and the need for restitution."	Silent *Edwards v. State*, 794 S.W.2d 249 (Mo. Ct. App. W.D. 1990): not ineffective counsel when counsel didn't object to impact testimony.	Mo. Rev. Stat. §557.041.2 — oral or written

Montana	Silent, but if new material facts, defendant must have adequate opportunity to respond Mont. Code Ann. §46-18-115: "The court shall permit the victim to present a statement concerning the effects of the crime on the victim, the circumstances surrounding the crime, the manner in which the crime was perpetrated, and the victim's opinion regarding appropriate sentence. At the victim's option, the victim may present the statement in writing before the sentencing hearing or orally under oath at the sentencing hearing, or both. . . .The court shall consider the victim's statement along with other factors. However, if the victim's statement includes new material facts upon which the court intends to rely, the court shall allow the defendant adequate opportunity to respond and may continue the hearing if necessary." (Am. 1995)	Balancing *State v. Legg*, 2004 MT 26 (2004): part of the purpose for amending statute in 1995 to allow for victim impact statements was protection of the victim when imposing restrictions on offender. "Given the Legislature's concern with protecting victims from repeat offenses . . . we believe the Legislature intended to allow the sentencing court wide latitude in considering any information relevant to the treatment of the offender and the risk he or she poses to the victim or to other children in a community." *State v. Johnson*, CR 92-44, 1993 Mont. Dist. LEXIS 628 (1993): Rules of evidence don't apply to sentencing hearings, but issue of cross is in doubt. D has due process guarantee and must be afforded opportunity to rebut negative info. Here, negative info can only be access to privilege info and cross. "The Court finds that to allow such disclosure and cross-examination would be highly invasive of the minor's privacy and could be counter-productive to her recovery from the harm that was, in fact, caused by the Defendant's criminal act upon her." State concedes D can cross the mom; resolve issue of victim by not including her VIS.	Mont. Code Ann. §46-18-115: in writing or orally under oath

Nebraska	Silent Neb. Rev. Stat. §81-1848: victim can submit a written impact statement and read it at sentencing.	Couldn't find relevant case law. No cross. *State v. Galindo*, 774 N.W.2d 190, 278 Neb. 599 (2009) — adopted Crawford holding, that Sixth Amendment rights are inapplicable during sentencing, applies to VIS.	Neb. Rev. Stat. §81-1848: written impact statement or read impact statement submitted pursuant to probation officer's preparation of PSI.
Nevada	Silent Nev. Rev. Stat. §176.015 does not mention cross examination	In limited circumstances *Buschauer v. State*, 106 Nev. 890 (1990): • If statements refers to facts of the crime, impact on victim, or restitution, victim must be sworn but no cross examination and no prior notice required,. In most instances, defense should be aware of and able to rebut statements falling under these categories • If statements includes references to specific prior acts of the defendant, victim should be under oath, and defendant should be given notice and opportunity to cross	Nev. Rev. Stat. §176.015: may appear personally, by counsel, or by personal representative.

New Hampshire	No cross N.H. Rev. Stat. Ann. §21-M:8-k: the victim has "the right to appear and make a written or oral victim impact statement at the sentencing of the defendant . . . No victim shall be subject to questioning by counsel when giving an impact statement." Statute was amended in 2007 to add this sentence. Legislative history, reasons include: "They are there and they are probably under a lot of stress saying how they have been affected by the crime that has been committed and to be questioned by an attorney just doesn't seem proper." Goal is to give them the opportunity to speak, in some instances, they have already been put on the stand and questioned. Impact statement not meant to be about the facts of the case, but the impact on the victim "Victim impact statements historically have been put in place to give that victim the freedom to speak without being cross-examined and without having to justify what they are saying." Sentencing hearings generally not subject to cross anyway. Often not sworn in.	Couldn't find case law: new statute	N.H. Rev. Stat. Ann. §21-M:8-k: written or oral

New Jersey	Silent N.J. Stat. Ann. §52:4B-36: allows victim "to make, prior to sentencing, an in-person statement directly to the sentencing court concerning the impact of the crime." NJ Stat. Ann. §39:4-50.11 (this appears to be for motor vehicle accidents only) — right to submit oral or written statement re sentencing, including nature and extent of physical, psychological, or emotional harm and loss of earnings or work and effect upon family.	Sometimes Cross examination of victim's mother occurred in *State v. Koskovich*, 168 N.J. 448 (2000), without discussion. *But see State v. Muhammad*, 145 N.J. 23 (1996), which compares victim speaking at sentencing to defendant allocution: "[W]e recognized the right of a capital defendant to make a brief statement in mitigation to the jury at the close of the presentation of evidence in the penalty phase without exposing himself to cross-examination. We observed that brief statement by the defendant would be unlikely to inject a fatal emotionalism into the jury's deliberations. We believe that a similar brief statement from the victim's family about how the killing has impacted their lives is also unlikely to inflame the jury. Justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."	N.J. Stat. Ann. §52:4B-36: in-person statement in addition to the statement permitted for inclusion in the presentence report
New Mexico	Silent N.M. Stat. Ann. §31-26-4 Victim has the right to make a statement to the court at sentencing See also constitution: N.M. Const art. II §24 (same)	Couldn't find case law re cross Other case law says VIS are okay, but must be "brief and narrowly presented," at least in death penalty cases. Also in death penalty cases, rules of evidence do apply. *State v. Jacobs*, 129 N.M. 448 (2000); *State v. Clark*, 128 N.M. 119 (1999): good language re purpose of impact evidence generally	N.M. Stat. Ann. §31-26-4: "make a statement to the court at sentencing"

New York	Silent, but D can rebut N.Y. C.P.L.R. §380.50 — victim can make statement, defendant can rebut.	Couldn't find case law re cross	N.Y. C.P.L.R. §380.50: "statement"
North Carolina	Silent N.C. Gen. Stat. §15A-825 — VIS seems to be in writing only	Couldn't find any on point *State v. Phillips*, 325 N.C. 222 (1989) (written VIS okay) *State v. Jackson*, 370 S.E.2d 667 (91 N.C. App. 124), 1988: ct says ordinarily those giving VIS should be in court and available for cross-examination. But not in error to have them as written statements. In this case D's objections were "merely to the receipt of the statements."	N. C. Gen. Stat. §15-A-825: have a VIS prepared for consideration by the court
North Dakota	Yes for oral; not specified for written N.D. Cent. Code. §12.1-34-02(14) "The victim of a violent crime may appear in court to make an oral crime impact statement at the sentencing of the defendant in appropriate circumstances at the discretion of the judge. The oral statement must be made under oath and is subject to cross-examination." (1987)	Couldn't find case law	N.D. Cent. Code. §12.1-34-02(14):written/oral only in appropriate circumstances at the discretion of the judge.

Ohio	Silent Ohio Rev. Code Ann. §2930.13; See also §2929.19(B): requiring court to consider VIS	No cross needed, but not prohibited *State v. Wallace*, 2003 WL 21787573 (Ohio Ct. App. 5th Dist. Richland County 2003): defendant did not need to be present at VIS because it was not a critical stage of the proceeding (if doesn't need to be present, seems don't have right to cross). *In re Zachary S.*, 2002 WL 471732 (Ohio App. 6th Dist. Lucas County 2002) — attempt to find error for ineffective counsel failing to ask court to permit cross was "not well taken."	Ohio Rev. Code Ann. §2930.13: written or oral statement or person preparing impact statement
Oklahoma	Depends Okla. Stat. tit. 22, §984.1: "Any victim or any member of the immediate family or person designated by the victim or by family members of a victim who appears personally at the formal sentence proceeding shall not be cross-examined by opposing counsel; provided, however, such cross-examination shall not be prohibited in a proceeding before a jury or a judge acting as a finder of fact."	Yes to cross *Conover v. State*, 933 P.2d 904 (Okla. Crim. App. 1997): in death sentence case, error to not allow cross of family (confrontation)	Okla. Stat. tit. 22, §984.1:written or oral
Oregon	Silent Or. Rev. Stat. §163.150 Evidence may be presented to any matter deemed relevant to sentencing, including victim impact evidence relating to the personal characteristics of the victim or the impact of the crime on the victim's family	Couldn't find relevant case law: because statute was amended in 1995/1997, the cases coming up are dealing with retroactive application of the law in death sentence cases.	Or. Rev. Stat. §163.150: doesn't specify, "victim impact evidence"

Pennsylvania	Silent 18 Pa. Cons. Stat. Ann. §11.201: victims have the right to offer prior comment on sentencing, including submission of a written and oral victim impact statement detailing the physical, psychological and economic effects of the crime on the victim and the victim's family. 42 Pa C.S. §9711 Evidence concerning the victim and the impact that the death of the victim had on the family of the victim is admissible in first-degree murder proceedings.	Couldn't find any case law re cross: defense arguments seem to come up in failure to object context, not failure to cross: see, e.g., *Com. v. Tedford*, 960 A.2d 1 (Penn. 2008).	18 PA. Cons. Stat. Ann. §11.201: written and oral
Rhode Island	Silent R.I. Gen. Laws §12-28-4: Right to address the court regarding the impact the defendant's criminal conduct has had on the victim; Art. 1, §23 of R.I. Const (same)	Couldn't find relevant case law re cross	R.I. Gen. Laws §12-28-4: "address the court" (same in Art. I, §23 of R.I. Const).
South Carolina	Silent, but defendant must be given opportunity to respond. S.C. Code Ann. §16-3-1550	Couldn't find relevant case law re cross	S.C. Code Ann. §16-3-1550: written or oral

	Court must hear or review any victim impact statement, written or oral, before sentencing. Within a reasonable period of time before sentencing, the pa must make the statement available to the defense and the court must allow the defense an opportunity to respond. [See S.C. Code Ann. §16-3-1550: court must protect rights of victims as diligently as those of defendant]		
South Dakota	Silent, but D can respond S.D. Codified Laws 23A-28C-1: victim S.D. Codified Laws §23A-27.1.1: victim, in court's discretion, may address the court concerning the emotional, physical, and monetary impact of the crime upon the victim and the victim's family and may comment upon the sentence that may be imposed. "The defendant shall be permitted to respond to such statements orally or by presentation of evidence and shall be granted a reasonable continuance to refute any inaccurate or false charges or statements."	Couldn't find relevant case law	S.D. Codified Laws §23A-28C-1: written or oral

Tennessee	Silent Tenn. Code Ann. §40-38-103: Victims have the right to "whenever possible" submit a VIS to courts and give "impact testimony" at sentencing hearings. §40-38-202: court shall solicit and consider VIS. VIS limited to information about the financial, emotional, and physical effects of the crime on the victim and victim's family, and specific info about the victim, circumstances surrounding the crime, and manner in which it was perpetrated. §40-35-209(b): victim opportunity to be heard at D's sentencing	Case law presumes ability to cross: *State v. Blackhurst*, 70 S.W.3d 88 (Tenn. Crim. App. 2001): Defendant had access to testimony 10 days earlier and victim was available for cross, so D has sufficient notice and a fair opportunity to rebut objectionable testimony	Tenn. Code Ann. §40-38-103: "whenever possible" submit a VIS to court and give "impact testimony"
Texas	Tex. Code Crim. Proc. art 56.02: victims have the right to provide pertinent info to probation dept. conducting presentencing investigation concerning impact of offense on the victim and family by testimony, written statement, or any other manner prior to sentencing; and to complete VIS and have it considered Tex. Code Crim. Proc. art 56.03: contemplates written form Tex. Code Crim. Proc. art 42.03: victim may appear in person to present statement on offense but must be *after* sentence pronounced.	Yes to cross *Aldrich v. State*, 296 S.W.3d 225 (Tex. App. Fort Worth 2009): "Because various unidentified witnesses stood and read their own statements to the trial court prior to the trial court's assessment of punishment or pronouncement of sentence . . . Aldrich had the right to confront and cross-examine them." Was error for court to not allow Aldrich to respond to or cross the witnesses. *Enos v. State*, 889 S.W.2d 303 (Tex. Crim. App. 1994): VIS should have been discoverable for cross-examination and possible impeachment.	Tex. Code Crim. Proc. Ann. art 42.03: in person to present statement but must be *after* sentence pronounced. Tex. Code Crim. Proc. Ann. art 56.03: contemplates written form

		Johnson v. State, 286 S.W.3d 346 (Tex. Crim. App. 2009): trial judge does not have discretion to impose jail time as a condition of community supervision immediately after he has heard unsworn, un-cross-examined victim-allocution statements in which victims stated they wanted appellant to go to jail. Statute only allows for victim-allocution after sentence has been imposed. Error was not harmless. • Court concerned about risk that statement might affect partiality of the fact finder: "Only after the entire sentencing procedure is complete — when it is not possible for anyone to think that unsworn, uncross-examined testimony could affect the trial judge's sentencing — may the victim deliver a statement to the defendant, the court, and the public." • Court says it is "widely acknowledged by commentators that victim-allocution statement are to have 'no effect' upon . . . decision making"	

Utah	Silent Utah Code Ann. §77-38-4(7): victim's right to be heard may be exercised in any appropriate fashion, including oral, written, etc. Utah Const Art I, §28: "To have a sentencing judge, for the purpose of imposing an appropriate sentence, receive and consider, without evidentiary limitation, reliable information concerning the background, character, and conduct of a person convicted of an offense [except in capital cases]"	Couldn't find anything on point *State v. Elm*, 808 P.2d 1097 (Utah. 1991) defendant objected because not able to cross victim in sentencing, but failed to preserve issue for appeal *State v. Weeks*, 2002 UT 98 (2002): rules of evidence don't apply to sentencing	Utah Code Ann. §77-38-4(7): victim's right to be heard may be exercised at the victim's discretion in any appropriate fashion, including an oral, written, audiotaped, or videotaped statement or direct or indirect information that has been provided to be included in any presentence report
Vermont	Silent VT Stat. Ann. tit. 13, §5321: victim has the right to appear personally to express reasonably his views on the crime, person convicted, and need for restitution	Couldn't find any case law on point	VT. Stat. Ann. tit. 13, §5321: appear personally, but if not present, the court shall ask whether the victim has expressed, either orally or in writing, views regarding sentencing, which should be taken into account.

Virginia	Silent Va. Code Ann. §19.2:11.01 Right to prepare written victim impact statement; upon testify prior to sentencing regarding the impact of the offense Va. Code Ann. §19.2-264.4: testimony limited to certain topics such as victim's welfare, need for medical services, etc. (see Va. Code Ann. §19.2-299.1)	Cross not mandatory, but seems to be allowed *Smith v. Com.*, 660 S.E.2d 691 (Va. App. 2008): "A sentencing hearing before a judge is not a criminal trial. When exercising the wide discretion inherent in sentencing, a judge should not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial." Given narrowness of sentencing hearing, D's inability to cross examine declarant didn't undermine fundamental fairness of proceeding; once guilty has been established, can consider responsible unsworn or out of court information. [But defendant had adequate opportunity to compel victims to take the stand and submit to cross]	Va. Code Ann. §19.2-11.01: right to prepare written victim impact statement; upon motion of VA, to motion of VA, to testify prior to sentencing
Washington	Wash. Rev. Code §7.69.030: right to submit impact statement to court §9.94A.500(1): allows "arguments" from victim Wash Const Art 1, §35: right to make a statement at sentencing subject to same rules of procedure that govern D's rights	Cross not necessary, but seems to be allowed. *State v. Bell*, 116 Wash. App. 678 (Div. 3, 2003): D did not object or requsest cross. "Crime victim impact reports and risk assessments must be considered by the court, together with argument of the crime victim at the time of sentencing. Notably, the rules of evidence don't apply to sentencing proceedings. Given this framework, the court did not abuse its discretion by considering the witness statements at the time of sentencing."	Wash. Rev. Code §7.69.030: right to submit impact statement to court and to present a statement personally or by representation.

West Virginia	W.Va. Code §61-11A-2(b): victim may make oral statement for the record or written statement. Statement must relate solely to the facts of the case and the extent of any injuries, financial losses and loss of earnings directly resulting from crime for which D is being sentenced. This statement is in addition to victim impact statement described below. W. Va. Code §61-11A-3: victim impact statement (report) considered by court. D must get it 10 days before and may introduce testimony or other information related to any alleged factual inaccuracies in the statement. See also W. Va. Code §61-11-A-1(b): The legislature declares that the purposes of this article are to enhance and protect the necessary role of crime victims and witnesses in the criminal justice process and to ensure that the state and local governments do all that is possible within the limits of available resources to assist victims and witnesses of crimes without infringing on the constitutional rights of the defendant."	Nothing directly on point. *State v. Tyler*, 211 W. Va. 246 (2002), discusses importance of right to speak, and, quoting Maryland case, says that the right is meant to remedy "what has been perceived as the justice system's neglect of crime victims." Also: "an important step toward accomplishing that task is to accept victim impact testimony wherever possible."	W.Va. Code §61-11A-2(b): victim may make oral statement for the record or written statement.

Wisconsin	Silent Wis. Stat. §950.04(iv)(m): provides victims the right to make statements concerning sentencing, disposition, or parole. Wis. Stat. §972.14(3)(a): victim may make a statement at sentencing relevant to the sentence.	Cross has been allowed, but it was looked upon unfavorably by appellate court *State v. Kempf*, 163 Wis.2d 1093 (1991): D appealed in part b/c limited in crossing victim at sentencing. "A convicted defendant has no absolute right to present his own witnesses at sentencing, since such proceedings are not designed to be full-blown evidentiary hearings or mini-trials." Notes trial court made "significant concession" to Kempf to take formal testimony. Think it "remarkable" that D appealed on this basis. Court has obligation to ensure victims treated with dignity and respect.	Wis. Stat. §950.04(iv)(m): provides victims the right to make "statement." Wis. Stat. Ann. §972.14(3)(a): make a statement in court or submit a written statement to be read in court.
Wyoming	Silent Wyo. Stat. Ann. §7-21-103: victim can give written or oral statement limited to explanation of injury, economic loss, need for restitution, recommendation for appropriate disposition.	Couldn't find any relevant case law.	Wyo. Stat. Ann. §7-21-103: oral or written.

Note: While we have not done a comprehensive survey, we are only aware of two states, Vermont and Maryland, that have rules on point. Vermont's rule allows cross-examination: V.R.Cr.P. 32(c)(4). Maryland's rule complements what we already have in the chart.