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# VICTIM IMPACT STATEMENTS: ADVERSELY IMPACTING UPON JUDICIAL FAIRNESS

ABRAHAM ABRAMOVSKY\*

A criminal defendant is entitled to “a public tribunal free of prejudice, passion, [and] excitement.”<sup>1</sup>

In 1982, New York State amended Article 390 of the Criminal Procedure Law,<sup>2</sup> and incorporated a Victim Impact Statement (“VIS”) as one discretionary aspect of a pre-sentence report. Furthermore, Articles 380 and 390 were significantly affected by New York’s 1992 Session Laws.<sup>3</sup> Section 380.50 now provides that at a felony sentencing “the victim [has] the right to make a statement with regard to any matter relevant to the question of sentence.”<sup>4</sup> The key issue addressed in this article is whether the addition of both oral and written VIS’s has enhanced or encumbered justice. Although this author can appreciate the inclusion of the victim’s version of the crime in sentences that are a result of plea bargains, I am of the opinion that in most cases, the VIS is at the least unnecessary and, at worst, prejudicial to the defendant. The use of a VIS at sentencing raises a myriad of constitutional issues and should therefore be restricted.

Moreover, VIS’s potentially create a situation in which sentencing length may be determined by the eloquence and social stand-

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<sup>1</sup> Sheppard v. Maxwell, 384 U.S. 333, 350 (1966) (quoting Chambers v. Florida, 309 U.S. 227, 236-37 (1940)).

<sup>2</sup> N.Y. CRIM. PROC. LAW § 390.30 (McKinney 1983), amended by Compensation of Crime Victims by Criminals—Repeal of Son of Sam Law, ch. 618, §§ 3, 4, [1992] N.Y. Laws 1669 (McKinney).

<sup>3</sup> See, e.g., N.Y. CRIM. PROC. LAW § 380.50 (McKinney 1991 & Supp. 1992), amended by Victim’s Right to Speak at Sentencing, ch. 307, §§ 1, 2, [1992] N.Y. Laws 1005 (McKinney); *Id.* § 390.30, amended by Compensation of Crime Victims by Criminals—Repeal of Son of Sam Law, ch. 618, §§ 3, 4, [1992] N.Y. Laws 1669 (McKinney).

<sup>4</sup> *Id.* § 380.50(2)(b).

ing of the victim rather than the severity of the offense and the specific underlying facts of the crime. This is particularly true if the victim seeks restitution via the criminal justice system,<sup>5</sup> or intends to start a civil action against the defendant. In such cases, the victim might foreseeably receive the advice of private counsel before making an impact statement to the probation department or to the court.

The sentence imposed by a judge should be based upon the evidence deduced at trial. While, on occasion, a VIS may enlighten the sentencing judge, as I have previously stated, I contend that VIS's are generally unnecessary, if not prejudicial. A judge may rightfully presume that a victim, or the victim's family, will want the defendant to receive the maximum sentence allowed by law.

In the tragic Happy Land Social Club fire in New York on March 25, 1990, defendant Julio Gonzalez was sentenced to the maximum of twenty-five years to life prior to the Section 390 amendments.<sup>6</sup> This sentence would have been imposed without the then-discretionary use of a VIS. Nonetheless, a VIS was prepared by the New York City Probation Department from interviews with the victims' families. One victim's parent quoted in the report stated, "[I] wish someone would chop pieces of flesh out of Gonzalez['s] body, pour gasoline, [and] set him on fire."<sup>7</sup> I sympathize with this mother's loss. I still contend, however, that victim impact statements of this nature are extremely inflammatory and prejudicial. In addition, the present compulsory nature of the presentence report encourages sentences based on passion rather than a well thought-out penalty which fits the severity of the crime, and the manner in which it was effectuated.

Part One of this article will analyze Article 390 of the Criminal Procedure Law, which outlines the content and scope of pre-sentence reports in general. Part Two will discuss victim impact statements in detail. Part Three will analyze the history of the admissibility of VIS's in New York, and Part Four will address the United States Supreme Court's holdings on the subject. Part Five will ex-

<sup>5</sup> See *id.* § 390.30(3)(b) (requiring victim to be informed of right to seek restitution and reparation).

<sup>6</sup> See Ralph Blumenthal, *87 Die in Blaze at Illegal Club, Police Arrest Ejected Patron, Worst New York Fire Since 1911*, N.Y. TIMES, Mar. 26, 1990, at B5. The fire was set by Julio Gonzalez after an argument with his former girlfriend who worked at the club. *Id.*

<sup>7</sup> Rose Marie Arce, *The Victims Left Behind*, NEWSDAY (New York ed.), Sept. 20, 1991, at 7 (quoting mother of Isabel Lopez Romero, one of the victims of the fire).

amine the impetus for amending criminal law to provide for VIS. Finally, in Part Six, I will argue that VIS's, as currently devised, are riddled with the potential for unduly influencing a judge in the sentencing process.

### I. PRE-SENTENCE REPORTS

Criminal Procedure Law section 390.20 requires that a sentencing judge order a pre-sentence investigation of the defendant and receive a written report of the investigation from the probation department. Specifically, the court may not pronounce sentence on any felony conviction without first receiving the report.<sup>8</sup> Secondly, the report requirement is also mandatory in those misdemeanor cases that would entail a sentence of either probation, a prison term of more than ninety days, or consecutive prison terms aggregating over ninety days.<sup>9</sup> The court also has the discretion to order a pre-sentence report for any offense it wishes, regardless of what sentence it might impose.<sup>10</sup>

The purpose of the pre-sentence report is to apprise the judge of both the facts underlying the commission of the offense, and the background and character of the defendant. Section 390.30 of the Criminal Procedure Law<sup>11</sup> describes the specific types of information which must be included in the report. First, the report should embody the "circumstances attending the commission of the offense, the defendant's history of delinquency or criminality, and the defendant's social history, employment history, family sit-

<sup>8</sup> N.Y. CRIM. PROC. LAW § 390.20(1) (McKinney 1991 & Supp. 1992). This section states: "In any case where a person is convicted of a felony, the court must order a pre-sentence investigation of the defendant and it may not pronounce sentence until it has received a written report of such investigation." *Id.*

<sup>9</sup> *Id.* § 390.20(2). This section states, in pertinent part:

Where a person is convicted of a misdemeanor a pre-sentence report is not required, but the court may not pronounce any of the following sentences unless it has ordered a pre-sentence investigation of the defendant and has received a written report thereof:

- (a) A sentence of probation except where . . . [probation has been agreed upon by the parties];
- (b) A sentence of imprisonment for a term in excess of ninety days;
- (c) Consecutive sentences of imprisonment with terms aggregating more than ninety days.

*Id.*

<sup>10</sup> *Id.* § 390.20(3). "For purposes of sentence, the court may, in its discretion, order a pre-sentence investigation and report in any case, irrespective of whether such investigation and report is required by subdivision one or two." *Id.*

<sup>11</sup> *Id.* § 390.30.

uation, economic status, education, and personal habits."<sup>12</sup> Second, the report may include any additional information which the investigating agency deems relevant to the question of sentencing.<sup>13</sup> Third, the report must incorporate any available information that documents the defendant's mental or physical state.<sup>14</sup> Finally, the probation department must include a VIS in the pre-sentence report "unless it appears that such information would be of no relevance to the recommendation or court disposition."<sup>15</sup>

## II. VICTIM IMPACT STATEMENTS

If the court deems that a VIS is an essential element of the pre-sentence report, the report must include:

[A]n analysis of the victim's version of the offense, the extent of injury or economic loss and the actual out-of-pocket loss to the victim and the views of the victim relating to disposition including the amount of restitution and reparation sought by the victim after the victim has been informed of the right to seek restitution and reparation, subject to the availability of such information.<sup>16</sup>

In the case of a homicide or where the victim is incapacitated, the victim's family may provide the necessary information.<sup>17</sup>

In rare instances, the VIS may provide the sentencing court with relevant and germane information. However, once a plea is offered by the prosecution and accepted by the defendant, the use of a VIS may often result in a waste of increasingly scarce judicial resources and prejudice to the rights of the defendant. Unless the VIS substantially differs from, or augments the facts presented to the sentencing judge via the prosecution, the defendant, and the probation department's pre-sentence report, a VIS seems to detract from, rather than add to, the neutrality and fairness of the sentencing process. The use of the VIS thus creates the potential for a judge to be swayed by the statements of a sympathetic and eloquent victim, thereby imposing a higher sentence on one de-

<sup>12</sup> *Id.* § 390.30(1).

<sup>13</sup> *Id.*

<sup>14</sup> N.Y. CRIM. PROC. LAW § 390.30(2) (McKinney 1991 & Supp. 1992).

<sup>15</sup> *Id.* § 390.30(3)(b).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

fendant, while another defendant, having had the good fortune to have perpetrated a crime against a destitute, less eloquent, or less publicized victim, could receive a lighter sentence.

### III. HISTORICAL PERSPECTIVE OF VIS'S IN NEW YORK

The following examination of recent case law highlights two areas where the inclusion of a VIS is especially problematic: the use of a written VIS versus an oral VIS, and the use of a VIS as the sole impetus behind a refusal to impose a sentence previously agreed upon by the prosecutor, the defendant, and the court itself.

As stated in sections I and II, Article 390 of the New York Criminal Procedure Law provides for the inclusion of a written VIS in the pre-sentence report submitted by the probation department.<sup>18</sup> Furthermore, the statute provides that the VIS be made available to the defendant "not less than one court day prior to sentencing."<sup>19</sup> This latter provision effectively thwarts defense counsel's ability to rebut an inaccurate or misleading statement. Further, the recent amendments<sup>20</sup> permit the victim to testify in person at the sentencing hearing.<sup>21</sup>

In *People v. Julia*,<sup>22</sup> a 1972 case which preceded the VIS amendments, the Appellate Division, Second Department, followed the intent of the New York State Legislature and prevented oral statements by the victim at sentencing. The court reasoned that the

<sup>18</sup> See *supra* notes 8-10 and accompanying text (describing requirements of report).

<sup>19</sup> N.Y. CRIM. PROC. LAW § 390.50(2)(a).

<sup>20</sup> See Victim's Right to Speak at Sentencing, ch. 307, §§ 1, 2, [1992] N.Y. Laws 1005 (McKinney) (amending N.Y. CRIM. PROC. LAW §§ 380.50, 390.50); Compensation of Crime Victims by Criminals—Repeal of Son of Sam Law, ch. 618, §§ 3, 4, [1992] N.Y. Laws 1669 (McKinney) (amending N.Y. CRIM. PROC. LAW § 390.30).

<sup>21</sup> See N.Y. CRIM. PROC. LAW § 380.50(2)(b) (McKinney 1991 & Supp. 1992), amended by Victim's Right to Speak at Sentencing, ch. 307, § 1, [1992] N.Y. Laws 1003-04 (McKinney). This section states, in pertinent part:

If the defendant is being sentenced for a felony the court, if requested at least ten days prior to the sentencing date, shall accord the victim the right to make a statement with regard to any matter relevant to the question of sentence. The court shall notify the defendant no less than seven days prior to sentencing of the victim's intent to make a statement at sentencing. If the defendant does not receive timely notice pursuant to this subdivision, the defendant may request a reasonable adjournment.

*Id.*

<sup>22</sup> 40 A.D.2d 560, 333 N.Y.S.2d 978 (1972), modified on other grounds, 43 A.D.2d 578, 349 N.Y.S.2d 648 (2d Dep't 1973), *aff'd*, 36 N.Y.2d 814, 331 N.E.2d 680, 370 N.Y.S.2d 898, *cert. denied*, 423 U.S. 868 (1975).

Legislature sought to prevent oral victim impact statements at sentencing so as not to "becloud the judicial atmosphere and to unbalance the . . . process of sentence imposition."<sup>23</sup> To allow oral statements at sentencing would transform the sentencing process into an emotional battleground devoid of constitutional safeguards. As stated by the United States Supreme Court, a criminal defendant is entitled to "a public tribunal free of prejudice, passion [and] excitement."<sup>24</sup>

In *People v. McCarthy*,<sup>25</sup> a 1987 case which preceded the 1992 VIS amendments, a homicide victim's parents petitioned the court for permission to make an oral statement at the sentencing of the defendant. They felt that a written VIS could not adequately convey their loss and the lasting effect that the crime would have on their family. Although sympathetic to the family's position, the court noted the then-contrary legislative intent behind sections 380.50 and 390.30 of the Criminal Procedure Law, reiterated the logic of *Julia*, and denied their request.<sup>26</sup> While the court's rationale is persuasive to me, the New York State Legislature disagreed. The 1992 New York State Session Laws now specifically permit such oral statements to be made.<sup>27</sup> This amendment will result in nothing less than a verdict imposed in a courtroom atmosphere charged with emotion and drama and pandering to the media—all to satisfy that segment of the public which thirsts for the blood of those convicted of crime.

Prior to the 1992 Session Law amendments, some courts had already allowed the victim to make an oral statement at sentenc-

<sup>23</sup> *Id.* at 561, 333 N.Y.S.2d at 980; see also *People v. McCarthy*, 136 Misc. 2d 623, 624-25, 519 N.Y.S.2d 118, 119 (St. Lawrence County Ct. 1987) (denying application of victim's parents to make oral statement at sentencing hearing but allowing written victim impact statement); cf. *People v. Branshaw*, 177 A.D.2d 1028, 1028, 578 N.Y.S.2d 45, 45 (4th Dep't 1991) (holding error harmless when court allowed murder victim's mother to speak at sentencing hearing), *appeal denied*, 79 N.Y.2d 918, 590 N.E.2d 1206, 582 N.Y.S.2d 78 (1992); *People v. Raucci*, 136 A.D.2d 48, 50, 525 N.Y.S.2d 730, 731 (prosecutor's breach of plea bargain agreement to make no recommendations at sentencing entitled defendant to withdraw plea or be resentenced), *aff'd*, 153 A.D.2d 1013, 545 N.Y.S.2d 630 (3d Dep't 1988), *appeal denied*, 74 N.Y.2d 951, 549 N.E.2d 488, 550 N.Y.S.2d 286 (1989).

<sup>24</sup> *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966) (quoting *Chambers v. Florida*, 309 U.S. 227, 236-37 (1940)).

<sup>25</sup> 136 Misc. 2d 623, 519 N.Y.S.2d 118 (St. Lawrence County Ct. 1987).

<sup>26</sup> *Id.* at 624, 519 N.Y.S.2d at 118-19 (citing *Julia*, 40 A.D.2d at 561, 333 N.Y.S.2d at 980).

<sup>27</sup> See *Victim's Right to Speak at Sentencing*, ch. 307, § 1, 2, [1992] N.Y. Laws 1005 (McKinney) (allowing oral VIS at sentencing) amending N.Y. CRIM. PROC. LAW § 380.50.

ing. In *People v. Sales*,<sup>28</sup> the probation department failed to include a VIS in their pre-sentence report, claiming that they were unable to locate the victim.<sup>29</sup> Upon being informed by the District Attorney that her attacker would probably be sentenced to one year imprisonment on his guilty plea to the charge of robbery, the victim petitioned for, and was granted, permission to address the court.<sup>30</sup> Based on the victim's articulate description of the specific impact which the robbery had on her personal and professional life, the court decided to offer the defendant the choice of a prison sentence of one and one-third to four years or an opportunity to withdraw his plea.<sup>31</sup>

*Sales* demonstrated the prejudicial effect that an oral impact statement can have on the imposition of a sentence. Only in those rare cases where a VIS substantially augments other material contained in the probation department's pre-sentence report should it be allowed to be a factor in sentence. These New York trial courts, as it appears in hindsight, foresaw the public demand (or what they believed to be the public demand) to increase the imposition of harsh sentences.

This is not to suggest that a judge is always bound to fulfill his originally proposed disposition of the case. As articulated by the New York Court of Appeals in *People v. Selikoff*,<sup>32</sup> every plea is conditional on the information available to the court at that time.<sup>33</sup> If subsequent information indicates that the promised sentence is inappropriate, the court has the discretion to depart from the originally promised sentence and either impose a different one or offer the defendant an opportunity to withdraw his plea. But often the distinction between new information and a reiteration of a victim's anguish, or a family's grief, is blurred.

Some courts have even maintained that a written VIS, by itself, should be allowed to become the sole basis for a sentencing judge to reconsider his promised sentence or to vacate the original plea. In *People v. Andrews*,<sup>34</sup> the Appellate Division, Third Department,

<sup>28</sup> 129 Misc. 2d 731, 493 N.Y.S.2d 945 (Sup. Ct. Kings County 1985).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 731, 493 N.Y.S.2d at 946.

<sup>31</sup> *Id.* at 732-34, 493 N.Y.S.2d at 946-47.

<sup>32</sup> 35 N.Y.2d 227, 318 N.E.2d 784, 360 N.Y.S.2d 623 (1974), *cert. denied*, 419 U.S. 1122 (1975).

<sup>33</sup> *Id.* at 237-38, 318 N.E.2d at 791, 360 N.Y.S.2d at 633.

<sup>34</sup> 155 A.D.2d 779, 548 N.Y.S.2d 91 (3d Dep't 1989).



basing their decision on promissory estoppel, held that the district attorney's extensive comments about the contents of the VIS did not violate a prosecutor's promise to refrain from making sentencing recommendations to the court.<sup>35</sup> Similarly, in *People v. Credidio*,<sup>36</sup> the Appellate Division, Second Department, remanded a portion of the trial court's decision which based the amount of restitution payable by the defendant solely upon statements made by the victim in the VIS. These cases seem to condemn both the very purpose of a pre-sentence report and the neutrality of the sentencing process.

#### IV. VIS'S AND THE UNITED STATES SUPREME COURT

In 1987, the Supreme Court, in *Booth v. Maryland*,<sup>37</sup> announced that "the introduction of a VIS at the sentencing phase of a capital murder trial violates the Eighth Amendment."<sup>38</sup> The Court stated, "[w]e thus reject the contention that the presence or absence of emotional distress of the victim's family, or the victim's personal characteristics, are proper sentencing considerations" in a capital case.<sup>39</sup> In 1989, the Court, in a 5-4 decision, reaffirmed *Booth* in *South Carolina v. Gathers*.<sup>40</sup> The Court invalidated a sentence because oral statements made during the sentencing phase by the prosecuting attorney were directed at the "personal qualities" of the victim.<sup>41</sup>

However, in the 1991 case of *Payne v. Tennessee*,<sup>42</sup> the realigned court overruled both *Booth* and *Gathers*, concluding that the Eighth Amendment no longer provided a "per se bar" to victim impact statements at sentencing hearings.<sup>43</sup> Clearly, the Court decided that VIS's are appropriate at sentencing hearings when a jury is determining the sentence.<sup>44</sup> However, in New York, the

<sup>35</sup> *Id.* at 780, 548 N.Y.S.2d at 91-92.

<sup>36</sup> 141 A.D.2d 661, 529 N.Y.S.2d 374 (2d Dep't), *appeal denied*, 72 N.Y.2d 1044, 531 N.E.2d 663, 534 N.Y.S.2d 943 (1988).

<sup>37</sup> 482 U.S. 496 (1987), *overruled by* *Payne v. Tennessee*, 111 S. Ct. 2597 (1991).

<sup>38</sup> *Id.* at 509.

<sup>39</sup> *Id.* at 507.

<sup>40</sup> 490 U.S. 805 (1989).

<sup>41</sup> *Id.* at 811.

<sup>42</sup> 111 S. Ct. 2597 (1991).

<sup>43</sup> *Id.*

<sup>44</sup> *See, e.g.,* *People v. Mickle*, 814 P.2d 290, 324-35 (Cal. 1991) (In Bank) (upholding introduction of VIS in capital sentencing while recognizing that *Payne* not binding on state courts); *see also* Michael Moline, *Court Upholds Death Sentence*, UPI, Nov. 25, 1991, *available*

responsibility of determining sentence is on the judge rather than the jury. Additionally, capital punishment is not an alternative in New York State for any crime. Thus, the circumstances that gave rise to the *Payne* decision currently do not exist in New York. However, the trend in the United States Supreme Court is mirrored by the trend in New York statutes.

#### V. EXAMINATION OF IMPETUS FOR AMENDMENTS

At the National Conference of Commissioners on Uniform State Laws [hereinafter the "Conference"], chaired locally by Norman Greene, it was advocated that a change in the laws regarding victim impact statements be made. Pursuant to the proposed statute, "A victim, or a member of the victim's immediate family, may present a written impact statement or, at the individual's option, appear personally at the sentence proceeding and present the statement orally."<sup>46</sup> When I began analyzing this problem I noted that we were not far away from a scenario that would be, at best, emotionally charged and, at worst, create the "carnival atmosphere" which the Supreme Court has declared violates defendants' constitutionally mandated rights.<sup>46</sup> The carnival has now come to town. This problem is further exacerbated by the presence of television cameras in the courtroom as permitted by a number of states, including New York.<sup>47</sup>

At the Conference, Maria Imperial, general counsel to the Victim Services Agency of New York, spoke of the need to "empower the victim" by expanding the use of victim statements. One way of achieving this goal, she urged, would be to permit victims, and/or their families, to make oral statements at the time of sentence. The New York Legislature granted Ms. Imperial's wishes this summer. Other jurisdictions also permit oral VIS's, as did the state of Minnesota in the sentencing of serial killer Jeffrey Dahmer. What ensued was a dismal scene with family members

in LEXIS, Nexis Library, UPI File. Justice Stanley Mosk of California stated, "My analysis has shown that the emotional impact of the crime on the victim's family is generally immaterial." *Id.*

<sup>46</sup> UNIFORM VICTIMS OF CRIME ACT § 19(a) (Proposed Official Draft Oct. 18, 1991).

<sup>46</sup> See *Sheppard v. Maxwell*, 384 U.S. 333, 358 (1966) (referring to presence of press in courtroom).

<sup>47</sup> See N.Y. JUD. LAW § 218(1). "[T]he chief judge of the state or his designee may authorize an experimental program in which presiding trial judges, in their discretion, may permit audio-visual coverage of civil and criminal court proceedings, including trials." *Id.*

uncontrollably venting their anger. As the Supreme Court stated in *Estes v. Texas*,<sup>48</sup> a criminal defendant is entitled to "judicial serenity and calm" in the courtroom.<sup>49</sup>

Ms. Imperial insists that "contrary to Professor Abramovsky's belief, a judge should not presume that a victim or the victim's family would want the defendant to receive the maximum sentence allowed by law."<sup>50</sup> But in light of statements such as "I wish someone would . . . pour gasoline [over the defendant and] set him on fire,"<sup>51</sup> is it presumptuous for a judge to conclude that a victim, or a victim's family, would want anything less than the maximum sentence? Furthermore, Ms. Imperial cites a study of rape victims which showed that a sense of participation is more critical to a victim than how severely the defendant is punished. Yet, is the criminal justice system to encourage participation of the victim at the expense of impartiality?

## VI. AGAINST STATEMENTS

The New York Legislature continues to react to the base interests of a society traumatized by crime.<sup>52</sup> There is little doubt, however, that the position of a member of society is significantly changed if that member's child is accused or convicted of an offense. It is at this point he seeks the protection traditionally afforded a defendant by the Due Process and Equal Protection Clauses of the United States and New York Constitutions. He shudders at the thought that sentencing could be dictated in conformance with what a newspaper or tabloid television broadcast finds appealing and entertaining to its audience. Sentencing should not be based on what shows like *A Current Affair*, *Hard Copy*, and *Inside Edition* find sufficiently titillating to their viewers. The sentencing process is no less significant to a defendant than other stages in the proceeding. It is nothing less than folly to safeguard a defendant's rights throughout the proceeding (both pre-

<sup>48</sup> 381 U.S. 532 (1965) (holding defendant deprived of right to due process under Fourteenth Amendment when media televised his notorious trial).

<sup>49</sup> *Id.* at 536.

<sup>50</sup> Maria Imperial, *A Contrasting View of Victims' Rights*, N.Y.L.J., Apr. 15, 1992, at 2, col. 6.

<sup>51</sup> See Arce, *supra* note 7, at 7 (quoting mother of victim of Happy Land Social Club Fire).

<sup>52</sup> See *supra* notes 3-5, 8-17 and accompanying text (discussing 1992 Session Law amendments to New York Criminal Procedure Law).

trial and trial), only to succumb to a sentence demanded by a revenge-starved family at the very end. If victims' oral statements detail a horrific ordeal, a judge may well consider how his constituency will react to the sentence he imposes, rather than how he discharges the duties by which he is bound, namely discretion and neutrality.

At a recent forum at the Association of the Bar of the City of New York, I presented several arguments against the use of VIS's at sentencing. The majority of the distinguished panel and audience vehemently opposed this viewpoint. They said that restricting the content and/or manner of presentation of victim impact statements would have a substantial negative impact on the effectiveness of the sentencing process.

Now the use of a VIS has been expanded. It is contended that, in light of the prosecutor's role as the representative of the victim, the use of VIS's unnecessarily encroach upon the due process rights of the defendant. Furthermore, it violates the notion of equal protection under the law.

Pursuant to section 390.30(3)(b) of the New York Criminal Procedure Law, a VIS shall contain "an analysis of the victim's version of the offense."<sup>53</sup> Such an analysis is likely to contain statements that were either inadmissible at trial or based solely upon opinion and emotion. In a recent assault case, the VIS contained the victim's claim that "if the blade had struck a few millimeters to the left, [I] would be paralyzed, and if the blade had been an inch longer, [I] would probably be dead."<sup>54</sup> Exaggerated statements such as this are often inadmissible during trial. While I sympathize with the victim, such statements are often unsubstantiated and are relatively irrefutable by the defense. A defendant is entitled to due process throughout his case. As the Supreme Court has stated, "the sentencing phase is a critical stage of the criminal proceeding at which . . . [the defendant] . . . is entitled to" his constitutionally mandated rights.<sup>55</sup>

Another argument for the restriction of victim impact state-

<sup>53</sup> N.Y. CRIM. PROC. LAW § 390.30 (McKinney 1991 & Supp. 1992), amended by Compensation of Crime Victims by Criminals—Repeal of Son of Sam Law, ch. 618, § 3, 4, [1992] N.Y. Laws 1669 (McKinney).

<sup>54</sup> Paul Langner, *Black Youth Gets 9 to 10 Years in Racial Assault Conviction*, BOSTON GLOBE, Dec. 6, 1991, at 36.

<sup>55</sup> Gardner v. Florida, 430 U.S. 349, 358 (1977).

ments is that the prosecutor adequately serves as the victim's representative at trial. The role of the prosecutor is to "serve the People of New York," and in reality, represents the interests of the victim. For example, a prosecutor often consults with the victim regarding the punishment to be sought. Therefore the prosecutor's statements at the time of sentencing should suffice. A written pre-sentence report prepared by the probation department is also more than sufficient. Nevertheless, the written VIS was introduced into the New York Criminal Procedure Law in 1982.<sup>66</sup> As I commented earlier, this already prejudiced defendants. But apparently this view was not shared by the legislature. The question is "Why?" Why is it that a written statement will no longer suffice? Is the judge not to be entrusted with a written document? Must he be reminded in open court lest he forget? I do not think that these were the underlying reasons. An oral statement was permitted not to educate a judge but to put him on the spot. If he did not listen to an impassioned plea in open court, he would be deemed not only impartial but inhuman. How could he dismiss the tears of agony? What was he, a coddler of criminals? In a crime-infested society is he, perhaps the utmost of taboos, soft on crime?

The final argument against the newly expanded VIS in sentencing is that it violates equal protection under the law. Justice should not be based on the victim's eloquence, financial position, or family's presence but on the severity of the crime. It is no less a crime to attack one who is illiterate, poor or without a family. Why should one life be given greater value than any other? Regarding the eloquence of the victim, a VIS prepared by one with a greater command of the English language will be more persuasive. A wealthy victim is more likely to obtain private counsel to assist in the preparation of a victim impact statement. A statement prepared by an attorney is bound to be more thorough and persuasive to a judge than that prepared by a layman. Finally, in the case of a homicide or where the victim is unable to prepare a victim impact statement, a victim without family ties will likely have no one "who cares" to speak for him at sentencing. In each case, the value of the victim impact statements is manipulated by external factors. The victim impact statement allows sentencing to be

<sup>66</sup> See *supra* note 2.

based on the extraneous factors concerning the victim, including statements that would never be admissible at trial. All victims should be entitled to equal justice.

#### CONCLUSION

Unless the probation department can demonstrate that the facts as portrayed by the prosecution, defense counsel, and pre-sentence report are insufficient to apprise the judge of all the factors necessary to impose sentence, there is no need for a VIS. Consequently, the inclusion of a VIS should be the exception rather than the rule. Only in those cases where the totality of the circumstances are substantially and materially augmented by the VIS should it be used. It is imperative that the sentencing process be the product of a neutral and detached magistrate, not the product of a victim's statement motivated either by revenge, potential pecuniary gain, or emotional trauma.

While most defense attorneys question the propriety or need for victim impact statements at sentencing, it is evident that the retraction of these laws is unlikely. Therefore, the judiciary should take it upon themselves to prevent the expansion of, and should limit the content of, victim impact statements. This safeguard will prevent the creation of a "carnival" atmosphere, while preserving the constitutionally mandated rights of the criminal defendant.

