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The Heterogeneity of Victim Impact Statements: A Content Analysis of Capital Trial Sentencing Penalty Phase Transcripts

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The Heterogeneity of Victim Impact Statements: A Content Analysis of Capital Trial Sentencing

Penalty Phase Transcripts

Abstract

Victim Impact Statements (VIS) are controversial in capital sentencing proceedings largely due to their questionable relevance to sentencing, the concern that characterizations of the victim may lead to arbitrary sentencing judgments, and the belief that the emotional nature of this evidence may be inflammatory. A sample of 192 capital trial VIS transcripts were analyzed for content as well as a linguistic analysis of their emotionality. The findings reveal that these statements are highly varied, including their format, length, and relation between the witness and the victim. Despite legislative mandate that they address the emotional, financial, and physical suffering experienced by victim survivors, testimony of this nature occurs in a minority of the cases. Most commonly, these statements tend to characterize the victim and their qualities, relay the witness' shock at first learning of the victim's death (i.e., trauma narratives), and address the significance of the deceased to the family unit. In approximately one third of the transcripts reviewed, the witness made mention of the defendant, but this rarely included any mention of a desire for vengeance or recommended punishment. Linguistic analysis revealed that emotional content was prevalent throughout the testimony, with sadness emerging as more pervasive than anger. However, the degree of emotional language contained in these statements was not particularly high—and was comparable to that typically encountered in everyday life (e.g., newspapers, novels). Implications, particularly with regard to the potential for victim impact statements to be considered inflammatory, are discussed.

Keywords: Victim Impact Statements; capital sentencing; content analysis; juror decisions; emotions and judgment

Victim Impact Statements (VIS) refer to statements given either in writing or orally that detail the impact of the defendant's crime on victims. In capital trials, this testimony is delivered by victim survivors who have included members of the decedent's family, but they have also been presented by friends, coworkers and even emergency first responders (Myers, Johnson, & Nunez, 2018). VIS is often described as educating the jury concerning both emotional as well as financial hardships that have arisen as a direct consequence of the loss of the victim. VIS appear regularly in courts in a number of countries such as the U.K., Australia, and Finland. In the United States, twenty-nine of the 31 states that currently enforce the death penalty allow for VIS during the penalty phase of the trial (Death Penalty Information Center, 2018). VIS in capital sentencing proceedings are controversial for a number of reasons, but chief among these issues are their relevance to the sentencing decision and the potential that their emotional nature may interfere with jurors' capacity to decide in a reasoned and impartial manner (Myers & Greene, 2004). These concerns were expressly addressed on three occasions by the U.S. Supreme Court in *Booth v Maryland* (1987), *South Carolina v. Gathers* (1989), and *Payne v Tennessee* (1991).

Victim Impact Statements in Capital Sentencing: Concerns with Relevance of Victim Character and Potential for Emotionality of Testimony to be Inflammatory

The relevance of victim character information. The U.S Supreme Court first addressed the constitutionality of VIS in *Booth v. Maryland (1987)*. In the penalty phase of the trial, the VIS provided by members of the family of the elderly couple who was murdered, and while the information concerned a variety of topics such as how family members continue to live in fear, it also addressed characteristics of the victims, including their "outstanding personal qualities"

(*Booth v. Maryland*, 1987, p. 2536) and the degree to which they were beloved in the community. In a 5-4 decision, the Court ruled that: "the Eighth Amendment prohibits a capital jury from considering victim impact evidence" on the grounds that the inclusion of such information "is irrelevant to a capital sentencing decision" and that admitting such evidence generates an "unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner" (*Booth v Maryland*, 1987, p. 503).

Of primary concern was the introduction of VIS may lead to the conclusion that qualities of the victim might determine the appropriate punishment of the defendant. These same concerns were raised later in *South Carolina v. Gathers* (1989) when the prosecutor read at length from contents found in the victim's wallet in a manner designed to reveal positive characteristics about the victim. Justice Brennan noted that such information "cannot possibly have been relevant to the circumstances of the crime" (p. 2211). The decision in *Gathers* did little to extend the Court's reasoning in *Booth* other than to clarify that it matters little how victim information is introduced (e.g., either by a witness or through the statements by the prosecutor; Myers & Greene, 2004).

In *Payne v. Tennessee* (1991), the U.S. Supreme Court returned to the question of whether the introduction of VIS in capital sentencing proceedings violates the defendant's 8th Amendment rights. During the VIS, the victim's mother spoke of her raising her grandson who lost both a mother and a baby sister. The extent to which the small boy still missed and asked about his mother and his sister was one of the key areas of concern in the VIS. In overruling both *Booth* and *Gathers*, the *Payne* decision underscored the perspective that VIS "in the majority of cases, and in this case…serves entirely legitimate purposes" (*Payne v. Tennessee*, 1991, p. 825). Moreover, Chief Justice Rehnquist, in delivering the opinion of the Court, noted that barring VIS is overly restrictive and prevents the jury from hearing information which "is designed to

show…each victim's uniqueness as a human being" (p.823). In quoting *Gregg v. Georgia* (1976), Rehnquist reiterated the long tradition of avoiding unnecessary restrictions on information that will aid the factfinder: "We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision" (*Payne v. Tennessee*, 1991, p. 821).

The emotionality of VIS and potential inflammatory effects. VIS sometimes evoke strong emotions into the penalty phase of the trial, and so concern has been expressed over the potential that this information will inflame the passions of the jury and lead to decisions based on emotion, rather than reason (Arrigo & Williams, 2003; Bandes, 1996; 2009; Blumenthal, 2001; Flamm, 1999; Myers, Weidemann, & Pearce, 2006). Within the legal system, emotionality on the part of jurors is seen as antithetical to reason (Shaunessy, 1992). Yet, VIS are typically presented in a context in which emotion and the law are inextricably linked (e.g., see Nuñez, Estrada, Schweitzer, & Myers, 2016; Wiener, Bornstein & Voss, 2006). That is, even if the content of VIS (e.g., evidence of emotional harm and suffering) were not so powerful, these statements are sometimes presented before jurors in a manner that promotes emotional responses (e.g., crying witnesses, pictures and videos of the deceased, background music), and as some would argue, in many cases purposely so (Austin, 2010; Schroeder, 2010). Far from trying to reduce the emotional power of these statements, these emotional displays may be used by some in order to gain an edge in securing a death penalty judgment (Burr, 2003). And, there appears to be little doubt that, in some instances at least, jurors are clearly moved by VIS testimony. Logan (1999) relays the case in the Timothy McVeigh trial for the bombing of the Federal Building in Oklahoma City, that not only jurors, but also the judge wept openly upon hearing the

testimony of a parent describing what it was like to hear that rescue crews were able to retrieve nothing but the hand of her two-year old daughter.

The concern surrounding the emotionality of VIS and the potential to bias juror judgments arose repeatedly in the U.S. Supreme Court decisions in *Booth* and *Payne*. In Booth, the Court stated "one can understand the grief and anger of the family caused by the brutal murders in this case, and there is no doubt that jurors are aware of these feelings. But the formal presentation of this information by the State can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant…any decision to impose the death sentence must 'be, and appear to be, based on reason rather than caprice or emotion' (*Booth v. Maryland*, 1987, 508, see also *Gardner v. Florida*, 1977). Because both the relevance of victim character information and the potential for the emotional nature of VIS to be inflammatory was central to the debate surrounding the constitutionality of VIS in capital sentencing, substantial jury decision making research has been conducted on these issues.

Jury Simulation Studies Investigating the Effects of Victim Character Information

Some early research has indicated that factors surrounding the victim such as their likability has been related to punishment or judgments relevant to sentencing (e.g., Deitz, Littman & Bentley, 1984; Kerr & Kurtz, 1977). This pattern has been uncovered in actual trials where less reputable victims promote greater leniency toward the defendant (Baumer, Messner, & Felson, 2000).

In studies explicitly examining VIS and victim qualities, again we see evidence that qualities of the victim matter to jurors. Greene, Koehring, and Quiat (1998), and later Greene

(1999) found that when the reputation of the deceased victim in the VIS was varied, there were corresponding differences in ratings that are relevant to sentencing (e.g., rating of how emotional the victim's family was and how serious the crime). More recently, Mitchell, Myers & Broszkiewicz (2016) found that when qualities of the victim focused on their significant role in the family, jurors judged the harmfulness of the crime as greater and these harm judgments mediated the relation between VIS and sentencing. Schweitzer and Nuñez (2017) found that participants were more likely to sentence defendants to death when the victim was of a higher SES. Consequently, both trial outcomes as well as jury simulation studies provide converging evidence to suggest that varying qualities of the victim matters when jurors sentence the defendant.

Jury Simulation Studies Investigating the Inflammatory Effects of VIS

Researchers have therefore sought to determine the effects of VIS on sentencing judgments, with a particular focus on whether VIS elicit strong emotions in jurors and whether these emotions are related to sentencing judgments. Early studies in this area failed to uncover a clear pattern suggesting that VIS elicits strong emotions and that these emotions interfere with reasoned decision making. The failure to uncover these effects, however, may have been due in part to a failure to distinguish between emotions of anger and sadness. In a number of these studies, emotional responses in jurors were either not measured (e.g., Tsoudis & Smith-Lovin, 1998), or were measured such that discrete emotions could not be determined (e.g., Myers, Lynn & Arbuthnot, 2002; Platania & Berman, 2006; Wevodau, Cramer, Kehn, & Clark, 2014).

The importance of measuring discrete emotional states finds support in social cognition research on emotions and judgment where repeated findings have emerged that anger and

sadness produce differential effects on judgments. A detailed account of the role emotions play

in juror judgments are beyond the scope of the present paper, but can be found elsewhere (e.g.,

see Feigenson & Park, 2006; Nuñez, Estrada-Reynolds, Schweitzer, & Myers, 2016). This

research indicates that different emotions have differential effects on how information is

processed (e.g., Bless, Bohner, Schwarz, & Stack, 1990; Bower, 1981; Schwarz and Clore,

1983). More specifically, Bodenhausen, Sheppard and Kramer (1994) found that angry

participants showed evidence of reduced information processing relative to sad participants.

Tiedens and Linton's (2001) findings propose that anger elicits feelings of certainty, and

certainty promotes less detailed information processing whereas sadness is associated with

feelings of uncertainty and the tendency to engage in more extensive information processing.

This research indicates anger may promote irrational (i.e., less reasoned) decisions, a pattern we

should not see when sadness is evoked. Other models advanced by others (e.g., Haidt, 2001;

Tetlock, 2002) propose that anger and sadness have differential effects on decisions, but for

reasons associated with motivations to evaluate information differently, not because of

differences in how extensively information is processed. All of these models suggest that

judgments may be impacted by emotions, but none of these models suggest anger and sadness

are equally prejudicial. Therefore, the research on mood and judgment fail to confirm the broad

characterizations voiced by legal commentators who describe *all* emotions as antithetical to

reason (e.g., Shaunessy, 1992).

Jury simulation studies that have assessed discrete emotions have tended to produce

findings consistent with those in the emotions and judgment literature whereby anger is

associated with more punitive responses in jurors. Paternoster and Deise (2011) found that

participants exposed to a videotaped penalty phase containing VIS were four times more likely to

vote for death (62.5%) than participants in the no-VIS condition (17.5%). The presentation of the

VIS was associated with higher feelings of anger and vengefulness in participants, and those

emotions partially mediated the relation between VIS and sentencing. Similar findings emerged

by Nuñez, Schweitzer, Chai, and Myers (2015) who presented all participants with a VIS and

found that mock jurors who became angrier following the VIS were more likely to sentence to

death than jurors who became sadder following the VIS (see similar findings by Georges,

Weiner & Keller, 2013 in a study not employing VIS).

Most recently, Nuñez , Myers, Wilkowski & Schweitzer (2017) randomly assigned death

qualified mock jurors to watch one of six videotaped trials that crossed three levels of VIS (no

VIS, Sad VIS, Angry VIS) with two levels of mitigating factors (weak vs. strong). The

emotionality of the VIS was manipulated by altering both the content of the VIS and witness

demeanor. Participants who witnessed the angry VIS were more likely to sentence to death than

those who were assigned no VIS or witnessed the sad VIS. Additionally, those in the angry VIS

condition rated the mitigating evidence as less important to their decisions. In sum, while the

U.S. Supreme Court in *Booth* and later in *Payne* highlighted the potential inflammatory effects of

VIS, the findings thus far provide empirical support to the contention that: (1) VIS do elicit

emotions in jurors, and (2) anger and not sadness has been linked to sentencing decisions.

This empirical evidence addressing the effects of VIS that elicit emotions in jurors is

critical to determining whether VIS can be considered inflammatory. However, it is equally

important to determine whether emotions such as anger and sadness are typically present in VIS.

How typical is emotional content in VIS? In addition, while simulation studies show the

importance of victim character on sentencing, it is not clear that character information frequently

accompanies VIS. The present content analysis of transcripts of VIS is designed to address these

gaps in our information on VIS. Moreover, a content analysis of VIS also affords the opportunity to judge whether simulation research conducted thus far, in general (and not just the research addressing emotionality and character), adequately reflect the VIS jurors typically encounter in actual trials.

Heterogeneity of VIS in Capital Trial Sentencing

The empirical findings using a jury simulation approach have failed to reveal consistent findings with regard to the effects of VIS on sentencing judgments (see Myers, Johnson, & Nuñez, 2018 for a review). Quite understandably, the variables examined and samples tested have varied across these studies, and so has the content of the VIS. Whether there is such a thing as a typical VIS remains an unanswered question because researchers have not content analyzed VIS presented in capital trials with this question in mind. Consequently, concerns regarding the emotional content of VIS, or the manner in which it is presented (e.g., multiple witnesses, identity of witness, presented in a written statement or through a question and answer format), are largely based on anecdotal reports rather than a systematic examination of VIS content and practices. Moreover, if there are aspects of VIS that can be considered to be typical of this testimony, whether or not these aspects are reflected in the jury simulation stimuli presented to mock jurors would be an important consideration when evaluating the external validity of this research.

Variability of state statutes related to VIS. We examined admissibility status of VIS for all 31 states that currently allow the death penalty, relying on Sanderford (2012) and www.deathpenalty.org as sources. In the 29 states that allow VIS during capital sentencing, the manner and degree to which VIS are controlled is highly varied and, consistent with earlier

accounts (e.g., Blume, 2003), there remains wide latitude in how VIS are introduced. In some

jurisdictions, the content and delivery of VIS has been strictly controlled. With the *Payne*

decision in 1991, many states passed statutes allowing VIS during capital sentencing, but the

statute placed strict limitations on the testimony to factors specifically relevant to mitigating and

aggravating circumstances (Pitt, 2013). Furthermore, in some cases these statutes included

provisions that the VIS could not include personal opinions about the defendant, or recommend a

sentence, and the number of statements was limited to one family member (Castellano, 1996).

Prior to abolishing the death penalty in 2007, New Jersey courts allowed VIS to be introduced

only if the defendant offered evidence of his character in the context of mitigating evidence and

courts were mandated to review the VIS prior to testimony, edit the emotional content out of the

statement, and require that the witness testify only if they could refrain from emotional displays

while testifying (Joh, 2000; Shanker, 1999).

In some states, VIS are permitted, but the potential effects are benign given the timing of

the statement. For example, Indiana permits the presentation of the VIS only *after* a sentencing

decision has already been made, and further limits the testimony to information about the victim

and the effects of the crime (*Bivens v. State*, 1994). But, we have little information about how

frequently this post-sentencing practice occurs. The *Payne* decision failed to provide sufficient

direction with regard to how VIS are presented to jurors (Frankel, 2008; Myers & Greene, 2004;

Platania & Berman, 2006), and states as well as federal courts have often been reluctant to place

tight restrictions on what gets admitted during a VIS (Blume, 2003; Logan, 2006). Consequently,

there is substantial heterogeneity in the content and procedural restrictions with regard to VIS

and capital sentencing,

In addition to procedural variations in how VIS is presented in court, the identity of the VIS witness has also, for the most part (cf., McGowan & Myers, 2004) been ignored in the research literature. Although we know that some jurisdictions place limits on who may testify as a witness (e.g., only immediate family members), we know very little about who typically testifies in these cases. The emotional nature of VIS supposes that witness gender may be important in eliciting sympathy from the jury, but currently there is no information regarding whether females are more likely to testify than males. Some jurisdictions allow multiple VIS testimonies, but again their frequency of occurrence is unknown as well as their effects because investigators have thus far failed to test the effects of VIS with more than a single witness.

In summary, given the wide latitude with regard to the format of VIS, the number of witnesses who may offer testimony, and the general lack of guidance or restrictions surrounding who may testify, the length of their testimony, or the content of the testimony, it is clear that VIS has the potential to vary greatly from case-to-case. It is therefore critical to carefully examine these differences in the administration of VIS and the content of VIS in order to better establish the degree to which the jury simulation research adequately reflects current practices.

Studies Examining the Content of Victim Impact Statements

Although the content of VIS in capital cases has generally been ignored, there are a few exceptions. Eisenberg, Garvey, and Wells (2003) interviewed jurors about capital cases which included VIS and, for a small sample (n = 24) of jurors, some of the questions asked participants to identify which aspects of VIS were present in the testimony, along with listing aspects of the testimony they found to be influential in their sentencing judgments. Based on these interviews, Eisenberg et al (2003) concluded that two issues were most commonly found in VIS: (1) testimony about the victim's personal qualities, and (2) how the witness was coping with the loss

of the victim. Comparatively, rarely (12%) did the VIS contain information about which

punishment the witness deemed was appropriate.

More recently, Younglove, Nelligan, and Reisner (2009) examined a total of 42 capital

trial transcripts from 1991-1998 obtained from Texas, New Jersey, and California and included a

total of 80 witnesses who provided VIS. Younglove et al. confined their examination of the

transcripts to evidence of victim character information. Because the majority of VIS testimonies

came from California, which does not limit the number of witnesses who may testify (e.g., for

one trial, 11 witnesses presented a VIS), the number of VIS testimonies was roughly twice the

number of cases. The researchers found that victim character information, specifically

information about the personality of the victim, was both "recurrent and prominent" (p. 542) in

the transcripts. For example, in California where 45 separate VIS testimonies were analyzed, a

total of 304 references were made to the victim's character. Because their analysis was based on

a large number of VIS transcripts, the article provides a detailed account of the type of character

testimony that was typically expressed during a VIS. However, by focusing specifically on

character information, the study did not reveal other areas of content that may frequently appear

in VIS (e.g., the emotionality of the testimony, characterizations of the defendant, recommended

punishment), nor did it specifically analyze procedural differences in the administration of VIS.

Consequently, despite the many strengths of this study, there remain some important and

unanswered questions regarding VIS content which merit further investigation.

In the present study, we obtained trial transcripts from a large number of capital trials (n

= 131) which yielded a large number of VIS transcripts (75 cases with 192 VIS statements). One

goal of the present investigation was to get a clearer picture of common elements found in VIS in

capital sentencing cases. Specifically, the present content analysis was conducted in order to

determine the prevalence of: relevant procedural factors (e.g., who testifies, how many, in what format, how lengthy?), testimony relating to information consistent with the stated purpose of VIS (e.g., financial, physical, psychological harm), as well as the prevalence of content that is not specifically identified in statutes or in some cases prohibited by states (e.g., victim character information, references to defendant, recommended punishment). Upon receiving transcripts containing VIS, we learned that testimony comes in three general formats: (1) a free-narrative method whereby the victim survivor reads a prepared statement to the court; (2) a question and answer format where the prosecutor conducts a direct examination and, in rare cases, the defense attorney may cross-examine and (3) a post-sentencing VIS where the witness addresses the judge with the jury not in the court and so these statements have no impact on what the jury decides.

A second goal of the present study was to address the degree of emotionality contained within VIS. As noted, empirical findings thus far suggest that angry responses to VIS are associated with greater likelihood of death penalty judgments whereas sad responses to VIS are unrelated to sentencing decisions. Apart from anecdotal cases, the degree to which VIS contain emotional content, specifically anger or sadness, is unknown. One way to obtain this information would be to assess the emotional language contained within the VIS transcripts using a program designed to measure the emotional valence of the words within the testimony. In this case, we used the Linguistic Inquiry and Word Count (LIWC) program developed by Pennebaker, Booth, and Francis (2015). Although this approach has its limitations (e.g., it is not sensitive to the context in which words appear), the program has been shown to measure emotional content (e.g., negative and positive emotion words) that correlate significantly with human ratings of emotionality (e.g., Alpers et al., 2005). Consequently, we sought to analyze the

emotional content of the VIS transcripts using the LIWC program to assess the degree to which

sad and angry content pervade VIS in capital trials.

METHOD

Transcript Selection

The Institutional Review Boards of two institutions of which the authors were affiliated

approved this study. The database of capital cases was obtained from the research by McCord

(2005) who listed all life and death capital cases across the U.S. during the 2004 calendar year.

The reason for choosing McCord's (2005) list of capital cases as our sampling frame was simple.

Though it is easy to find specific cases in a given year that result in the death penalty from

websites such as www.deathpenalty.org, there is no corresponding database for life sentences.

Thus, the best sampling frame was the complete set of cases obtained by McCord (2005).

Though, these represent cases that were tried more than a decade ago, there have been no major

court related changes during this time, and in the few states where there were changes (Arizona,

Georgia, Idaho, and Washington), the new laws would not affect the content examined in the

present investigation.

In 2004 there were 142 capital cases that resulted in the death penalty, and 120 that

resulted in life sentences from jurors. Using this as our sampling frame, we obtained trial

transcripts for 131 cases (52.8% of the death cases and 44.2% of the life cases) by contacting the

Clerk of Courts in the various counties in which the trial took place. Of those, 75 cases (57%)

contained VIS (35 life and 40 death sentences). We obtained transcripts from 28 of the 31 states

that allow the death penalty, and obtained our largest number of transcripts from Texas (n=21),

California (n=19), Ohio (n=13), and Florida (n= 10).

While the larger database we selected cases from (see McCord, 2005) allowed for

identifying cases based on random selection, unfortunately, the prohibitive cost of many

transcripts or extended delays in receiving requests meant that our sample of transcripts was not

random. Transcripts were purchased based on a per-page basis, with the exception of instances in

which they were obtained for free. A priori, we established a number of unreturned contact

requests to the Clerk of Courts (three) and a per-page cost limit that determined whether a

transcript was included in our sample. However, whether the penalty phase contained a VIS was

unknown to us at the time of purchase, and consequently selection of VIS testimonies was not

systematic. Based on this approach, we obtained a very large number of VIS testimonies (n =

192) which we could analyze. Methods for analyzing VIS content and emotional language are

described below.

Content Criteria and Categorization

Our goal was to analyze the VIS transcripts and identify important factors which would

have some relevance to the current debate surrounding the admissibility of VIS. In addition to

some demographic and procedural questions (e.g., gender of witness, relation of witness to

victim, VIS length, manner in which VIS was introduced), the present investigation further

identified a number of content areas that are of greatest relevance to the VIS debate: (1) financial

harm, (2) physical harm, (3) psychological harm, (4) family significance of victim, (5) victim

character, (6) expressed emotions, (7) referencing the defendant, (8) dehumanizing the

defendant, (9) describing the crime, and (10) recommended punishment. Consequently, the

specific factors we searched for in the transcripts were identified a priori, rather than following

an initial analysis where common themes were identified. One exception to this method occurred

because early on in reviewing the transcripts we quickly identified a tendency for witnesses to

describe the experience of learning the news that the victim had been murdered. In many

instances, and often in dramatic fashion, witnesses would provide detailed accounts of how they

learned that the victim had died. This account was relatively easy to identify in transcripts and

so content analyzers kept record of how often this information emerged in the course of the VIS

and this became the 11th content category.

Scoring. Independent raters were senior undergraduate psychology students who were

trained and supervised by a graduate student and the faculty directing the research lab. For each

VIS, each rater independently read the VIS and scored each of these content areas as either

present or absent. When statements could reasonably fall into two categories (e.g., family

significance and financial harm), raters were instructed to choose the one category that was more

clearly represented. Consequently, the percentages in each of the categories may under-report the

frequencies by which categories are represented. Not unlike the tendency for factor analysis

interpretation to use orthogonal rotation to better identify and label factors, we felt this scoring

approach that necessitated scorers choosing one category or another (rather than multiple

categories) would allow for easier interpretation of which content areas are more frequently

represented within VIS relative to each other. Raters were given examples of transcripts and

trained for approximately 2 hours on how to score the transcripts according to the scoring criteria

below. All 192 transcripts were scored independently by two raters and a third rater was assigned

to evaluate the two ratings along with the transcript to resolve discrepancies in cases of

disagreement.

Financial harm. This measure includes any mention by the witness which suggests that

there has been an economic impact, including whether there have been changes related to

financial factors (e.g., changing residence, getting a second job or changing jobs).

Psychological harm. This measure includes any mention of doctor visits for psychological services, or seeking treatment. It also includes mention of negative emotional experiences over a period of time (e.g., "it's taken away my sense of well-being and peace of mind"), or recurrent negative emotional experiences (e.g., "[I] live with emotional difficulties") or behavioral effects related to emotions (e.g., " [I] can't sleep" and "[have] nightmares").

Physical harm. This measure includes any mention of physical effects arising after the crime. Examples of these statements include witnesses experiencing "drug dependency," "developed shingles," and reporting general "health problems."

Family significance. Family significance refers to the degree to which the victim was a central and present member of the family (i.e., how involved), and the degree to which the family depended on them. Examples of family significance include mention that the deceased "always preached about family" and "was always there" and included instances where significance was implied by loss (e.g., "we can't celebrate holidays the same way anymore").

Victim character. Victim character refers to explicit mention of the qualities of the deceased or that mention how they were regarded by others. Often these refer to single terms (e.g., caring, honest), and at other times refer to behaviors indicative of the deceased character (e.g., "serious student and worker," and "worked with troubled youth").

Social standing/social value. As a subset of victim character, this category captures whether the witness mentions the victim's relationship to the community, or how involved they were or valuable they were to society (i.e., they were a doctor that helped save lives, etc.). The degree to which the victim was well regarded, held in esteem, or held ties to their community would be evidence of social standing/social value.

Emotions described. Any description or mention of emotions the witness conveyed either at the present time (e.g., "I'm sad," "I'm angry right now") or at any time since the crime (e.g., "I'm heartbroken," "I'm sad all the time"). This category refers to explicit descriptions of emotions by the witness, including instances where witness may have become emotional when testifying. However, if the witness did not explain how they were feeling, but the transcript indicates they were crying on the stand (some transcripts mention this), they were scored as describing emotions. No distinctions were made about the specific types of emotions described. Because of the importance of emotion to the VIS debate, any mention of emotion fit this category, even if emotions were mentioned in other categories (e.g., psychological harm). So, when individuals spoke of feeling depressed we characterized them as fitting the psychological harm category, but we also included them as also meeting the category of emotions described.

Defendant mentioned. This category includes any reference to the defendant either using the name directly or using pronouns or terms that suggest the defendant (e.g., "him," "he," "whoever did this crime").

Defendant dehumanized. This category includes any mention of the defendant in dehumanizing terms (e.g., "you became an animal") and it also refers to acts implying that the actor was less than human (e.g., if the defendant was described as engaging in "monstrous actions").

Brutality of crime expressed. This category includes witnesses describing any aspects of the crime, including the brutality of the act.

Recommended punishment. This category includes any mention of punishment or implies that the defendant should receive the death penalty (e.g., "he should receive the harshest

punishment possible"). Expressions by the witness that suggest the defendant should pay for his actions but not under the control of the criminal justice system were not scored as recommended punishment (e.g., "may you rot in hell").

Emotional language in VIS

The Emotional content of the VIS was also examined using the Linguistic Inquiry and Word Count (LIWC) program developed by Pennebaker, Booth, and Francis (2015). LIWC calculates the degree to which people use different categories of words across a wide array of texts. In the present study, VIS was isolated from the trial transcripts and analyzed. Two subscales of the analysis were of interest in the present study; anger and sadness. The Anger subscale is comprised of a word count that includes 230 anger related words (alpha = .97) and the Sadness subscale is comprised of 136 sadness related words (alpha = .91)

RESULTS

Characteristics of VIS Presentations

The word counts were recorded for the transcripts. Consequently, statements by the court, or by attorneys were included in the word count, because in many instances the questions posed were critical to the comprehension of the VIS, and so leaving out these words from the total count would have made little sense. However, for the most part, information coming from the court or an attorney reflected a small proportion of the total word count. Based on this approach, analysis for word count revealed lengths ranging from a low of 71 to a high of 8329 and a median length of 723 words ($M = 1059.72$, $SD = 1120.08$; $95\% CI = 900.28\text{-}1219.16$). As shown in Table 1, the reported means and standard deviations revealed that the word count varied according to the method used to present the VIS, with the higher word counts produced by the

question-and-answer format where the prosecutor directly examines the VIS witness, F (2,189) = 19.52, $p < .001$, $\eta 2 = .17$; *95% CI* = .08-.26.

In total, 69.7 % of VIS witnesses are female and 28.6% are male (in 1.7% of cases gender could not be determined). The relation to the victim was fairly dispersed among all categories, but parent (25.5%) was most common and child (16.7%) was next, whereas spouse (7.8%) was among the least common type of witness identity. Examining the number of VIS per case, we found that an average of 2.65 (*Median* = 2) VIS were presented in each case, and the number of VIS ranged from 1 to 14. It was rare for information concerning the age and ethnicity of the witness to be mentioned, and so this information is not reported.

One important finding from the VIS transcripts was that across jurisdictions, VIS were delivered in many different ways. In the free narrative method, the victim survivor read a statement that had been prepared and written prior to the court appearance. In the question-and-answer method, the prosecuting attorney conducted a direct examination of the VIS witness and the defense attorney would, in rare cases, cross examine the witness. In some cases, during the course of the direct examination, the witness also read a prepared statement. In those rare instances, we coded the testimony as a question and answer format. Both of these methods were carried out in front of the jury prior to the jury's sentencing decisions. The post-sentencing method was conducted after the jury rendered their sentence but before the judge meted out the sentence. As can be seen in Table 1, of the three methods, the question-answer method was most common among our transcripts (55.6%), the free narrative method was less common (21.7%), and, surprising to us, a not insignificant percentage of VIS (22.8%) were presented to a judge without the jury present. Although more females than males were VIS witnesses, there were no significant gender differences across VIS type, X^2 (2, $N = 189$) = .18, $p = .91$.

Content Analysis of the VIS

Raters independently coded all VIS transcripts and the percentages for each category

along with Kappa levels are reported in Table 2. The inter-rater agreement for each category

using Kappa varied from .66 (relayed emotions) to .91 (mentioned defendant and recommended

punishment), with an average of $k = .79$, where Kappa levels above .61 are characterized as

substantial agreement (McHugh, 2012). In instances of disagreement between the two

independent raters, a third rater provided the final judgment after reviewing the transcript.

Percentages are based on ratings after all discrepancies were resolved.

In terms of the common elements present in the VIS testimony, and contrary to the stated

purpose behind victim impact statements, information concerning the physical (9.4%),

psychological (26.6%), and financial (3.6%) impact of the crime on the victims and their family

was infrequently present in the statements. Some discussion of victim character was commonly

addressed in the statements (76.6%). These descriptions may have been as brief as mentioning a

trait about the deceased (e.g., "loving," "compassionate") to lengthier descriptions of the victim's

characteristics such as brief anecdotes about their accomplishments (e.g., "10 years with the

Guard," "accepted into law school"). If we also restrict descriptions of the victim to social

standing/social value, where descriptions of social standing concerned how well regarded they

were by their community or their ties to the community, then instances of this type were much

less common (16.7%).

In many cases, the description of the victim focused on the importance of the member to

the family unit. Information about the importance of the deceased to the surviving family and

how involved the victim was with the family was also a common element that appeared in the

statements (56.8%). This significance to the family in most instances described the victim's involvement with the family and the degree to which they were a critical part of their everyday lives. There are numerous examples of these statements (e.g., "he wasn't going anywhere without his children or her" and "he really wanted to support them, you know, and have money for college and all that"). Clear descriptions of the degree to which the family depended on the victim and therefore would be damaged by their loss, (e.g., mention of the degree to which the defendant was the sole breadwinner) was much less common, occurring in only 13% of the transcripts analyzed.

Analysis of content concerning emotions included instances where the witness described their feelings, used emotional terms, or appeared to demonstrate emotional demeanor (e.g., crying). Results of the analysis of emotional content of the statements using linguistic analysis are presented in a later section. Thus, content analysis described in this section concern rather broad mentions of emotion within the VIS, encompassing scenarios where the witness described how they felt, or were likely to feel in the coming months or years. Instances where the witness described these feelings were common (66.7%). It is noteworthy that in many instances the witnesses would not explicitly name the emotion but instead convey the magnitude of their emotional experience (e.g., "I felt like there was an earthquake that had fallen over me"), or they detailed emotional shifts or struggles to deal with emotion (e.g., "I see-sawed between hope and despair"), or indicated that their emotional experience was not likely to change over time (e.g., "I don't think my pain is ever going to be healed").

References to the defendant occurred in a number (30.7%) of cases, but when the defendant was mentioned it tended to be little more than a single pronoun such as "he" or "him." In a few instances the defendant was specifically addressed as the witness communicated directly

to him (e.g., "I hope every morning your eyes pop open because of the image of what you've done to my mom"). Rarer still were instances where the defendant was dehumanized (6.3%). We restricted our instances of dehumanization to cases where nonhuman terms were used to describe the defendant, rather than simply utterances of hate or vengeance directed toward the defendant. Few instances of direct dehumanization (e.g., "he should be put down like a rabid dog" and "you became an animal") were observed in the transcripts we examined. Somewhat more common (16.7%) were descriptions of the crime itself, or the brutality of the act. This relatively broad category included instances where the witness called attention to the needlessness of the murder, highlighting the defendant's lack of concern for harming others. We also examined testimony for instances in which the witness recommended or requested a punishment outcome for the defendant. We restricted coding of recommended punishment to instances where the witness appeared to appeal to the jury about an appropriate sentence, and not to instances where they wanted the defendant to suffer for his actions (e.g., "rot in hell"). Here, we see that punishment was recommended in 14.1% of the transcripts we examined (e.g., "I feel that he does deserve the maximum sentence on everything").

One element which was not identified a priori as a topic of analysis, but appeared in a number (33.3%) of the statements we analyzed, was a description of the personal experience of first learning about the crime. This trauma narrative emerged with a relatively consistent pattern. In some cases, they were prompted by the prosecutor (e.g., "tell the court how you learned of his death"), while in other instances they emerged unsolicited. In each of these cases, witnesses described how they learned about the crime, and often described their shock or behaviors that illustrated the devastation they felt at the time (e.g., "He called me at my place of employment. I

dropped the phone and began to scream"). In many instances, they depicted these trauma narratives as shocking and life-altering events from which they have not recovered.

In Table 2, VIS content was broken down into the three formats of free-narrative, question and answer, and post-sentencing. Percentages in which each of the content categories (e.g., dehumanized defendant) was therefore reported separately for each presentation format. A series of Chi-Square Goodness of Fit tests were conducted to determine if the percentages across presentation formats departed significantly from one another and we set the per comparison alpha level at .005 in order to control for alpha inflation. As reported in Table 2, you see significant differences across half of the content areas: (1) personal character, (2) learned of death, (3) mentioned defendant, (4) crime brutality, (5) recommended punishment, and (6) physical harm. Personal character of the victim was least likely and the defendant was most likely to be mentioned in post-sentencing VIS. Crime brutality and recommendations for punishment were least likely to appear in the question and answer VIS, but accounts of how the witness learned of the victim's death were most likely to appear in this format. Accounts of physical harm were most likely to appear in the free narrative VIS.

In Table 3, VIS content was broken down by sentencing decision (life/death). Here, a series of Chi-Square Goodness of Fit tests were conducted to examine differences percentages across the sentencing outcome categories. When controlling for alpha inflation for the 12 tests using $p < .005$ as the per comparison type I error rate, none of the categories were found to differ significantly across sentencing outcome.

Analysis of Emotional Content of VIS Transcripts

The LWIC process scores the level of emotionality contained in the statement based on the percentage of total words falling into a particular word category. The program identifies out of a possible count of 230 anger words and 136 sadness words the percentage of total word count for each transcript that contained the category anger and sadness. For example, if the sadness count was 1.0, it indicated that 1% of the total word count consisted of words belonging to the sadness category. Therefore, given that it represents the percentage of total words, scores reflect the density of the particular emotion category within a statement.

Emotionality of VIS was analyzed by separating VIS into the three different modes of presentation; free narrative, question-and-answer, and post sentencing, reasoning that the different methods of VIS presentation might vary in emotional content. A linear mixed effect model ANOVA was run to examine the Emotion Type (Anger versus Sadness, as a within-subjects variable) by Presentation Type (Question-and-Answer, Free Narrative, and Post-Sentencing, as a between subject variable). The analysis yielded a significant main effect for Emotion Type (F (1, 188) = 12.65, p = .0005, $\eta 2$ = .06; *95% CI* = .01-.14). Overall, the VIS contained more sadness (*M* = .69, *SD* = .71, 95% CI [.59 - .79]) than anger (*M* = .48, *SD* = .58, *95% CI* [.40 - .56]). The effect of Emotion Type was qualified, however, by a significant interaction of Emotion with VIS Type; F (1, 188) = 5.07, p = .03, $\eta 2$ = .03; *95% CI* = 0.0001-.09.

An analysis of simple main effects focusing on Emotion Type revealed that when the Presentation Type was post-sentencing there were no significant differences between anger and sadness; F (1, 45) = .17, p = .68, $\eta 2$ = .004; *95% CI* = 0.0-.10. For the question-and-answer, and

free-narrative VIS, there was significantly more sadness than anger in the VIS (F (1, 105) =

14.72, $p < .001$, $\eta 2 = .12$; *95% CI* = .03-.24 and F (1, 37) = 8.54, $p = .006$, $\eta 2 = .19$; *95% CI* =

0.02-.39 respectively. See Figure 1.

Simple main effects focusing on Presentation Type revealed a significant difference in

anger scores by VIS type, F (2, 187) = 14.89, $p < .001$, $\eta 2 = .14$; *95% CI* = 0.05-.22. Post hoc

comparisons using Tukey's revealed that anger scores were significantly higher in the Post-

Sentencing versus Question-and-Answer format (*95% CI* for the difference -.72 to -.27, $p <$

.001). Anger scores were also significantly higher in the Free Narrative versus Question-and-

Answer format (*95% CI* for the difference scores .08 to .56, $p = .005$). There were no significant

differences in anger scores between the Post-Sentencing and Free-Narrative VIS formats. With

regard to sadness, the analysis revealed no significant differences by Presentation Type; F (2,

188) = 1.50, $p = .22$, $\eta 2 = .016$; *95% CI* = 0.0-.06. See Figure 1.

We also examined whether emotionality of VIS, as measured by LIWC scores, differed

between male and female witnesses. We conducted two ANOVAS with LIWC scores as the

dependent variables and gender as the independent variable. With regard to sadness, no

significant differences were found, $F(1, 178) = .18$, $p = .67$, $\eta 2 = .001$; 95% CI = 0.0-.03. Male

and female witnesses expressed similar amounts of sadness in their VIS (*M* = .64, *SD*= .72, *95%*

CI [.44 - .84] and *M* = .69, *SD* = .68, *95% CI* [.57 - .81] respectively). Similarly, there were no

significant differences in expressions of anger between males and females, $F(1, 178) = 1.47$, $p =$

.23, $\eta 2 = .008$; 95% CI = 0.0-.05. Males expresses similar amounts of anger (*M* = .38, *SD* = .37,

95% CI [.27 - .48]) as females (*M* = .48, *SD* = .57, *95% CI* [.38 - .58]).

We next sought to determine the relationship between emotion-expression (i.e., anger & sadness) in VIS and death penalty verdicts. There was often multiple VIS per trial. To ensure independence of observations, it was therefore necessary to calculate the average level of anger- and sadness-expression across all VIS witnesses in a given trial, and use this variable in analyses. As such, the effective sample size for these analyses was only 52, and statistical power should be considered somewhat modest. For these analyses, Death-Verdicts was dummy-coded as death = 1 and life = 0. VIS Format was dummy-coded as Question-and-Answer format = 1 and Free Narrative = 0.

Initial zero-order correlations suggested that Sadness-Expression was negatively correlated with Death-Verdicts, $r = -.33$, $p = .01$, *95% CI = -.55, -.06*, but Anger-Expression was not related to Death-Verdicts, $r = -.12$, $p = .40$, *95% CI = -.37, .16*. There was also some (non-significant) suggestion of a positive relationship between Anger- and Sadness-Expression, $r = .22$, $p = .11$, *95% CI = -.05, .47*. Echoing analyses reported above, however, the Question-and-Answer Format was also associated with less Sadness-Expression, $r = -.49$, $p = .0003$, *95% CI = -.62, -.16*, and less Anger-Expression, $r = -.41$, $p = .002$, *95% CI = -.67, -.24*. There was also some indication that the Question-and-Answer Format was related to greater Death-Verdicts, $r = .27$, $p = .054$, *95% CI = -.007, .50*.

It was thus not clear from the zero-order correlations which variable was most directly related to Death-Verdicts. As such, we next simultaneously entered all three variables as predictors of Death-Verdicts in a logistic regression in order to determine each variable's unique effect. When this was done, Anger-Expression continued to exhibit a clearly non-significant effect (unstandardized $b = -.02$, standardized $\beta = -.005$, *95% CI of β = -.37, .36*, Wald $\chi^2 = 0.0008$, $p = .98$). Sadness-Expression (unstandardized $b = -.92$, standardized $\beta = -.33$, *95% CI of*

$\beta = -.75, .08$, Wald $\chi^2 = 2.53$, $p = .11$) and Presentation Format (unstandardized $b = .61$, standardized $\beta = .16$, *95% CI of β = -.22, .55*, Wald $\chi^2 = .70$, $p = .40$) also exhibited non-significant effects with Death-Verdicts. However, it should also be noted that these effects qualify as medium and small effect sizes, respectively (i.e., according to their standardized regression coefficient; Cohen, 1988). Thus, it's quite possible that future research with greater statistical power could establish their reliability.

DISCUSSION

Analysis of 192 capital trial VIS transcripts revealed substantial variability in the statement content, highlighting the fact that no single study on VIS could adequately represent the information jurors experience in capital trials. Nevertheless, there were a few consistencies that emerged within the transcripts, thereby providing some guidance to researches wishing to examine the effects of VIS testimony using more ecologically valid stimuli that better represents actual capital trials. In addressing these common elements, we focus first on procedural issues (i.e., how VIS are presented) along with some common content emerging from witnesses.

With regard to witness characteristics and procedural issues surrounding VIS presentation, the findings revealed that witnesses were nearly three times as likely to be female than male, they were most frequently a parent, and the question-and-answer format occurs approximately 2.5 times more often than the free narrative format. Surprisingly, the free narrative format is not more common than a post-sentencing VIS delivered to a judge with the jury out of the room. The length of VIS testimonies varied greatly, but averaged approximately 1500 words. Multiple witnesses presenting a VIS is the modal scenario: arising more than three times (77%) as often as a single witness presenting a VIS.

In terms of some commonalities in content, looking across all formats, VIS regularly contain characteristics of the victim, and expressions of the emotional suffering the victim survivors have experienced arises frequently. In contrast, although the stated purpose of VIS include highlighting "information concerning any harm, including financial, social, psychological, and physical harm, done to or loss suffered by any victim of the offense" (*Booth v Maryland*, 1987, p. 517), this category of information reflects a small part of what jurors typically hear. Moreover, although *Booth* addressed concerns surrounding VIS allowing victims to suggest appropriate punishment, the analysis of the 192 VIS transcripts revealed that any mention of the defendant, including the witness using dehumanizing terms regarding the defendant as well as any recommendations for punishment, are very rare events--happening in less than 1 in every 10 cases. As a general rule, VIS tended to focus on the qualities of the victim that will be missed, and how the survivors were dealing with their grief.

Some interesting patterns emerged regarding VIS content when the format of VIS presentation was considered. For example, while any mention of the defendant or a recommended punishment was a rare event overall, it was a fairly common element in post-sentencing scenarios where no jury was present. In those instances, the VIS was presented only to the judge (and presumably) in the presence of the defendant. Mention of the crime and the level of brutality of the act was significantly more common. Moreover, some controversial aspects of VIS such as mention of the defendant, or the crime, or any suggestion for punishment arose very infrequently overall, but most often in post-sentencing VIS with no jury present. This focus on the defendant, his actions, and the degree of brutality he inflicted is consonant with a focus on vengeance and anger directed at the defendant. With the jury out of the room, the goal

of the VIS may shift toward a witness unburdening themselves of their hatred toward the

defendant.

Differences in content across the two sentencing outcomes were also examined. When

controlling for type I error rate inflation arising from multiple comparisons, none of the content

categories differed in frequencies across the sentencing outcomes. In fact, in almost all cases,

life and death cases were remarkably similar in the VIS content. The lone exception was the

likelihood that the testimony included how the survivor learned of the victim's death. These

narratives were more than twice as likely to arise in death cases than in cases leading to a life

sentence, although this difference failed to reach statistical significance.

The Prevalence of Victim Character Information and Emotionality in VIS

Victim characteristics. The *Booth, Gathers,* and *Payne* decisions focused on the

relevance of victim information to sentencing judgments. Ultimately, the appropriateness for

victim survivors to address the personal qualities of the victim was supported in *Payne v.*

Tennessee (1991). Allowing the jury to see the victim as more than a "faceless stranger", or

someone who mattered to the victim survivors and their community was one of the chief

arguments in *Payne* in support of the introduction of VIS into capital sentencing proceedings.

However, information concerning victim qualities remains controversial because the

Payne Court was unclear about whether the reputation of the victim or their social standing in the

community warrants consideration by the jury (Logan, 2000; 2005). In addition, in the *Booth*

decision, Chief Justice Douglas noted that the Court does not wish to imply "that defendants

whose victims were assets to their community are somehow more deserving of punishment than

those whose victims are perceived to be less worthy... [because] our system of justice does not

tolerate such distinctions' (*Booth v. Maryland*, 1987, p. 506).

In the present content analysis, mention of the victim and their personal qualities was common. In more than half the transcripts, the description of the victim focused chiefly on how their loss was likely experienced by the surviving family. This is consistent with the perspective in *Payne* and prior findings by Mitchell et al. (2016) that VIS provides an opportunity to convey the harm caused by the defendant's actions—information of direct relevance to sentencing. However, descriptions of the victim's reputation in the community, or their social standing, was infrequently present in the VIS testimonies; occurring in less than 1 in every 6 transcripts. Whereas sentencing outcome did not differ in terms of the likelihood that victim characteristics was present in the testimony, this is not the case with VIS format. Looking across VIS formats we see that descriptions of the victim characteristics occur significantly less frequently in cases where the jury is not present. Perhaps letting the jury see the victim as more than a "faceless stranger" may be regarded by victim survivors as more pertinent than providing this information before a judge.

Emotionality of VIS. In *Booth* and later *Payne,* the U.S. Supreme Court voiced concerns regarding prejudicial effects of VIS due to their potential to be inflammatory. This issue has been investigated by a number of researchers using a jury simulation approach and the findings have tended to show that angry jurors are more likely to sentence the defendant to death than sad jurors (e.g., Nunez et al., 2017). In the present investigation, the emotional nature of VIS was examined by measuring information present in the VIS likely to generate emotions in jurors (e.g., descriptions of their emotional pain and suffering), but also by conducting a linguistic analysis of emotional language present in the testimony.

The data reveals that in approximately two-thirds of the cases we reviewed, witnesses sought to convey the emotional suffering they experienced as a result of the crime. The emotional devastation associated with the death of a loved one is frequently conveyed through a description of the experience in which the witness first learned that the victim had been killed. These trauma narratives are relatively descriptive and delivered in a manner that promotes the likelihood that the jury will take their perspective and imagine what it would be like to learn this tragic news. In many cases, this testimony was prompted by the prosecutor, who specifically asked the witness to relay this information. Thus, these trauma narratives were more likely to be present in the question-and-answer VIS format. Although these elements of VIS have not been systematically studied to determine their influence on jurors, the fact that they depict life-changing moments may resonate with jurors who can imagine learning tragic news about a loved one, and researchers have suggested that the degree to which jurors may take the victim's perspective can play an important role in punishment (e.g., see Judges, 1999; Kirchmeier, 2005).

A linguistic frequency analysis revealed that emotional content regularly occurred throughout VIS testimony, and sadness terms were 44% more prevalent than angry terms in these testimonies. However, the overall level of emotionality in these transcripts indicated that less than one half of one percent of all words were angry, and only slightly more than one half of one percent were sad. Consequently, concerns that the overall level of emotionality present in VIS is excessive could benefit from some perspective. Based on comparing these findings to the norms reported by Pennebaker et al (2015), mean sadness scores in a typical VIS ($M = .69$) are more than twice as high as you would see in natural speech ($M = .23$) or an article in the New York Times ($M = .29$), and slightly higher than is typical of novels ($M = .55$). Mean anger scores in a typical VIS ($M = .48$) was comparable to what you would encounter in the New York Times

($M = .47$) and novels ($M = .51$), and slightly higher than typically found in natural speech ($M = .36$). Thus, while emotional language does find its way into VIS testimony, the overall level of anger and sadness does not distinguish it from levels present in other contexts encountered in everyday life.

The format in which the VIS is presented bears some association with the degree of emotionality present in the testimony. Indeed, with the exception of post-sentencing testimony where the witness addresses the court and the defendant, but after the jury has already rendered a sentencing recommendation, VIS was significantly more likely to contain sad content than angry content. The fact that post-sentencing produced such a considerable increase in angry content is interesting and may occur for a number of reasons. First, many courts restrict what a witness can say in the VIS when witnesses direct their testimony to the jury. In the post-sentencing phase, when the jury no longer has a role in sentencing, the VIS becomes more about offering the witness an opportunity to address either the judge or the defendant. The tendency for the prevalence of anger and sadness to vary as a function of whether the testimony is given pre- or post-sentencing may be partly a function of the degree to which courts have limited the content of the testimony when presented in front of jurors, and partly a function of who the testimony is directed toward.

Little is known regarding what specific emotions prosecutors may attempt to elicit in witnesses, but eliciting sadness might be a goal in an attempt to gain sympathy from the jury (Burr, 2003). If this is true, then the sad language pervading VIS in which a question-and-answer format is used could be in part a result of prosecution strategies to elicit emotional responses in jurors. And our finding that the question-and-answer format was correlated with an increase in death sentences supports the idea that prosecutors may be somewhat successful in using VIS to

get harsher sentencing decisions. Future research might examine the goals and strategies prosecuting attorneys use in presenting VIS to a jury. Given the high prevalence of the question/answer VIS format, prosecuting attorneys are afforded ample discretion in directing VIS testimony. Thus, their views are particularly relevant in this area.

The relation between sentencing outcome and the degree to which the VIS terms reflect anger and sadness was examined, and there was little evidence in the present study to indicate higher levels of anger are associated with greater frequency of death penalty judgments. Indeed, the zero order correlations suggested that sadness might be a predictor of sentence, and it was positively related to life-sentences. This is inconsistent with the jury simulation research findings, and the small sample of independent cases and our inability to control for a number of important predictors of sentencing would suggest that future research in warranted.

Limitations

The manner in which we structured this content analysis merits attention. A "top-down" approach to the content analysis (sometimes referred to as directed, or deductive) was used in the present investigation. In this approach, the researchers set the agenda for what specifically would be looked for in the transcripts (Elo & Kyngas, 2008; Hsieh & Shannon, 2005). This can be contrasted with a "bottom-up" approach (sometimes referred to as inductive, conventional, or grounded theory) where the materials would first be examined for important themes that arise, without any preconceived notions about the content areas examined (Hsieh & Shannon, 2005; Elo & Kyngas, 2008; Strijbos, Martens, Prins, & Jochems, 2006). The only factor we assessed which was generated from the content (i.e., bottom up) was the theme of the trauma narrative, whereby witnesses would describe their experience of first learning of the death of the victim. In

every other case, the data we obtained was specifically identified a priori. Consequently, it could

be argued that our analysis missed some important themes that characterize the nature of VIS in

capital sentencing proceedings.

For the present investigation, this directed approach focused on the analysis of specific

content that would best inform researchers who investigate the effects of VIS on jurors, and that

would address issues of contention among legal commenters with regard to the constitutionality

of VIS. With regard to the former, the degree to which jury simulation studies conducted thus far

adequately represent presentation format, the length of the testimony, the relationship of the

witness to the victim, and the type of information commonly provided in the testimony (e.g.,

emotional content, characteristics of victim, mention of defendant) all represent factors that are

easily identified both in the research on VIS as well as in the transcripts we obtained. With

respect to the latter choice, the present study focused on examining the VIS transcripts with

regard to: (1) emotionality, (2) characterization of the victim, (3) characterization of the

defendant and recommended punishment. While these do not represent the full spectrum of

issues of controversy that have surrounded VIS, all three represent factors given considerable

focus in the three critical cases of *Booth*, *Gathers*, and *Payne*, and all three issues represent

content areas most easily defined in a way that could be reliably content analyzed. Moreover,

this approach also allows for conclusions about what is rare, and what is common, whereas a

more conventional approach would not analyze rare factors because they would not emerge in

the first place as common themes. Nevertheless, an approach driven by the content of the

transcripts rather than the specific a priori factors identified by investigators would likely yield a

different picture of what constitutes typical VIS testimony.

A second limitation with the present investigation was the sampling method used to obtain VIS transcripts. The sample obtained was not random, but rather was a convenience sample based on all death penalty cases tried that year (McCord, 2005). While the cases in question occurred more than a decade ago, the sample used in this investigation is unlikely to have yielded differences in how VIS testimony is typically presented today as the cases analyzed in the current study all occurred after the *Payne* decision, which marked a significant change in how VIS was handled by courts (Blume, 2003; Pitt, 2013). Indeed, a report by Sanderford (2012) along with recent analysis of state statutes concerning VIS supports the notion that only a few states have undergone changes with regard to how VIS is administered since our sample was taken, and these issues would have little impact on our findings. Moreover, while per-page costs were a consideration on which transcripts were obtained, whether or not a VIS was present in the transcript was unknown to us before the transcript was sent, and so we have little reason to assume that our sampling approach led to any systematic differences in VIS testimonies that would have impacted the representativeness of the data. Moreover, an additional limitation is that while the outcome of the case (life or death) was not discussed as a hypothesis for our study with coders, they were nevertheless not kept blind to the outcome of the case.

Our study focused on VIS in death penalty cases that have been tried in the United States. Thus, we cannot speak to VIS that might be presented in non-capital cases or VIS presented in other countries that allow VIS (e.g., Australia, or the UK). However, with regard to VIS that is presented in *death penalty cases*, our work may be particularly relevant, given that the United States is the only known country that allows both the death penalty and VIS.

Lastly, our analysis of the level of emotionality in VIS fails to address subtle factors that likely play a significant role in how moving testimony may be for a given juror. The way

someone tells the story, their ability to articulate grief, and facial expressions they make all likely play a role in how the jury is likely to respond to the testimony. This is an initial attempt at trying to measure the content of VIS, and so we encourage further research that takes alternative approaches to measuring the emotional impact of VIS.

Policy Implications

The findings here suggest a number of changes that would be necessary for simulation research to better represent VIS that occur in actual trials (e.g., witness characteristics, examples of content). However, it is also important to identify areas in which existing policies concerning VIS may be discordant with the research findings, as well as highlighting findings that support existing practices. The chief issue of contention regarding VIS in capital sentencing concerns its relevance to the sentencing process, and this issue has already been decided in *Payne v. Tennessee* (1991). Whether victim character information should be heard and whether it is appropriate for testimony that is emotional to be present when jurors decide punishment are legal questions that cannot be answered by jury decision making researchers. Instead, the appropriate role here is for psychology to inform the debate by answering relevant empirical questions such as whether victim character information influence how jurors decide punishment, and which specific emotions lead to harsher sanctions. The findings in the present investigation are meant to shed some light on whether the kinds of studies researchers are conducting in the laboratories are reflective of the kinds of VIS evidence typically present in the courtroom.

Efforts to limit VIS have been promoted in a number of states since *Payne v Tennessee* (e.g., see Blume, 2003; Frankel, 2008; Sanderford, 2012). VIS are regarded by many as emotional, and for some, the evidence that these emotions will be transferred to jurors and

promote prejudice is unmistakable (Frankel, 2008). Laboratory studies examining emotions and

legal judgment place the average effect size of modest-to-moderate in magnitude (Feigenson,

2016). Consequently, as we noted earlier, a number of states have passed laws restricting the

degree of emotionality permissible in a VIS. But, how to enforce these restrictions is another

matter. Previous research on VIS and emotions suggest that the type of emotion elicited matters,

and the present findings may provide some direction in establishing practices which could limit

the potential for VIS to be prejudicial.

The research on the emotional effects of VIS on jurors thus far suggests that sentencing

judgments are likely to be impacted, but only when jurors are angered, not when they are

saddened (Nuñez et al., 2017; Myers et al., 2018). The present findings indicate that while

emotional language does populate VIS testimony, sadness is present much more commonly than

is anger, which was encountered in less than one-half of one percent of all words in the VIS. Of

course, this study as well as jury simulation studies we review have failed to address the

numerous factors during trial that may mitigate the effects of emotion on judgments. But,

because previous studies have indicated a pattern whereby anger promotes harsher sentencing

but sadness does not, it was important in the present investigation to identify how frequently

emotional content arises in VIS.

If courts are concerned about the emotionality of VIS, one practical way to limit the

degree to which anger is introduced into the courtroom is through the format by which the VIS is

presented. As we noted, free-narrative format is much less common than a question-and-answer

format whereby the prosecutor directs the testimony of the witness. Linguistically, anger was

most common in the post-sentencing format when the jury had already made their sentencing

recommendation to the court. Anger was much lower during the penalty phase, with the lowest

anger scores occurring for the question-and-answer format. Limiting VIS to this format may be one approach to limit the anger expressed in the testimony, and this format also affords the judge an opportunity to halt proceedings before a witness answers if the question posed by the prosecutor is judged to likely promote an angry response from the witness (e.g., if a prosecutor asked witness if they had something to say to the defendant). Consequently, this format allows victims to speak before the jury, but it does not give them free rein.

Limiting this opinion testimony may allow the court to limit the degree of anger present in the VIS. Anecdotally, instances have been reported where angry witnesses confront the defendant and appeal to the jury for vengeance (e.g., in some cases witnesses "begged" juries to impose death, while in other cases witnesses have prompted jurors to "show no mercy", see Logan, 2005). Our present findings suggest that any mention of the defendant is extremely rare, and calls for punishment are rarer still. Less can be said about the potential impact of this information on jurors, as researchers have still not systematically varied the opinions offered for punishment to determine if they do indeed influence sentencing judgments. However, it is perhaps worth noting that VIS itself typically fails to produce strong effect sizes in simulation studies, and the most reliable effects occur when VIS provoke an anger response in participants (Myers et al., 2018). Going forward, systematically studying how statements directed at the defendant that specifically request harsh punishments would better inform decisions regarding the prejudicial effects of this testimony. Importantly, in the present investigation, any comments directed specifically at the defendant occurred vary rarely, and when it did, it was most likely when the jury was not present to hear the testimony.

In conclusion, the present investigation suggests that jury simulation research on VIS deviate from the "typical" VIS testimony in a variety of ways including the relation between the

victim and the witness, the number of witnesses, and the format in which the VIS is presented.

The question and answer format is most common, and suggests the prosecutors who direct the

questioning have great influence on what information the jury hears during a VIS. In most

instances, they direct witnesses to convey the emotional toll experienced by the victim survivors

in dealing with their loss, and convey to the jury the personal qualities of the deceased. Very

rarely do they address the defendant or allow witnesses to vent their anger toward the defendant.

Anger is far less prevalent in VIS testimony than is sadness, and when anger is more common, it

typically occurs when the jury is not present and therefore not in danger experiencing the

prejudicial effects of this testimony.

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Table 1.

Content Analysis: Wordcount, Witness Gender, and Relation to Victim by VIS Format

	All Formats	**Free-Narr.**	**Q &A**	**Post**
Wordcount:				
M	1059.7	624.8	1478.5	491.5
SD	1120.1	469.3	1312.8	484.5
Witness Gender	**n (%)**	**n (%)**	**n (%)**	**n (%)**
Female	134 (69.3)	28 (68.3)	75 (71.4)	31 (72.1)
Male	55 (28.6)	13 (31.7)	30 (28.6)	12 (27.9)
Relation to Victim	**n (%)**	**n (%)**	**n (%)**	**n (%)**
Parent	49 (26.5)	11 (28.2)	30 (29.4)	8 (18.2)
Child	32 (17.3)	7 (17.9)	17 (16.7)	8 (18.2)
Relative*	31 (16.8)	7 (17.9)	12 (11.8)	12 (27.3)
Sibling	30 (16.2)	8 (20.5)	16 (15.7)	6 (13.6)
Friend	22 (11.9)	1 (2.6)	16 (15.7)	5 (11.4)
Spouse	15 (8.1)	5 (12.8)	9 (8.8)	1 (2.3)
Multiple**	6 (3.2)	0 (0.0)	2 (2.0)	4 (9.1)

Note: For the above table, in cases where data is missing (e.g., gender of witness was not provided or a statement was read by a third party meant to represent the feelings of an entire family), percentages are based on total available scores (i.e., valid percent). * Note: Relative when the witness is related but does not fit into existing categories of sibling, parent, spouse, or child. ** Note: In the case of multiple victims, a witness may represent multiple roles (e.g., spouse and parent if a father and child were the victims).

Table 2.

Content Analysis: Content Categories Across VIS Formats: Frequencies, Kappa, and Chi-Square Goodness of Fit Scores.

Category	All Formats n (%)	K**	Free Narr. n (%)	Q&A n (%)	Post n (%)	X^2
Relayed emotions	128 (66.7)	.66	24 (58.5)	77 (73.3)	27 (58.7)	2.05
Personal character	121 (63.0)	.85	27 (65.9)	27 (73.3)	17 (37.0)	12.42*
Social value	50 (26.0)	.84	11 (26.8)	33 (31.4)	6 (13.0)	7.55
Family signif.	109 (56.8)	.72	19 (46.3)	68 (64.8)	23 (50.0)	3.74
Learned death	64 (33.3)	.89	9 (22.0)	48 (45.7)	7 (15.2)	19.11*
Mentioned defend	59 (30.7)	.91	13 (31.7)	13 (12.4)	33 (71.7)	48.28*
Defendant dehum	12 (6.3)	.85	5 (12.2)	4 (3.8)	3 (6.5)	4.26
Psychological harm	51 (26.6)	.73	12 (29.3)	28 (26.7)	11 (23.9)	0.48
Crime brutality	32 (16.7)	.67	9 (22.0)	9 (8.6)	14 (30.4)	11.05*
Recommended punish	27 (14.1)	.91	13 (31.7)	1 (1.0)	22 (47.8)	42.30*
Physical harm	18 (9.4)	.71	11 (26.8)	6 (5.7)	1 (2.2)	30.91*
Financial harm	7 (3.6)	.72	4 (9.8)	2 (1.9)	1 (2.2)	9.14
	n = 192		n = 41	n = 105	n = 46	

* Chi-Square Goodness of Fit tests using df = 2 and significant at *p* < .005. ** Kappa scores based on agreement between raters across all formats.

Table 3.

VIS Content by Sentencing Outcome.

	Life		**Death**		
Category	**n**	**%**	**n**	**%**	**X^2**
Relayed emotions	47	62.7	81	69.2	0.32
Personal character	42	56.0	79	67.5	1.07
Social value	13	17.3	19	16.2	0.05
Family significance	37	49.3	72	61.5	1.34
Learned death	15	20.0	49	41.9	7.75
Mentioned defendant	23	30.7	36	30.8	0.01
Defendant dehumanized	4	5.3	8	6.8	0.19
Psychological harm	17	22.7	34	29.1	0.80
Crime brutality	16	21.3	16	13.7	1.65
Recommended punishment	14	18.7	13	11.1	1.94
Physical harm	7	9.3	11	9.4	0.01
Financial harm	3	4.0	4	3.4	0.05
	75	39.1	117	60.9	

Note: When correcting for alpha inflation using $p < .005$, no differences are statistically significant

Figure 1: Anger and Sadness Content of VIS