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VICTIM IMPACT STATEMENTS AND CORPORATE SEX CRIMES

ERIN SHELEY*

Introduction

Wherever there is a position of power, there seems to be potential for abuse. I had a dream to go to the Olympics, and the things that I had to endure to get there, were unnecessary, and disgusting.

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A question that has been asked over and over is: How could have Larry Nassar been allowed to assault so many women and girls for more than two decades?

The answer to that question lies in the failure of not one, but three major institutions to stop him -- Michigan State University, USA Gymnastics and the United States Olympic Committee.

When my story became public the US Olympic Committee said, "Each doctor working with our athletes undergoes background checks including an evaluation of medical licensure actions. Unfortunately, this predator was not identified by any organization during the time in question."

Reports in the Nation's leading newspapers and media outlets document credible claims that Michigan State University trainers and coaches received complaints about Nassar going back to the late 1990s. These complaints were ignored.

.....

A simple fact is this. If Michigan State University, USA Gymnastics and the US Olympic Committee had paid attention to any of the red flags in Larry Nassar's behavior I never would have met him, I never would have been "treated" by him, and I never would have been abused by him.¹

Former U.S. Olympic gymnast McKayla Maroney made these remarks as part of her victim impact statement at the trial of Larry Nassar, former Michigan State University physician and team doctor to the USA

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1. McKayla Maroney, *Victim Statement of McKayla Maroney*, SCRIBD 2-3, <https://www.scribd.com/document/366590076/Victim-Statement-Final-McKayla-Maroney> (last visited May 13, 2020).

Gymnastics national team. Nassar pled guilty to seven counts of criminal sexual assault, in addition to separate federal child pornography charges.² But Maroney's statement, like so many of the other 160 former gymnasts who came to testify at his sentencing, implies that Nassar was not their only abuser. Maroney refers to the complicated institutional framework which, as an aspiring member of the Olympic team, she was expected to obey.³ Elsewhere in her statement she describes how gymnasts of all ages were often cloistered at the Karolyi Training Ranch in Huntsville, Texas, from which parents were explicitly excluded.⁴ She indicates here how Michigan State and USA Gymnastics' repeated mishandling of complaints, coupled with the categorical control the latter had over her life from a very early age, facilitated fifteen years of abuse.⁵ Maroney makes rather explicit the fact that she experienced her victimization as the product not only of Nassar's molestation but of the institutional entities that supported it.

The Nassar case is a particularly high-profile example of the relationship between institutional power and sex abuse. It is unusual not only in the depravity of the offenses, spread over a period of decades, but in the fact that the institutions who facilitated it became the focus of public outcry, arguably in part due to the eloquence of the victims who spoke publicly about their experiences to the media and at trial. Several high-level officials at these institutions were prosecuted for crimes related to their concealment of Nassar's abuse, including former Michigan State University president Lou Anna Simon⁶ and former USA Gymnastics CEO Steve Penny.⁷ Furthermore, the U.S. Olympic Committee has moved to remove USA Gymnastics as the governing body for the sport,⁸ and the institution has

2. Eric Levenson, *Larry Nassar Sentenced to Up to 175 Years in Prison for Decades of Sexual Abuse*, CNN (Jan. 24, 2018, 9:29 PM ET), <https://www.cnn.com/2018/01/24/us/larry-nassar-sentencing/index.html>.

3. See Maroney, *supra* note 1, at 1–2.

4. *Id.* at 2.

5. See *id.*

6. See Vanessa Romo, *Michigan State University Ex-President Charged with Lying in Larry Nassar Case*, NPR (Nov. 20, 2018, 10:19 PM ET), <https://www.npr.org/2018/11/20/669845087/michigan-state-university-ex-president-charged-with-lying-in-larry-nassar-case>.

7. Sarah Fitzpatrick & Alex Johnson, *Former USA Gymnastics Head Steve Penny Arrested on Tampering Charges in Abuse Probe*, NBC NEWS (Oct. 17, 2018, 11:29 PM CDT), <https://www.nbcnews.com/news/crime-courts/former-usa-gymnastics-head-steve-penny-arrested-tampering-charges-abuse-n921476>.

8. Kevin Dotson & Darran Simon, *US Olympic Committee Moves to Revoke USA Gymnastics' Status*, CNN (Nov. 6, 2018, 7:07 PM ET), <https://www.cnn.com/2018/11/05/us/usa-gymnastics-us-olympic-committee/index.html>.

filed for bankruptcy as the result of the numerous civil lawsuits brought by victims.⁹

Nonetheless, despite the fairly low bar presented by the American standard for corporate criminal liability—*respondeat superior*, which allows corporations to be charged with all of the crimes of employees committed within the scope of employment¹⁰—neither USA Gymnastics nor Michigan State University have been criminally charged for Nassar’s offenses. Sovereign immunity prevents charges against the public university,¹¹ but USA Gymnastics is a private 501(c)(3) entity, thus no sovereign immunity concerns are present. The lack of criminal action in this case is, sadly, all too typical. Even in the case of the Weinstein Company, in which ample evidence suggests it was close to corporate policy for employees to assist Harvey Weinstein in his sexual assaults of innumerable actresses and professional contacts,¹² no jurisdiction currently prosecuting or investigating Weinstein himself has filed charges against the Company.¹³

The doctrinal bar to prosecuting corporate entities appears to be that courts have read into the *respondeat superior* standard the requirement that,

9. Holly Yan, *USA Gymnastics Files for Bankruptcy After Hefty Lawsuits Over Larry Nassar*, CNN (Dec. 5, 2018, 8:03 PM ET), <https://www.cnn.com/2018/12/05/us/usa-gymnastics-files-for-bankruptcy/index.html>.

10. *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 492–93 (1909).

11. *See Qiu v. Univ. of Cincinnati*, No. 19-3630, 2020 WL 634036, at *4 (6th Cir. Feb. 11, 2020) (“Because a public university like the University of Cincinnati is an arm of the state, it is entitled to Eleventh Amendment immunity from suit for compensatory and punitive damages.”).

12. Sixteen former executives and assistants at Weinstein’s companies have said they were fully aware of the unwanted sexual contact Weinstein routinely imposed on women in professional settings. Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein’s Accusers Tell Their Stories*, *NEW YORKER* (Oct. 10, 2017, 10:47 AM), <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories>. They describe “a culture of complicity at Weinstein’s places of business, with numerous people throughout his companies fully aware of his behavior but either abetting it or looking the other way.” *Id.* Some even admit to engaging in subterfuge to facilitate Weinstein’s assaults: “A female executive with the company described how Weinstein’s assistants and others served as a ‘honeypot’—they would initially join a meeting along with a woman Weinstein was interested in, but then Weinstein would dismiss them, leaving him alone with the woman.” *Id.*

13. Richard Winton & James Queally, *Who Is Willing to Defend Harvey Weinstein? A Third High-Powered Lawyer Wants Off Case*, *L.A. TIMES* (June 17, 2019, 3:33 PM), <https://www.latimes.com/local/lanow/la-me-ln-harvey-weinstein-jose-baez-out-20190617-story.html> (describing New York criminal case against Weinstein and ongoing criminal investigations in Los Angeles, Beverly Hills, and London).

in order for the entity to be criminally liable, the employee must at least partially intend the crime to benefit the corporation.¹⁴ It is, of course, difficult (though probably not impossible) to imagine how an employee's sex crime could serve to benefit his employer. I have argued elsewhere that this is an anomalous result when we consider the operation of corporate criminal mens rea as a whole.¹⁵ Generally, criminal *respondeat superior* is overbroad in the sense that it leaves a corporation on the hook for the crimes of a single rogue employee, even when the government can make no showing of even negligence at the institutional level.¹⁶ Yet the operation of the "intent-to-benefit" requirement means that, specifically in cases of sex crimes, no amount of evidence of collective culpability (which arguably rises to gross negligence in the case of USA Gymnastics, and even willfulness in the case of the Weinstein Company) is ever enough to convict the corporate employer.¹⁷ I have proposed that courts apply criminal *respondeat superior* in accordance with the original doctrine in tort law, which imposes no such intent-to-benefit requirement.¹⁸ I have also called for legislative interventions to bring criminal *respondeat superior* in line with tort *respondeat superior* in this way (among others).¹⁹

One reason such reforms may be a long time coming, however, is a general reluctance among legislators, prosecutors, and the public at large to see non-human entities as capable of committing bodily offenses. Only fifteen states (plus the federal government) have cases on record reflecting a corporation being prosecuted for manslaughter or negligent homicide.²⁰

14. See, e.g., *Steere Tank Lines, Inc. v. United States*, 330 F.2d 719, 722–24 (5th Cir. 1963).

15. See generally Erin L. Sheley, *Tort Answers to the Problem of Corporate Criminal Mens Rea*, 97 N.C. L. REV. 773 (2019) [hereinafter Sheley, *Tort Answers*].

16. See *id.* at 785–86.

17. See *id.* at 801–02.

18. *Id.* at 777, 802–06 (arguing that tort *respondeat superior*—while broader than its criminal counterpart in the sense that it allows for corporate liability for employee sex crimes—is narrower in the sense that it is better cabined by a foreseeability requirement in all cases). The proposed standard, while expanding corporate criminal liability for sex crimes, bars liability in *all* cases where a rogue employee commits a crime that is either not reasonably foreseeable to a person engaging in the corporation's business or which the corporation has taken all reasonable steps to prevent. *Id.* at 805–06.

19. *Id.* at 778–79.

20. See James W. Harlow, Note, *Corporate Criminal Liability for Homicide: A Statutory Framework*, 61 DUKE L.J. 123, 133 & n.65 (2011) (citing *United States v. Van Schaick*, 134 F. 592, 602–05 (C.C.S.D.N.Y. 1904) (permitting the indictments of a corporation and its individual officers for manslaughter under a federal maritime statute); *Arizona v. Far W. Water & Sewer Inc.*, 228 P.3d 909, 916 (Ariz. Ct. App. 2010) (affirming

Given that it is arguably much easier to conceive of a homicide as the product of corporate action (in, say, an industrial accident) than it is to conceive of a sexual assault as being such, it stands to reason that the lack of corporate criminal liability for sex offenses may boil down, in large part, to a lack of imagination.

This Article argues that more frequently including victim impact statements during the sentencing phase of corporate criminal trials would help lay foundation for legislative reforms geared towards punishing corporations on the occasions where genuinely corporate misconduct, such as that of USAG and the Weinstein Company, can be said to have caused

the conviction of a corporation for criminally negligent homicide); *Granite Constr. Co. v. Superior Court*, 197 Cal. Rptr. 3, 4 (Ct. App. 1983) (permitting the indictment of a corporation for manslaughter under California law); *Illinois v. O'Neil*, 550 N.E.2d 1090, 1098 (Ill. App. Ct. 1990) (reversing the involuntary manslaughter conviction of an Illinois corporation and its individual officers based on mutually exclusive mental states); *Indiana v. Ford Motor Co.*, 47 U.S.L.W. 2514, 2515 (Ind. Super. Ct. 1979) (sustaining an indictment against Ford for reckless homicide under Indiana law); *Kentucky v. Fortner LP Gas Co.*, 610 S.W.2d 941, 943 (Ky. Ct. App. 1980) (upholding the indictment of a corporation for second-degree manslaughter under Kentucky law); *Massachusetts v. Angelo Todesca Corp.*, 842 N.E.2d 930, 934 (Mass. 2006) (affirming the conviction of a corporation for motor-vehicle homicide under Massachusetts law); *Michigan v. Gen. Dynamics Land Sys., Inc.*, 438 N.W.2d 359, 361 (Mich. Ct. App. 1989) (sustaining the indictment of a corporation for involuntary manslaughter under Michigan law); *New Jersey v. Lehigh Valley R.R. Co.*, 103 A. 685, 687 (N.J. 1917) (upholding the indictment of a corporation for involuntary manslaughter under New Jersey law); *New York v. Ebasco Servs., Inc.*, 354 N.Y.S.2d 807, 811–12 (N.Y. App. Div. 1974) (permitting, as a matter of New York law, the indictment of a corporation for criminally negligent homicide but dismissing the indictment on other grounds); *Ohio v. Consol. Rail Corp.*, C.A. No. L-81-033, 1981 WL 5726, at *3 (Ohio Ct. App. July 24, 1981) (requiring the trial court to address the validity of a corporate indictment for vehicular homicide under Ohio law); *Pennsylvania v. Mellwain Sch. Bus Lines, Inc.*, 423 A.2d 413, 420 (Pa. Super. Ct. 1980) (sustaining the indictment of a corporation for criminal homicide by vehicle under Pennsylvania law); *Vaughan & Sons, Inc. v. Texas*, 737 S.W.2d 805, 814 (Tex. Crim. App. 1987) (en banc) (affirming the conviction of a corporate for criminally negligent homicide under Texas law); *Wisconsin v. Richard Knutson, Inc.*, 537 N.W.2d 420, 429 (Wis. Ct. App. 1995) (affirming the conviction of a corporation for criminally negligent homicide under Wisconsin state law); Patrick J. Schott, Comment, *Corporate Criminal Liability for Work-Site Deaths: Old Law Used a New Way*, 71 MARQ. L. REV. 793, 805 (1988) (describing the Connecticut prosecution of PGP Industries, Inc. for criminally negligent homicide that was ultimately dismissed during the trial); Randall Chase, *Refinery Fined in Deadly Blast; Motiva Enterprises Was Ordered to Pay in a 2001 Tank Explosion That Killed a Bucks County Man*, PHILA. INQUIRER, July 9, 2003, at B03 (reporting that a corporation pled no contest to charges of criminally negligent homicide under Delaware law)).

sexual offenses.²¹ The Article proceeds in three Parts. First, I argue that criminal enforcement against corporations is generally untethered from harm to victims, and that this thwarts one of the most coherent justifications for the existence of corporate criminal liability. Next, I argue that a focus on victim narratives in sentencing, where relevant, can both restore coherence to the project of corporate criminal liability and expand public understanding of corporations as potential perpetrators of violent criminal offenses. Finally, I conclude by speculating about how an increased role for the victim in the prosecution of entities generally might lead to a greater willingness among legislatures, prosecutors, and the general public to recognize corporations as capable of sex offenses.

I. Perceptual Harm and the Corporate Criminal

Not to be overlooked, the existence of corporate criminal liability is quite controversial in the first place. Many critics ask how a personality-less entity, incapable of remorse or even incarceration, can be guilty of a crime.²² Other critics have suggested that corporate criminal liability creates redundant punishment, above and beyond civil and regulatory liability, that over-deters corporate conduct and thus results in a net loss to society.²³ I have argued elsewhere that the best justification for corporate criminal liability comes not just from the frequently observed fact that “corporations do really bad things,” which does not adequately respond to either set of concerns.²⁴ Instead, the justification lies in the fact that when a corporation commits a crime, it imposes a distinct set of harms on the victims and on society—above and beyond the substantive harms caused by the offense—that flow from the nature of the corporate entity itself.²⁵ I have called these harms “perceptual harms.”²⁶

21. For a more detailed standard for determining when such corporate mens rea exists, see Sheley, *Tort Answers*, *supra* note 15 and discussion *supra* note 18.

22. See, e.g., John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1329, 1339 (2009); William S. Laufer, *Corporate Bodies and Guilty Minds*, 43 EMORY L.J. 647, 655 (1994); Gerhard O.W. Mueller, *Mens Rea and the Corporation: A Study of the Model Penal Code Position on Corporate Criminal Liability*, 19 U. PITT. L. REV. 21, 41–46 (1957).

23. See, e.g., Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 322 (1996); V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1510 (1996).

24. Erin Sheley, *Perceptual Harm and the Corporate Criminal*, 81 U. CIN. L. REV. 225, 227 (2012).

25. *Id.* at 228.

26. *Id.*

Perceptual harms amount to the empirically demonstrated sense of helplessness a victim feels when faced with a perpetrator that is temporally enduring, powerful, and materially complex.²⁷ The shattering of a victim's "belief in a just world"²⁸—a psychological heuristic that is crucial to a person's wellbeing—that occurs when a corporate offender goes unpunished becomes a unique sort of harm flowing from the corporate structure itself.²⁹ In understanding this argument, the prototypical examples of this effect is the corporate environmental offenses which impose long-term psychological costs on their victims.

For example, the psychological literature has documented a particular sort of harm in victims of the major oil spills of the last several decades: evidence suggests the psychological harm experienced by victims is exacerbated by the corporate nature of the responsible entities and issues related to assignation of blame.³⁰ Specifically, the literature has identified, in addition to the immediate physical losses suffered by the victims of technological disaster, the victims' communities also suffer a long-term social deterioration described as "the corrosive community."³¹ Evidence attributes part of this corrosive effect to the members of a community struggling over where to place blame, authorities being evasive and unresponsive, and victims becoming suspicious and cynical.³²

27. *Id.* at 259–63.

28. See, e.g., J. Dzuka & C. Dalbert, *The Belief in a Just World and Subjective Well-Being in Old Age*, 10 *AGING & MENTAL HEALTH* 439, 442 (2006).

29. See Melvin J. Lerner, Dale T. Miller & John G. Holmes, *Deserving and the Emergence of Forms of Justice*, 9 *ADVANCES IN EXPERIMENTAL SOC. PSYCHOL.* 133 (1976); Melvin J. Lerner & Carolyn H. Simmons, *Observer's Reaction to the "Innocent Victim": Compassion or Rejection?*, 4 *J. PERSONALITY & SOC. PSYCHOL.* 203 (1966); Melvin J. Lerner, *The Justice Motive: Some Hypotheses as to Its Origins and Forms*, 45 *J. PERSONALITY* 1 (1977).

30. See Brian Mayer, Katrina Running & Kelly Bergstrand, *Compensation and Community Corrosion: Perceived Inequalities, Social Comparisons, and Competition Following the Deepwater Horizon Oil Spill*, 30 *Soc. F.* 369, 370 (2015).

31. See William R. Freudenburg & Timothy R. Jones, *Attitudes and Stress in the Presence of Technological Risk: A Test of the Supreme Court Hypothesis*, 69 *SOC. FORCES* 1143 (1991) [hereinafter Freudenburg & Jones, *Attitudes and Stress*]; William R. Freudenburg, *Contamination, Corrosion and the Social Order: An Overview*, *CURRENT SOC.*, July 1997, at 19; Krzysztof Kaniasty & Fran H. Norris, *A Test of the Social Support Deterioration Model in the Context of Natural Disaster*, 64 *J. PERSONALITY & SOC. PSYCHOL.* 395 (1993); J. Stephen Kroll-Smith & Stephen R. Couch, *Symbols, Ecology, and Contamination: Case Studies in the Ecological-Symbolic Approach to Disaster*, 5 *RES. IN SOC. PROBS. & PUB. POL'Y* 47 (1993).

32. Freudenburg & Jones, *Attitudes and Stress*, *supra* note 31, at 1158.

Psychologist Deborah du Nann Winter, whose expertise centers on the psychological effects of environmental damage, has observed from her studies of victims of the *Deepwater Horizon* oil spill that the primary emotional reaction among these victims is “anger . . . around the oil company’s failure to abide by regulations,” as well as “helplessness” (which she explains by noting the phenomenon of “learned helplessness,” which is the tendency of organisms to become non-responsive in the face of situations over which they have no control).³³ Again, the structural relationship between the corporation and the underlying legal authority that supports it can be directly linked to the psychological damage experienced by victims.

Unfortunately, the actual enforcement of the criminal laws against corporations does not appear to track with the severity of human harms they impose. Resource-strapped state prosecutors prioritize criminals perceived as intrinsically “violent,” and other top-down policies often focus on drugs and weapons.³⁴ While the populist sentiment sparked by the corporate scandals of the early 2000s led to an increase in state prosecution of corporations,³⁵ such prosecutions tend to be pursued more frequently by the federal government with its broad arsenal of statutory offenses suitable for corporate misconduct. In one particularly well-known example, after the *Exxon Valdez* disaster in 1989, the State of Alaska individually prosecuted Captain Joseph Hazelwood, who was convicted of negligent discharge of oil and received only a suspended sentence.³⁶ By contrast, the United States entered into a \$100 million plea agreement with Exxon Corporation.³⁷

While the federal government prosecutes corporations more frequently than states do, it nonetheless does so inconsistently and increasingly less

33. Susan Koger, *Coping with the Deepwater Horizon Disaster: An Ecopsychology Interview with Deborah Du Nann Winter*, 2 ECOPSYCHOLOGY 205, 205 (2010) (quoting an answer from Deborah Du Nann Winter).

34. See generally Marcia R. Chaiken & Jan M. Chaiken, *Priority Prosecution of High-Rate Dangerous Offenders*, RES. IN ACTION (Nat’l Inst. for Justice, Washington, D.C.), Mar. 1991, at 1, <https://www.ncjrs.gov/pdffiles1/Digitization/124135NCJRS.pdf>.

35. Dan K. Webb, Robert W. Tarun & Steven F. Molo, CORPORATE INTERNAL INVESTIGATIONS § 1.14 (2020) (Lexis).

36. Daniel L. Cheyette, *Policing the Corporate Citizen: Arguments for Prosecuting Organizations*, 25 ALASKA L. REV. 175, 177–78 (2008) (discussing *Hazelwood v. Alaska*, 836 P.2d 943 (Alaska Ct. App. 1992), *aff’d in part, rev’d in part*, 866 P.2d 827 (Alaska 1993)).

37. *Id.* at 178.

often.³⁸ The rise of the era of deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs) means greater numbers of criminal corporations escape formal criminal charges entirely.³⁹ Instead, these entities merely pay fines and make stipulated changes to internal governance.⁴⁰ These agreements are “mutually beneficial” to the extent that they make life easier for prosecutors, who can avoid the massive discovery costs involved in taking a corporation to trial,⁴¹ and for corporations, who can avoid the sting of criminal conviction and its collateral effects (especially the risk of being barred from business with the government, as happened to both Enron Corporation and its auditor Arthur Andersen).⁴²

Useful for this analysis, the Department of Justice’s official factors for determining whether a corporation should be criminally charged include “the risk of harm to the public” posed by the crime committed.⁴³ This factor takes into consideration the reciprocal costs of a prosecution to the public and to innocent third parties, such as employees of the corporation.⁴⁴ However, these guidelines also include such factors as “remedial actions” and “willingness to cooperate.”⁴⁵ The prevalence of DPAs thus ties much of federal criminal enforcement against corporations to the relative ease with which the two sides can strike a bargain, as opposed to the degree of actual harm to human victims. Adding to this uncertainty, the use of DPAs and NPAs is not even consistent across the DOJ: the Environment and Natural Resources Division and the Antitrust Division rarely use them, while the Criminal Division and some United States Attorney’s offices resort to them more often than not.⁴⁶

Even with regard to crimes for which DPAs are used more rarely than they are for, say, Foreign Corrupt Practices Act or securities law violations, enforcement patterns repeatedly ignore human victims. For example, the government often prosecutes health care fraud, which usually involves false

38. *Justice Department Data Reveal 29 Percent Drop in Criminal Prosecutions of Corporations*, TRAC REPORTS (Oct. 13, 2015), <https://trac.syr.edu/tracreports/crim/406/> (showing a 29% drop in federal prosecutions of corporations between 2004 and 2014).

39. See David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1301–02 (2013).

40. *Id.* at 1301.

41. See *id.* at 1324.

42. *Id.* at 1335 (citing 33 U.S.C. § 1368(a) (2006)); *id.* at 1337.

43. U.S. DEP’T OF JUSTICE, JUSTICE MANUAL 9-28.300(A)(1) (Nov. 2018), <https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations>.

44. *Id.* at 9-28.300(A)(8).

45. *Id.* at 9-28.300(A)(4), (7).

46. Uhlmann, *supra* note 39, at 1301.

billings or kickbacks, under 18 U.S.C. § 1347, which criminalizes the knowing and willful execution or attempted execution of any scheme to defraud a health care benefit program if the scheme relates to the delivery of or payment for health care benefits, items, or services.⁴⁷ Anthony Kyriakakis argues that the internal politics of the federal criminal justice system, including both governmental interests and the individual interests of agents and prosecutors, have led federal prosecutors to treat health care fraud as just another sort “of fraud against the government or private insurers.”⁴⁸ These prosecutors seem to make charging decisions based on the degree of harm the provider has inflicted on such collective entities, with little regard for harms suffered by the patients themselves, despite the fact that they are the most vulnerable stakeholders in the fraudulent transaction.⁴⁹ Kyriakakis asserts that “[t]his has caused the harms suffered by patients to be minimized, overlooked, or ignored.”⁵⁰ A greater attention to the perceptual harms imposed by an institutional medical actor on the potentially suffering human being in its care would create an appropriately coherent enforcement pattern for health care fraud, more consistent with genuine retributive principles.

As another example, federal prosecutors largely ignore an entire category of corporate crime where the harm to human victims is arguably the greatest: violations of the Occupational Safety and Health Act.⁵¹ In the forty years between when Congress enacted the Act and 2012, there were more than 400,000 workplace fatalities, yet fewer than eighty cases criminally prosecuted with only approximately a dozen resulting in convictions.⁵² Notably, 2010 saw the worst mining disaster in forty years (the death of twenty-nine miners in an explosion at Massey Energy’s Upper Big Branch Mine) go unpunished criminally, despite a finding of the Mine Safety and

47. 18 U.S.C. § 1347 (2018).

48. Anthony Kyriakakis, *The Missing Victims of Health Care Fraud*, 2015 UTAH L. REV. 605, 611.

49. *See id.* at 641–43 (discussing that patient harms present a complicated investigatory and prosecutorial challenge while “[f]ar less complicated are the numbers on a spreadsheet listing Medicare payments or those on a target’s billing records”).

50. *Id.* at 611.

51. 29 U.S.C. §§ 651–678 (2018).

52. Jordan B. Schwartz & Eric J. Conn, *OSHA Criminal Referrals on the Rise*, EPSTEIN, BECKER & GREEN, P.C.: WORKFORCE BULL. (Dec. 18, 2012), <https://www.oshalawupdate.com/2012/12/18/osha-criminal-referrals-on-the-rise/>.

Health Administration that Massey's "unlawful policies and practices . . . were the root cause."⁵³

In short: any attempt to hold corporations criminally liable for the sex offenses of their employees must contend with several unfortunate truths. The first is that criminal prosecution of corporations is already rarer than warranted, even as a general matter. The second is that punishment of white-collar crime has remained conceptually untethered from the existence of human victims, however inconsistent that may be with the harm principle and general principles of retribution. Due to state prosecutors' lower degree of interest in corporations generally, these problems are likely to be amplified in the state criminal courts with jurisdiction over most sex offenses.

II. Victim Impact Statements at Corporate Sentencing

To create a greater public demand for corporate prosecution, and to pave the way for courts and state legislatures to acknowledge institutional culpability for sex offenses in the cases where it can be proven, I argue that prosecutors should pay closer attention to the role of the victims of corporate crime generally. Specifically, where prosecutors can identify victims, those victims should be made aware of the opportunity to read victim impact statements (VIS) during a corporate sentencing proceeding. This would assist in the process of (a) breaking down the conceptual barrier between corporate and individual crime, which prevents us from viewing a corporation as capable of committing a crime of violence and (b) helping to better tether the project of criminalizing corporations to some version of the harm principle, as opposed to the goal of prosecutorial economy.

It should be noted at the outset that in general criminal law, scholars take a rather dim view of the use of VIS. Susan Bandes fears they mobilize merely lower order emotions against the defendant and that they "evoke not merely sympathy, pity, and compassion for the victim, but also a complex set of emotions directed toward the defendant, including hatred, fear, racial animus, vindictiveness, undifferentiated vengeance, and the desire to purge collective anger."⁵⁴ She argues that they shift the focus away from the defendant's moral culpability and toward "a thirst for undifferentiated

53. Uhlmann, *supra* note 39, at 1296 (quoting MINE SAFETY AND HEALTH ADMIN., U.S. DEP'T OF LABOR, REPORT OF INVESTIGATION, FATAL UNDERGROUND MINE EXPLOSION, Apr. 5, 2010, at 2).

54. Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 395 (1996) (footnote omitted).

vengeance.”⁵⁵ She also believes that the narratives developed during the guilt phase of the trial are already stacked against the defendant by the time sentencing takes place.⁵⁶

Martha Minow opposes victim evidence for fear that it will encourage dueling victim narratives between the victim and defendant; she urges that the system adopt normative standards for evaluating “historical” harm experienced by oppressed groups, as opposed to individuals.⁵⁷ And Jennifer Culbert sees VIS as inappropriately establishing the suffering of the victim as an incontrovertible basis for deciding punishment in an otherwise pluralistic and morally relativistic society.⁵⁸ These scholars all present extremely valid concerns about the potentially prejudicial effects of victim narratives at trial. Yet these arguments rely on a bilateral view of sentencing in which the victim’s only function is to oppose the interests of the defendant. Indeed, many popular arguments in *favor* of VIS rely on similar, but symmetrically opposite, grounds: that we should prioritize the victim’s individual needs over the defendant’s by allowing VIS.⁵⁹

In my past scholarship I have made two arguments in defense of VIS. First, I have argued that the current debate on the victim’s participation in the criminal sentencing process ignores how “the complexity of a victim narrative effectively conveys” to the sentencing body the community’s “experience of harm, without which the criminal justice system loses its

55. *Id.* at 398; *see also* Steven G. Gey, *Justice Scalia’s Death Penalty*, 20 FLA. ST. U. L. REV. 67, 123 (1992) (criticizing the use of unanticipated consequences of a crime as aggravated sentencing factors simply for the purpose of ameliorating a “public sense of injustice”); Martha C. Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFF. 83, 89–90 (1993) (showing how the retributive theory of punishment is, in the first place, “committed to a certain neglect of the particulars” regarding the defendant’s situation).

56. *See* Bandes, *supra* note 54, at 400.

57. Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411, 1437–38 (1993).

58. Jennifer L. Culbert, *The Sacred Name of Pain: The Role of Victim Impact Evidence in Death Penalty Sentencing Decisions*, in PAIN, DEATH AND THE LAW 103, 104–05 (Austin Sarat ed., 2001).

59. *See, e.g.*, Jonathan Simon, *Fearless Speech in the Killing State: The Power of Capital Crime Victim Speech*, 82 N.C. L. REV. 1377, 1383 (2004) (arguing that the state’s tendency, in recent years, to fetishize the “crime victim” has been a justification for conservative criminal legislation); Kenji Yoshino, *The City and the Poet*, 114 YALE L.J. 1835, 1884 (2005) (arguing that VIS do not serve the ends of “fairness,” which he defines explicitly as allowing the defendant to assume the “narrative posture . . . of a Scheherazade, telling stories to the state so she may live . . . untrammelled by other voices”) (footnote omitted).

legitimacy as a penal authority.”⁶⁰ This full account of public harm is crucial to the retributive function of sentencing and, if it is excluded, the system risks perceptions of illegitimacy.⁶¹

Using a collection of victim impact statements from the sentencing of a Pan Am Flight 73 hijacker, I demonstrated how particular narrative features of VIS work to make a victim’s harm accessible to a listener.⁶² I argued that, because these victim stories also circulate through society outside of the courtroom, they shape social norms about culpability.⁶³ I concluded that if the sentencing process cannot accommodate victim stories, it risks illegitimacy in the eyes of a society guided by these norms.⁶⁴ It also risks allowing undifferentiated stereotypes, developed by political and media actors, to take the place of individuated victim accounts in the mind of a fact-finder.⁶⁵

Looking beyond the impact on effect of VIS on the sentencing body itself, the second argument considered their *external*, or expressive function. The external impact of victim statements has been compounded by the rise of social media as a means of transmitting *unmediated* trial narratives through public spaces they have not penetrated in the past.⁶⁶ “I argue[d] that the traditional news media has long distorted public perceptions about crime and punishment, thereby undermining the expressive function of criminal justice.”⁶⁷ The traditional Marxist critique of the media asserts that those in power manipulate the press to harness support for policies that criminalize those with the least power in society.⁶⁸ However, the “left realist” school of criminology points out that the whole of public concern about crime is hardly the product of false consciousness.⁶⁹ There are quite rational reasons to fear crime and many

60. Erin Sheley, *Reverberations of the Victim’s “Voice”: Victim Impact Statements and the Cultural Project of Punishment*, 87 *IND. L.J.* 1247, 1248–49 (2012).

61. *Id.* at 1249.

62. *Id.* at 1272–77.

63. *Id.* at 1277–84.

64. *Id.* at 1285.

65. *Id.*

66. Erin Sheley, *Victim Impact Statements and Expressive Punishment in the Age of Social Media*, 52 *WAKE FOREST L. REV.* 157, 158 (2017) [hereinafter Sheley, *Victim Impact Statements*].

67. *Id.* at 159.

68. YVONNE JEWKES, *MEDIA AND CRIME* 16, 24 (3d ed. 2015).

69. See, e.g., Jock Young, *The Tasks Facing a Realist Criminology*, 11 *CONTEMP. CRISES* 337 (1987).

people, in fact, fear it due to direct interaction with actual victims.⁷⁰ Unmediated victim narratives have therefore always been an important source of information about actual criminal harm, particularly harm to victims ignored by the prevailing media account.

I have used examples drawn from the circulation of victim narratives about police violence attendant to the Black Lives Matter movement, as well as the uniquely impactful viral victim impact statement delivered by Emily Doe in the Stanford rape case (to which I will return shortly)⁷¹ to illustrate how the expressive function of punishment has become even more critical in light of “new” media.⁷² One could argue, of course, that victim narratives can be disseminated without being first expressed during a formal sentencing hearing—the police violence videos are a good example of this. Yet, to the extent that institutions of justice support these narratives by providing a forum for their expression and dissemination, the institutions themselves are participating in what Anthony Duff describes as the “communicative” purpose of punishment.⁷³ Punishment sends a message to the offender about his conduct, to the victim about his or her worth in the eyes of the community, and to the community about what we morally require from one another.⁷⁴ The system serves this purpose better if it incorporates unmediated victim narratives into this process.

In sum, particularly in the era of “viral” social media content, VIS can be used to vindicate the rights of the powerless *against* the powerful as easily as they can be used to increase the punitiveness of the justice system against certain defendants. And, in our status quo universe, in which VIS will continue to be used in the latter capacity, there is arguably a greater moral urgency to use them in the former as well. Corporate criminal punishment provides an ideal setting for this endeavor. It is hard to think of a greater power asymmetry than that existing between a corporate defendant on the one hand and an individual human victim on the other.

We don’t have examples of many victim impact statements at corporate criminal trials, but it is helpful to consider a couple of victim narratives

70. See, e.g., *id.* at 337 (arguing that perceptions of crime are largely “constructed out of the material experiences of people rather than fantasies impressed upon them by the mass media or agencies of the State”); ADAM CRAWFORD, TREVOR JONES, TOM WOODHOUSE & JOCK YOUNG, *THE SECOND ISLINGTON CRIME SURVEY* 76 (1990) (“In inner city areas, mass media coverage of crime tends to reinforce what people already know.”).

71. See *infra* Part III.

72. Sheley, *Victim Impact Statements*, *supra* note 66, at 172–73, 175–85.

73. R.A. Duff, *Guidance and Guidelines*, 105 COLUM. L. REV. 1162, 1182 (2005).

74. See *id.*

about corporate harm occurring in other formal settings. Consider, for example, the victims of the 1972 Buffalo Creek disaster, in which a coal slurry dam owned by the Pittston Corporation burst and caused 125 citizens of Logan County, West Virginia to drown in black sludge.⁷⁵ (Additionally, the property destruction left 4000 people homeless.)⁷⁶ Despite the fact that the investigation determined that the dam had violated numerous federal and state safety regulations,⁷⁷ no criminal charges were ever filed against the Pittston Corporation, its subsidiary Buffalo Mining Co., or any of their officers.⁷⁸ The citizens of the Buffalo Creek area formed a Citizens Commission to investigate the disaster, which concluded:

We think that this coal company, Pittston, has murdered the people, and we call upon the prosecuting attorney and the judge . . . to prosecute and bring to trial this coal company . . .

. . . .

. . . [T]he fact of the matter is that these are all laws on the books which the company felt completely free to ignore, which says something about the relationships between coal companies and state governments . . . just this complete freedom to ignore these laws with no fear of any kind of prosecution.⁷⁹

These words make explicit the perceptual harms that corporate crime imposes on its victims. The Buffalo Creek victims' commission identified, as part of the trauma the community had suffered, their comparative helplessness relative to a company with (a) continued temporal existence and (b) some sort of interrelationship with structures of state power.

Very similar themes appear in the congressional testimony of Keith Jones, whose son Gordon died in the *Deepwater Horizon* drilling rig explosion:

75. GERALD M. STERN, *THE BUFFALO CREEK DISASTER* ix (1976); *see also* Paul Cowan, *The Buffalo Creek Disaster*, N.Y. TIMES (Sept. 5, 1976), <https://www.nytimes.com/1976/09/05/archives/the-buffalo-creek-disaster.html>.

76. STERN, *supra* note 75, at x.

77. Cowan, *supra* note 75.

78. William Rhee, *Buffalo Creek Timeline*, W.V.U. C. OF L., <https://www.law.wvu.edu/buffalo-creek-symposium/buffalo-creek-timeline> (last visited May 19, 2020) (“Special grand jury led by two special prosecuting attorneys . . . brings no criminal indictments against Pittston.”).

79. *The Buffalo Creek Flood: An Act of Man Transcript*, BUFFALO CREEK FLOOD 5, <https://buffalocreekflood.org/media/BCF-transcript.pdf> (last visited May 19, 2020).

Transocean, Halliburton, and any other company will be back because they have the infrastructure and economic might to make more money. But Gordon will never be back. Never. And neither will the 10 good men who died with him.⁸⁰

Again, it is not *only* the loss of Gordon that Jones identifies here but the *asymmetry* between that loss and the *impossibility* of an equivalent loss on the side of an enduring entity like Halliburton. The disruption to the belief-in-a-just-world heuristic resulting from perceived unfairness⁸¹ appears in both these accounts of suffering due to unpunished or inadequately punished corporate crime.

These victim narratives draw attention to the *sine qua non* of a corporate criminal act—to that which justifies punishing the institution itself above and beyond the culpable individual actors that can and should also be charged where possible. It is not just that the harm imposed by corporations is severe. That can be true and yet it still be the case that punishing both individual employees *and* the corporation is redundant if the latter is punished for the same harm as the former. The issue is that the psychic harm posed by corporate crime is *distinct* in kind.

From these premises it becomes clear that victim narratives have the potential to give coherence to a conceptually unstable area of the criminal law. Whatever one thinks of the *respondeat superior* standard as a tool for distributing corporate criminal liability, there is a clear retributive theoretical basis for doing so. And the use of VIS at corporate sentencing reifies this unique corporate criminal harm for a sentencing body, whose job it is to dispense appropriate punishment. We now turn to the particular importance of victim narratives in the unique context of corporate sex crimes.

III. Victim Impact Statements and Corporate Sexual Abuse

This discussion has seemingly wandered far afield of the particular topic of corporate liability for sexual abuse; it is time to bring it home. Victim impact statements help us understand the need for corporate criminal liability while, in turn, corporate criminal liability, as a concept, needs victim narratives in order to have intellectual coherence, to function according to traditional harm principles. With both pieces in place, the

80. *Legal Liability Issues Surrounding the Gulf Coast Oil Disaster: Hearing Before the Comm. on the Judiciary*, 111th Cong. 25 (2010) (statement of Keith D. Jones, Baton Rouge, La.).

81. *See supra* Part I.

nature of *corporate* sexual abuse as a crime requiring distinct institutional, as well as individual, punishment emerges into the light. Victim narratives help us understand how a non-human entity may be the proximate *cause* of a sex offense, even if the offending employee cannot be said to have been acting in any way to benefit his employer.

Larry Nassar's sentencing hearing featured, as noted, 160 victim impact statements.⁸² Among those, one of the most frequently quoted was that of Aly Raisman (2016 Olympic team captain and multiple medalist), whose description of the abuse she suffered reveals how helpless she felt in a situation that had been created and imposed by USA Gymnastics as a condition of maintaining her career. Speaking in the first person, she relived her abuse for the courtroom. She told Nassar, "I don't want you to be there, but I don't have a choice. Treatments with you were mandatory."⁸³ The psychological pressure imposed by USA Gymnastics on the young gymnast constitutes action that rose to the level of proximate causation: her abuse was "mandatory" because the structure of power the organization maintained imposed limits on its participants' basic horizon of possibility.

Raisman also criticizes USA Gymnastics' *failure* to do anything when they had notice of a problem:

False assurances from organizations are dangerous, especially when people want so badly to believe them. They make it easier to move away from the problem and enable bad things to continue to happen. And even now after all that has happened, USA Gymnastics has the nerve to say the very same things it has said all along.⁸⁴

Here again she unwittingly expresses the principle of omission as causation, which is probably the theory more likely to arise in corporate sexual abuse

82. The inclusion of so many victims who were not the victims he was convicted of assaulting in that particular trial raises some due process problems, which have been noted elsewhere. See, e.g., Anne E. Gowen, *How the Judge in Larry Nassar's Case Undermined Justice*, TIME (Jan. 26, 2018, 1:15 PM EST), <http://time.com/5119433/larry-nassar-judge-rosemarie-aquilina-justice/>; *Justice for Whom?: The Dangers of the Growing Victims' Rights Movement*, HARV. CIV. RTS.-CIV. LIB. L. REV. BLOG (Nov. 27, 2018), <https://harvardcrcl.org/justice-for-whom-the-dangers-of-the-growing-victims-rights-movement/>.

83. Mahita Gajanan, *'It's Your Turn to Listen to Me.' Read Aly Raisman's Testimony at Larry Nassar's Sentencing*, TIME (Jan. 19, 2018, 4:52 PM ET), <https://time.com/5110455/aly-raisman-larry-nassar-testimony-trial/> (providing an account of Aly Raisman's full statement).

84. *Id.*

cases (most of which are likely to lack the extreme conditions of the USA Gymnastics scenario). Nonetheless, she articulates the extent to which the organization's assurances represented an undertaking to protect its athletes, which it violated. Its behavior was "dangerous" for precisely the same reason that an undertaking generally creates a legal duty that, in Anglo-American law, forms the basis for a criminal omission. Finally, like the victims in the Buffalo Creek and *Deepwater Horizon* examples given above, Raisman points to the endurance of USA Gymnastics—its static ability to continue on in its false representations and to outlive the various athletes it victimized—as a component of the harm to which she testifies.⁸⁵

Narratives like Raisman's have the potential to serve a unique purpose: to transmit to the public the lived reality of something that may not seem intellectually plausible: sexual assault by an entity. We have seen a similar power to transmit a different sort of narrative about sexual violation in Emily Doe's victim impact statement in "Stanford swimmer" Brock Turner's sentencing.⁸⁶ Emily Doe expressed the horrifying experience of *not* remembering a sexual assault.⁸⁷ Instead of the testimonial impairment doubters tend to infer from such a lack of memory in similar scenarios, Doe demonstrated to the world how her fragmented recollection was instead a condition rendering her assault *more* horrific and her account *more* accurate.

Narratives of sexual abuse are notoriously challenging, both to articulate and to receive. Yet such narratives are crucial to the criminal justice system being able to process the reality of institutional sexual offenses. Obviously, as noted, few corporate scenarios involve quite the same degree of categorical control imposed by an institution on the victims of sexual assault as the USA Gymnastics case does. Nonetheless, extreme examples can, at least, serve to disprove a general principle—in this case, that it is "not possible" for a non-human entity to commit a sexual offense. For the criminal justice system to fully account for the unique harms of corporate crime generally, it must make a greater general effort to include victim narratives in already-existing corporate prosecutions. This is the first step. The second is for advocates to provide public forums for victims of corporate sex crimes to tell their stories and thereby generate a public

85. *Id.*

86. Katie J.M. Baker, *Here's the Powerful Letter the Stanford Victim Read to Her Attacker*, BUZZFEEDNEWS.COM (June 3, 2016, 4:17 PM ET), <https://www.buzzfeednews.com/article/katiejmbaker/heres-the-powerful-letter-the-stanford-victim-read-to-her-ra>.

87. *Id.*

demand for what would, essentially, amount to the creation of corporate criminal liability for sexual offenses.