

1998

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Recommended Citation

Beth E. Sullivan, *HARNESSING PAYNE: CONTROLLING THE ADMISSION OF VICTIM IMPACT STATEMENTS TO SAFEGUARD CAPITAL SENTENCING HEARINGS FROM PASSION AND PREJUDICE*, 25 Fordham Urb. L.J. 601 (1998).
Available at: <https://ir.lawnet.fordham.edu/ulj/vol25/iss3/9>

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HARNESSING *PAYNE*: CONTROLLING THE ADMISSION OF VICTIM IMPACT STATEMENTS TO SAFEGUARD CAPITAL SENTENCING HEARINGS FROM PASSION AND PREJUDICE

*Beth E. Sullivan**

Introduction

It was just three days before Christmas when James Bernard Campbell came into the Reverend Bosler's home and brutally murdered the Reverend and critically injured his daughter Sue Zann.¹ Sue Zann Bosler stood terrified and helpless as this total stranger stabbed her father twenty-four times, and then stabbed her six times, leaving them both for dead.² Sue Zann's father died, but, miraculously, she survived and now must live everyday with the painful memories and physical scars of this gruesome crime.³

A jury convicted Campbell of murder in the first degree.⁴ At the sentencing hearing, the judge informed the jury that the sentence could be either death or life imprisonment.⁵ Sue Zann took the stand to give a victim impact statement, as permitted by Florida law, which would inform the jury about her own life and the life her father lived.⁶ She gave "deep," "dramatic," and "emotionally moving" testimony.⁷ In short, Sue Zann was the prosecution's "blockbuster witness," who, through her wrenching testimony,

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1. See *48 Hours: My Father's Killer* (CBS television broadcast, Oct. 2, 1997) (noting that the crime occurred on December 22, 1968) [hereinafter *48 Hours*].

2. See *id.*

3. See *id.*

4. See *id.*

5. See *id.*

6. See *id.*

7. *Id.* With tears streaming down her face, she described the savage murder and the pain she endured. See *id.* Between tears, she relayed to the jury how the stabbing resulted in taking the side and part of her brain out of her skull. See *id.*

helped secure the death penalty.⁸ Two courts, however, subsequently reversed the sentence on technicalities.⁹

Meanwhile, over the past ten years, Sue Zann Bosler has become the person most determined to keep Campbell alive.¹⁰ At the third sentencing hearing in ten years, Sue Zann again took the stand, but under significantly different circumstances.¹¹ In a valiant effort to uphold the beliefs of her father, who opposed the death penalty, Sue Zann was determined to see peace prevail.¹² While her prior testimony was "deep and eloquent," this time it was "as unsympathetic and undramatic as possible."¹³ In response to the prosecution's question about her livelihood, Sue Zann explained that she has two jobs: one as a hairstylist and one as an advocate

8. *Id.*

9. *See id.*; *see also* Campbell v. State, 571 So.2d 415 (Fla. 1990) (vacating death penalty and remanding for resentencing on grounds that the court should have considered in mitigation the fact that Campbell suffered from impaired capacity and had a deprived and abusive childhood); Campbell v. State, 679 So.2d 720 (Fla. 1996) (reversing death sentence and remanding for third resentencing, holding that Campbell was denied a fair penalty hearing because the prosecutor improperly discredited the defense psychologist and made improper comments to the jury).

10. *See 48 Hours*, *supra* note 1. "Despite what has happened, she sees James Campbell not as a monster, but as a human being." *Id.* In fact, Sue Zann has become a leading voice in the movement against the death penalty, traveling nationwide with a group called "Murder Victims' Families for Reconciliation," in an effort to enlist support and encouragement for the movement, as well as Campbell. *Id.* "It has become her cause, almost her obsession," to save not only Campbell, but every single person on death row. *Id.*

11. *See id.*

12. *See id.* Sue Zann Bosler recalled how her father once had told her that if he were to be murdered he still would not want the defendant to be put to death; for, more than anything, he desired peace on earth. *See id.*

13. *Id.* No longer did she clutch a tissue and wipe her tears; rather, she remained calm and collective. *See id.* She referred to the defendant as "James" or "the gentleman," as she coldly and abruptly responded to the prosecution's questions about the crime. *Id.* "It was deliberate - she had an agenda," noted the prosecutor, who described Sue Zann's victim impact statement to be a different testimony entirely, with a different Sue Zann. *Id.*

against the death penalty.¹⁴ In only three hours the jury returned a sentence of life imprisonment.¹⁵

A comparison of Sue Zann's remarkably different testimonies reveals the role emotions can play in capital sentencing, and how significantly they can prejudice the defendant's constitutional rights. When Sue Zann expressed pain and torment, Campbell received the death penalty; however, upon manipulating her testimony so as to maintain a calm and distant appearance, Campbell received only life imprisonment. Unlike Sue Zann, however, most victims support the death penalty.¹⁶ In fact, in today's society, victims are often the driving force behind the prosecution's push for a death sentence,¹⁷ and it is their tears and painful recollections that

14. *See id.* While Florida law does permit the use of victim impact statements in capital sentencing hearings, the State has made clear the prohibition against any opinions regarding the death penalty of life imprisonment. *See id.*; *see also* FLA. STAT. ANN. § 921.141 (West Supp. 1997). Despite this restriction by the state, Sue Zann still managed to find a loophole through which she could express her beliefs. But, when she was called back to the stand by the defense, the judge was skeptical about letting her proceed. *See 48 Hours, supra* note 1. He sent the jury out and ordered Sue Zann to tell him what she planned to say. *See id.* In response, she asserted that she wanted to forgive James. *See id.* Moreover, she commented, "I respect his life and value it here on this earth, and I believe in life." *Id.* The judge ruled that such opinions have no place in the courtroom and are not allowed under Florida law. *See id.* As such, the defense found no room to call Sue Zann as a witness.

15. *See id.* Sue Zann's determination to save Campbell's life ended in victory, not only for herself and Campbell, but also for the movement. In retrospect, she believes this final sentencing gave her the closure she so desired and her own life a new beginning. *See id.* But, while that is indeed heart-warming, that was not what our courtrooms were designed for. The purpose of a criminal prosecution is not to heal the wounds of the victim, but to punish the offender. Oftentimes the two may coincide, but that cannot be the sole mission of justice.

16. *See* Tom Morganthau, *Condemned to Life*, NEWSWEEK, Aug. 7, 1995, at 19 (reporting that only 17% of those questioned in a random poll oppose the death penalty in all cases). "Now more than ever, Americans support the death penalty by striking majorities." *Id.* In a poll taken by Princeton Survey research associates, 79% of the adults surveyed favored the death penalty for Timothy McVeigh. *See id.*; *see also* David Wallechinsky, 'He Killed My Child, But I Don't Want Him To Die,' PARADE MAGAZINE, Jan. 18, 1998, at 4 (noting that recent surveys conclude that a majority of Americans favor the death penalty).

17. *See generally* Editorial, *Death and Delusion*, 19 NAT'L L.J. 44, June 30, 1997, at A14 (noting that "[p]opular sentiment has long favored the death penalty"); Scott Robinson, Editorial, *Stacking the Deck Heart-Wrenching 'Victim Impact' Statements Make it Virtually Impossible for Jurors to Set Emotion Aside*, ROCKY MTN. NEWS, June 8, 1997, at 1B (noting that in "modern-day death penalty trials" the "emphasis has shifted to the personal human consequences of crime, paving the way for death sentences based on moral outrage and retribution"); Brent Staples, Editorial, *When Grieving 'Victims' Can Sway the Courts*, N.Y. TIMES, Sept. 22, 1997, at A26 (stating that "the solemn activity of mourning has become a raucous and public blood sport").

deeply touch the jury in a way that substantially prejudices the defendant.¹⁸

Victim impact evidence, as introduced by oral testimony and statements that identify victims of the crime and the extent of their suffering, presents a myriad of problems to the American court system,¹⁹ especially with regard to the criminal defendant's right to a fair trial. This Note traces the historical development of victim impact statements ("VIS") through United States Supreme Court jurisprudence and state legislation, and analyzes their use in the sentencing phase of capital trials. Part I explores the case and statutory history of VIS during capital sentencing hearings. Part II examines the current use of VIS and the reality of their consequences, by comparing the recent sentencings of Jesse Timmendequas and Timothy McVeigh. Part III argues that the Supreme Court's decision in *Payne v. Tennessee*²⁰ has troublesome implications in light of the capital defendant's constitutional rights, the history of the death penalty, and traditional sentencing procedures. This Note concludes by proposing guidelines that should be expressed in an amendment to the United States Constitution to compel all courts to uniformly regulate the use of VIS during capital sentencing hearings and to protect the constitutional rights of defendants.

18. Rule 403 of the Federal Rules of Evidence recognizes how substantially emotions can prejudice in holding that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403. The prejudice which Rule 403 refers to is "unfair prejudice." *Ballou v. Henri Studios*, 656 F.2d 1147 (5th Cir. 1981) (noting that unfair prejudice is "an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one"). See e.g., *Terry v. State*, 491 S.W.2d 161 (Tex. Crim. App. 1973) (holding that the autopsy pictures revealing severed parts of an infant's body "clearly served to inflame the minds of the jury"); see also *infra* notes 80-87 and accompanying text (detailing the pain and anguish jurors, reporters, and spectators endured as family members of the victims of the Oklahoma bombing took the stand at Timothy McVeigh's sentencing hearing).

19. See *United States v. McVeigh*, 944 F. Supp. 1478, 1491 (D. Colo. 1996) (stating that victim impact statements are the "most problematical of all the aggravating factors and may present the greatest difficulty in determining the nature and scope of the 'information' to be considered").

20. 501 U.S. 808 (1991) (holding that "the eighth amendment did not erect a per se bar prohibiting a capital sentencing jury from considering victim impact evidence").

I. A Historical Perspective

A. Case Law

The constitutionality of victim impact evidence was first addressed by the Supreme Court in *Booth v. Maryland*.²¹ The Court held, in a five-to-four decision, that the Eighth Amendment prohibits a capital sentencing jury from considering VIS.²² The VIS, prepared by the State of Maryland, provided the jury with a description of the personal characteristics of the victims and the emotional impact of the crime on the survivors.²³ They also contained family members' detailed characterizations and opinions of both the crime and the defendant.²⁴ The Court found that the admission of VIS "creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner."²⁵

21. 482 U.S. 496 (1987). Booth was convicted of robbing and murdering an elderly couple and a jury of his peers sentenced him to death, after considering a VIS. *See id.* at 501-02.

22. *See id.* The Court reasoned that such information is entirely irrelevant to the decision of imposing the death penalty. *See id.* at 503.

23. *See id.* at 499-500.

24. *See id.* The statement was formulated on the basis of interviews with the families of both of the victims and described in great detail the emotional impact of the crime, including personal problems that the survivors have since endured. *See id.* at 499. It also emphasized the victims' background and personalities, highlighting their best qualities and stressing how much they would be missed. *See id.* In one section, the daughter "concluded that she could not forgive the murderer, and that such a person could '[n]ever be rehabilitated.'" *Id.* at 500 (quoting App. 62). The son noted that as a result of the crime he suffers from insomnia and depression, and is "fearful for the first time in his life." *Id.* (quoting App. 61). Moreover, he asserted that his parents were "butchered like animals." *Id.* "The VIS also noted that the granddaughter had received counseling for several months after the incident, but eventually stopped because she concluded that 'no one could help her.'" *Id.* (quoting App. 63). The State Division of Parole and Probation official, who had conducted the interviews, concluded the VIS by writing: "It is doubtful they will ever be able to fully recover from this tragedy and not be haunted by the memory of the brutal manner in which their loved ones were murdered and taken from them." *Id.* (quoting App. 63-64).

Defendant moved to suppress this emotionally laden VIS on the grounds that it was "both irrelevant and unduly inflammatory, and that therefore its use in a capital case violated the Eighth Amendment of the Federal Constitution." *Id.* at 500-501; *see also* U.S. CONST. amend. VIII (providing that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted").

25. *Booth*, 482 U.S. at 503. The Court in *Booth* was deeply concerned with prejudicial impact VIS can have on defendants, especially in light of their irrelevancy to the blameworthiness of the defendant. *See id.* at 504. The Court reasoned that the defendant most often does not know the victim and therefore can have no such knowledge about his or her character and/or family. *See id.* (stating that studies have revealed "defendants rarely select their victims based on whether the murder will

The Supreme Court subsequently held, in *South Carolina v. Gathers*,²⁶ that VIS given by a prosecutor also violate the Eighth Amendment.²⁷ Relying on *Booth*, the Court held that the state-

have an effect on anyone other than the person murdered"). In addition, the Court noted that "a defendant's level of culpability depends not on fortuitous circumstances such as the composition of his victim's family, but on circumstances over which he has no control." *Id.* at 505 n.7 (quoting *People v. Levitt*, 156 Cal.App.3d 500, 516-17 (1984)). As such, "[a]llowing the jury to rely on a VIS therefore could result in imposing the death sentence because of factors about which the defendant was unaware, and that were irrelevant to the decision to kill." *Id.* at 505. Such evidence could indeed be prejudicial in diverting the jury's attention away from the defendant's background, record, and circumstances of the crime, and placing it instead on the victim's family and their suffering. *See id.* And, while "[s]uch bereavement is relevant to damages in a civil action, . . . it has no relationship to the proper purposes of sentencing in a criminal case." *Id.* at 505 n.7 (quoting *Levitt*, 156 Cal.App.3d at 516-17).

The Court further noted that VIS could also be prejudicial in that not every victim leaves behind a family, and not all families can articulate their feelings of grief equally. *See id.* (noting that "[t]he fact that the imposition of the death sentence may turn on such distinctions illustrates the danger of allowing juries to consider this information"). The ability of a family to express its grief is a factor which must remain irrelevant to determining something as grave as who should live or die. *See id.* Consequently, some victims may be viewed as more valuable in the eyes of society than others, and some defendants more deserving of punishment. *See id.* at 506. Our system does not tolerate distinctions to be made which would render some defendants, whose victims were assets to their community, more deserving of punishment, as opposed to those whose victims were not. *See id.* at 506 n.8.

A final threshold concern of the Court was the difficulty, if not impossibility, of a fair rebuttal to VIS; for any cross-examination would surely have the effect of "shifting the focus of the sentencing hearing away from the defendant" and consequently create a "'mini-trial' on the victim's character." *Id.* at 506-507. Granting the state permission to introduce evidence of the personal qualities of the victim would, in turn, open the door to defendant to rebut such information. *See id.* (citing *Gardner v. Florida*, 430 U.S. 349, 362 (1977) (opinion of Stevens, J.) (due process requires that defendant be given a chance to rebut presentence report)). Such a result "is more than simply unappealing; it could well distract the sentencing jury from its constitutionally required task — determining whether the death penalty is appropriate in light of the background and record of the *accused* and the particular circumstances of the crime." *Id.* at 507 (emphasis added & italic omitted). Moreover, the admission of the family members' opinions and characterizations of the crime were held to "serve no other purpose than to inflame the jury and divert it from deciding the case on relevant evidence concerning the crime and the defendant." *Id.* at 508.

Accordingly, the Court ruled that a decision to impose the death penalty that might turn on the aforementioned factors could never be justified. As such, the introduction of a VIS at a capital sentencing hearing was held to violate the Eighth Amendment. *See id.* at 509.

26. 490 U.S. 805 (1989).

27. *See id.* Defendant Demetrius Gathers was convicted of the murder of a self-proclaimed minister and was sentenced to death. *See id.* at 806. The victim, Richard Haynes, was about 31 years old and unemployed. *See id.* at 807. Evidence revealed that Haynes had suffered some mental disturbances over the course of the two years prior to his death and had consequently been in and out of a mental hospital three times. *See id.* Despite his lack of formal religious training, he rendered himself a preacher, referring to himself as "Reverend Minister." Moreover, he typically carried

ments at issue concerned “personal characteristics of the victim” which were irrelevant to the defendant’s blameworthiness.²⁸ As such, the Court deemed it unconstitutional to impose a sentence of death based upon factors of which the defendant could not have been aware.²⁹

Only two years later, however, the Court, in *Payne v. Tennessee*, overruled *Booth* and *Gathers*, in so far as they prohibited VIS.³⁰ The *Payne* Court’s six-to-three decision opened the door to victim impact evidence relating to the personal characteristics of the victim, the emotional impact of the crime on the victim’s family, as

several bags containing such religious articles as rosary beads, two Bibles, olive oil, plastic statues, and religious tracts. *See id.*

The prosecutor’s closing remarks before the sentencing jury included reading at length from a religious tract that the victim had been carrying at the time of the murder and commenting on personal qualities inferred from the possession of such. *See id.* at 808. The tract from which the prosecutor read was entitled “The Game Guy’s Prayer.” It relied upon metaphors of football and boxing to extol the virtues of the “good sport.” *See id.* at 807. The prosecutor inferred from the fact that the victim possessed this tract, as well as a voter registration card, that he was a religious man who cared about his community. *See id.* at 809. The prosecutor remarked:

We know from the proof that Reverend Minister Haynes was a religious person. He had his religious items out there Among the many cards that Reverend Haynes had among his belongings was this card. It’s in evidence. Think about it when you go back there. He had . . . religious items, his beads. He had a plastic angel.

Id. at 808 (citing App. 41-43). In addition, the prosecutor read one of the victim’s prayers at length, and concluded: “Reverend Haynes believed in this community. He took part. And he believed that in Charleston County, in the United States of America, that in this country you could go to a public park and sit on a public bench and not be attacked by the likes of Demetrius Gathers.” *Id.*

28. *Id.* at 811 (noting that the statement by the prosecutor is “indistinguishable in any relevant respect from that in *Booth*”). “As in *Booth*, ‘[a]llowing the jury to rely on [this information] . . . could result in imposing the death sentence because of factors about which the defendant was unaware, and that were irrelevant to the decision to kill.’” *Id.* (citing *Booth*, 482 U.S. at 505).

29. The Court relied on their prior holding in *Booth*, in which the Court held that “such statements introduced factors that might be ‘wholly unrelated to the blameworthiness of a particular defendant.’” *Id.* (citing *Booth*, 482 U.S. at 504). In conclusion, the *Gathers* Court rendered the content of the victim’s belongings, such as the religious tract from which the prosecutor read and his voter registration card, to have been completely irrelevant to the circumstances of the crime. *Id.* at 812 (stating that “[u]nder these circumstances, the content of the various papers the victim happened to be carrying when he was attacked was purely fortuitous and cannot provide any information relevant to the defendant’s moral culpability”). The logic of this reasoning seems obvious when considering the flip side of the facts of the *Gathers* case. For instance, the victim’s bag could very well have contained porno magazines and a dime bag of marijuana instead of religious artifacts.

30. 501 U.S. 808 (1991).

well as comments from the prosecutor.³¹ The Court reasoned that the *Booth* decision “unfairly weighted the scales in a capital trial” because the defendant has a right to introduce all mitigating evidence that may inform the jury about his character, while the State is barred from counteracting such evidence.³² Moreover, the Court

31. *See id.* (holding that “[t]he Eight Amendment erects no per se bar prohibiting a capital sentencing jury from considering ‘victim impact’ evidence relating to the victim’s personal characteristics and the emotional impact of the murder on the victim’s family, or precluding a prosecutor from arguing such evidence at a capital sentencing hearing”). Payne was convicted of first-degree murder of a mother and her two-year-old daughter, and first-degree assault with intent to murder a three-year-old boy. *See id.* at 811. The jury sentenced Payne to death and Payne appealed, contending that the admission of testimony by the victim’s grandmother, as well as the State’s closing argument, violated his Eighth Amendment rights under *Booth*. *See id.* at 816.

The grandmother’s testimony described how her grandson Nicholas had been affected by the murders of both his mother and sister. *See id.* at 814. She asserted:

He cries for his mom. He doesn’t seem to understand why she doesn’t come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I tell him yes. He says, I’m worried about my Lacie.

Id. at 814-15 (citing App. 3).

During closing arguments, in an effort to persuade the jury to apply the death penalty, the prosecutor commented:

There is obviously nothing you can do for Charisse and Lacie Jo. But there is something you can do for Nicholas. Somewhere down the road Nicholas is going to grow up, hopefully. He’s going to want to know what happened to his baby sister and his mother. He’s going to want to know what type of justice was done. He is going to want to know what happened. With your verdict, you will provide the answer.

Id. at 815 (citing App. 12).

The Supreme Court of the United States affirmed both the sentence and the conviction, rejecting the merit of Payne’s assertions. *See id.* at 827 (“A state may legitimately conclude that evidence about the victim and about the impact of the murder on the victim’s family is relevant to the jury’s decision as to whether or not the death penalty should be imposed.”). The Court grounded its reasoning on the assertion that “the assessment of harm caused by the defendant as a result of the crime charged has understandably been an important concern of the criminal law, both in determining the elements of the offense and in determining the appropriate punishment. *Id.* at 819 (reasoning that “two equally blameworthy criminal defendants may be guilty of different offenses solely because their acts cause differing amounts of harm”). The Court illustrated that two defendants may each participate in a robbery, and each may act with “reckless disregard for human life,” but only one defendant may be subject to the death penalty simply because his robbery resulted in the death of a victim, while the other’s did not. *Id.* (citing *Tison v. Arizona*, 481 U.S. 137, 148 (1987)).

32. *See id.* at 822. The Court reasoned:

while virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances, the State is barred from either offering ‘a quick glimpse of the life’ which a defendant ‘chose to extinguish,’ or demonstrating the loss to the victim’s family and to society which has resulted from the defendant’s homicide.

Id. (quoting *Mills v. Maryland*, 486 U.S. 367, 397 (1988) (Rehnquist, C.J., dissenting)); *see also Booth*, 482 U.S. at 517 (White, J., dissenting) (arguing that the State has a

argued that VIS are not offered to provoke prejudicial and arbitrary determinations, but rather to show each victim's "uniqueness as a human being."³³ Accordingly, the *Payne* Court concluded that the specific harm caused by the defendant is essential to the jury's meaningful assessment of the defendant's "moral culpability and blameworthiness."³⁴

B. Victims' Rights Movement and the Legislative Response

Over the past three decades, a massive outpouring of support for victims' rights has proliferated.³⁵ Motivated by the same concerns

legitimate interest in counteracting the defendant's mitigating evidence "by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family").

The Court deemed it an insult to all civilized members of society to welcome a parade of witnesses who will testify on the defendant's behalf (i.e., with respect to character, good deeds, troublesome background, upbringing, etc.), without granting the victim an equal right of response. The Court found that to virtually place no limits on the introduction of mitigating evidence by the defendant, but to bar the State "from either offering 'a quick glimpse of the life' which a defendant 'chose to extinguish,' . . . or demonstrating the loss to the victim's family and to society which has resulted from the defendant's homicide," is to unfairly weight the scales in a capital trial. *Id.* at 822 (quoting *Mills v. Maryland*, 486 U.S. 367, 397 (1988) (Rehnquist, C.J., dissenting)). Thus, in a sincere effort to address such inequity and "keep the balance true," the Court granted the victim a role in the prosecution. *Id.* at 826 (citing *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934)). And, by rendering the heinousness of the crime to be an inherent part of the defendant's blameworthiness, the Court removed victims from the second-rate position they have for so long assumed, thereby tipping the scales of justice back in the other direction.

33. *Id.* at 823 (dismissing the *Booth* Court's concern that VIS will encourage comparative judgments such as, "that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy").

34. *Id.* at 825. However, in rendering VIS valid under the Eighth Amendment, the Court did not mean to say that they were not troublesome. Justice O'Connor's concurrence noted: "We do not hold today that victim impact evidence must be admitted, or even that it should be admitted. We hold merely that if a State decides to permit consideration of this evidence, 'the Eighth Amendment erects no per se bar.'" *Id.* at 831. "If, in a particular case, a witness' testimony or a prosecutor's remark so infects the sentencing proceeding as to render it fundamentally unfair, the defendant may seek appropriate relief under the Due Process Clause of the Fourteenth Amendment." *Id.*

35. See Carrie L. Mulholland, Note, *Sentencing Criminals: The Constitutionality of Victim Impact Statements*, 60 MO. L. REV. 731, 734 (1995) ("The rise of the victims' rights movement started in the 1960's, in conjunction with the women's rights movement's claim that the criminal system mistreated rape victims").

Recent years have seen an outpouring of popular concern for what has become known as 'victims' rights' — a phrase that describes what its proponents feel is the failure of the courts of justice to take into account in their sentencing decisions not only the factors mitigating the defendant's moral

as the *Payne* Court, advocates of the victims' rights movement seek to balance the rights of victims with those already granted to the defendant by entitling them to a voice and a means of fair redress.³⁶ They argue that the system ignores victims, thereby victimizing them twice.³⁷ In an attempt to level the playing field, the

guilt, but also the amount of harm he has caused to innocent members of society.

Booth, 482 U.S. at 520 (Scalia, J., dissenting); see also Kathryn E. Bartolo, *Payne v. Tennessee: The Future Role of Victim Statements of Opinion in Capital Sentencing Proceedings*, 77 IOWA L. REV. 1217, 1218 (1992) (noting that "by 1991, there were over 7,000 victim assistance programs"); Carole Mansur, Comment, *Payne v. Tennessee: The Effect of Victim Harm at Capital Sentencing Trials and the Resurgence of Victim Impact Statements*, 27 NEW ENG. L. REV. 713, 715 (noting that the growing concern for victims' rights "coincides with a period of rising crime and violence in our society"); Michael Ita Oberlander, *The Payne of Allowing Victim Impact Statements as Capital Sentencing Hearings*, 45 VAND. L. REV. 1621, 1623 (1992) ("The victims' rights movement is a viable and active political force in American society today"). The 1960's witnessed a primary concern for "establishing compensation programs at the state level and on expanding restitution as a sentencing alternative," while the 70's made victim-witness assistance programs a central concern of the lobbyists. See *id.* at 1625-26 (noting that "[t]he victim-witness assistance programs serve the purpose of guiding the victim through the complicated maze of the criminal justice system and minimizing the administrative inconveniences associated with participation in the process"). More recently, advocates have exacted a system that responds more directly to the needs of the victims (i.e., "one that assists rather than manages the victim"). *Id.* at 1626. Victims are currently demanding the right to personally participate in the criminal process, deeming victim services that fail to provide such an opportunity meaningless. See *id.* Consequently, such activism has propagated many recent responses on behalf of the government. See *infra* notes 40-52 and accompanying text. Cf. Jose Felipe Anderson, *Will The Punishment Fit The Victims? The Case For Pre-Trial Disclosure, and The Uncharted Future of Victim Impact Information in Capital Jury Sentencing*, 28 RUTGERS L.J. 367, 396 (1997) (noting that "[t]he movement has not only resulted in increased victim participation in criminal cases by encouraging states to adopt victim impact statements at sentencing, it has also spawned many recent successful state efforts to ratify victim based constitutional amendments"). "Even federal law provides for victim participation in the sentencing process." *Id.* at 396-97 (citing FED. R. CRIM. P. 32(b)(4)).

36. See Mulholland, *supra* note 35, at 734 (1995) ("Supporters of the movement contended that the criminal justice system was entirely unsympathetic to victims by denying them a formal role in the judicial system, exploiting them to prosecute the criminal, and failing to provide rehabilitation or assistance after sentencing of the criminal."). Essentially, supporters mandate that the law provide victims with a more meaningful role in the criminal justice system. See *id.*; see also Diane Kiesel, *Crime and Punishment: Victim Rights Movement Presses Courts, Legislatures*, 70 A.B.A. J. 25, 28 (Jan. 1984).

37. See Oberlander, *supra* note 35. Some victims feel as though the system excludes them from participating in the prosecution of the defendant, thereby victimizing them yet again. See *id.*; see also Thomas J. Phalen & Jane L. McClellan, *Speaking For The Dead At Death Sentencing: Victim Statements in Capital Cases — A Right of Survivorship?*, 31 ARIZ. ATT'Y 12, 12 (Nov. 1994) (noting that one goal of the movement is "to prevent victims from being victimized twice — once by the criminal and once by the criminal justice system"). Essentially, the argument is that victims are too

movement places primary emphasis on passing legislation, with an ultimate goal of achieving a constitutional amendment.³⁸ Two concerns seem to govern the movement: (1) the desire for the victim to obtain closure and regain a sense of control over life, and (2) the concern for retributive justice.³⁹

often forgotten by the system, and deemed irrelevant to the administration of justice. By means of the VIS, however, the jury is forced to view the victim as flesh and blood and take into account the true extent of the defendant's actions. Without such evidence, both the crime and the victim are otherwise marginalized.

38. See Kelly McMurry, *Victims' Rights Movement Rises to Power*, ASS'N OF TRIAL LAW. OF AM., July 1, 1997 (stating that the "ultimate goal" of victims' rights advocates is "to win passage and enactment of a proposed victims' rights amendment to the U.S. Constitution" and further noting that this effort has already achieved "the endorsement of President Clinton and won significant bipartisan support in Congress"). Supporters of the amendment are motivated primarily by the hope that its passage would "bring into balance a criminal justice system in which the scales are tipped in favor of the accused." *Id.* (noting that "[a]n amendment would also ensure that crime victims' rights are enumerated in much the same way the Bill of Rights outlines protections for criminal defendants"). In its current form, as Senate Joint Resolution 6, the proposed 28th Amendment provides victims of violence the following rights:

to be notified of and to attend all public proceedings relating to the crime; to be heard and to submit impact statements at sentencing and parole hearings; to be notified of an offender's release, parole, or escape; to a final disposition of the criminal proceedings without unreasonable delay; to an order of restitution from the convicted offender; to have the safety of the victim considered in determining any offender's release from custody; and to be notified of these rights.

Id. (noting that "[w]hile advocates are quick to applaud . . . federal and state measures, they contend that the legislation varies in scope and, when taken together, does not go far enough to ensure that 'justice, fairness, and equity are extended to all innocent victims of crimes, just as we properly do for those accused of crimes'"). In essence, the above proposal combines the assurances of a number of federal and state legislative acts into a constitutional amendment in an effort to ensure universal application. See also Evan Gahr, *Advocates Raise Wide Support for Victims-Rights Amendment*, INSIGHT MAG., March 10, 1997, at 42 (noting that the leaders of the grassroots crime-victims movement are pushing for amendment because "[a]bsent federal action . . . , the justice system will continue to treat victims as second-class citizens"). The overall consensus of the advocates is that there is a pressing need to enumerate such rights; for without an amendment there is no way to guarantee that the rights of crime victims will not be ignored. See *id.* The rights provided by the proposal are indeed pertinent in ensuring a victims a greater degree of rights within the justice system; however, the proposal ignores the effects on the defendant. My own proposal, in contrast, addresses the rights of both victims and defendants, in an effort to attain a true balance. See *supra* notes 145-155 & accompanying text. Rather than included only general provisions that essentially reiterate current statutory rights, my amendment proposal focuses primarily on controlling the prejudice which VIS have the grave potential to create. See *id.*

39. Oberlander, *supra* note 35, at 1624 (citing Maureen McLeod, *Victim Participation at Sentencing*, 22 CRIM. L. BULL. 501, 504 (1986)). "A victim is often devastated by the criminal act against her because of her resulting feeling of vulnerability and her sense that she has lost control over her life. Consequently, some critics have viewed the victims' rights movement merely as a self therapy for victims." *Id.* at 1624-25; see

In response to innumerable proposals by victims' rights advocates and out of a growing concern for the rights of victims, Congress took a ground-breaking step in 1982 and enacted the Victim and Witness Protection Act,⁴⁰ which sought to accord witnesses and victims a greater degree of rights and protections in the criminal justice system.⁴¹ In 1990, Congress passed the federal Victims Rights and Restitution Act,⁴² more commonly known as the Victims' Bill of Rights,⁴³ granting victims the right to be notified of, and present at, court proceedings and to be kept apprised of the status of such factors as the defendant's conviction, sentencing, imprisonment, and release.⁴⁴ The Victims' Bill of Rights mandated that victims could not be excluded from the courtroom, unless their

also Mulholland, *supra* note 35, at 747, 735 (noting that victims' families seek "a means of coping and closure," as well as "more effectively equate the criminal's punishment to the full extent of the harm caused").

40. Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 2(b)(1), 96 Stat. 1248 (codified at 18 U.S.C. §§ 1512-1515, 3579-3850 (1988)). Public Law Number 98-473, section 212, 98 Stat. 1837, 1987 (1984) amended §§ 3579-80 and relocated the sections to 18 U.S.C. §§ 3663 and 3664.

41. *See id.*; *see also* Oberlander, *supra* note 35, 1626 n.28 (stating that the Act "codified Congressional findings that recognized the importance of victims in the criminal justice system"). The Victim and Witness Protection Act recognized the importance of victims in the criminal justice system, declaring its purposes to be:

(1) to enhance and protect the necessary role of crime victims and witnesses in the criminal justice process; (2) to ensure that the Federal Government does all that is possible within limits of available resources to assist victims and witnesses of crime without infringing on the constitutional rights of the defendant; and (3) to provide a model for legislation for State and local governments.

See Oberlander, *supra* note 35 at 1626 n.28 (citing 96 Stat. at 1249). In addition, the Act "amended the Federal Rules of Criminal Procedure to require the inclusion of victim impact as part of the presentence report submitted to the sentencing authority." Mulholland, *supra* note 35, at 735.

42. 42 U.S.C. § 10606(b) (1995). A crime victim has the following rights:

(1) the right to be treated with fairness and with respect for the victim's dignity and privacy; (2) the right to be reasonably protected from the accused offender; (3) the right to be notified of court proceedings; (4) the right to be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial; (5) the right to confer with attorney for the Government in the case; (6) the right to restitution; (7) the right to information about the conviction, sentencing, imprisonment, and release of the offender.

Id.

43. *See* McMurry, *supra* note 38.

44. *See id.* (citing Paul G. Cassel & Robert E. Hoyt, *The Tale of Victims' Rights*, LEGAL TIMES, Dec. 23, 1996, at 32); *see also* 42 U.S.C. § 10606(b).

presence at trial would materially alter their testimony at the sentencing.⁴⁵

This conditional language of the Victims' Bill of Rights was tested, however, during the Timothy McVeigh trial,⁴⁶ when Judge Matsch ruled that if the victims of the crime were to testify at the sentencing, then they could not be present at the trial.⁴⁷ Consequently, most victims of the Oklahoma bombing faced a Catch-22. If they opted to testify at sentencing, then they would never see justice play out. If they watched the trial, however, then they could never personally tell the jury of their suffering.⁴⁸ Frustrated and angered by having to make such a painful choice, the victims turned to Congress in hopes of redress, arguing that the defendant had no legitimate basis for barring them from trial.⁴⁹

In response to their cries, President Clinton endorsed the "Victim Rights Clarification Act"⁵⁰ ("VRCA") on March 19, 1997, overruling Matsch's order on the eve of the trial and mandating that a crime victim be permitted to make VIS, as well as observe

45. See 42 U.S.C. § 10606(b)(4).

46. McVeigh was found guilty and sentenced to death for using an explosive-laden truck to blow up the Alfred P. Murrah Federal Building in Oklahoma City, consequently killing 168 people and injuring hundreds more. See John Gibeaut, *The Last Word: Jury Is Still Out On Effects Of Victim Impact Testimony*, A.B.A. J., Sept. 1997, at 42. Six months after McVeigh was sentenced to die, Terry Nichols was convicted of conspiring with McVeigh and eight counts of involuntary manslaughter, but acquitted of first degree murder and use of a truck bomb. See Jo Thomas, *Death Penalty Ruled Out As Nichols Jury Deadlocks in Oklahoma Bombing Case*, N.Y. TIMES, Jan. 8, 1998, at A1. Nichols, however, escaped the death penalty, on January 7, 1998, when the deeply divided jury failed to reach a unanimous decision. See *id.* (stating that after deliberating for 13 hours, over the course of two days, the Federal jury "could not decide just how active a role he played in the bombing"). Judge Matsch dismissed the jury and will now impose sentencing himself. See *id.* But, under Federal law, only a jury may impose a sentence of death; thus, Nichols will now get a life term, or possibly a lesser sentence. See *id.* (noting that Nichols still could face the death penalty should a grand jury in Oklahoma indict him and McVeigh in state murder charges).

47. See *United States v. McVeigh*, 958 F. Supp. 512, 514 (D. Colo. 1997) (excluding potential penalty witnesses from the courtroom under Rule 615 of the Federal Rules of civil Procedure); see also McMurry, *supra* note 38 (stating that Judge Matsch's concern was "[t]hat what they heard and saw in the courtroom could prejudice their testimony").

48. See McMurry, *supra* note 38.

49. See *id.*; see also 143 CONG. REC. S2507-01, S2507 (March 19, 1997) (noting that the Victim Rights and Restitution Act serves to clarify the Victims' Bill of Rights "so it is indisputable that district courts cannot deny victims and surviving family members the opportunity to watch the trial merely because they will provide information during the sentencing phase of the proceedings"); *Judge Gives Bomb Survivors OK to Attend McVeigh Trial*, S. F. EXAMINER, March 26, 1997, at A11.

50. 18 U.S.C. § 3510 (1997).

the trial itself.⁵¹ The Act's goal is to treat victims with a greater degree of respect by demanding that they be granted not only a voice by which to express their pain, but also a wider latitude of participation.⁵²

II. The Reality of Victim Impact Statements in the Courtrooms of Capital Sentencing Hearings Today

The VRCA and the *Payne* decision provide the groundwork for the law today with respect to VIS, despite their failure to specify any limitations or guidelines regarding the scope of admissible statements.⁵³ Thus, while forty-nine states presently allow the sentencing jury to consider VIS in non-capital cases,⁵⁴ the extent of their use varies distinctly from court to court, and state to state.⁵⁵ Many jurisdictions mirror the *Payne* Court's decision, broadly allowing statements from the families of victims about the impact of

51. *See id.* The statute, which is currently in effect, enacted a new provision that allows victims of crime in capital cases to observe the trial "of a defendant accused of that offense because such victim may, during the sentencing hearing, testify as to the effect of the offense on the victim and the victim's family" *See McVeigh*, 958 F. Supp. at 514 (citing 18 U.S.C. § 3510(b)). The title is short for Public Law 105-6, which the President signed. *See id.*; *see also* 143 CONG. REC. at S2508 ("This bill will ensure that victims of crimes have an opportunity to alleviate some of their suffering through witnessing the operation of the criminal justice system."); Editorial, *Oklahoma Trial Ruling Fallout*, CHI. SUN-TIMES, March 27, 1997, at 29.

52. *See* 143 CONG. REC. at S2507 (noting that "this is an important piece of bipartisan legislation that will clarify the intent of Congress with respect to a victim's right to attend and observe a trial and participate at sentencing"). One speaker, Mr. Leahy, a senator from Vermont, further noted the importance of victims both having access to the courtroom and being heard, recalling:

many times when the person being sentenced had suddenly gotten religion, had suddenly become a model person, usually dressed in a better suit and tie than I wore as a prosecutor and was able to cry copious tears seeking forgiveness and saying how it was all a mistake, sometimes reality came to the courtroom only when the victim would speak.

Id. at S2507-S2508. Mr. Leahy continued: "I remember one such victim had very little to say, with heavy scars on her face that would probably never heal. That said more than she might." *Id.* at S2508 (noting the statute's probable influence on state courts as well).

53. *See* Gibeaut, *supra* note 46, at 43. "There is simply no clear guidance [from *Payne*] as to where the line between appropriate . . . victim impact testimony ends and an appeal to passion - the human reactions, emotive reactions of revenge, rage [and] empathy, all of those things - beings,' Matsch told the lawyers before the sentencing phase began." *Id.*

54. *See* Mulholland, *supra* note 35, at 742.

55. *See id.* at 743; *see also* Oberlander, *supra* note 35, at 1627 (noting that "[w]hile almost all states allow for some form of victim impact at some stage in the judicial process, the extent of that involvement varies from jurisdiction to jurisdiction").

the death on the family.⁵⁶ Other states, however, have imposed more stringent limitations on their use.⁵⁷ For example, some states,

56. See Mulholland, *supra* note 35, at 743 & n.74. The following state statutes specifically provide for victim impact evidence from the victim's family in some form or another: ALASKA CODE § 12.55.022 (1997); ARIZ. REV. STAT. ANN. § 13-702 (Supp. 1997); ARK. CODE ANN. § § 5-65-102, 5-65-109 (Michie Supp. 1997); CAL. PENAL CODE § 1191.1 (West Supp. 1994); COLO. REV. STAT. ANN. § § 24-4.1-302, 24-4.1-302.5 (Supp. 1994); CONN. GEN. STAT. ANN. § 54-220 (West 1994); DEL. CODE ANN. tit. 11, § 4331 (Supp. 1993); D.C. CODE ANN. § 23-103 (1989); FLA. STAT. ANN. § 921.143 (West Supp. 1997); GA. CODE ANN. § 17-10-30 (Supp. 1996); IDAHO CODE § 19-5306(1)(b)(3) (Supp. 1994); 725 ILL. COMP. STAT. ANN. 120/6 (West Supp. 1997); IND. CODE § 35-50-2-9 (Supp. 1996); IOWA CODE ANN. § 901.3 (West Supp. 1994); KAN. STAT. ANN. § 8-1019 (Supp. 1994); KY. REV. STAT. § § 421.500, 421.520 (Michie/Bobbs-Merrill Supp. 1994); LA. CODE CRIM. PROC. ANN. art. 875(B) (West Supp. 1994); ME. REV. STAT. ANN. tit. 15 § 6101, tit. 17A § 1257 (West Supp. 1994); MD. ANN. CODE OF 1957 art.41, § 4-609 (1993); MASS. GEN. L. ANN. ch. 258B, § 3(p) (West Supp. 1994); MICH. COMP. LAWS ANN. § § 780.752, 780.791 (West Supp. 1994); MINN. STAT. ANN. § § 611A.01, 611A.037 (West Supp. 1994); MISS. CODE ANN. § 99-19-151, et seq. (Supp. 1994) (bound); MO. REV. STAT. § 217.762 (1994); MONT. CODE ANN. § 46-18-112 (Supp. 1993); NEB. REV. STAT. ANN. § 29-2521 (1995); N.H. REV. STAT. ANN. § 651:4-a (Supp. 1993); N.J. STAT. ANN. § 2C:44-6 (West Supp. 1995); N.M. STAT. ANN. § § 31-26-3, 31-26-4 (Michie Supp. 1994); N.Y. CRIM. PRO. § 390.30(3)(b) (McKinney Supp. 1994); N.C. GEN. STAT. § 15A-825 (Supp. 1996); N.D. CENT. CODE § § 12.1-34-01, 12.1-34-02(14) (1993); OHIO REV. CODE ANN. § § 2947.051, 2929.12 (Anderson Supp. 1996); OKLA. STAT. ANN. tit. 22, § § 982, 984 (West Supp. 1996); OR. REV. STAT. § § 137.530(3), 144.790(3) (1996); PA. STAT. ANN. tit. 71, P.S. 180-9.3 (Supp. 1995); R.I. GEN. LAWS § 12-28-3 (1993); S.C. CODE ANN. § 16-3-1150 (Law Co-op. 1993); S.D. CODIFIED LAWS ANN. § 23 A-28C-1 (Supp. 1997); TENN. CODE ANN. § § 40-35-207, 40-38-203 (1994); TEX. CRIM. PRO. CODE ANN. § 56.03 (West Supp. 1995); UTAH CODE ANN. § 76-3-207 (Supp. 1996); VA. CODE ANN. § § 19.2-264.5, 19.2-299.1 (Michie 1995); VT. STAT. ANN. tit. 13, § 7006 (Supp. 1993); WASH. REV. CODE ANN. § § 7.69.020, 7.69.030 (West Supp. 1994); W. VA. CODE § § 61-11A-2, 61-11A-3 (1995); WIS. STAT. ANN. § 950.04 (West 1994); WYO. STAT. § § 7-21-101, 7-13-303 (1994). *But see id.* at n.77 (noting that Hawaii does not have any statute or case law addressing the constitutionality of VIS); *see also* ALA. R. CRIM. P. 26.3 (1993); NEV. REV. STAT. § 176.145 (Supp. 1993). "The Alabama and Nevada victim impact statutes do not provide for victim impact statutes taken from the victim's family;" however, they do allow statements from the victim. Mulholland, *supra* note 35, at 743 & n.77.

57. See Mulholland, *supra* note 35, at 743. For example, some states impose various requirements such as:

- (1) the statements must be general and cannot delve into the victim's character and worth; (2) the statements must be read by the prosecutor, and not on the form of testimony from family members; (3) the statements cannot be unduly prejudicial to the defendant; (4) the statements must adhere to victim impact statement forms; and (5) the statements can only be used when a judge, instead of a jury, is sentencing the defendant.

Id. Cf. TEX. CRIM. PRO. CODE ANN. § 56.03 (West Supp. 1995) (requiring VIS to comply with victim impact forms); *State v. Wise*, 879 S.W.2d 494, 516 (Mo. 1994) (requiring that statements be general and not delve into the victim's character); *State v. Sumpter*, 438 N.W.2d 6, 9 (Iowa 1989) (requiring victim impact evidence to comply with victim impact forms).

such as Idaho and Georgia, limit VIS to non-capital cases,⁵⁸ while Pennsylvania, Kansas, and New Hampshire allow VIS only when a judge, and not a jury, is sentencing the defendant.⁵⁹ Currently, twelve of the thirty-eight states that impose the death penalty have permitted consideration of victim impact statements during capital sentencing hearings.⁶⁰

A. New Jersey's Approach

New Jersey is one of the states that has permitted VIS in capital cases after *Payne*, but has been particularly stern with respect to their use. On June 19, 1995, Governor Whitman signed a "victim impact statute"⁶¹ into law, which essentially provides that the prosecution may admit evidence of the victim's character and the impact of the death on the victim's survivors, but not until the defendant has placed his own character at issue.⁶² Moreover, the

58. See, e.g., *Sermons v. State*, 417 S.E.2d 144 (Ga. 1992) (following *Muckle v. State*, 211 S.E.2d 361 (Ga. 1974)); *State v. Wersland*, 873 P.2d 144, 146 (Idaho 1994) (holding VIS statements from the victim's parents to be admissible in a non-capital case); *State v. Bivens*, 803 P.2d 1025, 1026 (Idaho Ct. App. 1991) (noting that in the absence of the death penalty, the court may consider VIS during sentencing).

59. See *Mulholland*, *supra* note 35, at 743 n.76; see also, e.g., N.H. REV. STAT. ANN. § 651:4-a (Supp. 1993); PA. STAT. ANN. tit. 71, P.S. § 180-9.3 (Supp. 1994); *State v. Hill*, 799 P.2d 997, 999 (Kan. 1990).

60. See ARK. CODE ANN. § 5-4-602 (Michie Supp. 1995); COLO. REV. STAT. ANN. § 16-11-103 (West Supp. 1996); FLA. STAT. ANN. § 921.141 (West Supp. 1997); LA. CODE CRIM. PROC. ANN. art. 905.2 (West Supp. 1997); MO. ANN. STAT. § 565.030 (West 1997); MONT. CODE ANN. § 46-18-302 (1995); N.J. STAT. ANN. § 2C:11-3 (West 1995); OKLA. STAT. ANN. tit. 21, § 701.10(c) (West Supp. 1996); OR. REV. STAT. § 163.150 (Supp. 1996); PA. CONS. STAT. ANN. § 9711 (West Supp. 1997-98); S.D. CODIFIED LAWS § 23 A-27A-2(2) (Michie Supp. 1997); UTAH CODE ANN. § 76-3-207 (Supp. 1996); see also Gibeaut, *supra* note 46.

61. N.J.S.A. 2C:11-3c(6) (1995).

62. See *id.* "Unlike the open-ended federal law and many state statutes, New Jersey's only allows victim impact evidence if the defendant first presents evidence on his or her own character." Gibeaut, *supra* note 46, at 43. The law provides that:

When a defendant at a sentencing proceeding presents evidence of the defendant's character or record pursuant to subparagraph (h) of paragraph (5) of this subsection, the State may present evidence of the murder victim's character and background and of the impact of the murder on the victim's survivors. If the jury finds that the State has proven at least one aggravating factor beyond a reasonable doubt and the jury finds the existence of a mitigating factor pursuant to subparagraph (h) of paragraph (5) of this subsection, the jury may consider the victim and survivor evidence presented by the State pursuant to this paragraph in determining the proper weight to give mitigating evidence presented pursuant to subparagraph (h) of paragraph (5) of this subsection.

State v. Muhammad, 678 A.2d 164, 169 (N.J. 1996) (quoting N.J.S.A. 2C:11-3c(6)). The statute was enacted by the New Jersey Legislature in response to the Supreme Court's decision in *Payne*, as well as the constitutional authority granted by the New

Supreme Court of New Jersey has noted that despite the statute's constitutional authority under *Payne*, it "'provides an additional and, where appropriate, more expansive source of protections against the arbitrary . . . imposition of the death penalty.'"⁶³

New Jersey allows the use of VIS only in limited circumstances, and in a way that the jury will not likely become "overwhelmed and confused."⁶⁴ The Supreme Court of New Jersey refuses to admit statements by the family members that either make characterizations or elicit personal opinions about the defendant, the crime, or the appropriate sentence.⁶⁵ Any statement that is "grossly inflammatory, unduly prejudicial, or extremely likely to divert the jury from its focus on the aggravating and mitigating factors" likewise is excluded.⁶⁶ Accordingly, the New Jersey courts have limited victim impact evidence to "statements designed to show the

Jersey Victim Right's Amendment, which "explicitly authorized the Legislature to provide victims with 'those rights and remedies' that are deemed appropriate to effectuate the purposes of that Amendment." *Id.* at 170. The Victim's Rights Amendment provides:

A victim of a crime shall be treated with the fairness, compassion and respect by the criminal justice system. A victim of a crime shall not be denied the right to be present at public judicial proceedings except when, prior to completing testimony as a witness, the victim is properly sequestered in accordance with the laws of the Rules Governing the Courts of the State of New Jersey. A victim of a crime shall be Entitled to those rights provided by the Legislature. . . .

Id. at 169.

63. *Muhammad*, 678 A.2d at 173 (quoting *State v. Koedatich*, 548 A.2d 939 (1988), quoting *State v. Ramseur*, 524 A.2d 188 (1987)).

64. *Id.* at 175. The *Muhammad* Court held that a brief statement by the victim's family, as to how the murder impacted their lives, would not tend to inflame the jury anymore than would a brief statement by the defendant. *See id.* at 175 (citing *State v. Zola*, 548 A.2d 1022 (1988), cert. denied, 489 U.S. 1022 (1989) (holding that a brief statement by the defendant "would not inject fatal emotionalism into the jury's deliberations")). However, the *Muhammad* Court noted limitations on the use of such evidence, holding that if offered to rebut the defendant's presentation of mitigating evidence, the VIS must be both "relevant and reliable." *Id.* at 176. Moreover, the admission of such evidence demands a balancing test as whether its probative value is substantially outweighed by a risk of prejudice to the defendant or confusion to the jury. *Id.* The Court noted that "in each case there is a traditional guard against the inflammatory risk, in the trial judge's authority and responsibility to control the proceedings consistently with due process, on which grounds the defendant may object." *Id.* (quoting *Payne*, 501 U.S. at 836 (Souter, J., concurring)). In addition, the evaluation of specific victim impact evidence's admission should ultimately be left to the discretion of the trial court, unless such evidence is on its face clearly inadmissible. *See id.* at 176.

65. *See id.*

66. *Id.* (citing *State v. Williams*, 550 A.2d 1172 (N.J. 1988)). "Allowing such testimony could render a defendant's trial fundamentally unfair and could lead to the arbitrary imposition of the death penalty." *Id.* at 176-77.

impact of the crime on the victim's family and to statements that demonstrate that the victim was not a faceless stranger," concluding that "[t]here is no place in a capital trial for unduly inflammatory commentary."⁶⁷

The New Jersey Legislature also has taken steps to reduce the chance that the jury will misuse victim impact evidence.⁶⁸ For instance, the jury may consider victim impact evidence only if the jury finds that the State has proven, beyond a reasonable doubt, at least one aggravating factor, and the jury finds the existence of a mitigating factor.⁶⁹ Moreover, even if such requirements are met, the VIS can be used only to determine how much weight the jury will attach to the catch-all mitigating factor.⁷⁰ In contrast to other state legislatures, the New Jersey Legislature adamantly opposes the use of victim impact evidence as a general aggravating factor, in a sincere effort to shield the sentencing phase from prejudice.⁷¹ As such, the Legislature has adopted a number of safeguards to ensure that such evidence "will not be admitted in a manner that would allow the arbitrary and unconstitutional imposition of the death penalty."⁷²

67. *Id.* at 177. The *Muhammad* Court concluded that "in conjunction with the Victim's Rights Amendment, it is obvious that the electorate of New Jersey wants the State to align itself with the weight of authority that has recognized the relevance of victim impact evidence." *Id.* at 178.

68. *See id.* at 179 (noting that "the admission of victim impact evidence is limited to a clearly delineated course").

69. *See id.*

70. *See id.* "Essentially, section 5(h) is a catch-all factor of defendant's mitigating evidence not encompassed in the other defining factors." *Id.* at 170. The victim impact statute mandates that such evidence can be introduced for one purpose and one purpose only - to give the jury proper assistance in determining the appropriate weight to give the catch-all mitigating factor. *Id.* at 179. "Victim impact testimony may not be used as a general aggravating factor or as a means of weighing the worth of the victim." *Id.* "[O]ur law does not regard a crime committed against a particularly virtuous person as more heinous than one committed against a victim whose moral qualities are perhaps less noteworthy or apparent." *Id.* (quoting *Williams*, 550 A.2d at 1202).

71. *See id.* at 179. Some state legislatures have enacted statutes that essentially allow victim impact evidence to be admitted for any purpose whatsoever, as opposed to New Jersey's more stringent limitations. *See id.* (citing ARK. CODE ANN. § 5-4-602(4) (Michie 1993)); *see also* ILL. REV. STAT. Ch. 38, para. 1406 (1989). Moreover, it is apparent that the New Jersey Legislature relied upon previous state opinions which recognized the necessity of allowing capital sentencing juries to "reach a verdict and impose a penalty without inordinate exposure to unduly prejudicial, inflammatory commentary." *Muhammad*, 678 A.2d at 179 (citing *Williams*, 550 A.2d at 1204).

72. *Id.* The New Jersey victim impact statute does not automatically grant the victim's family the right to testify during the sentencing hearing. *See id.* "'[R]ather, the prosecutor is to determine what evidence, if any, should be submitted' to the

B. Recent Capital Sentencing Hearings

All of the precautions constructed by the New Jersey Supreme Court⁷³ were taken into account in the sentencing of Jesse Timmendequas, the repeat sex offender who was convicted of the rape and murder of seven-year-old Megan Kanka in 1994.⁷⁴ In response

jury." *Id.* (citing Senate Judiciary Committee, Statement to Senate Bill No. 1728, at 1 (March 20, 1995)).

The limitations that we have placed on the admission of victim impact evidence are not designed to restrict any of the rights afforded to victims by either the Victim's Rights Amendment or the victim impact statute. Rather, these controls are necessary to minimize the possibility that victim impact statements made during the penalty phase of a capital trial will inflame the jury and prevent it from deciding the proper punishment on the basis of relevant evidence.

Id. at 180. For instance, prior to commencement of the sentencing hearing the defendant must be warned that if he or she chooses to assert the catch-all factor, then the State has the freedom to introduce victim impact evidence. *See id.* Moreover, the State must provide the defendant with a list of names of all witnesses that it plans to call so that defense counsel will have a full and fair opportunity to interview such witnesses prior to their testimony. *See id.*

Recognizing the significant possibility that such evidence will prejudice the defendant, the State has also expressed that, absent any exceptional circumstances, one survivor's account will suffice to provide the jury with "a glimpse of each victim's uniqueness as a human being and to help the jurors make an informed assessment of the defendant's moral culpability and blameworthiness." *Id.* (noting that "[t]he greater the number of survivors who are permitted to present victim impact evidence, the greater the potential for victim impact evidence to unduly prejudice the jury against the defendant"). Emotions are to be kept under complete control, and the court will not hear any testimony concerning "the victim's family member's characterizations and opinions about the defendant, the crime, or the appropriate sentence." *Id.* The State has further held that the testimony of minors should be permitted "except under circumstances where there are no suitable adult survivors." *Id.*

In addition, the New Jersey judge ordinarily conducts a Rule 104 hearing before the sentencing hearing begins as to the statement's admissibility. *See id.* The testimony must be reduced to writing and can provide a general factual profile of the victim's character, as well as describe the impact of the death on the family. *See id.* The statement must be free of any "inflammatory comments or references" and must be factual, not emotional. *Id.* Moreover, the probative value of the proffered testimony cannot be substantially outweighed by the risk of prejudice to the defendant. *See id.* ("Determining the relevance of the proffered testimony is particularly important because of the potential for prejudice and improper influence that is inherent in the presentation of victim impact evidence."). However, the court notes that in making the determination of relevance, there is ordinarily a strong presumption that the victim impact evidence will be admissible if it demonstrates that the victim was a unique human being. *See id.* Finally, the prosecutor is put on notice that any comments about victim impact evidence during closing arguments must be limited to that already stated by the witness, in his or her pre-approved testimony. *See id.*

73. *See supra* notes 61-72 and accompanying text.

74. *See* Dale Russakoff & Blaine Harden, *Megan's Murderer is Sentenced To Death; Jury Finds Repeat Sex Offender's Childhood Suffering Did Not Lessen Responsibility*, WASH. POST, June 21, 1997, at A3, available in 1997 WL 11162193. Jesse Timmendequas, the repeat sex offender, was convicted of the rape and murder of 7-year-

to defense counsel's pleas for compassion, Megan's father, Richard Kanka, took the stand for the prosecution.⁷⁵ He read from a pre-approved, three-page victim impact statement,⁷⁶ portraying his daughter as a tomboy who enjoyed playing with toy trucks in the mud, and also as a girl, who adored having tea parties with her dolls.⁷⁷ Mr. Kanka also mentioned that Megan's brother, who was eighteen months older, always considered himself her protector, and has been found screaming in his closet in the middle of the night in the three years since his sister's rape.⁷⁸

As required by law, Mr. Kanka maintained his composure throughout, and kept his "emotion at bay."⁷⁹ While his statement gave the jury a glimpse into the character of Megan Kanka and the pain which her death has caused to those who loved her, it neither capitalized upon such emotions, nor made inflammatory or prejudicial comments. By adhering to the procedural safeguards mandated by the New Jersey Supreme Court, Mr. Kanka's statement balanced the sentencing hearing in the most controlled manner possible.

In the recent trial of Timothy McVeigh,⁸⁰ however, the VIS were not as strictly regulated, and the emphasis shifted dramatically from a small peek into the life of the victim to wrenching tales of the horrifically personal and emotional consequences of McVeigh's crime. The VIS permitted by the trial judge during the sentencing hearing were drenched with pain, torment, despair, and anguish.⁸¹

old Megan Kanka and was sentenced to death by a jury in Trenton, New Jersey, on July 21, 1997. *See id.* During the penalty phase, Timmendequas' lawyers pled for mercy, insisting that his intent was never to kill Megan. *See id.* They characterized him as borderline mentally retarded, perhaps due to his mother's alcoholism, a pedophile, and a victim of sexual abuse by his own father. *See id.*

75. *See* Gibeaut, *supra* note 46, at 43.

76. *See id.*

77. *See* Russakoff & Harden, *supra* note 74. He noted that her favorite color was pink and her favorite flavor of ice cream was mint chocolate chip. *See id.* "Megan was our little community newsletter," he said, "with live broadcasts nearly every day at dinner time." *Id.* Mr. Kanka also stated: "The only peace we have as parents are the moments during sleep when we don't have to deal with the harsh realities of our everyday lives." Gibeaut *supra*, note 46, at 43.

78. *See Fate of Megan's Killer Argued; Death Penalty Begins In Case That Led To Molester Notification Laws*, MILWAUKEE J. & SENTINEL, June 19, 1997, at 6, available in 1997 WL 4808789.

79. *Id.*

80. *See supra* note 46.

81. *See* Peter Gorner, *Empathy vs. Impartiality In The Courtroom; Victims Leave Lasting Impact On The System*, CHI. TRIB., June 15, 1997, at 1, available in WL 3558785 (noting that "[w]ithin minutes, six of the jurors had begun to weep").

They consumed two full days of testimony, as a parade of witnesses described in extensive detail the crime's gruesome aftermath.⁸²

One police officer gave an account of "life ebbing from the hand of a dying woman trapped by concrete rubble, whose gurgling blood was mistaken for running water."⁸³ Another heart-wrenching story described to the jury three-year-old Brendan Denny clenching a green block in his hand, with a brick embedded in his forehead.⁸⁴ And, Kathleen Treanor told the jury how she kissed her four-year-old daughter Ashley goodbye, never to see her alive again.⁸⁵ The parade of grief-stricken witnesses actually evoked

82. See Gibeaut, *supra* note 46, at 42. "[J]urors, spectators and even the judge wept as family members, rescue workers and others took the stand for two days." *Id.* at 43. U.S. District Judge Matsch's goal was to keep the sentencing hearing from turning into some kind of public "lynching;" however, his efforts were apparently not enough. See Richard A. Serrano, *Judge Restricts McVeigh Penalty Case Testimony*, L.A. TIMES, June 4, 1997, at A1, available in 1997 WL 2216846 (noting that the penalty phase "cannot become a matter of such emotional testimony which would inflame or incite the passions of the jury . . . as to whether the defendant should be put to death"). Matsch told prosecutors that he would allow relatives and survivors to take the stand, but their testimony could not address a desire for revenge nor mention the funerals of loved ones who has died as a result of the bombing. See *id.* Matsch also denied the government's request to admit certain videotapes of victims, including a home-made film of a typical day at a credit union prior to the bombing. See *id.*; see also Michael Fleeman, *Judge in Oklahoma Bombing Vows to Avoid 'Lynching,' Pares Back Hearing*, ASSOCIATED PRESS, June 3, 1997, available in 1997 WL 4869060 (noting that Judge Matsch also barred a poem by a victim's father). Despite such efforts, however, grief, sorrow, and devastation took a toll on jurors and spectators alike. See generally Gibeaut, *supra* note 46.

83. See Robinson, *supra* note 17. The use of VIS by witnesses such as police officers and coroners is obviously problematic given that bystanders are by definition not victims. Thus, to introduce such testimony serves only to capitalize upon the jurors' emotions, thereby running the impermissible risk that the death penalty will be imposed arbitrarily and capriciously. See also *infra* text accompanying notes 126-128.

84. See Robinson, *supra* note 17 (questioning how any juror could respond dispassionately to such an event).

85. Eric Pooley et al., *Death or Life? McVeigh Could Be The Best Argument For Executions, But His Case Highlights The Problems That Arise When Death Sentences Are Churned Out In Huge Numbers*, TIME MAG., June 16, 1997, at 31, available in 1997 WL 10902240. Treanor explained how after unspeakable days of waiting, she "recovered her daughter's body from the rubble, buried the little girl, and trudged on." *Id.* She said she received a call from the medical examiner's office several months later. See *id.*

He said, 'We have recovered a portion of Ashley's Hand,' Treanor testified in a trembling voice that Rose as she fought to get through each sentence, 'and we wanted to know if you wanted that buried in the mass grave or if you would like to have it.' And I said, 'Of course, I want it. It's a part of her.'

Id. That was about the extent of Treanor's testimony; for that was about all she could physically and emotionally handle. See *id.* "Treanor dissolved, her body racked by

such a "mass outpouring of empathy from those in attendance that at least one newspaper offered to provide counseling for its reporters covering the case."⁸⁶ In fact, the government ultimately cut its presentation short because of its dramatic effect.⁸⁷

Both McVeigh and Timmendequas were forced to pay for their heinous crimes with their own lives. Their sentencing hearings differed drastically, however, with respect to the use of VIS.⁸⁸ A comparison of the two hearings reveals the inconsistency that plagues capital sentencing proceedings in America. What is perhaps most troubling, however, is the grave potential for abuse in situations where the evidence against the defendant is not so overwhelming. In a case where the crime is not as atrocious, and the guilt not as obvious, the emotional impact of the VIS certainly could be the defining line between life and death.

sobs, and almost everyone in the courtroom dissolved with her. Jurors went openly, survivors wailed, reporters groped for hankies and sodden bits of tissue." *Id.* ("Through it all sat McVeigh, cold and silent as stone."). It was at this very moment that "it seemed unconceivable that the jury could do anything but sentence him to death — and that anything but simple vengeance would be the reason why." *Id.* "When the day's testimony was over, even [Judge Richard] Matsch looked shaken. 'You're human, and I'm human too,' he told the jury. '[But] we are not here to seek revenge against Timothy McVeigh.'" *Id.* But, his words appeared to have gone in vain; for no type of limiting instruction could make those jurors forget the wrenching testimony they had heard.

Other witnesses to take the stand included a ten-year-old boy, who told jurors about the loss of his mother, a woman who had volunteered to work a hotline to counsel victims, and a citizen who was moved to buy savings bonds for family members of the deceased. *See Serrano, supra* note 82. A rescue worker also testified to holding a hand in the burning rubble "only to feel the pulse stop." *Fleeman, supra* note 82. Matsch also permitted testimony with respect to the notion that some of the victims did not die instantaneously, but rather "died painfully as gravel and other debris from the falling nine-story structure filled their lungs." *Serrano, supra* note 82. In addition, Matsch allowed "photos of maimed survivors, pictures of victims being wheeled into hospitals and testimony from the coroner about the various causes of death." *Fleeman, supra* note 82.

86. *Gorner, supra* note 81.

87. *See id.* "They could see we were all physically and mentally exhausted," remarked one reporter. "Every one of the jurors cried. Reporters found themselves hugging each other for solace, sobbing, saying they couldn't take it any more." *Id.* (quoting Maurice Possley of the Chicago Tribune). "We were barely able to comprehend it. We couldn't wrap our minds around it. We were getting snapshots of a few people, but we knew that for every one of them up there on the stand, there was a score of them who weren't there." *Id.*

88. *See Gibeaut, supra* note 46, at 42.

III. Evaluating the Prejudicial Impact of Victim Impact Statements in Light of the History of the Death Penalty and the Constitutional Rights of the Capital Defendant

VIS primarily are supported on grounds of fairness to the victim.⁸⁹ It repeatedly has been argued that because a defendant may introduce mitigating evidence to inform the jury about his or her character, the State must likewise be granted the right of fair response.⁹⁰ VIS, by their nature, grant victims a new voice in the criminal justice system which can remind the capital sentencer that they also are individuals whose deaths touched the lives of many. Accordingly, victims claim that VIS rectify the imbalance pervading criminal courtroom proceedings by allowing them to participate in the prosecution of the defendant.⁹¹ Advocates further contend that VIS allow the victim a means of coping, closure, and recovery,⁹² as well as encourage cooperation between the prosecutor and the victim.⁹³

VIS, however, have not escaped constitutional challenge and debate, especially with respect to their potential violation of the constitutional rights of the capital defendant.⁹⁴ VIS primarily are criticized because they replace the rational process of imposing a death sentence with arbitrary and capricious jury discretion.⁹⁵ Many opponents argue not only that the emotional nature of VIS

89. See *supra* notes 36-39 and accompanying text.

90. See *supra* note 32 and accompanying text. But see *Payne v. Tennessee*, 501 U.S. 808, 859 (1991) (Stevens, J., dissenting) ("This argument is a classic non sequitur: The victim is not on trial; her character, whether good or bad, cannot therefore constitute either an aggravating or a mitigating circumstance.").

91. See Phalen & McClellan, *supra* note 37, at 12 (stating that the movement also "seeks to provide victims with a greater role in the criminal justice process"); see also Oberlander, *supra* note 35, at 1625.

92. See *supra* note 39.

93. See McLeod, *supra* note 39, at 504-07 (noting that VIS help victims regain control over their lives, enhance system efficiency by encouraging cooperation of witnesses, and also fulfill the victim's desire for retributive justice).

94. See *supra* note 25; see also *infra* note 95.

95. See William Hauptman, Note, *Lethal Reflection: New York's New Death Penalty and Victim Impact Statements*, 13 N.Y.L. SCH. J. HUM. RTS. 439, 475-76 (1997) (noting that "[t]he most commonly voiced objection to victim impact statements is the inherent possibility that they violate a defendant's right to equal protection"). "When our society is choosing which heinous murderers to kill and which to spare, its gaze ought to be carefully fixed on the harm they have caused and their moral culpability for that harm, not on irrelevant factors such as the social position, articulateness, and race of their victims and their victims families." *Id.*; see also Mulholland, *supra* note 35, at 746 ("Arguably, victim impact statements inject an arbitrary factor in deciding whether to impose the death penalty").

"impermissibly inflame and prejudice the jury,"⁹⁶ but that the reliability of VIS is suspect because they "are difficult to verify and impossible for the defendant to rebut."⁹⁷ Others hold that VIS are unfair because they value some lives more than others and unconstitutionally punish defendants for things which they could never have foreseen.⁹⁸ It also has been argued that their appeal to juror's emotions undermines the Supreme Court's command that the decision to impose the death penalty should be reasoned and morally sound, not discretionary and wanton.⁹⁹ Finally, it is fair to contend that courtrooms are not designed for the coping of the victim, and that the trial and conviction of the defendant is, in and of itself, an adequate vindication of the victim's rights.

A. The *Payne* Decision Reconsidered

Despite criticism and dissent, the victims' rights movement has gained momentum and nationwide support.¹⁰⁰ A majority of jurisdictions now permit VIS,¹⁰¹ and Congress has codified *Payne's* basic legal tenets.¹⁰² Moreover, popular sentiment favors the death

96. Mulholland, *supra* note 35, at 747.

97. *Id.* ("A defendant's sentence should solely be based on the severity of the crime and the defendant's record, not on the emotional impact of the victim's family.").

98. See generally *Booth v. Maryland*, 482 U.S. 496 (1987); *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934); *State v. Muhammad*, 678 A.2d 164, 175 (N.J. 1996).

99. See *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (following the holding of *Furman v. Georgia*, 408 U.S. 238 (1971) that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action"). The Court further noted that the punishment "must not involve the unnecessary and wanton infliction of pain," and "must not be grossly out of proportion to the severity of the crime." *Id.* at 173; see also Gibeaut, *supra* note 46, at 42; *infra* notes 110-115 and accompanying text.

100. See *supra* note 35.

101. See Mulholland, *supra* note 35, at 742 (noting that "[m]ost jurisdictions, including . . . the District of Columbia and the federal court system, are closely aligned with the United States Supreme Court decision in *Payne* and permit victim impact statements from the victim's family regarding the impact of the victim's death on the family").

102. See FED. R. CRIM. P. 32(c)(2)(D); see also *supra* notes 40-52 and accompanying text; Mulholland, *supra* note 35, at 735 n.29 (citing UNIF. R. EVID. 404 (a)(2) (amended 1986) (emphasis added)). The Uniform Rules of Evidence, which are more restrictive than the Federal Rules of Criminal Procedure, also provide:

(E)vidence of a pertinent trait of character of the victim offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor (is admissible for the purpose of providing that the victim acted in conformity with his character on a particular occasion).

penalty,¹⁰³ and victims' rights advocates have proposed a victims' rights amendment to the Constitution.¹⁰⁴ If VIS are going to be an intrinsic part of the criminal justice system, however, then it must be determined *how* they will be used, so as to minimize any risk of prejudice to the capital defendant.

While the *Payne* Court did hold that VIS were not an Eighth Amendment violation, the Court did "not hold . . . that victim impact evidence must be admitted, or even that it should be admitted."¹⁰⁵ In fact, the Court noted that VIS could be inflammatory in certain instances and thereby unduly prejudice the defendant.¹⁰⁶ What the Court failed to consider, however, is where to draw the line between the admissible and the inflammatory and in what manner the courts may draw it. Although the Court apparently was confident that this was a detail best left to the discretion of the trial judge on a case-by-case basis,¹⁰⁷ the blatant inconsistencies and troublesome discrepancies between the McVeigh and Tim-

UNIF. R. EVID. 404(a)(2) (amended 1986). Moreover, "(a)s crime has increased it is not illogical to believe that the trends for a more active role of the victims will increase." Anderson, *supra* note 35, at 402 (noting that "[p]olitical pressure on judges, prosecutors, and other elected officials to recognize the need for victims to participate in the punishing of the offender will continue to have a profound effect on all aspects of the criminal justice system").

103. See *supra* notes 16-17.

104. See *supra* note 38.

105. *Payne*, 501 U.S. at 831 (O'Connor, J., concurring).

106. Justice O'Connor notes:

The possibility that this evidence may in some cases be unduly inflammatory does not justify a prophylactic, constitutionally based rule that this evidence may never be admitted. . . . If, in a particular case, a witness' testimony or a prosecutor's remark so infects the sentencing proceeding so as to render it fundamentally unfair, the defendant may seek appropriate relief under the Due Process Clause of the Fourteenth Amendment.

Id. Moreover, O'Connor states that "[t]hat line was not crossed in this case," yet fails to define what exactly that line is. *Id.*

107. See *Payne*, 501 U.S. at 827 (holding that "[a] State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty is imposed"). But, in ruling that such evidence should be treated no "differently than other relevant evidence is treated" the Court seems to leave the door of admittance open to the discretion of the particular trial judge. Justice O'Connor's concurring opinion lends further support to this notion. See *id.* at 831 (noting that "[t]rial courts routinely exclude evidence that is unduly inflammatory"). In other words, if the judge chooses to admit the VIS, the Eighth Amendment will not render it unconstitutional; however, if the evidence is found to be so unduly inflammatory that its admittance would prejudice the jury against the defendant, then the judge has the option of excluding it. See *id.* And, in the event that the trial is rendered "fundamentally unfair," as a result of admitting prejudicial victim impact evidence, then the Due Process Clause of the Fourteenth Amendment can provide a means of relief. See *id.* at 825.

mendequas sentencing hearings reveal the inherent danger of such ambiguity.¹⁰⁸ Accordingly, if the use of VIS is to continue, it must be strictly regulated.¹⁰⁹

1. *Comparing Payne to Prior Supreme Court Death Penalty Jurisprudence*

The Supreme Court consistently has held that "the penalty of death may not be ordered automatically, arbitrarily, irregularly, randomly, capriciously, wantonly, freakishly, disproportionately or under any procedure that permits discrimination by race, religion, wealth, social position or economic class."¹¹⁰ For the application of the death penalty to be constitutionally valid, the procedure must carefully protect against passion or prejudice.¹¹¹ Thus, in an effort to shield the capital sentencing proceeding from the foregoing prejudices, "the Supreme Court has mandated that the sentencer be given specific guidelines which will direct and limit the sentencer's discretion."¹¹² The sentencer must weigh the aggravating and mitigating circumstances in making a reasoned determination.¹¹³ Moreover, the death penalty process must ensure individu-

108. See *supra* notes 74-88 and accompanying text.

109. The Court seems to deny the fact that VIS significantly alter traditional sentencing procedures, in stating that "[v]ictim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities." *Payne*, 501 U.S. at 825. In this respect, the Court is rather disingenuous.

110. See *United States v. McVeigh*, 944 F. Supp. 1478, 1487 (D. Colo. 1996) (noting that "[f]our separate opinions were filed in support of the judgment in *Gregg v. Georgia* . . . that a sentence to death for murder under a new sentencing scheme adopted by the Georgia legislature was not an unconstitutional punishment"). While the Supreme Court has accepted the death penalty as constitutional, individual justices continue to struggle with an exact articulation of their views "about the imperatives of a valid procedure in the many subsequent decisions approving and disapproving variations in state laws governing the extreme punishment of death." *Id.* "They have been more clear in stating what is prohibited than what is required." *Id.*; see also *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (holding that the death sentence must be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action"); accord *South Carolina v. Gathers*, 490 U.S. 805, 810 (1989). Cf. *Enmund v. Florida*, 458 U.S. 782 (1982); U.S. CONST. amend. VIII & XIV.

111. See *McVeigh*, 944 F. Supp. at 1487.

112. Thomas G. Myrum, *State v. Paz: Adoption of the Harmless-Error Standard of Review for Capital-Sentencing Errors*, 27 IDAHO L. REV. 375, 376 (1990/1991).

113. See 18 U.S.C. § 3593(c) (1995). At the sentencing hearing, any information relevant to the sentence may be admitted, including any mitigating or aggravating factor considered under § 3592. See *id.* The defendant may present any information relevant to a mitigating factor, and the government may present information relevant to a mitigating factor, for which notice has been provided for under 18 U.S.C.A. § 3593(a). See *id.* While there is some degree of variation with respect to how states qualify such "aggravating" circumstances, the aggravating factors must be "objectively

alized consideration of each defendant and allow the jury to consider both the circumstances of the crime, as well as the defendant's character.¹¹⁴ Accordingly, when making the very serious de-

provable and rationally related to the criminal conduct in the offenses proven at trial." *McVeigh*, 944 F. Supp. at 1487. "The aggravating factors function to focus the jury's attention on the particular facts and circumstances pertinent to each defendant found guilty of an offense punishable by death in the context of mitigating factors unique to him as an individual human being." *Id.* at 1488. In essence, they serve to aid the jury in distinguishing "those who deserve capital punishment from those who do not" *Id.* (citing *Arave v. Creech*, 507 U.S. 463, 474 (1993)); *see also* U.S.C. § 3593(a)(2) (1995) (setting forth the aggravating factors that the government, if the defendant is convicted, proposes to prove as justifying a death sentence).

The factors for which notice is provided under this subsection may include factors concerning the effect of the offense on the victim and the victim's family, and may include oral testimony, a victim impact statement that identifies the victim of the offense and the extent and scope of the injury and loss suffered by the victim and the victim's family, and any other relevant information.

18 U.S.C. § 3593. Aggravating circumstances often include such factors as the murder of a public official or a law-enforcement officer, murder for hire, or an especially cruel or heinous felony murder. *See* Rich Henson, *3 Men, 3 Convictions; What Happened?*, SEATTLE TIMES, June 15, 1997, at A3, *available in* 1997 WL 3238466 (noting that legal experts say that aggravating circumstances usually must be proven beyond a reasonable doubt, as opposed to mitigating circumstances, which need only be proven by a preponderance of the evidence). If no aggravating factor is found to exist, then "the court shall impose a sentence other than death authorized by law." 18 U.S.C. § 3593(d) (noting that "[a] finding with respect to any aggravating factor must be unanimous").

With respect to "mitigating" circumstances, the Supreme Court has mandated that the defendant has the constitutional right to present all relevant mitigating factors that could support a sentence less than death. *See* 18 U.S.C.A. § 1392(a) (West 1997) (listing all mitigating factors which the finder of fact shall consider in determining whether a sentence of death is justified). Such factors include: "impaired capacity;" "duress;" "minor participation;" "equally culpable defendants;" "no prior criminal record;" "disturbance;" "victim's consent;" and, "other factors in defendant's background, record, or character or any other circumstance of the offense that might mitigate imposition of the death sentence." *Id.* at §§ (a)(1)-(8); *see also*, 18 U.S.C.A. § 3593(c) (mandating that "the burden of establishing the existence of any mitigating factor is on the defendant, and is not satisfied unless the existence of such a factor is established by a preponderance of the information"); *McVeigh*, 944 U.S. at 1487 (stating that "[t]here can be no limitation on the ability of individualized jurors to consider mitigating factors"); *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982).

114. *See* Myrum, *supra*, note 112, at 376-77; *see also* *Zant v. Stephens*, 462 U.S. 862, 879 (1983) (stating that a jury must make an "individualized determination" as to whether the defendant should be sentenced to death, based on "the character of the individual and the circumstances of the crime"); *Enmund*, 458 U.S. at 801; *Woodson v. North Carolina*, 428 U.S. 280, 281 (1976) (noting that "[t]he respect for human dignity underlying the Eighth Amendment . . . requires consideration of aspects of the character of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of imposing the ultimate punishment of death").

termination whether to execute the defendant, the jury must "focus on the defendant as a 'uniquely individual human bein[g].'"¹¹⁵

Before the *Payne* Court's ruling, the decision to impose the death penalty was applied universally and dispassionately.¹¹⁶ Any evidence that did not inform the jury about the character of the crime or the character of the defendant was automatically disregarded.¹¹⁷ Under the confines of such a controlled standard, each defendant was equal in the eyes of the sentencer.¹¹⁸ The *Payne* decision, however, marked a deviation from traditional procedures, in an eager attempt to grant the victim a higher degree of equality.

This effort to balance the rights of the victim with those of the defendant, however, comes with a hefty price. Although the "uniqueness" of the victim, his or her character and reputation, the victim's family, and the emotional impact of the crime are presented to the jury, there is a grave risk that some victims' lives will be valued more than others.¹¹⁹ Moreover, the victim impact evidence creates a "'tactical' 'dilemma' for the defendant because it allows the possibility that the jury will be so distracted by prejudicial and irrelevant considerations that it will base its life-or-death decision on whim or caprice."¹²⁰

2. *The Payne Decision's Troublesome Implications*

VIS, by their nature, focus on the victim's uniqueness—a notion that represents a complete departure from the traditional focus on the defendant. Although this departure may be warranted, both by society and the ideals of justice,¹²¹ it is gravely important not to violate the constitutional confines of rational and moral sentencing

115. *Booth v. Maryland*, 482 U.S. 496, 504 (1987) (quoting *Woodson*, 428 U.S. at 304 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.)). "[I]t is the function of the sentencing jury to 'express the conscience of the community on the ultimate question of life or death.'" *Id.* (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968)).

116. *See Staples*, *supra* note 17, at A26 ("In the interest of equal justice, the same, dispassionate standard was to be applied to every crime and to every defendant, whether rich or poor, criminal or upstanding, loved or despised.").

117. *See id.*

118. *See id.*

119. *See Payne v. Tennessee*, 501 U.S. 808, 866 (1991) (Stevens, J., dissenting) (asserting that "[t]he fact that each of us is unique is a proposition so obvious it requires no evidentiary support"). In fact, "[s]uch proof risks decisions based on the same invidious motives as a prosecutor's decision to seek the death penalty if a victim is white but to accept a plea bargain if the victim is black." *Id.*

120. *Payne*, 501 U.S. at 864 (Stevens, J., dissenting) (citing *Booth*, 428 U.S. at 506-507).

121. *See generally supra* notes 35-39 and accompanying text.

procedures in doing so. The justice system simply cannot allow arbitrary and prejudicial factors to constitute the means of VIS, regardless of the importance of the ends of protecting victims' rights. It is untenable to permit a decision as grave as the death penalty to "turn on the perception that the victim was a sterling member of the community rather than someone of questionable character."¹²²

The Supreme Court merely danced around this issue in *Payne*, stating that victim impact evidence "is not offered to encourage comparative judgments of this kind," but rather to reveal "each victim's 'uniqueness as an individual human being,' whatever the jury might think the loss to the community resulting from his death might be."¹²³ This argument ignores the vulnerability of human emotions. Thus, the Court failed to address the troublesome implication of allowing emotionally laden factors, such as the circumstances of the victim's death, the community's recollections of the victim's benevolence, or the degree of emotional distress suffered by the family, to be included in the VIS.¹²⁴

Recall the emotional roller coaster of the McVeigh sentencing.¹²⁵ The sobering tales and gruesome memories of the victims were painful enough for any juror to hear, but when coupled with the graphic and horrific details recalled by rescue workers, police, and coroners, the grief became simply too much for any human to handle.¹²⁶ Certainly no juror could have been expected to set emotions aside and make a decision based on reason alone. The alleged purpose of VIS is to grant *victims* a voice, by which those victims may cope and obtain closure.¹²⁷ At no point throughout the entire course of the victims' rights movement, however, has anyone advocated the need to grant bystanders a voice. Thus, the testimony admitted by Judge Matsch from witnesses, such as the police and coroners, was completely unwarranted and provided an

122. *Booth*, 482 U.S. at 506 & n.8 (stating that "[w]e are troubled by the implication that defendants whose victims were assets to the community are more deserving of punishment than those whose victims are perceived to be less worthy").

123. *Payne*, 501 U.S. at 823.

124. Perhaps the Court overlooks the fact that we, as human beings, are by nature all unique individuals, no matter what our position in society may be. Certainly any member of the jury can well recognize such a notion without the aid of detailed description by the victim's family. "What is not obvious, however, is the way in which character or reputation in one case may differ from that of possible victims," and where evidence that dwells on a victim's social status is admitted to prove such differences, some victims are consequently rendered more deserving of protection and life than others. *Payne*, 501 U.S. at 866 (Souter, J., dissenting).

125. See *supra* notes 80-87 and accompanying text.

126. See *supra* notes 85-86 and accompanying text; see generally *id.*

127. See *supra* note 39 and accompanying text.

even greater imbalance to the capital sentencing hearing.¹²⁸ To open the door to testimony by professionals who have chosen to routinely interact with crisis situations serves only to unduly prejudice a jury that has already heard the testimony of the victims themselves. Accordingly, Judge Matsch's lack of control over the sentencing hearing completely undermined McVeigh's constitutional protections and rendered the jury's decision to impose the death penalty both arbitrary and capricious.

In McVeigh's case, the heinousness of his crime made the outcome fairly predictable, but in countless other cases VIS could be the defining line between life and death.¹²⁹ Without a more controlled and uniform employment of VIS, their use becomes troublesome and highly prejudicial. This result was not expected by the *Payne* Court, and does not constitute a reasoned and moral application of the death penalty under the Eighth Amendment.¹³⁰

3. *Proposals to Limit Payne*

To permit anything less than controlled and uniform procedures for admitting VIS is potentially to open a "Pandora's box" of possibilities for a prosecutor seeking the death penalty."¹³¹ Consider the ramifications of a sentencing hearing that permits evidence, such as the victim's resume, diary, funeral eulogy, poetry, art work, pictures, and trophies, as well as tales by the victim's family of their loved one's goals, dreams, and aspirations. Moreover, imagine the admission of testimony from people that the victim assisted emotionally and economically as a result of volunteer work, or patients of the victim's medical practice who would testify to the victim's ability to save lives, or even fellow parishioners of the victim's church who would recall the victim's regular attendance and heartfelt generosity. Absent more narrowly defined guidelines or crite-

128. See *supra* notes 83-85 and accompanying text.

129. See *supra* note 18.

130. See U.S. CONST. amend. VIII (dictating that "cruel and unusual punishments" should not be inflicted); see also *supra* notes 110-112 and accompanying text; *Payne* 501 U.S. at 824 (noting that "[w]here the State imposes the death penalty for a particular crime, we have held that the Eighth Amendment imposes special limitations upon that process").

131. Anderson, *supra* note 35, at 405. Imagine just how far the line could be pushed. See *id.* (noting that the prosecutor might attempt to submit "work performance evaluations, recorded testimonials, funeral eulogies, or even a high school report card, in an effort to demonstrate the loss to the family and community"). It doesn't take much of an imagination to fathom what the future might hold if the reigns of admittance are not tightened severely. McVeigh's sentencing might only have been the beginning, rather than the extreme.

ria from the Supreme Court, Congress, or state legislatures, there exists too grave a potential that the *Payne* holding will be improperly interpreted.¹³²

Although proponents of VIS put forth a number of "compelling arguments,"¹³³ the fundamental concern underlying the movement for victim participation is human emotions.¹³⁴ Most victims may be

132. See *Lee v. State*, 942 S.W.2d 231, 236 (Ark. 1997) (allowing VIS by the victim's sister describing the painful experience of selecting the victim's wig for the funeral); *Hicks v. State*, 940 S.W.2d 855, 857 (Ark. 1997) (Brown, J., concurring) (permitting into evidence a 14 minute silent videotape, accompanied by a family member's tearful narration, that contained approximately 160 photographs spanning the entire life of the victim). While more than 60 of the photos depicted stages of the victim's life from when he was a toddler up to his marriage and birth of two children, another 70 or so were dedicated to the lives of his two sons, tracing their growth from infancy to adulthood, and the remaining pictures ranged from "family events, such as Thanksgiving dinner, to the victim's involvement with various aspects of the carnival business." *Id.* But see *Ledbetter v. State*, 933 P.2d 880, 890 (Okla. Cr. 1997) (finding error in admitting portions of a VIS that "described the murder as a 'selfish act,' related one child's opinion that his mother was 'butchered like an animal,' and recalled one child's memory that Appellant had threatened to kill the victim and 'somehow I knew in my heart he meant it'"). Despite such a ruling, however, the *Ledbetter* court held that the survivor's opinion that the death penalty was an appropriate sentence was not improper. See *Ledbetter*, 933 P.2d at 891. Cf. *Conover v. State*, 933 P.2d 904, 920 (Okla. Cr. 1997) (holding that the admitted VIS tipped the scales too far in favor of the prosecution). The court rendered statements such as the victim was "butchered like an animal," that the defendant was a "parasite" and "murderous animal" failed to "shed any light on the victim's life or the impact of the loss of the victim to his family." *Conover*, 933 P.2d at 920-21 (stating that "such statements are inflammatory descriptions designed to invoke an emotional response by the jury"). Moreover, the court found that the VIS which described the victim as a baby, his childhood, and his parent's dreams and hopes for his future "in no way provide insight into the contemporaneous and prospective circumstances surrounding his death; nor do they show how the circumstances surrounding his death have . . . impacted a member of the victim's immediate family." *Id.* at 921. As such, the commentary was deemed to have been more prejudicial than probative and thus outside of the permissible scope of victim impact evidence. See *id.* at 920. The case was remanded for resentencing because of the trial court's failure to provide the defendant with his right of confrontation; thus, the actual effect of having improperly admitted such prejudicial victim impact evidence was addressed only in dicta. See *id.* See also *State v. Tucker*, 478 S.E.2d 260, 267 (1996), cert. denied, 117 S.Ct. 1561 (1997) (admitting photographs during sentencing hearing so as to depict "shots to Victim's head and that they were fired at close range," as well as color photos "to show the difference between the blood Victim coughed up and the blood from her wound"). In addition, the sentencing judge admitted photos of "Victim at different places on vacation, Christmas decorations in Victim's yard, Victim holding her godchild, and Victim fishing." *Tucker*, 478 S.E.2d at 27 (holding that such victim impact evidence was admissible to show the victim's uniqueness and that nothing shown by the photographs would render the trial fundamentally unfair).

133. See *supra* notes 36-39 and accompanying text; see also *supra* text accompanying notes 89-93.

134. Anderson, *supra* note 35, at 399 (noting that "[e]motional considerations and recognition of the victim's personal suffering play a major role. . .").

motivated to tell their story out of a sincere desire to attain closure. However, what if the victim instead is motivated by spite?¹³⁵ It is often difficult to tell exactly where the victims' motivations lie, and the judicial process should not be jeopardized by allowing America's courtrooms to become a dwelling place for bloodthirsty revenge.¹³⁶ The death penalty cannot bring back the dead, nor is its purpose to serve in the interest of vengeance.¹³⁷ Wounds that cut as deep as these never will be healed by the death of another.¹³⁸

135. One commentator noted that "[t]here is also a calculated judgment that the sentencer who hears from the victim or the victim's family will find the victims suffering more reason to hold the defendant responsible and thus will sentence more stringently." *Id.* at 400 (citing Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411, 1416 (1993)). Others asserted that opening the door to VIS "marks the resurgence of vengeance by victims and families through the criminal justice system since direct participation in the courtroom provides an alternative to vigilante justice." *Id.*

136. The pain and suffering which victims' families endure as a result of their loss is no doubt extreme, but America's courtrooms are not a place for emotional outbursts and inflammatory comments. As one observer noted:

Until quite recently, bereavement brought a period of reflection. But over the last decade, the solemn activity of mourning has become a raucous and public blood sport. In the television age anguish only seems real when broadcast over the airwaves. . . . The bereaved now hold regular press conferences, as did Ronald Goldman's father almost every day of the O.J. Simpson trial. Elsewhere, family members leave the courtroom with high fives and fists in the air as though sentencing someone to death were no more serious than a football game. I understand the depth of the pain and the desperate quest for relief. But the judicial system and courtroom were meant for a different purpose entirely.

Staples, *supra* note 17.

137. See Hauptman, *supra* note 95, at 479 (noting that "vengeance is an inappropriate rationale for allowing the use of victim impact statements"). "Vengeance is pure anger manifested by uncontrollable, prejudicial outbursts. This leads to disproportionate sentencing which hinges on the eloquence (or mere presence) of family members." *Id.*

138. See Wallechinsky, *supra* note 16 (article exploring why a minority of victims' families actually oppose the death penalty for the very people who murdered their loved ones). Bud Welch's daughter, Julie Marie, was a victim of the Oklahoma bombing. See *id.* He recalls a conversation he had once shared with his daughter about the death penalty and their mutual opposition to it. See *id.* He admits wavering, however, after Julie's death because he was consumed by rage and hate. See *id.* (stating that "[t]he first half year after the bombing, had I known that McVeigh was guilty, I would have been for his execution"). As time passed, however, Welch's outlook altered. He recalled:

[A]fter time, I was able to examine my conscience, and I realized that if he is put to death, it won't help me in the healing process. People talk about execution bringing 'closure.' To hell with 'closure.' My little girl is not coming back, and that's for the rest of my life.

Id. Celeste Dixon is another victim who opposes the death penalty. See *id.* (noting that she started to feel sorry for the man who killed her mother). See comments:

There's a tendency in victims' support groups and within prosecuting attorneys' offices to make people feel that they are being disloyal to the person

That is simply not the nature of the healing process, and it is not the purpose or the intent of the criminal justice system.¹³⁹ The law is not a form of therapy, but rather, a means of justice.

The Eighth Amendment dictates that reason, morals, and precision must reign supreme.¹⁴⁰ Thus, a means must be developed for granting the victim a voice that does not capitalize on inflammatory and emotional factors or unduly sway the jury with wrenching tales of sorrow and pain. Under proper guidelines, VIS should contain no more than a general description of the victim. Any statements dealing with social status, religion, and political beliefs should be prohibited because they serve no more than to capitalize upon the jury's emotions and preconceived ideals. Moreover, commentary about the victim's funeral and gory, distasteful details or characterizations of the crime itself should be exempt on the grounds that such statements open the door to passion and prejudice.¹⁴¹ In addition, any opinions regarding the death penalty, appropriate sentencing, or the defendant must be barred on the grounds that they are irrelevant to the decision of whether or not to impose the death penalty, as well as prompt irrational and emotionally charged decision-making.

B. Minimizing the Prejudice of *Payne* by Imposing a Set of Stringent and Uniform Guidelines

The *Payne* Court's ambiguity regarding the proper procedures for admitting victim impact evidence during a capital sentencing trial is troublesome. While the interests of the victim are impor-

who died if they don't want the murderer to die. They're led to expect that the murderer's death is going to help them heal. It doesn't. All it does is make them focus on anger and hatred. After the execution, the object of their hatred is gone, and they still haven't dealt with their grief.

Id., at 4-5.

139. "Sentencing in criminal cases is said to serve all or part of four purposes: (1)retribution; (2)deterrence; (3)incapacitation; and (4)rehabilitation." Hauptman, *supra* note 95, at 478.

140. See *supra* note 110-112 and accompanying text; see also U.S. CONST. amend. VIII (mandating against the infliction of "cruel and unusual punishments"); *supra* note 99.

141. One need not be a "bleeding-heart liberal to be wary of injecting too much emotionalism into death penalty cases." Cathy Young, *Let's Keep the Focus on the Perpetrator of Crime*, DET. NEWS, June 24, 1997, at A7, available in 1997 WL 5590501. While the suffering of those affected by the heinous crime is indeed something we should consider, it is crucial to remember that "we differentiate degrees of homicide not according to the victim's pain or the survivor's grief, but according to the intent and the moral culpability of the perpetrator, and that's where the focus should remain." *Id.*

tant, a death sentence free from passion or prejudice must remain the primary concern. When the decision whether to execute a person is based on arbitrary factors, inflammatory comments, or an appeal to juror emotions, the death penalty is no longer being applied objectively or reasonably. It thus follows that VIS demand the most stringent, controlled, and narrowly defined means of regulation possible given their potential to render a capital defendant's trial fundamentally unfair. Assuming, therefore, that a majority of courts will continue to use VIS, it is necessary to determine how courts can apply them in a manner which *least* prejudices the defendant's right to a trial free from passion and prejudice.

1. *Proposed Procedural Safeguards*

In order to prevent a decision as grave as sentencing a human to death from resting on arbitrary, subjective, and capricious factors, a test no less restrictive than strict scrutiny is demanded.¹⁴² From a constitutional perspective this is crucial because fundamental rights mandate the highest judicial scrutiny.¹⁴³ And, the right to a capital sentencing hearing free from passion and prejudice is fundamental because the Eighth Amendment has consistently been interpreted to guarantee such a right.¹⁴⁴ Accordingly, the means employed to achieve this kind of justice must be *directly* related to the state's compelling interest in ensuring that right.¹⁴⁵

Improperly employed VIS can violate a defendant's fundamental rights. Thus, their use must adhere to a very stringent set of guidelines that should be expressed in a constitutional amendment,¹⁴⁶

142. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (holding that "all racial classifications, imposed by federal, state, or local government actor, must be analyzed by strict scrutiny"). The same analysis would apply to capital sentencing hearings; for rights at risk here are equally fundamental. In fact, no right could be more fundamental than the right to life. As such, nothing short of strict scrutiny should apply. "The strict scrutiny standard analysis requires that the legislative purpose be so compelling as to justify the means utilized." 20 N.Y. JUR. 2d *Constitutional Law* § 356 (1982). In other words, the ends must be narrowly tailored to the ends.

143. See *id.* (noting that "classifications affecting fundamental interests . . . are subject to the strict scrutiny test").

144. See *supra* notes 110-115 and accompanying text; see also); *Woodson v. North Carolina*, 428 U.S. 280, 228 (1976); *Gregg v. Georgia*, 428 U.S. 153, 173 (1976); *Robinson v. California*, 370 U.S. 660, 666 (1962); *United States v. McVeigh*, 944 U.S. 1478, 1487 (D. Colo. 1996) (noting that "the procedure must protect against a decision motivated by passion and prejudice").

145. See *supra* note 142; see also 16A AM. JUR. 2d *Constitutional Law* § 750 (1979) ("Statutes affecting fundamental constitutional rights must be drawn with precision and must be tailored to serve their legitimate objectives . . .").

146. The process of achieving an amendment is not an easy one. Under Article V of the Constitution, the process does not even begin unless "two-thirds of both

thereby ensuring that the law will be applied fairly and consistently. By incorporating victims' rights into the "supreme law of the land,"¹⁴⁷ all judges and courts will be compelled to comply with minimum requirements. Moreover, the procedure of admittance should be clear and unambiguous, leaving no room for abuse of discretion, thereby reducing the costs of frivolous appeals.

The procedural safeguards outlined by the New Jersey Supreme Court provide the best starting point for establishing a universal set of guidelines because they address the needs of the victim, while, at the same time, protect the defendant's constitutional rights.¹⁴⁸ In fact, the sentencing of Jesse Timmendequas was a perfect example of how such safeguards effectively can control passion and prejudice.¹⁴⁹ Timmendequas' gruesome crime certainly had the makings for a wrenching sentencing hearing.¹⁵⁰ Forced to comply with the state's requirements, however, Mr. Kanka controlled his emotions, and his testimony granted the jury only a small peek into the life that was destroyed.¹⁵¹ The VIS did not capitalize on the suffering of the victims, but still reminded the jury that they were dealing with human beings. Moreover, despite the court's limitations, it was inevitably clear that the defendant's actions caused an innocent family incredible suffering. Mr. Kanka's testimony thus accomplished all that was ever desired by victims' rights advocates, without jeopardizing the defendant's right to a sentencing free of arbitrary and capricious factors.

Houses propose an amendment, or if the legislatures of two-thirds of the states call for a constitutional convention." GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 75 (3d ed. 1996). Furthermore, in order for the amendment to be adopted, it must be ratified by three-fourths of the states. *See id.* It should be noted that this amendment may also be used as a template for state statutes. Nonetheless, I am proposing a constitutional amendment because that is the direction things are heading. *See McMurry, supra* note 38 (setting forth the contents of the current proposal). For the sake of administrative convenience, it seems most logical to adhere to this current trend, given that if passed, the law would apply universally to all states, as opposed to proposing that all fifty states adopt identical statutes.

147. *Marbury v. Madison*, 5 U.S. 137, 180 (1803) (holding that "the particular phraseology of the constitution of the United States confirms and strengthens the principle . . . that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument").

148. *See supra* notes 61-72 and accompanying text.

149. *See supra* notes 74-79 and accompanying text.

150. *See supra* note 74.

151. *See supra* notes 76-79 and accompanying text.

2. *Proposal for a Constitutional Amendment*

The following proposal for an amendment to the United States Constitution establishes guidelines and procedural safeguards to effectively minimize the risk of prejudicing the jury against the capital defendant.¹⁵²

The trial judge, because of her familiarity with the case, knowledge of and respect for the law, and inherent authority to control and provide a fair courtroom, is in the best position to undertake the balancing test outlined by the following guidelines:

Section 1. The victim impact statement first must be written out and submitted to the judge for approval. The testimony may relate to the impact of the victim's death on his or her *immediate* family. It may also contain general commentary about the victim, such as education, age, employment, and family.¹⁵³ Moreover, the VIS must adhere to the following standards:¹⁵⁴

- [1] It can be no more than 2 pages, double-spaced.
- [2] It can make absolutely no reference to or opinions about the death penalty or appropriate sentence.
- [3] It can express no feelings or opinions about the defendant.
- [4] It must refrain from making any characterizations about the circumstances of the crime.
- [5] It must not assert any comment about the victim's moral views or religious affiliation.
- [6] It must be void of overtly emotional or inflammatory comments.
- [7] It must avoid all commentary that touches upon the victim's social status or political beliefs.

152. The proposed amendment relies heavily upon many of the concerns of the New Jersey Supreme Court. *See supra* notes 61-72 and accompanying text.

153. This prong closely adheres to the language of *Payne*. The *Payne* Court held that "evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

154. With respect to subsections [2] and [3], however, the *Payne* Court refrained from deciding the constitutionality of such commentary. *See id.* at 832-33 (O'Connor, concurring). *But see* *Booth v. Maryland*, 482 U.S. 496, 508 (1987) (holding that such information "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"). Moreover, the *Booth* Court noted that the admission of such "emotionally charged opinions . . . is inconsistent with the reasoned decisionmaking we require in capital cases." *Id.* at 508-09; *see supra* note 25.

Section 2. The probative value of the victim impact evidence must not be substantially outweighed by its risk of undue prejudice to the capital defendant or confusion to the jury.¹⁵⁵

Section 3. If admissible under Sections 1 and 2, only one spokesperson may speak to the jury on behalf of all victims. That person must be over the age of eighteen, unless no other survivors are available to testify. In such an event, admissibility will then be left to the discretion of the trial judge. The testimony shall take the form of reading from the pre-approved statement, and the designated reader shall refrain from crying or showing any overt signs of emotion. The judge will warn the designated reader of this requirement beforehand. If there is a problem controlling emotions, the prosecutor will be appointed to read the statement.

Section 4. The VIS shall be read only if the defendant opens the door to character evidence by introducing mitigating evidence at the sentencing.

Section 5. The defendant shall be forewarned that if he or she chooses to introduce mitigating evidence, then the government will likewise have the opportunity to introduce evidence about the character of the victim by way of VIS.

Section 6. Defense counsel shall be given timely notice of the government's intentions to present victim impact evidence and the name of the victim who will testify. Defense counsel may interview the witness beforehand and cross-examine the witness at the sentencing hearing.¹⁵⁶

Section 7. Any comments by the prosecution during summation, with respect to the victim impact evidence, should be strictly limited to the previously heard testimony.

Section 8. In response to the reading of the VIS, the judge shall give the jury a limiting instruction. The jury shall be ordered to

155. This prong essentially mirrors the language of Rule 403 of the Federal Rules of Evidence, which holds: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

156. The prospect of cross-examining a witness is not appealing. Consider the ramifications of attacking the character of the grieving widow or the reputation of the suffering parent. The mere possibility of causing the witness more pain and anguish seems to render cross-examination a far too risky endeavor for the defense attorney, especially given the likely response of the jury. Nevertheless, as a matter of due process, the defendant is entitled to a rebuttal of the evidence offered against him or her. See *Booth*, 482 U.S. at 507 (citing *Gardner v. Florida*, 430 U.S. 349, 362 (1977) (opinion of Stevens, J.) (due process requires that defendant be given a chance to rebut presentence report)).

make a reasoned and moral judgment, and not be swayed by emotions or sympathy. The judge shall remind the jury that while emotions are indeed powerful, a death sentence cannot be motivated by vengeance, and emotions cannot be a factor in determining a sentence. In addition, the judge shall note that VIS are designed to give the jury a small glimpse into the life of the victim and the suffering that his or her death imposed on the survivors. However, the full extent to which the victim's survivors have suffered cannot be the grounds for determining the defendant's moral culpability. The jury shall concentrate on the circumstances of the crime and the defendant's record in making a sentencing determination.

3. *Discussion of Amendment*

The above guidelines do not require the jury to first find evidence of one aggravating factor beyond a reasonable doubt before considering the VIS, as the New Jersey Supreme Court does, because such mental gymnastics are well beyond the comprehension of a lay juror.¹⁵⁷ Thus, if the defendant opens the door to such evidence, the jury may consider it. In addition, the above proposal strictly limits the victim impact testimony to one survivor, while the New Jersey Supreme Court leaves the door open to "special circumstances."¹⁵⁸ Given the high potential of undue prejudice that can result from days of heart-wrenching testimony, there can be no room for discretion on the part of the sentencing judge to allow

157. See *supra* notes 69-71 and accompanying text. By invoking such a limitation, New Jersey seeks to prevent VIS from becoming "a means of weighing the worth of the defendant against the worth of the victim." *State v. Muhammad*, 678 A.2d 164, 179 (N.J. 1996). And, in essence, that is exactly what this Constitutional Amendment is trying to prevent. However, New Jersey's means of achieving this goal is somewhat thwarted; for once the jurors hear the VIS, it will be virtually impossible for them to forget what was said should they not unanimously find the existence of an aggravating factor. See *id.* While the *Muhammad* Court maintains that "[t]he entire structure of the penalty phase of capital cases is premised on the belief that jurors will use evidence only for its proper purpose," it is unlikely that emotionally laden testimony of this nature could ever be completely ignored, especially given the weakness of human emotions. See *id.* Perhaps the New Jersey Supreme Court overlooked the fact that juries are not typically comprised of trained legal professionals, but rather lay persons whose knowledge of and experience with the law is minimal. The risk that the jurors will misuse the VIS is significant; thus, any effort to impose such complex rules is in vain. Given the likelihood that the other narrowly defined guidelines will counter any risk of prejudice, the VIS may therefore be considered whenever the defendant opens the door to such evidence.

158. See *Muhammad*, 678 A.2d at 180. The Court fails to specify what such circumstances may be; however, the mere possibility of an exception to the rule creates the inherent danger of a slippery slope.

statements from more than one survivor. Finally, at the conclusion of the victim impact testimony, the judge also will be required to give a limiting instruction as to the extent of the testimony's use in order to temper the effect of human emotions. The instructions are to remind jurors of the goals of sentencing and the higher ideals of the justice system, in order to prevent them from reaching a decision based on fleeting emotions.

These guidelines are not inconsistent with the *Payne* decision. They merely clarify its ambiguities and ensure that VIS are properly employed. The *Payne* Court noted that "(t)here is no reason to treat such evidence differently than other evidence is treated,"¹⁵⁹ and thus, VIS, like all other evidence, must be susceptible to tests of relevance, reliability, and prejudice. Although the traditional focus on the defendant may have shifted, the *Payne* Court did not rule that VIS are exempt from the traditional admissibility standards for evidence.¹⁶⁰

Conclusion

In many cases, VIS have the potential to make a marked difference between life and death. Faced with the inconsistent state of the law after *Payne*, efforts must now be directed towards controlling the prejudicial impact of VIS, in order to avoid unduly prejudicing defendants in capital sentencing hearings. An amendment to the United States Constitution is the most adequate protection against the influence of passion and prejudice. The gravity of the sentence demands such uniformly stringent control, and the rights already defined by the Constitution compel nothing less. By applying the safeguards set forth by these guidelines, courts throughout the United States can avoid inconsistent, capricious, and arbitrary decisions. To permit otherwise would be to run the impermissible risk of tipping the scales of justice, thereby denying the possibility of equality in the courtroom.

159. *Payne*, 501 U.S. at 826.

160. *See id.*; *see also supra* notes 105-106 and accompanying text.

