The Relevance of "Execution Impact" Testimony as Evidence of Capital Defendants' Character

Darcy F. Katzin
NOTES

THE RELEVANCE OF “EXECUTION IMPACT” TESTIMONY AS EVIDENCE OF CAPITAL DEFENDANTS' CHARACTER

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INTRODUCTION

Most states prohibit capital defendants from introducing testimony during the sentencing phase of death penalty cases about the effect that their execution would have on their family and friends.1 The primary explanation offered by courts that have considered and rejected such testimony is that the effect of an execution on third parties is not relevant to determining a capital defendant's culpability.2 Only a few courts presently allow defendants to introduce “execution impact” testimony.3 Of these few, only the court in State v. Stevens4 addressed the admissibility of “execution impact” testimony in detail. In Stevens, the Supreme Court of Oregon held that third party impact evidence is admissible because it circumstantially sheds light on the defendant's character and might, therefore, provide some basis for imposing a sentence less than death.5

When courts address the issue of whether to admit “execution impact” evidence during the sentencing phase of death penalty cases, the threshold inquiry is whether such evidence is relevant to the capital sentencing determination. Two lines of Supreme Court cases illustrate the main theories of relevance that the Court has applied to admit evidence during capital sentencing trials.6 One line of cases examines only the admissibility of mitigation evidence,7 while the other line of

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1. For a discussion of the law regarding execution impact evidence, see infra Part III.
4. 879 P.2d 162 (Or. 1994).
5. See id. at 168.
6. The two theories of relevance in the context of “execution impact” evidence are based upon the retributive theory of punishment. This is the dominant theory used by courts that have considered such evidence. See infra note 62.
7. See, e.g., Skipper v. South Carolina, 476 U.S. 1, 4-5 (1986) (admitting circumstantial evidence of character as mitigation evidence); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (holding that a capital jury must consider evidence that tends to mitigate a defendant's guilt); Woodson v. North Carolina, 428 U.S. 280, 301-05 (1976) (holding that capital sentencing determinations must be individualized). For a detailed discussion of the mitigation theory of relevance, see infra Part II.A.
cases considers the admissibility of both mitigation evidence and victim impact evidence.  

Careful comparison of these two lines of cases reveals inconsistencies in the Court's reasoning, which raises questions about whether courts are wrong to exclude "execution impact" testimony during the sentencing phase of death penalty trials. Specifically, the Court applies a different theory of relevance depending on which party offers particular evidence in capital cases. While defendants are generally limited to offering evidence relating to their "moral culpability," the government, in addition to providing such evidence, is also permitted to introduce testimony about the harm that the defendant has inflicted on third parties. This Note examines how courts' use of these two theories of relevance leads to inequality and violates capital defendants' Eighth Amendment rights. This Note suggests that courts should apply uniform reasoning to all evidentiary determinations made during capital penalty trials.

Part I of this Note provides background information on the Supreme Court's regulation of death penalty statutes. Part II examines the two theories of relevance that courts use to determine the admissibility of evidence in the sentencing phase of death penalty trials. Part III discusses the state of the law regarding the admissibility of "execution impact" evidence at penalty trials. Specifically, this part looks at the majority and minority views on this issue, along with the rationales offered by courts for the acceptance or rejection of such evidence. Finally, part IV argues that courts must allow juries to consider "execution impact" testimony as mitigation evidence. This part analyzes two significant inconsistencies in courts' reasoning for their exclusion of "execution impact" evidence.

I. The Supreme Court's Constitutional Regulation of the Death Penalty

The Supreme Court began regulating state administration of the death penalty in 1972. In Furman v. Georgia, the Court held in a per curiam opinion that the death penalty, as applied in the three

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8. See, e.g., Payne v. Tennessee, 501 U.S. 808, 827 (1991) (holding that victim impact evidence is admissible in capital sentencing trials). Victim impact evidence is evidence that informs the judge or jury of "the financial, physical, and psychological impact of the crime on the victim and the victim's family." Black's Law Dictionary 655 (Pocket ed. 1996). For a detailed discussion of the harm theory of relevance, see infra Part II.B.

9. See infra Part IV (arguing that "execution impact" testimony must be admitted as mitigation evidence).

10. See infra Part II.B.


12. 408 U.S. 238 (1972) (per curiam).
cases before it, was unconstitutional. One of the cases involved an appeal from a death sentence imposed for a murder conviction, while the other two cases were appeals from death sentences imposed for rape convictions. Furman represented a drastic change in courts' approach to capital sentencing. Prior to Furman, juries that rendered a guilty verdict had to decide immediately whether to impose the death penalty; they were not given any standards or additional information to assist them in their sentencing determination.

Although there was no majority opinion in Furman, the five concurring opinions of the justices shed light on the Court's decision. The core holding of the concurring justices' opinions was that the discretionary jury systems in place at the time violated the Eighth Amendment's prohibition of cruel and unusual punishment because these systems produced arbitrary and capricious death penalty determinations.

Significantly, the Furman Court did not hold that the death penalty was per se unconstitutional. Rather, the concurring justices merely concluded that the death penalty procedures in effect at that time violated capital defendants' Eighth Amendment right against cruel and unusual punishment. Several justices left open the possibility that the death penalty could survive constitutional scrutiny if certain procedural safeguards were implemented. For example, Justice Douglas explained that the death penalty statutes at issue were unconstitutional because the wide discretion and lack of guidance given to sentencing juries resulted in discrimination through arbitrary and capricious results. Douglas specifically reserved decision, however, on whether a non-discretionary statute would be constitutional. Similarly, Justice Stewart observed that the Eighth and Fourteenth Amendments would not permit the death penalty to "be so wantonly and so freakishly imposed" as it had been under the statutes at issue, but he also implied that he might find the death penalty constitutional under different circumstances.

13. See id. at 239-40; see also Randall Coyne & Lyn Entzeroth, Capital Punishment and the Judicial Process 96 (1994) (discussing the Court's holding that "the imposition and infliction of the death penalty under arbitrary and randomly administered systems in which juries are given unrestricted and unguided [sentencing] discretion . . . constitutes 'cruel and unusual' punishment in violation of the Eighth and Fourteenth Amendments").

14. See Furman, 408 U.S. at 239.

15. See Welsh S. White, The Death Penalty in the Nineties 73-74 (1991). Such discretion inevitably led to "arbitrary and capricious" results. Id. Following Furman, states began to provide a capital sentencing jury with many standards and much information to aid it in its sentencing determination. See infra notes 21-37 and accompanying text.

16. See Furman, 408 U.S. at 239-40.

17. See id. at 255-57 (Douglas, J., concurring).

18. See id. at 257 (Douglas, J., concurring).

19. See id. at 310 (Stewart, J., concurring).
Justice Brennan also emphasized the unconstitutionality of discretionary death penalty statutes. He concluded that "the State must not arbitrarily inflict a severe punishment. This principle derives from the notion that the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others." Thus, the Court delivered a clear message to the states that their current death penalty systems were unconstitutional, and that it was up to them to repair their punishment process.

In response to the Furman decision, states adopted statutes that provided jurors with more guidance in making death sentence determinations. To eliminate wholly arbitrary decisions and promote to consistency, some states adopted statutes listing specific aggravating and mitigating factors that a capital sentencing jury could consider in its decision-making process. Other states enacted statutes that required a capital jury to impose the death penalty if the jury concluded that certain conditions were met. The Supreme Court had an opportunity to review a number of these new laws in 1976.

In Gregg v. Georgia, the Court considered the constitutionality of a death penalty statute that provided for a bifurcated trial with separate guilt and sentencing phases. The statute also provided for factors to guide jurors' decision-making process with respect to aggravating and mitigating circumstances. Specifically, the statute listed ten aggravating factors that the jury could consider when making its determination, including whether the defendant had a prior capital felony conviction, whether the defendant committed the murder while committing another capital felony, whether the defendant committed the murder for pecuniary gain, and whether the circumstances of the murder were outrageously inhuman. Although the jury could also consider aggravating and mitigating factors that were not provided for by the statute, it could not impose the death penalty unless it found at least one of the statutory factors present. The Court concluded that the statute was constitutional, explaining that:

[T]he concerns expressed in Furman that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition

20. See id. at 274 (Brennan, J., concurring).
22. See infra notes 24-30 and accompanying text.
23. See infra notes 31-34 and accompanying text.
25. See id. at 195.
26. See id. at 164-66; see also Capital Punishment, supra note 21, at 161 (discussing the Court's reasoning in Gregg); Coyne & Entzeroth, supra note 13, at 116 (same).
27. See Gregg, 428 U.S. at 165 n.9 (citing Ga. Code Ann. § 27-2534.1 (Supp. 1975)).
28. See id. at 164-65.
these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.  

The Court found that the Georgia statute did, in fact, satisfy these criteria by providing the capital jury with adequate guidance to protect Gregg's Eighth Amendment rights.  

The Court decided *Woodson v. North Carolina* on the same day that it decided *Gregg*. In *Woodson*, the Court struck down a statute that required the jury to impose the death penalty if it concluded that certain circumstances were present in the case. The statute provided:

A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death.

The Court held that the North Carolina statute was unconstitutional for three reasons: (1) it was not useful as an indicator of contemporary values regarding mandatory death sentences; (2) it did not provide a reasonable response to *Furman*’s rejection of the discretionary jury system; and (3) it did not allow the particularized consideration of relevant aspects of the character and record of each convicted defendant. Thus, *Woodson* introduced the notion of individualized sentencing into death penalty jurisprudence.

Together, *Furman*, *Gregg*, and *Woodson* illustrate the requirements that a death penalty statute must satisfy to survive constitutional scrutiny. First, the statute must provide capital juries with guided discretion to achieve uniformity in sentencing. Second, the statute must allow for individualized sentencing determinations based on evidence of mitigating circumstances. These procedural safeguards are

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29. *Id.* at 195.
30. See *id.* at 206-07.
32. See *id.* at 302-05.
34. See *id.* at 304 ("[W]e believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment... requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." (citation omitted)).
36. See *id.*
designed to assure that defendants are protected against arbitrary and capricious death penalty determinations.\textsuperscript{37}

Despite the Court's establishment of these safeguards, many commentators began to suggest that the two goals of uniformity and individualization were incompatible and could not co-exist within a single capital sentencing scheme.\textsuperscript{38} The concerns of these commentators proved to be justified; as subsequent Supreme Court cases have indicated, the Court itself did not treat these two goals equally and began to favor individualization over uniformity.\textsuperscript{39}

For example, in \textit{Lockett v. Ohio},\textsuperscript{40} the Court struck down a state statute that prevented the sentencing jury from considering the circumstances of the crime and the record and character of the offender as mitigating factors.\textsuperscript{41} The Court explained that the statute created the risk that a jury would impose the death penalty without considering factors that may justify a less severe punishment.\textsuperscript{42} In \textit{Booth v. Maryland},\textsuperscript{43} the Court held, in a five-to-four opinion, that victim impact statements are inadmissible in capital cases.\textsuperscript{44} The Court reasoned that these statements do not reflect a defendant's individual moral culpability.\textsuperscript{45} The Court indicated that such statements tend to lead jurors to base their decisions on emotion rather than reason, frus-

\begin{itemize}
\item \textsuperscript{37} See Gregg v. Georgia, 428 U.S. 153, 169 (1976) ("We now hold that the punishment of death does not invariably violate the Constitution.").
\item \textsuperscript{38} See, e.g., White, supra note 15, at 6 (discussing the existing tension between the Supreme Court's goals of guided discretion and individualized sentencing); James S. Liebman & Michael J. Shepard, \textit{Guiding Capital Sentencing Discretion Beyond the "Boiler Plate": Mental Disorder as a Mitigating Factor}, 66 Geo. L.J. 757, 757-60 (1978) (same); Scott E. Sundby, \textit{The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing}, 38 UCLA L. Rev. 1147, 1148 (1991) (same).
\item \textsuperscript{39} See White, supra note 15, at 8 ("Because death is different, the Court deemed it appropriate to apply safeguards designed to make capital sentencing procedures more reliable."); Ronald J. Mann, \textit{The Individualized-Consideration Principle and the Death Penalty as Cruel and Unusual Punishment}, 29 Hous. L. Rev. 493, 540-41 (1992). The rationale underlying individualized capital sentencing determinations is that "death is different," and, therefore, the capital penalty trial requires additional safeguards. See Lockett v. Ohio, 438 U.S. 586, 604 (1978) (observing that the "penalty of death is qualitatively different" from any other sentence (citation omitted)); see also Coyne & Entzeroth, supra note 13, at 119 (noting that the death penalty is different from other punishments); Markus Dirk Dubber, \textit{Regulating the Tender Heart When the Axe is Ready to Strike}, 41 Buff. L. Rev. 85, 119-20 (1993) (discussing the extra protection afforded capital defendants because of the finality and severity of the death penalty).
\item \textsuperscript{40} 438 U.S. 586 (1978).
\item \textsuperscript{41} See id. at 589, 608-09. For a detailed discussion of \textit{Lockett}, see infra notes 68-77 and accompanying text.
\item \textsuperscript{42} See \textit{Lockett}, 438 U.S. at 605.
\item \textsuperscript{44} See \textit{Booth}, 482 U.S. at 509.
\item \textsuperscript{45} See id. at 504 ("The focus of a [victim impact statement] . . . is not on the defendant, but on the character and reputation of the victim and the effect on his family. These factors may be wholly unrelated to the blameworthiness of a particular defendant.").
\end{itemize}
trating the goal of uniformity in sentencing because a defendant’s sentence would differ according to the victim’s moral worth.46

In 1991, however, the Court shifted the focus of capital sentencing trials away from the defendant and onto the victim. In Payne v. Tennessee,47 Pervis Tyrone Payne appealed his conviction for first degree murder of a mother and her two-year-old daughter, along with a conviction for assault with intent to murder the mother’s three-year-old son.48 During the sentencing phase of the trial, the trial court permitted the state to present testimony regarding the effect of the murders on the three-year-old child.49 The state called the child’s grandmother as a witness, who testified that the child “cries for his mom. He doesn’t seem to understand why she doesn’t come home. And he cries for his sister . . . .”50

The Supreme Court affirmed Payne’s conviction, overruling Booth and holding that states could admit victim impact evidence in capital sentencing trials.51 The Court found that the harm caused by the crime is an important factor in determining the defendant’s sentence.52 In addition, the Court explained that victim impact evidence illustrates each victim’s “uniqueness as an individual human being.”53 The Court summed up its holding as follows: “We are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant’s moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant.”54

Payne, therefore, introduced a new category of evidence into the capital sentencing determination: victim impact evidence. By allowing the admission of such evidence, the Court shifted much of the focus away from capital defendants and placed more emphasis on the victims. Payne, however, did not provide much guidance regarding the scope of admissible victim impact evidence. The Court left individual states with broad discretion to determine what victim impact evidence a capital jury would be permitted to consider.55

46. See id. at 505-06.
48. See id. at 811.
49. See id. at 814.
50. Id.
51. See id. at 827-30.
52. See id. at 820.
53. Id. at 823.
54. Id. at 825.
55. See Catherine Bendor, Defendants’ Wrongs and Victims’ Rights: Payne v. Tennessee, 27 Harv. C.R.-C.L. L. Rev. 219, 241 (1992); Angela P. Harris, The Jurisprudence of Victimhood, 1991 Sup. Ct. Rev. 77, 87. For example, some states only allow victim impact evidence that directly reflects on a defendant’s moral culpability, whereas other states admit victim impact statements that do nothing more than illustrate the grief caused by the defendant. Compare State v. Craig, No. 95-KA-2499, (La. May 20, 1997) (unpublished appendix to 699 So. 2d 865) (holding that victim impact
The Supreme Court, as evidenced by *Payne*, has come full circle from the pre-*Furman* days of unguided discretion and lack of uniformity in sentencing. Many commentators have criticized the *Payne* decision for its apparent departure from the Court's previous attempts to ensure that the use of the death penalty remains constitutional. For example, Catherine Bendor has argued that *Payne* undercuts the Supreme Court's prior emphasis on the need for heightened procedural protection for capital defendants. Robert Black criticized victim impact evidence by suggesting that it "does [victims] no obvious good but may augment the state's ever increasing arsenal against the individual." Despite such criticism, *Payne* remains the law today.

A closer examination of the Court's decisions in this area indicates that this departure stems from an expansion of the type of evidence that the Court has deemed to be relevant. Part II looks at the theories of relevance on which the Court has based the admission of evidence in capital sentencing cases.

II. THE THEORIES OF RELEVANCE UNDERLYING EVIDENCE ADMITTED AT CAPITAL SENTENCING TRIALS

Supreme Court decisions indicate that there are two main categories of evidence that are relevant to the sentencing determination during the penalty phase of a capital trial. The first category is evidence relating to a defendant's moral culpability. The second category is evidence of the harm caused by a defendant's actions. This part examines the Court's reasoning for finding these two categories of evidence relevant in light of one of the predominant theories of punishment underlying criminal law: the retributive theory.

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56. See Mann, supra note 39, at 541.  
57. See, e.g., Bendor, supra note 55, at 242 (noting that the *Payne* decision "may be a harbinger of future Court action to eliminate the special procedural safeguards established for capital defendants in past Eighth Amendment jurisprudence"); Robert C. Black, *Forgotten Penological Purposes: A Critique of Victim Participation in Sentencing*, 39 Am. J. Juris. 225, 238 (1994) (arguing that victim impact evidence adds very little to the "culpability calculation").  
58. See Bendor, supra note 55, at 241-42.  
59. Black, supra note 57, at 228.  
60. See infra notes 68-85 and accompanying text.  
61. See infra notes 86-96 and accompanying text.  
62. The two main theories of punishment in criminal law are the retributive and utilitarian theories of punishment. See Gregg v. Georgia, 428 U.S. 153, 183 (1976) ("The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders."); see also Coyne & Entzeroth,
examination reveals inconsistencies in the Court's reasoning that, in turn, raise questions about whether courts are wrong to exclude "execution impact" evidence.

Retribution has two different definitions: (1) a defendant should be punished according to his moral culpability; and (2) a defendant should be punished according to the extent of the harm he caused. Courts have admitted evidence based on both of these definitions during capital sentencing trials. Retribution based on a defendant's moral culpability supports the admission of evidence that sheds light on the defendant's character and the circumstances of the offense. On the other hand, retribution based on the extent of harm caused by a defendant supports the admission of evidence concerning the impact of the defendant's crime on third parties. Until Payne, courts adhered to the first definition of retribution and only admitted evidence relating to a defendant's moral culpability during capital sentencing trials. By departing from prior precedent and using the second definition of retribution to also allow capital juries to consider evidence of the harm caused by defendants, Payne signaled an expansion in the

supra note 13, at 73-74, 78-79 (discussing the theoretical bases of retribution and deterrence); Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law 21-25 (1972) (listing various theories of punishment); Paul Campos, The Paradox of Punishment, 1992 Wis. L. Rev. 1951, 1931 (stating that arguments regarding theories of punishment relate to "two broad camps": retribution and utilitarianism); Richard S. Murphy, Comment, The Significance of Victim Harm: Booth v. Maryland and the Philosophy of Punishment in the Supreme Court, 55 U. Chi. L. Rev. 1303, 1306 (1988) ("Justifications for punishment . . . usually fall into one of two categories: retributive or utilitarian."); Christopher Adams Thorn, Note, Retribution Exclusive of Deterrence: An Insufficient Justification for Capital Punishment, 57 S. Cal. L. Rev. 199, 200 (1983) ("[I]nstufctions for capital punishment focus on deterrence and retribution.").

This Note focuses on the retributive notion of punishment because it is the theory under which mitigation and victim impact evidence is relevant and admissible. See, e.g., Bendor, supra note 55, at 234 ("[T]he only justification [for punishment] to which victim impact evidence directly relates is retribution."); cf. Murphy, supra, at 1306 (noting that "[a] particular penalty may have both retributive and utilitarian elements, but the theories in general are in opposition"); Thorn, supra, at 200-02 (highlighting that justifications for capital punishment focus on both deterrence and retribution).

63. See Bendor, supra note 55, at 234; Murphy, supra note 62, at 1319-20; see also Black's Law Dictionary 549 (Pocket ed. 1996) (defining retribution as: either (1) "the theory that a criminal should be punished in proportion to the harm that he or she caused," or (2) "[r]epayment").

64. See, e.g., Lockett v. Ohio, 438 U.S. 586, 604-05 (1978) (finding that an individualized decision based on a defendant's moral culpability is essential in capital cases).

65. See, e.g., Payne v. Tennessee, 501 U.S. 808, 825 (1991) (holding that the specific harm caused by the defendant is relevant to the sentencing decision).

66. See, e.g., Booth v. Maryland, 482 U.S. 496, 504 (1987) (explaining that victim impact statements are inadmissible during capital sentencing trials because "[t]he focus of a [victim impact statement] . . . is not on the defendant, but on the character and reputation of the victim and the effect on his family. These factors may be wholly unrelated to the blameworthiness of a particular defendant."), overruled by Payne v. Tennessee, 501 U.S. 808 (1991).
scope of evidence that is relevant to capital sentencing determinations.\footnote{67}

A. The Relevance of Evidence of Mitigating Circumstances

The Supreme Court has held that the Eighth Amendment mandates that a capital jury consider any evidence that tends to mitigate a defendant's moral culpability.\footnote{68} The Court established this principle in \textit{Lockett v. Ohio},\footnote{70} which held that capital juries must be allowed to consider any factor that reflects on a defendant's character, record, or the circumstances of the offense.\footnote{70} In that case, Sandra Lockett had helped devise a plan with several others to rob a pawn broker's shop because some of her friends needed money.\footnote{71} Although the perpetrators did not plan to kill the pawn shop owner, one of the participants accidentally shot and killed the owner during the robbery.\footnote{72} Lockett was outside the store, waiting to drive the getaway car while the robbery and shooting took place.\footnote{73} She was convicted of aggravated murder and aggravated robbery, and she received a death sentence.\footnote{74} Ohio's death penalty statute explicitly precluded the sentencing judge from considering as mitigation evidence such factors as Lockett's character, prior record, age, lack of specific intent to cause death, or her minor part in the crime.\footnote{75}

The Court found that Ohio's limitation violated Lockett's Eighth Amendment rights because it prohibited the sentencer from making an individualized determination of her moral culpability based on all of the mitigation evidence available.\footnote{76} Specifically, the Court found that:

\begin{quote}
[T]he Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. . . . The considerations that account for the wide acceptance of individualization of sentences in noncapital cases surely cannot be thought less important in capital cases. Given that the imposition of death by public authority is so pro-
\end{quote}

\footnote{67. See \textit{Mann}, supra note 39, at 538.}
\footnote{68. \textit{See Lockett}, 438 U.S. at 608. As one commentator observed, "Ostensibly, \textit{Lockett v. Ohio} does not deal with the admissibility of evidence. But by defining what is constitutionally relevant to the death penalty determination, \textit{Lockett} makes it clear that the capital defendant has a broad right to present mitigating evidence at the penalty trial." \textit{White}, supra note 15, at 97.}
\footnote{70. 438 U.S. 586 (1978).}
\footnote{71. \textit{See id.} at 590.}
\footnote{72. \textit{See id.}}
\footnote{73. \textit{See id.}}
\footnote{74. \textit{See id.} at 589.}
\footnote{75. \textit{See id.} at 597 (referring to Ohio Rev. Code Ann. § 2929.04 (1975)).}
\footnote{76. \textit{See id.} at 604.}
foundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases.\textsuperscript{77}

Thus, because Ohio’s statute did not permit an individualized decision, the Court struck it down as unconstitutional.

Similarly, in \textit{Skipper v. South Carolina},\textsuperscript{78} the Court reiterated and extended \textit{Lockett}’s emphasis on individualized death sentence determinations.\textsuperscript{79} During the sentencing phase of his capital trial, Ronald Skipper attempted to introduce the testimony of two jailers and one of Skipper’s visitors who were prepared to assert that he had “made a good adjustment” during his period of imprisonment.\textsuperscript{80} Although the Court recognized that this evidence did not bear directly on Skipper’s moral culpability, it held that the evidence should nonetheless have been admitted because a capital sentencing jury must be allowed to consider \textit{any} evidence that might provide the basis for a sentence less than death.\textsuperscript{81} By adopting such a broad interpretation of what constituted mitigation evidence under \textit{Lockett}, the Court extended the notion of relevant mitigation evidence to that which may even indirectly bear on the defendant’s moral culpability.

Although the Court emphasized the individualization of the defendant in \textit{Lockett} and \textit{Skipper}, it has also recognized the possibility that juries might be improperly swayed by the sympathetic aspects of mitigation evidence. For example, in \textit{California v. Brown},\textsuperscript{82} the Court upheld the constitutionality of anti-sympathy jury instructions given in an attempt to prevent the jury from making its decision based on emotion rather than reason in a death penalty case.\textsuperscript{83} According to the Court, a trial judge may instruct a capital jury to consider all of the aggravating and mitigating evidence presented, but not to base its decision on an emotional response to such evidence.\textsuperscript{84} Read together, \textit{Lockett}, \textit{Skipper}, and \textit{Brown} indicate the Court’s attempt to ensure that capital juries consider all evidence that might relate to a defendant’s moral culpability, while using that evidence to reach a reasoned, moral sentencing determination.\textsuperscript{85}

\begin{footnotes}
\item[77.] \textit{Id.} at 604-05 (footnotes omitted).
\item[78.] 476 U.S. 1 (1986).
\item[79.] \textit{See id.} at 4-5.
\item[80.] \textit{Id.} at 3.
\item[81.] \textit{See id.} at 4-5.
\item[82.] 479 U.S. 538 (1987).
\item[83.] \textit{See id.} at 543.
\item[84.] \textit{See id.}
\item[85.] \textit{See id.} at 545 (O’Connor, J., concurring) (“[T]he sentence imposed at the penalty stage should reflect a reasoned \textit{moral} response to the defendant’s background, character, and crime rather than mere sympathy or emotion.”); \textit{see also} Dubber, \textit{supra} note 39, at 111-12 (discussing the need to eliminate emotional sentencing determinations in racially charged sentencing hearings); \textit{Harris, supra} note 55, at 89 (emphasizing jurors’ ability to “adopt a reflective and critical perspective toward their own intuitive judgements”).
\end{footnotes}
B. The Relevance of the Harm Caused by the Crime

Beginning with *Payne v. Tennessee*, the Supreme Court expanded the scope of what type of evidence is relevant in the capital sentencing phase of a trial by shifting to the second view of retribution: punishment should be based on the harm caused by the defendant. In *Payne*, the Court expressly rejected the notion that only evidence related to a defendant’s moral culpability is admissible at a capital sentencing trial. The Court explained that by removing all of the limits on a defendant’s right to introduce mitigating evidence, prior cases had “unfairly weighted the scales” in capital trials towards the defendant. Therefore, in an attempt to “level the playing field,” the Court held that states were now permitted to introduce victim impact testimony.

Consideration of the actual harm that a defendant inflicts on a victim is pervasive in criminal law. In *Payne*, the Court traced the history of the significance of harm to sentencing decisions from Biblical times through the twentieth century. The Court explained that, over time, the notion of the harm caused by a defendant has become a guiding principle of sentencing determinations. As the Court observed, “Wherever judges in recent years have had discretion to impose sentence, the consideration of the harm caused by the crime has been an important factor in the exercise of that discretion.”

*Payne* extended the category of evidence relevant to the sentencing determination to include the impact of the defendant’s actions on third parties. Under *Payne*, victim impact testimony is relevant because it indicates the degree of social harm that the defendant caused.

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87. See id. at 825.
88. See id. (rejecting Booth’s reasoning that only evidence reflecting on a defendant’s moral culpability is relevant to the sentencing determination); see also Valerie Finn-DeLuca, *Victim Participation at Sentencing*, 30 Crim. L. Bull. 403, 419 (1994) (citing Justice Stevens’s dissent in *Payne* for the proposition that *Payne* “abandons rules of relevance that are older than the Nation itself”).
89. See *Payne*, 501 U.S. at 822.
90. See id. at 827.
91. See Murphy, *supra* note 62, at 1325-27 (“This practical relevance of result [i.e., harm] . . . is pervasive in criminal law.”). Indeed, criminal law generally categorizes punishment according to the harm inflicted by the defendant. See id. at 1326. For example, the Federal Sentencing Guidelines require an increase in a defendant’s sentence if certain objective factors are present. See id. (citing U.S. Sentencing Commission, Federal Sentencing Guidelines and Policy Statements (1987)). The harm caused by a defendant as a result of his or her actions is a “prominent aspect” of these factors. See id.
92. See *Payne*, 501 U.S. at 819-25.
93. See id.
94. Id. at 820.
95. See id. at 825 (“Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question . . . .”).
to others as a result of his or her actions.\footnote{\textit{See id.}} Such testimony includes evidence of the effect of the victim's death on third parties because it sheds light on the victim's character and is thus indicative of the loss suffered by society caused by the death of the victim.

As a result of the \textit{Payne} decision, the Court reversed what it perceived as a trend toward courts providing too much protection to defendants in death penalty cases. In its attempt to "level the playing field," however, the Court has gone too far and "unfairly weighted the scales"\footnote{\textit{Id.} at 822.} toward the government. To combat this problem, many defendants have argued that if the government is allowed to introduce victim impact evidence, then defendants should be permitted to introduce "execution impact" evidence. Part III looks at the decisions of courts that have considered this argument.

III. The State of the Law Regarding the Admissibility of "Execution Impact" Evidence

A number of state courts have addressed the issue of whether a defendant should be allowed to introduce testimony about the effect that the defendant's execution would have on his or her family. The majority of these courts have excluded such evidence as irrelevant to the capital sentencing determination.\footnote{\textit{See infra} notes 100-04 and accompanying text.} In fact, of all the courts that have handled this issue, only one has held such evidence admissible.\footnote{\textit{See State v. Stevens, 879 P.2d} 162, 167-68 (Or. 1994).} This part examines several of these cases and describes the various lines of reasoning that courts have used to admit or exclude "execution impact" evidence.

A. Majority View: "Execution Impact" Evidence is Inadmissible in Capital Sentencing Trials

Most courts that have addressed the admissibility of "execution impact" evidence have held that such evidence does not reflect on any mitigating factor of the defendant's character and, therefore, is irrelevant to the sentencing determination.
The supreme courts of Washington, California, Mississippi, and Florida have explicitly held that "execution impact" evidence is inadmissible.

Stenson v. State illustrates a defendant's attempt to introduce, as mitigating evidence, testimony regarding the impact his execution would have on his family. Darold Ray Stenson appealed his conviction of first-degree murder and his death sentence for killing his wife and another man. During the penalty phase of his trial, Stenson sought to introduce testimony from his father-in-law and sister-in-law about the impact that his execution would have on his three children. The trial court did not allow Stenson to introduce such testimony. On appeal, Stenson argued, among other things, that: (1) the court's refusal to admit "execution impact" evidence violated his right to present mitigation evidence; and (2) if the victim's family had the right to present victim impact evidence, then the Equal Protection Clause required that he have the right to present "execution impact" evidence as well.

The Washington Supreme Court did not address Stenson's equal protection claim because the trial court had not admitted any victim impact testimony. Therefore, according to the court, Stenson's equal protection, quid-pro-quo argument was moot. The court did

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100. See State v. Stenson, 940 P.2d 1239, 1282 (Wash. 1997) (holding that "the potential impact of the Defendant's execution on third parties is not relevant").
101. See State v. Loftin, 680 A.2d 677, 713 (N.J. 1996) ("[M]itigating evidence that focuses on the potential impact [of an execution] on a third party is not relevant to a defendant's character, record, or the circumstances of the offense, and therefore could properly be excluded."); State v. DeFrisco, 645 A.2d 734, 771 (N.J. 1994) (holding that the exclusion of evidence relating to the impact the defendant's execution would have on his mother was proper).
103. See Wilcher v. State, 697 So. 2d 1123, 1134 (Miss. 1997) ("[Execution impact] testimony is not relevant to the defendant's character, record, or the circumstances of the offense . . . ."); Turner v. State, 573 So. 2d 657, 667 (Miss. 1990) (finding that testimony concerning the impact of an execution on a defendant's family "is not relevant to the consideration of whether the death sentence should be imposed").
104. See Burns v. State, 699 So. 2d 646, 654 (Fla. 1997) ("The impact the defendant's family will feel as a result of the defendant's execution does not mitigate the harm caused by the crime and thus is not similarly relevant or authorized.").
106. See id. at 1278.
107. See id. at 1278-79.
108. See U.S. Const. amend. XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.").
110. See id. at 1280. At the time of Stenson's trial, the Washington Supreme Court had not yet ruled on the admissibility of victim impact statements in capital cases. See id. at 1279. After Stenson's trial, but before his appeal, the Washington Supreme Court held victim impact testimony admissible during capital cases. See id. (citing State v. Gentry, 888 P.2d 1105 (Wash. 1995)).
111. See id. at 1280.
address, however, Stenson’s claim that the trial court had violated his right to present mitigation evidence. The court rejected this claim, explaining that “execution impact” evidence did not reflect on Stenson’s character, record, or the circumstances of his offense, and was therefore irrelevant to the sentencing decision. The court further reasoned that such evidence was unnecessary because the trial court had already allowed evidence of Stenson’s relationships with his family and friends.

Although Stenson provides the most comprehensive explanation given by a court for excluding “execution impact” evidence, the Washington Supreme Court left unresolved the question of whether such evidence would have been admissible if the prosecution had introduced victim impact testimony. As the court observed, “[s]ince the trial court did not allow any victim impact evidence, Stenson’s contention that it violates equal protection to disallow ‘execution impact’ evidence when victim impact evidence is admitted is irrelevant in this case.” Other state courts have, in fact, been faced with such a situation, and most of them have concluded that “execution impact” evidence may be excluded despite the simultaneous admission of victim impact evidence.

For example, in Burns v. State, the defendant, David Burns, appealed his conviction of first-degree murder for killing a police officer. The trial court had admitted victim impact testimony during the penalty trial. The trial court did not, however, allow Burns to proffer testimony from his sister and two daughters about the effect that his execution would have on them and other family members. On appeal, Burns argued that the trial judge should have admitted this “execution impact” testimony because: (1) the evidence reflected on Burns’s “character and background and was therefore mitigating,” and (2) the Due Process Clause mandated the introduction of the “execution impact” evidence because the State introduced victim impact evidence.

The Supreme Court of Florida rejected both of Burns’s arguments. The court did not explain in detail its decision to exclude such evidence, but summarily concluded that “the trial court did not

112. See id. at 1281 (“[N]othing limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant’s character, prior record, or the circumstances of his offense.” (citation omitted)).
113. See id. at 1282.
114. Id. at 1280.
115. 699 So. 2d 646 (Fla. 1997).
116. See id. at 647-49.
117. See id. at 652-53.
118. See id. at 654.
119. Id.
120. See id.
121. See id.
abuse its discretion in excluding this testimony concerning the sentence Burns’ [sic] should receive.”\(^\text{122}\) The court also rejected Burns’s argument that due process required the introduction of “execution impact” testimony because the State was permitted to introduce victim impact evidence. The court simply stated that “[w]e do not find merit in this kind of quid pro quo assertion. . . . The impact the defendant’s family will feel as a result of the defendant’s execution does not mitigate the harm caused by the crime and thus is not . . . relevant . . . .”\(^\text{123}\)

Similarly, in Wilcher v. State,\(^\text{124}\) the defendant appealed his conviction of capital murder and his death sentence for a “gruesome double murder and robbery.”\(^\text{125}\) He argued that his trial was “fundamentally unfair” because the trial judge allowed the victim’s family, but not his own family, to give their “subjective impressions about the effect of the crime and the alternatives for punishment on them.”\(^\text{126}\) The Mississippi Supreme Court relied on Payne to uphold the trial court’s decision to admit evidence about the impact of the murder on the victim’s family.\(^\text{127}\) At the same time, the court held that Wilcher’s “execution impact” evidence was “not relevant to the defendant’s character, record, or the circumstances of the offense and that the exclusion of such evidence [was] proper.”\(^\text{128}\)

B. Minority View: “Execution Impact” Evidence is Admissible at the Sentencing Phase of Capital Trials

While most courts have held that “execution impact” evidence is irrelevant to the sentencing phase of a capital trial, at least one court has held that such evidence is, in fact, relevant. In State v. Stevens, the Supreme Court of Oregon held that the trial court erred by refusing to admit “execution impact” testimony as mitigating evidence during the sentencing determination.\(^\text{129}\) The defendant, convicted of aggravated murder, was sentenced to death.\(^\text{130}\) On the first appeal from his conviction, the court affirmed the jury’s guilt determination but vacated the death sentence because the trial court had given instructions that

\(^{122}\) Id.

\(^{123}\) Id. Further, the court observed that while the admission of victim impact evidence was authorized by statute, the similar admission of “execution impact” evidence was not. See id.; see also Fla. Stat. Ann. § 921.141(7) (West 1996) (authorizing the introduction of victim impact evidence).

The court’s choice of words suggests that it confused the two theories of relevance discussed supra in part II, because the court spoke of “mitigating the harm” rather than “mitigating culpability” or “being evidence of specific harm.”

\(^{124}\) 697 So. 2d 1123 (Miss. 1997).

\(^{125}\) Id. at 1126.

\(^{126}\) Id. at 1133.

\(^{127}\) See id. at 1134.

\(^{128}\) Id. (citations omitted).

\(^{129}\) See State v. Stevens, 879 P.2d 162, 168 (Or. 1994).

\(^{130}\) See id. at 162.
limited the jury's ability to consider mitigating evidence. On remand, the jury again sentenced Stevens to death. On his second appeal, Stevens argued that the trial court erred in excluding "execution impact" evidence, thereby violating his Eighth Amendment right to present any evidence that mitigated his culpability.

Stevens made three offers of proof that the Oregon Supreme Court found had been improperly excluded. Stevens had sought to introduce testimony from his wife, who had been called as a government witness. First, Stevens proffered the following testimony:

Q: What is your opinion about what is best for [your daughter]?
A: I think to know that her dad was executed by the State would be destructive to her.
Q: In what way?
A: Well, emotional. I'm sure she would feel responsible somehow. It would not be good for her. I mean, she knows he's going to be in there the rest of his life, and that's, you know, that's a better story than they killed him.

You know, it's just not going to be good for her at all. I mean, she knows that he's going to be in prison the rest of his life. She'll never hug him. She knows he's going to grow old and gray and die. But she doesn't know they're going to kill him.

Next, Stevens sought to introduce his wife's testimony that she would allow her daughter to visit Stevens in jail: "[I]n time when [my daughter] can fully accept and everything for what everything is worth and its face value is, if she really would want to see her dad, I would do what she wanted to do for herself . . . ." Finally, Stevens tried to introduce the following testimony elicited from his wife:

Q: [I]s there something about . . . Stevens, his character and how he associated with and worked with his daughter that you feel that she should be given an opportunity to see if she wants to rekindle that condition, because of what he was in the past?

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131. See id.
132. See id. at 163.
133. See id. In addition to his constitutional claim, Stevens argued that the trial court violated an Oregon statute that required all mitigation evidence to be presented to a capital jury. See id. at 165-66 (citing Or. Rev. Stat. § 163.150 (1989)). Because the Oregon statute tracks the language of Lockett almost identically, for purposes of this analysis the statutory and constitutional claim are considered the same.
134. See id. at 163.
135. See id.
136. Id. at 163-64.
137. Id. at 164.
A: [S]he’s old enough to handle it and understand it, I’m sure she’s still going to, you know, want to see him for maybe some reason or another.

Q: And that’s because of his early years with him [sic]?

A: He is her father.138

Stevens argued that these three excerpts from his wife’s testimony were relevant because “testimony about the anticipated negative effect of his execution on his daughter suggests something particular about his character and background.”139 The court agreed with Stevens, vacating his death sentence for the second time and remanding the case to the trial court.140 In reaching its decision, the court indirectly relied on Payne to hold that testimony from relatives of a capital defendant might provide insight into the defendant’s character.141 The court explained:

While the witness’s testimony may not offer any direct evidence about defendant’s character or background, it does offer circumstantial evidence. A rational juror could infer from the witness’s testimony that she believed that her daughter would be affected adversely by defendant’s execution because of something positive about his relationship with his daughter and because of something positive about defendant’s character or background. Put differently, a rational juror could infer that there are positive aspects about defendant’s relationship with his daughter that demonstrate that defendant has the capacity to be of emotional value to others. In that inference, a juror could find an aspect of defendant’s character or background that could justify a sentence of less than death.142

The court disagreed with other state courts that have held that “execution impact” evidence is irrelevant because it does not reflect on a capital defendant’s character.143 According to the Oregon court, if such evidence circumstantially reflects the defendant’s character, it is relevant mitigation evidence that the jury must consider.144

Despite the Stevens court’s formidable and persuasive reasoning, a majority of state courts have rejected the quid-pro-quo argument that if the prosecution is entitled to introduce victim impact evidence, then defendants should be entitled to introduce “execution impact” evidence. Part IV argues that such a quid-pro-quo approach is essential to maintain consistent reasoning, which is especially important when a person’s life hangs in the balance. Specifically, part IV suggests that if courts allow the government to use victim impact evidence as circum-

138. Id.
139. Id. at 167 (footnote omitted).
140. See id. at 168.
141. See id. at 167-68.
142. Id. at 168.
143. See supra notes 100-28 and accompanying text.
144. See Stevens, 879 P.2d at 168.
stantial evidence of a victim's character, then these courts should also admit "execution impact" testimony as circumstantial evidence of a defendant's character.

IV. COURTS MUST ADMIT "EXECUTION IMPACT" TESTIMONY AS MITIGATION EVIDENCE

This part argues that courts' refusal to admit "execution impact" testimony as mitigation evidence violates capital defendants' Eighth Amendment right to individualized sentencing determinations. Specifically, this part points out two glaring inconsistencies in these courts' reasoning. First, to the extent that courts admit victim impact evidence because it circumstantially sheds light on a victim's character, it is inconsistent for these courts to simultaneously exclude "execution impact" evidence which circumstantially sheds light on the defendant's character. Second, this part points out the inconsistency in excluding "execution impact" evidence because of repetition, while blatantly ignoring an identical repetition argument when the government offers victim impact evidence. Both of these inconsistencies result in clear violations of capital defendants' Eighth Amendment rights.

A. Execution Impact Evidence Is Reflective of a Defendant's Character

The Supreme Court has held that the Eighth Amendment guarantees the right of capital defendants to individualized sentencing determinations. By excluding "execution impact" evidence on the ground that it does not reflect on capital defendants' moral culpability, courts violate this right. Courts must allow defendants to introduce "execution impact" testimony because it does, in fact, shed light on a capital defendant's character and, therefore, must be admitted as mitigation evidence under Lockett.

As discussed earlier, the Supreme Court has determined that there are two categories of evidence that are relevant in the sentencing stage of a death penalty trial: evidence reflecting a defendant's moral culpability, and evidence reflecting the amount of harm caused by the victim's death. In contrast, while most courts allow the government to introduce victim impact evidence as an indication of how much harm a defendant caused, the same courts inexplicably reject "execution impact" testimony as evidence that mitigates the defendant's moral culpability. The problem with this reasoning is that these courts

146. See supra notes 68-77 and accompanying text.
147. See supra Part II.
favor one type of character evidence over another, resulting in severe prejudice to defendants.

In *Payne v. Tennessee*, the Supreme Court admitted third party impact testimony. The Court explained that victim impact evidence (i.e., evidence of harm) "is designed to show... 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." In addition, the Court explained that such evidence illustrated the specific harm caused by the defendant because it demonstrated the collateral effects of the death, including the "unique loss to society and in particular to his family." Thus, according to the Court, evidence of harm to third parties is relevant because it reveals both the individuality of the victim and the harm that the defendant caused to society.

Evidence of the victim's individuality necessarily sheds light on the victim's character. If the victim had a loving family and friends who testified at the penalty trial, the jury could infer that the victim was a good person. If, on the other hand, the victim alienated all of his family and friends, the government would probably not proffer any victim impact testimony. Consequently, the jury could draw a negative inference about the victim's character from the absence of victim impact testimony. In both scenarios, third party impact testimony might circumstantially shed light on the jury's assessment of the victim's character, which subsequently sheds light on the harm caused to society by the victim's death.

Nevertheless, most courts do not allow defendants to use circumstantial character evidence to shed light on their own character or to illustrate the collateral effects that yet another death—the defendant's—would have on the community. These courts reject the idea that testimony regarding the impact of an execution on a defendant's family reveals something about the defendant's character. As the court in *State v. Loftin* explained, "[M]itigating evidence that focuses on the potential impact [of an execution] on a third party is not relevant to a defendant's character, record, or the circumstances of the offense, and therefore could properly be excluded."

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149. *Id.* at 823.
150. *Id.* at 825 (citation omitted).
151. See *id.*
152. The *Payne* Court explicitly stated that "victim impact evidence is not offered to encourage comparative judgments..." *Id.* at 823. Nevertheless, when victim impact evidence is available, a jury may use such evidence to formulate an impression about who the victim was.
153. See *supra* notes 100-04 (listing cases that held that "execution impact" evidence was inadmissible).
154. *State v. Loftin*, 680 A.2d 677, 713 (N.J. 1996); see also *Wilcher v. State*, 697 So. 2d 1123, 1134 (Miss. 1997) ("[S]uch ["execution impact"] testimony is not relevant to the defendant's character, record, or the circumstances of the offense... and the exclusion of such evidence is proper."); *State v. Stenson*, 940 P.2d 1239, 1282 (Wash.
This rejection, however, is difficult to reconcile with the Supreme Court's jurisprudence regarding mitigating evidence. As discussed earlier, the capital defendant is entitled to present any evidence which relates to his own character.\textsuperscript{155} If, like a victim, the capital defendant had family and friends who loved him and would miss him after execution, a jury might infer that the defendant should not be executed. Indeed, "execution impact" is evidence of character. If the defendant did not possess good character, then people would not miss him.

The exclusion of "execution impact" testimony is particularly troubling when one considers the Supreme Court's attempt to protect capital defendants by requiring heightened procedural safeguards in death penalty cases.\textsuperscript{156} \textit{Lockett} and \textit{Skipper} interpreted the Eighth and Fourteenth Amendments as affording capital defendants broad access to any evidence that might provide the basis for a sentence less than death.\textsuperscript{157} Given such language, it is surprising that a majority of courts have not allowed defendants to use third party impact statements as circumstantial evidence of their character. Not only do courts limit the previously broad category of mitigation evidence that defendants are allowed to introduce under \textit{Lockett} and \textit{Skipper}, but, by admitting victim impact testimony, they also expand the amount and kind of evidence that the government may use in mounting its case against the defendant.

**B. "Execution Impact" Evidence is No More Repetitive than Victim Impact Evidence**

In addition to their inconsistent treatment of circumstantial evidence of character, courts rely on additional flawed reasoning to exclude "execution impact" evidence. One justification that courts have offered for excluding "execution impact" testimony is that it is unnecessarily repetitive because evidence regarding the defendant's character had already been introduced to the jury through testimony regarding the defendant's family relationships. Nevertheless, these same courts admit victim impact testimony even though such testimony often contains evidence previously heard by the jury or available in another form.

For example, in \textit{State v. Loftin}, the New Jersey Supreme Court held that even if the trial court erred in refusing to admit evidence regarding the impact that the defendant's execution would have on his wife and children as mitigating factors, the error would have been harmless because the defendant had already introduced character evidence that

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\textsuperscript{155} See supra Part II.A.

\textsuperscript{156} See supra notes 21-37 and accompanying text.

\textsuperscript{157} See \textit{Skipper} v. South Carolina, 476 U.S. 1, 4-5 (1986); \textit{Lockett} v. Ohio, 438 U.S. 586, 605 (1978).
directly focused on his relationship with his wife and children.\textsuperscript{158} Similarly, in \textit{State v. Stenson}, the Washington Supreme Court justified its decision to exclude "execution impact" testimony by indicating that the trial court allowed character and background evidence, including testimony about Stenson's relationship with his family and friends and particular circumstances of the crime.\textsuperscript{159} Thus, these courts have suggested that third party impact testimony is unnecessary because a capital defendant can introduce the same evidence through direct character testimony during the penalty trial.

Although this argument for exclusion, in and of itself, is not without some merit, courts continue to admit victim impact testimony during the penalty trial even though evidence relating to the victim has often already come before the jury in other forms. The same reasoning courts use to exclude "execution impact" testimony, therefore, could be used to exclude victim impact testimony. Ironically, in \textit{Payne}, the Supreme Court relied on the argument that evidence regarding the victim had already been presented to the jury to support its holding that victim impact evidence should be admissible during capital penalty trials.\textsuperscript{160} The Court explained that "[i]n many cases the evidence relating to the victim is already before the jury at least in part because of its relevance at the guilt phase of the trial."\textsuperscript{161} Thus, the Court reasoned that many of the defendant's objections to victim impact testimony were moot.

In sum, courts should apply the same reasoning to every evidentiary determination made during capital sentencing cases. Courts can turn to \textit{State v. Stevens} as a model for harmonizing the inconsistencies that result from excluding "execution impact" evidence in cases where victim impact evidence is admitted.\textsuperscript{162} These courts should acknowledge that "execution impact" testimony does provide circumstantial evidence of the defendant's character and that it is no more repetitive to admit "execution impact" evidence than it is to admit victim impact evidence. Until courts apply such reasoning, they will continue to violate capital defendants' constitutional rights.

\textbf{Conclusion}

In 1972, the Supreme Court attempted to ensure that capital defendants' constitutional rights were adequately protected.\textsuperscript{163} With its 1991 decision in \textit{Payne}, however, the Supreme Court retreated from its prior emphasis on the protection of the defendant in capital sentencing proceedings and indicated its willingness to allow the states to

\begin{footnotesize}
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\item \textsuperscript{158} See Loftin, 680 A.2d at 713.
\item \textsuperscript{159} See Stenson, 940 P.2d at 1282.
\item \textsuperscript{161} Id.
\item \textsuperscript{162} See supra notes 129-44 and accompanying text.
\item \textsuperscript{163} See supra notes 11-37 and accompanying text.
\end{itemize}
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fashion their own capital sentencing jurisprudence. The inconsistent reasoning that the majority of courts employ to make evidentiary determinations during capital penalty trials indicates that courts do not always protect capital defendants' Eighth Amendment rights. In fact, present day death penalty jurisprudence bears a significant resemblance to the pre-Furman days of unguided discretion that the Court held to be unconstitutional. The only way for courts to rectify this highly disturbing development is to admit "execution impact" evidence during capital sentencing, which gives defendants the crucial constitutional protections to which they, like all of us, are entitled.

164. See supra notes 47-55 and accompanying text.