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No *Payne*, No Gain?: Revisiting Victim Impact Statements After Twenty Years in Effect

Damon Pitt[*]

INTRODUCTION

Twenty-four years ago in *Booth v. Maryland*'s five-to-four decision,[1] Justice Scalia recognized a growing social and political movement, now commonly referred to as "victims' rights."[2] Justice Scalia considered the movement a popular reaction to a perceived failure by courts properly to account for the damage that murderers caused not just to their victims, but to other innocent members of society, particularly victims' families.[3] In the majority opinion, however, the Supreme Court held that victim impact testimony at capital sentencing proceedings constituted cruel and unusual punishment under the Eighth Amendment.[4] Four years and two new Justices later, in *Payne v. Tennessee*,[5] the Supreme Court overturned *Booth*,

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1 Booth v. Maryland, 482 U.S. 496 (1987), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991).

2 *Id.* at 520 (Scalia, J. dissenting); *see also* John H. Blume, *Ten Years of Payne: Victim Impact Evidence in Capital Cases*, 88 CORNELL L. REV. 257, 260 (2003) (noting Justice Scalia's recognition of the victims' rights movement).

3 *See Booth*, 482 U.S. at 520 (Scalia, J., dissenting) (claiming that many citizens considered it "one-sided and hence unjust" that a "parade of witnesses" could "testify to the pressures beyond normal human experience that drove the defendant to commit his crime, with no one to lay before the sentencing authority the full reality of human suffering the defendant has produced").

4 *Id.* at 502–03, 509 (majority opinion). Victim impact testimony, commonly referred to as a "victim's impact statement," is a "statement read into the record during sentencing to inform 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 1598 (8th ed. 2004). At least thirty-three states admit victim impact statements at the sentencing phase of a capital trial. Blume, *supra* note 2, at 267. The scope of victim impact statements range from state to state, each "ensur[ing] that a crime victim has the opportunity to be an active participant in at least some phases of the criminal case" and to "influence the way in which the defendant is treated." Donald J. Hall, *Victims' Voices in Criminal Court: The Need for Restraint*, 28 AM. CRIM. L. REV. 233, 234 (1991). For example, California requires that victims be heard, upon request, at any sentencing proceeding. CAL. CONST. art. 1, § 28(b)(8); *see also* § 28(b)(10) (allowing victims to provide information to probation officials "conducting pre-sentencing investigations concerning the impact of the offense on the victim and the victim's family and any sentencing recommendations before the sentencing of the defendant").

5 Payne v. Tennessee, 501 U.S. 808 (1991).

holding that the Eighth Amendment presented no *per se* bar to the admission of victim impact evidence.[6] This time, Justice Scalia joined the majority in a six-to-three decision, and he again noted a "public sense of justice keen enough that it has found voice in a nationwide 'victims' rights' movement."[7] In a spirited dissent, Justice Stevens also acknowledged the movement but questioned the majority's susceptibility to a politically appealing argument that had "no proper place in a reasoned judicial opinion."[8]

The Supreme Court's sharp turn from *Booth* to *Payne* in only four years set the stage for a continuing debate over the role of victims' rights in determining criminal sentences.[9] What may have begun as a reactive social or political movement ultimately found its voice in the Supreme Court of the United States.[10] The movement has transformed crime victims and their families from witnesses into participants at sentencing hearings, thus altering the constitutional analysis of victim impact evidence in criminal proceedings.[11]

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6 *Id.* at 808, 827, 830 (emphasis in original). In 1987, the *Booth* majority included Justices Powell, Brennan, Marshall, Blackmun, and Stevens; Chief Justice Rehnquist, and Justices White, O'Connor, and Scalia dissented. *See Booth*, 482 U.S. at 496–97. In 1989, the majority in S. Carolina v. Gathers, 490 U.S. 805 (1989), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991) (discussed below) again included Brennan, Marshall, Blackmun, and Stevens, with White then concurring. 490 U.S. at 812 (White, J., concurring) ("Unless Booth . . . is to be overruled, the judgment . . . must be affirmed."). In *Gathers*, Chief Justice Rehnquist, along with Justices O'Connor and Scalia, again dissented. *Id.* Justice Kennedy, replacing Justice Powell in 1988, also dissented. *Id.* Thus, Justice White moved from the dissent in *Booth* to the majority concurrence in *Gathers*, while Justice Powell's majority opinion in *Booth* was displaced by Justice Kennedy's dissenting opinion in *Gathers*, maintaining the balance at five-to-four against victim impact testimony. *See id.* In 1990, Justice Souter succeeded Justice Brennan. *Members of the Supreme Court of the United States*, SUPREME COURT OF THE UNITED STATES, http://www.supremecourt.gov/about/members.aspx (last visited Sept. 14, 2012). In the six-to-three *Payne* decision in 1991, Chief Justice Rehnquist now wrote for the majority, along with Justices White, O'Connor, Scalia, Kennedy, and Souter. *Payne*, 501 U.S. at 810–11. Justices Marshall, Blackmun, and Stevens dissented. *Id.* at 844 (Marshall, J., dissenting); *id.* at 856 (Stevens, J., dissenting).

7 *Payne*, 501 U.S. at 834 (Scalia, J., concurring).

8 *Id.* at 859 (Stevens, J., dissenting).

9 *See, e.g.*, Mary L. Boland & Russell Butler, *Crime Victims' Rights: From Illusion to Reality*, 24 CRIM. JUST. 4, 9–11 (2009) (contending that law practitioners, local bar associations, and the ABA should continue to press governments to enforce victims' rights); Andrew Ashworth, *Restorative Justice*, *in* PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY 302 (Andrew von Hirsch & Andrew Ashworth eds., Oxford 2d ed. 1998) (noting the theory that crime does wrong to both the victim *and* the community). *But see* Joe Frankel, Comment, Payne*, Victim Impact Statements, and Nearly Two Decades of Devolving Standards of Decency*, 12 N.Y. CITY L. REV. 87, 128 (2008) ("Victim impact statements have no place in capital decisions.").

10 *See Payne*, 501 U.S. at 827; *id.* at 834 (Scalia, J., concurring); *see also* Boland & Butler, *supra* note 9, at 5 (contending that the victims' rights movement emerged from the civil rights movement of the 1960s and 1970s in response to increased attention to crime and its effects).

11 Douglas Beloof, *Constitutional Implications of Crime Victims as Participants*, 88 CORNELL L. REV. 282, 283 (2003). Since *Payne*, "crime victims' status in the criminal process has changed." *Id.* at 285. Victims are no longer "witnesses providing opinion evidence," but rather participants in the criminal procedure with "state constitutional and statutory rights to give sentencing recommendations." *Id.* "[A]ny constitutional challenge to victim sentencing recommendations" must now be made "against the constitutionality of *participants* recommending sentences, not as *witnesses* giving *opinions*." *Id.* at 283 (emphasis in original). Victims, however, do not have *party* status. *See* United States v. Rubin, 558 F. Supp. 2d 411, 417 (E.D.N.Y. 2008).

Part I of this Comment revisits *Booth* and *South Carolina v. Gathers*,[12] the Supreme Court decisions overruled by *Payne*, and draws particular attention to the conflicting philosophies among the Justices over the course of the three decisions. It focuses on how different Justices frame the issues surrounding victim impact testimony and the influence of victim impact testimony on juries. Part I also briefly looks at the rise of victims' rights as a socio-political movement, a movement which has often caused intense discord between state legislatures and courts in the sentencing phases of capital cases.[13] This tension seemingly culminated with the Supreme Court twice ruling against the movement,[14] only to overturn both decisions shortly thereafter in what is now the law of the land.[15]

Part II addresses the fallout from the Supreme Court's about-face in *Payne* by surveying the empirical research conducted in the wake of the *Payne* decision and examining the competing philosophical concerns in relation to the statistical findings. This Part also surveys how states that allow for the death penalty have reacted to *Payne*, and dwells primarily on the effects of victim impact statements ("VIS") on the rates of death sentences handed down in capital cases.

After examining the fallout, Part II revisits the original philosophical tension embedded in the VIS decisions and questions whether *Payne* has impacted sentencing in the ways hoped for by proponents of VIS and feared by skeptics.[16] The question again is whether the Court struck the right balance between the State's interests in presenting to a jury the full impact of a killer's actions and protecting against the danger of unfairly influencing the jury to rule with emotion rather than reason.[17] This Part explores whether or not *Payne* adequately accounts for the indigent or unsavory victim with no family to speak on his or her behalf, and whether this problem is perhaps counterbalanced by the justice system's competing desire to offset a defendant's mitigating testimony.[18]

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12 S. Carolina v. Gathers, 490 U.S. 805 (1989), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991).

13 *See generally* Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611 (2009) (addressing the tension between legal academia and the citizenry at large with regard to victims' rights).

14 *See Gathers*, 490 U.S. at 812 (affirming the Supreme Court of South Carolina's decision excluding VIS offered by the prosecutor in his closing argument); *see also* Booth v. Maryland, 482 U.S. 496, 507 (1987), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991) (rejecting the emotional distress of a victim's family as "proper sentencing considerations in a capital case").

15 *See Payne*, 501 U.S. at 827; *id.* at 834 (Scalia, J., concurring).

16 Chief Justice Rehnquist's concern was that disallowing VIS "unfairly weighted the scales" in favor of the defendant, tipping the balance in a defendant's favor and barring insight into the life that was taken. *Id.* at 822 (majority opinion). Justice Marshall, however, feared that admitting VIS created an "unacceptable risk of sentencing arbitrariness." *Id.* at 846 (Marshall, J., dissenting).

17 *See supra* note 16.

18 *See Payne*, 501 U.S. at 856 (Marshall, J., dissenting) ("Cast aside today are those condemned to face society's ultimate penalty. Tomorrow's victims may be minorities, women, or the indigent."); *see also id.* at 857 (Stevens, J., dissenting) (noting that "all would recognize immediately that the evidence was irrelevant and inadmissible" if a defendant offered evidence about the immoral character of his victim, thus illustrating the inherent double standard for evidence offered about a victim's good

Embedded in the Part II discussion is a survey of the competing arguments regarding whether VIS, if not closely safeguarded by courts, unfairly influences juries to arbitrarily recommend harsher sentences by placing harm to a victim's loved ones above the harm committed against the State. Part II also explores whether, in the absence of character evidence presented to assert a victim's good moral standing, juries fail in their role as the "conscience of the community."[19] By allowing consequences incidental to murder to determine the degree of the violation of the public trust, are juries tempted to give less regard to the inherent value of human life by considering the communal standing of the victim rather than the personal responsibility of the murderer? Does putting the victim's character to the test degrade the victim by pandering to a jury's sense of moral approval? Was Justice Powell justified in his concern that a jury's decision to impose the death penalty would "turn on the perception that the victim was a sterling member of the community rather than someone of questionable character"?[20] This Part puts these abstract questions in context by surveying the existing empirical research and statistical analyses to see what answers are given when tested by professionals in the field.

Finally, Part III turns the focus from the debate over the merits of *Payne* to the continuing questions surrounding its implementation in criminal courtrooms. Part III examines several proposed safeguard measures intended not to overturn the decision, but to ensure that the use of VIS strikes the balance between protecting the "faceless" victim and preventing arbitrary and capricious sentences.[21] Scholars have proposed several protective measures in recent years to be applied to lingering concerns about the effects of *Payne* in the courtroom, and Part III questions their continued need in light of a significant decline in death sentences over the past decade.[22] With death sentences dropping by nearly two-thirds since

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qualities); *Gathers*, 490 U.S. at 811 (limiting what a jury could consider when deciding to impose the death penalty to factors about which the defendant was aware, and not those that were "irrelevant to the decision to kill") (quoting *Booth*, 482 U.S. at 505); *Booth*, 482 U.S. at 505 (noting the problem of a victim who leaves behind no family, and also the "danger of allowing juries" to consider information given by family members who may be "less articulate in describing their feelings even though their sense of loss is equally severe"). Justice Powell also highlighted the jury's requirement in capital cases to make an "*individualized* determination" whether a defendant should be executed based on mitigating factors such as the "character of the individual and the circumstances of the crime." *Id.* at 502 (quoting Zant v. Stephens, 462 U.S. 862, 879 (1983) (emphasis in original)). *But see Payne*, 501 U.S. at 825 (reaffirming the State's "legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in") (quoting *Booth*, 482 U.S. at 517 (White, J., dissenting)).

19 *Booth*, 482 U.S. at 504; Witherspoon v. State of Ill., 391 U.S. 510, 519 (1968).

20 *See Booth*, 482 U.S. at 506.

21 *See Gathers*, 490 U.S. at 821 ("Nothing in the Eighth Amendment precludes the community from considering its loss in assessing punishment nor requires that the victim remain a faceless stranger at the penalty phase of a capital trial."). *But see Booth*, 482 U.S. at 502–03 (addressing the risk of arbitrariness that VIS pose in capital cases).

22 *Death Sentences in the United States From 1977 By State and By Year*, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2008 (last visited Sept. 14, 2012) [hereinafter DEATH PENALTY INFORMATION]; *see also Capital Punishment*,

1996,[23] both proponents and critics of *Payne* might seek to re-examine their assumptions about the effects of VIS on juries.[24] Has the State's interest in balancing the scales adequately been weighed against the need to safeguard defendants from arbitrary sentencing? Has a defendant's characterization in court become the determining factor in sentencing recommendations meted out by juries whose heartstrings have either been tugged too far or, conversely, ignored altogether? This Comment reflects on twenty years of VIS and explores their role in the current capital punishment debate.

I. THE FOUNDATION

Any analysis of the *Payne v. Tennessee* decision requires a discussion of two previous Supreme Court decisions, both of which provide the foundation and context necessary to fully understand *Payne*. As this Comment illustrates, significant legal analysis has been dedicated to the following three cases and their collective impact on sentencing decisions. While much of the scholarship has included brief overviews of the cases as background for related issues, this Comment brings the opinions to the foreground, giving the philosophical underpinnings more attention than their conclusions.

A. *Booth v. Maryland*

In *Booth v. Maryland*, the Supreme Court considered whether the Constitution prohibits a jury from considering VIS during the sentencing phase of a capital murder trial.[25] The defendant was convicted at trial on two counts of first-degree murder and the jury sentenced him to death.[26] At trial, defense counsel moved to suppress VIS compiled from interviews of the victims' family members on the ground that the information was "both irrelevant and unduly inflammatory, and that therefore its use in a capital case violated the Eighth Amendment of the Federal Constitution."[27] The

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BUREAU OF JUSTICE STATISTICS, http://bjs.ojp.usdoj.gov/ (select "Corrections;" then select "Capital Punishment").

23 DEATH PENALTY INFORMATION, *supra* note 22. The number of death sentences given in capital cases has dropped from 315 in 1996 to 112 in 2009, declining every year but two—1998 and 2002—during that period. *Id.* In 2010, 104 new inmates were sentenced to death, perhaps illustrating a stabilization, though one that is statistically minimal. *Id.*

24 For example, Justice White assumed and expected that "[m]any if not most jurors . . . will look less favorably on a capital defendant when they appreciate the full extent of the harm he caused, including the harm to the victim's family." *Booth*, 482 U.S. at 516. A reasonable inference to draw from this assumption is that death sentences would increase rather than decline post-*Payne*. As the statistics show, this has not been the case, leaving open the question of *Payne*'s actual impact on death sentences overall.

25 *Id.* at 497.

26 *Id.* at 498, 501. Defendant robbed and murdered an elderly couple in their home. *Id.* at 497–98. The defendant was a neighbor of the victims and knew they could identify him. *Id.* at 498. The victims were bound, gagged, stabbed repeatedly, and their bodies were discovered two days later by the victims' son. *Id.*

27 *Id.* at 500–01. The VIS consisted of interviews with the victims' son, daughter, son-in-law, and granddaughter, all testifying to the victims' "outstanding personal qualities," the resulting emotional and personal problems suffered by the family members, and the likelihood that none of the family

trial court denied the motion and ruled that the jury could hear any evidence bearing on the sentencing decision.[28] The trial court rejected the defense's claim that VIS were "arbitrary factor[s]" added to the sentencing decision, holding instead that VIS serve an "important interest by informing the sentencer of the full measure of harm caused by the crime."[29]

The Supreme Court overturned the decision, noting that a jury's "discretion to impose the death sentence must be 'suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.'"[30] The Court highlighted the jury's requirement to "make an '*individualized* determination' whether the defendant in question should be executed, based on 'the character of the individual and the circumstances of the crime.'"[31] The Court has long recognized that in determining sentences, justice requires "that there be taken into account the circumstances of the offense together with the character and propensities of the offender."[32] Therefore, the Court further determined that the personal characteristics of the victims, the emotional impact of the crimes on the family, and the family members' opinions and characterizations of the crime and defendant were "irrelevant to a capital sentencing decision," creating an "unacceptable risk" that the information leads to unfairly prejudicial, arbitrary, or capricious sentences.[33]

B. *South Carolina v. Gathers*

Two years later in *South Carolina v. Gathers*,[34] the Court again addressed the issue of statements admitted in a capital case concerning a

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would "ever be able to fully recover from [the] tragedy." *Id.* at 499–500.

28 *Id.* at 501.

29 *Id.*

30 *Id.* at 502 (quoting Gregg v. Georgia, 428 U.S. 153, 189 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.); California v. Ramos, 463 U.S. 992, 999 (1983)).

31 *Id.* at 502 (quoting Zant v. Stephens, 462 U.S. 862, 879 (1983) (emphasis in original)); *see* Furman v. Georgia, 408 U.S. 238, 249, 255–57 (1972) (holding that because the death penalty was unique among punishments, it was therefore different in kind and could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary or capricious manner, or in a manner allowing a jury to discriminate unfairly); *see also* Gregg v. Georgia, 428 U.S. 153, 189 (1976) ("*Furman* mandates 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 or capricious action.").

32 *See Gregg*, 428 U.S. at 189 (quoting Pennsylvania *ex rel.* Sullivan v. Ashe, 302 U.S. 51, 55 (1937)); s*ee also* Williams v. Oklahoma, 358 U.S. 576, 585 (1959); Williams v. New York, 337 U.S. 241, 247 (1949)). The Court had feared that without the noted considerations in capital sentencing, the "system cannot function in a consistent and a rational manner." *Gregg* at 189 (quoting the American Bar Association Project on Standards for Justice, Sentencing Alternatives and Procedures § 4.1(a), Commentary, p. 201 (App. Draft 1968). *But see* Scott W. Howe, Furman*'s Mythical Mandate*, 40 U. MICH. J.L. REFORM 435, 435 (2007) ("[C]onsistency is implausible as an Eighth Amendment aspiration and . . . the Court has never seriously pursued consistency after *Furman*.").

33 *See Booth*, 482 U.S. at 502–03.

34 S. Carolina v. Gathers, 490 U.S. 805 (1989), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991).

victim's personal characteristics.[35] There, the jury found the defendant guilty of murder and first-degree criminal sexual conduct for his brutal physical and sexual assault of a mentally disabled man in a public park.[36] The prosecutor's closing argument included remarks about the victim's Christian beliefs, community involvement, and mental disability.[37] Relying on *Booth*, the Supreme Court of South Carolina found the prosecutor's comments to the jury "unnecessary to . . . the circumstances of the crime."[38] The court therefore reversed Gathers' death sentence and remanded the case for a new sentencing proceeding.[39] Upon granting certiorari, the Supreme Court affirmed its reasoning in *Booth*, holding again that the Eighth Amendment barred admission of victim impact evidence during the penalty phase of a capital trial.[40] The *Gathers* majority opinion was a mere six pages, essentially noting: (a) the distinction that the prosecutor offered the VIS in this case, while the victim's family members did so in *Booth*; and (b) that the issue and reasoning in this case were otherwise "indistinguishable" from *Booth*.[41] The dissent, however, was over twice as long—much of it would later constitute the bulk of the *Payne* majority opinion.[42]

C. *Payne v. Tennessee*

In 1991, just four years after *Booth* and two years after *Gathers*, the Court changed course, overturning both cases and holding that the Eighth Amendment permits the admission of victim impact evidence in capital cases.[43] In *Payne v. Tennessee*, the jury convicted the defendant on two counts of first-degree murder and one count of attempted murder, and sentenced him to death.[44] At trial, the defendant proffered several character

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35 *Id.* at 811.

36 *Id.* at 807–08. The victim referred to himself as the "Reverend Minister" despite no religious training, and carried with him several bags of religious articles. *Id.* at 807. After beating and kicking the victim, the defendant smashed a bottle over his head, beat him again with an umbrella, and sodomized the victim with the same. *Id.* The defendant apparently returned to the scene sometime later and stabbed the victim with a knife. *Id.*

37 *Id.* at 808–10. The prosecutor also read aloud a religious tract entitled, "the Game Guy's Prayer," which used football and boxing metaphors to promote the virtues of being a good sport, team player, hardworking, and the like. *Id.* at 808–09.

38 *Id.* at 810 (quoting State v. Gathers, 369 S.E.2d 140, 144 (1988), *aff'd sub nom.* S. Carolina v. Gathers, 490 U.S. 805 (1989), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991)). The Supreme Court of South Carolina concluded that the prosecutor "conveyed the suggestion appellant deserved a death sentence because the victim was a religious person and a registered voter." *Id.*

39 *Id.*

40 *Id.* at 811.

41 *Id.*

42 *See id.* at 812–25 (O'Connor, J., dissenting); *see also* Payne v. Tennessee, 501 U.S. 808 (1991).

43 *See Payne*, 501 U.S. at 827.

44 *Id.* at 811. The defendant in *Payne* inflicted over eighty wounds on a mother in her home with a butcher knife, while stabbing her two-year-old in the chest, stomach, back, and head, killing both. *Id.* at 811–13. The surviving three-year-old son sustained stab wounds that "completely penetrated through his body from front to back," yet he survived. *Id.* at 812.

witnesses to attest to his non-violent disposition.[45] The State, in response, offered victim impact evidence pertaining to the defendant's actions and their impact on the victims' parents, grandparents, and surviving child.[46] The Tennessee Supreme Court affirmed the sentence and the defendant appealed the admission of the VIS.[47] The Supreme Court affirmed, holding that a misreading of its own precedent had "unfairly weighted the scales in a capital trial" by placing no limits on mitigating evidence offered by a defendant of his own circumstances, while not giving similar parity to testimony on behalf of victims.[48]

Chief Justice Rehnquist characterized the precedent as merely mandating that courts hear testimony offered about a defendant's character as a mitigating factor, rather than as *barring* testimony of a *victim's* character from the courtroom during sentencing.[49] Because of the alleged misreading, he concluded, the State was "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."[50] With this in mind, and in consideration of the fact that both *Booth* and *Gathers* were "decided by the narrowest of margins, over spirited dissents challenging the basic

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45 *Id.* at 814 (bringing testimony in from defendant's mother, father, girlfriend, and a clinical psychologist, all testifying to defendant's caring nature, politeness, and low IQ).

46 *Id.* at 814–15 (focusing on the surviving son's life without his mother, the traumatic effect of witnessing the murder of his mother and sister, and the opportunity for the jury to answer his subsequent question of "what type of justice" would be done for him—the implication being that the harsher the sentence the greater the justice done).

47 *Id.* at 816–17.

48 *Id.* at 822. *Booth* directed juries to "focus on the defendant as a 'uniquely individual human bein[g].'" Booth v. Maryland, 482 U.S. 496, 504 (1987), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991) (quoting Woodson v. N. Carolina, 428 U.S. 280, 304 (1976) (plurality opinion)). The *Payne* decision cited language from another Supreme Court case handed down the same day as *Woodson*, stating that "[s]o long as the evidence introduced and the arguments made at the presentence hearing do not prejudice a defendant, it is preferable not to impose restrictions" on the evidence a jury may use "when it makes the sentencing decision." *Payne*, 501 U.S. at 821 (quoting Gregg v. Georgia, 428 U.S. 153, 203–04 (1976)); *see also* S. Carolina v. Gathers, 490 U.S. 805, 817 (1989), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991) (O'Connor, J., dissenting) ("[T]his case illustrates the one-sided nature of the moral judgment that the Court's broad reading of *Booth* would require of the capital sentencer.").

49 *See Payne*, 501 U.S. at 822 ("The language quoted from *Woodson* in the *Booth* opinion was not intended to describe a class of evidence that *could not* be received, but a class of evidence which *must* be received." (emphasis in original)); *see also* Lockett v. Ohio, 438 U.S. 586, 604 (1978) (holding that "the 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 . . . that the defendant proffers as a basis for a sentence less than death" (emphasis in original)).

50 *See Payne*, 501 U.S. at 822 (quoting Mills v. Maryland, 486 U.S. 367, 397 (1988) (Rehnquist, C.J., dissenting)). Chief Justice Rehnquist added that the *Booth* court was wrong to state that victim impact evidence leads to the "arbitrary imposition of the death penalty," particularly when considering the State's "legitimate interest" in reminding a sentencer that the victim of a homicide is an individual representing a "unique loss to society" and to his family. *Id.* at 825; *see* Gregg v. Georgia, 428 U.S. 153, 183 (1976) (noting that retribution is a valid penological goal of the death penalty); Tison v. Arizona, 481 U.S. 137, 149 (1987) ("The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender."). Thus, "one essential factor in determining the defendant's culpability is the extent of the harm caused." *Gathers*, 490 U.S. 805 at 818 (O'Connor, J., dissenting).

underpinnings of those decisions," the Court reconsidered its decisions and overruled them, holding that they had been wrongly decided.[51]

Justice Marshall issued a vigorous dissent focused on the fact that nothing justified abandoning *Booth* since neither the law nor the facts had changed significantly from one case to the next—only the personnel of the Court had.[52] "Power, not reason," he said, "is the new currency of this Court's decisionmaking."[53] Justice Stevens' dissent added that even if *Booth* and *Gathers* had never been decided, "today's decision [in *Payne*] would represent a sharp break with past decisions" and would provide no support for the majority's conclusion that "the prosecutor may introduce evidence that sheds no light on the defendant's guilt or moral culpability, and thus serves no purpose other than to encourage jurors to decide in favor of death rather than life on the basis of their emotions rather than their reason."[54] Ultimately, *Payne* justified VIS in two ways: (a) by offsetting the defendant's right to offer mitigating character evidence on his or her own behalf; and (b) by providing a jury with information enabling it to calculate the specific harm resulting from the crime.[55] While VIS are not required, the Eighth Amendment provides no *per se* bar.[56] *Payne* did not, however, depart from *Booth* and *Gathers* with regard to the admission of family members' characterizations or opinions about the *crime* or the *defendant*.[57] Any character testimony provided by a family member must

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51 *See Payne*, 501 U.S. at 828–30. Members of the Court had questioned both *Booth* and *Gathers*, and lower courts applied them inconsistently. *Id.* at 829–30; *see Gathers*, 490 U.S. 805 at 813 (O'Connor, J., dissenting); Mills v. Maryland, 486 U.S. 367 at 395–96 (Rehnquist, C.J., dissenting); *see also* State v. Huertas, N.E.2d 1058, 1070 (1990) (Moyer, C.J., concurring) ("The fact that the majority and two dissenters in this case all interpret the opinions and footnotes in *Booth* and *Gathers* differently demonstrates the uncertainty of the law in this area."). The *Payne* Court limited its holding to the holdings in *Booth* and *Gathers*, namely that "evidence and argument relating to the victim and the impact of the victim's death on the victim's family are inadmissible at a capital sentencing hearing." *Payne,* 501 U.S. at 830 n.2. (finding that since no evidence was admitted regarding the victim's family members' "characterizations and opinions about the crime, the defendant, and the appropriate sentence," the Court need not issue an opinion on whether such evidence would violate the Eighth Amendment). The Court further qualified its opinion, adding that "[i]n the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Id.* at 825.

52 *Payne,* 501 U.S. at 844 (Marshall, J., dissenting).

53 *Id.* at 844–45. Marshall further opined that the reversal of *Booth* and *Gathers* "ominously" suggested that more Court precedent would be subject to "upheaval," considering that the "implications of this radical new exception to the doctrine of stare decisis are staggering." *Id.* at 844–45. Marshall noted the Court's "unmistakable course" toward "an even broader and more far-reaching assault upon this Court's precedents." *Id.* at 856.

54 *Id.* (Stevens, J., dissenting). Justice Stevens goes on to say that "[e]vidence that serves no purpose other than to appeal to the sympathies or emotions of the jurors has never been considered admissible." *Id.* at 856–57. While Justice Stevens does not cite any cases in that sentence to support his claim that *Payne* represents a "sharp break with past decisions," he later references several cases to support the assertion, including Williams v. New York, 337 U.S. 241 (1949); Lockett v. Ohio, 438 U.S. 586 (1978); Booth v. Maryland, 482 U.S. 496 (1987), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991); Zant v. Stephens, 462 U.S. 862, 879 (1983); Eddings v. Oklahoma, 455 U.S. 104, 112 (1982); Edmund v. Florida, 458 U.S. 782, 801 (1982). *Id.* at 857–58.

55 *Payne,* 501 U.S. at 825; *see also* Blume, *supra* note 2, at 266.

56 *Payne,* 501 U.S. at 827.

57 *Id.* at 830 n.2 (emphasis added). *But see* Ledbetter v. State, 933 P.2d 880, 891 (Okla. Crim.

be limited to the victim or the specific emotional impact on the family member.[58]

The Court responded to the main concerns raised by (a) the indigent victim with no family or loved ones to parade into court on his or her behalf during sentencing, and (b) the unsavory victim who presents to a jury very little reason to believe his or her death is worth rectifying in the first place:

> Payne echoes the concern voiced in *Booth*'s case that the admission of victim impact evidence permits a jury to find that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy. As a general matter, however, victim impact evidence is not offered to encourage comparative judgments of this kind—for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but that the murderer of a reprobate does not. It is designed to show instead *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.[59]

The reasoning goes that if the defense can present character witnesses to testify on the convicted defendant's behalf as *mitigating* factors to be considered in the determination of the sentence, then there is neither a public policy argument against nor a constitutional ban on the State's right to present character witnesses on behalf of the victim as *aggravating* factors to be balanced in the sentencing calculus.[60] If a capital defendant must be treated as a "uniquely individual human bein[g],"[61] then so should the defendant's victim.

While *Booth* lasted four years and *Gathers* only two, *Payne* appears to be solidly entrenched as the law twenty years later.[62] Though it may have

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App. 1997) (holding that a victim impact witness may offer an opinion regarding the appropriate sentence, but the case will then be subject to increased scrutiny upon appeal); Hyde v. State, 778 So. 2d 199, 213–14 (Ala. Crim. App. 1998) (allowing victim impact witness to recommend what he considered an appropriate sentence so long as the testimony did not overly prejudice the jury and was not considered by the trial court when rendering the actual sentence); State v. Gideon, 894 P.2d 850, 863–64 (Kan. 1995) (admitting victim impact testimony that was interpreted as "an emotional appeal to bias or prejudice" but was not "in any way" considered by the trial court when determining defendant's sentence).

58 *See Payne*, 501 U.S. at 830 n.2 (noting that the *Payne* holding is limited to the holdings in *Booth* and *Gathers*, as *Booth* held, "the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence [still] violate[] the Eighth Amendment").

59 *Id.* at 823 (emphasis in original) (internal citations omitted).

60 *Id.* at 826; *see also* Eddings v. Oklahoma, 455 U.S. 104, 117 (1982); Skepper v. S. Carolina, 476 U.S. 1, 5 (1985); Mills v. Maryland, 486 U.S. 367, 374–75 (1988).

61 Booth v. Maryland, 482 U.S. 496, 504 (1987) (plurality opinion) (quoting Woodson v. N. Carolina, 428 U.S. 280, 304 (1976)), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991).

62 *See* Jeremy Blumenthal, *Affective Forecasting and Capital Sentencing: Reducing the Effect of Victim Impact Statements*, 46 AM. CRIM. L. REV. 107, 110 (2009) [hereinafter Blumenthal, *Affective Forecasting*] (opining that the abolition of *Payne* is unlikely, as are VIS in some form); *see also* Bryan Myers & Edith Greene, *The Prejudicial Nature of Victim Impact Statements: Implications for Capital Sentencing Policy*, 10 PSYCHOL. PUB. POL'Y & L. 492, 492–94 (2004); Wayne A. Logan, *Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials*, 41 ARIZ. L. REV. 143, 177 (1999); José Felipé Anderson, *Will the Punishment Fit the Victims? The Case for Pre-*

settled the law, the fallout and subsequent academic debate is ongoing and varied. In fact, much of the debate has moved from lamenting or applauding the decision to investigating its impact and offering suggestions to prevent both victim anonymity and unfair jury prejudice.[63] It is the evolution of this movement to which this Comment now turns.

II. THE FALLOUT

Fallout from *Payne* has varied, with states essentially determining for themselves the extent to which parties may offer evidence and the forms VIS may take.[64] The Court's decision was a "major victory" for what had been at that time a ten-year-old movement to "empower victims in the criminal justice system."[65] The decision also further highlighted the ideological and philosophical divide that existed in the Court, which had

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Trial Disclosure, and the Uncharted Future of Victim Impact Information in Capital Jury Sentencing, 28 RUTGERS L.J. 367, 430 (1997).

63 *See* Blumenthal, *Affective Forecasting*, *supra* note 62, at 110–11.

64 Blume, *supra* note 2, at 267–69. Blume, asserting that "*Payne* is not going away," also notes that VIS are highly unregulated and politically popular, making it "difficult to imagine" that state or federal courts would limit their admissibility. *Id.* at 278. Blume further contends that the "increasing power" of the victims' rights movement has resulted in nearly all death penalty jurisdictions now authorizing some form of VIS. *Id.* at 267; Theodore Eisenberg et al., *Victim Characteristics and Victim Impact Evidence in South Carolina Capital Cases*, 88 CORNELL L. REV. 306, 312–13 (2003) (contending that after the *Payne* decision, each state was "left to decide for itself whether it would follow *Booth* and *Gathers*, or *Payne*," and referring to VIS in capital cases as "routine" since the *Payne* decision); *see also* Pickren v. State, 500 S.E.2d 566, 568 (Ga. 1998) (refusing to place "rigid limitations on the volume of [VIS]" while upholding the State's admission of eight such statements in the sentencing hearing); People v. Gonzales, 673 N.E.2d 1181, 1183 (Ill. App. Ct. 1996) (refusing to place any limits on the number of witnesses offering VIS). For forms of VIS, see, for example, People v. Zamudio*,* 181 P.3d 105, 134 (Cal. 2008) (allowing a fourteen minute video with 118 photographs of the victims as part of VIS); People v. Kelly*,* 171 P.3d 548, 570 (Cal. 2007) (allowing a twenty minute video compilation of the victim's life with music playing in the background); Noel v. State, 960 S.W.2d 439, 446–47 (Ark. 1998) (permitting the mother of three child murder victims to read a poem about her children to the jury); State v. Basile, 942 S.W.2d 342, 358–59 (Mo. 1997) (en banc) (allowing the victim's sister to read a poem, and the victim's mother to read from a laudatory diary she kept about her now-deceased daughter); *see also* State v. Gray, 887 S.W.2d 369, 389 (Mo. 1994) (en banc) (playing a videotape of a family Christmas-gathering); State v. Roberts, 948 S.W.2d 577, 604 (Mo. 1997) (en banc) (displaying hand-crafted items made by the victim); State v. Ard, 505 S.E.2d 328, 331 (1998) (allowing, in an extreme example of VIS, the jury to see a photograph of a dead fetus wearing clothes picked out by the mother, who was also killed, to be worn home from the hospital).

65 Janice Nadler & Mary R. Rose, *Victim Impact Testimony and the Psychology of Punishment*, 88 CORNELL L. REV. 419, 427 (2003). Nadler & Rose recognized President Reagan's Task Force on Victims of Crime, which issued a report concluding that there was a "serious imbalance" in the criminal system between defendants' and victims' rights to be heard. *Id.* (quoting PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 114 (1982) (emphasis omitted)). Nadler & Rose contend that the momentum and influence of the victims' rights movement, though controversial, intensified after *Payne*. *Id.*; *see also* John W. Gillis & Douglas E. Beloof, *The Next Step for a Maturing Victim Rights Movement: Enforcing Crime Victim Rights in the Courts*, 33 MCGEORGE L. REV. 689, 689–90 (2002) (calling the victims' rights movement "one of the most successful civil liberties movements of recent times"); Susan Elizabeth Anitas, Note, *The Status of Victim Impact Statements in Ohio Capital Offense Sentencing*, 57 OHIO ST. L.J. 235, 238–39 (1996) (recognizing the controversial history of VIS during the capital sentencing phase and contending that Ohio passed its own Victims' Rights Act in response to the "rise in victims' rights awareness"). For a more recent analysis of VIS in state courts, including an enlightening history of the victims' rights movement from its genesis in America, see Boland & Butler, *supra* note 9, at 6.

resulted in the reversal of two prior decisions in four years, and was exacerbated by the appointment of two new Justices in that time.[66] The following section addresses the philosophical divide, raising again the question of whether a convicted murderer's moral blameworthiness rests on the quality of the individual who was murdered, and exploring how this question has been examined through post-*Payne* empirical research.

A. The Philosophical Divide

The problem addressed in this Comment, while highlighting the philosophical underpinnings, rests on two public policy questions left open by the *Payne* decision[67] when read in light of *Booth* and *Gathers*: Do VIS entice juries to recommend sentences in an arbitrary or capricious manner? If so, does the risk of creating "faceless" victims outweigh that concern? Legal academia has been "almost uniformly critical" of allowing VIS during the sentencing phase of a capital trial.[68] When presented on behalf of a victim, VIS are an attempt to force a jury to connect emotionally with the victim or victim's family in a way that does not directly reflect blameworthiness in the same way a defendant's character does.[69] Testimony on behalf of a defendant's character is different *in kind* than testimony offered to ensure a victim's treatment as a "uniquely individual human being."[70] The result is an emotional appeal to a jury's sympathy for the victim based on extrinsic testimony of how "good" or "bad" of a person the victim happened to be. The jury's role as the "conscience of the community"[71] thus collapses, and a jury becomes little more than the conscience of the victim's family.

The reasoning posited is as follows: A defendant's background and life-experience, including how he or she is perceived by peers, family,

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66 Nadler & Rose, *supra* note 65, at 428–29; *see also supra* text accompanying note 6.

67 Blume, *supra* note 2, at 279. Blume explores several issues left open after *Payne*, one of which is the prosecution's invitation to a jury to consider the value of the victim's life (based on third-person impact testimony) when making sentencing determinations. *Id.*; *see also* Vivian Berger, Payne *and Suffering: A Personal Reflection and a Victim-Centered Critique*, 20 FLA. ST. U. L. REV. 21, 46 (1992) (arguing that the intention of VIS is to invite "comparative judgments" of the victim's life, as evidenced by the absence of a prosecutor's focus "on the dead person's vices").

68 Eisenberg et al., *supra* note 64, at 320; *see also* Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 365–66 (1996); Berger, *supra* note 67, at 21–22; Markus Dirk Dubber, *Regulating the Tender Heart When the Axe Is Ready to Strike*, 41 BUFF. L. REV. 85, 86–87 (1993); Angela P. Harris, *The Jurisprudence of Victimhood*, 1991 SUP. CT. REV. 77, 78 (1991); Elizabeth E. Joh, *Narrating Pain: The Problem with Victim Impact Statements*, 10 S. CAL. INTERDISC. L.J. 17, 18 (2000); Wayne A. Logan, *Opining on Death: Witness Sentence Recommendations in Capital Trials*, 41 B.C. L. REV. 517, 518 (2000); Logan, *supra* note 62, at 144–45. *But see* Paul Gewirtz, *Victims and Voyeurs at the Criminal Trial*, 90 NW. U. L. REV. 863, 864–65 (1996).

69 *See* Nader & Rose, *supra* note 66, at 429; *see also* Blumenthal, *Affective Forecasting*, *supra* note 62, at 109 (noting criticism by both courts and commentators that VIS has a tendency to bias capital jurors in favor of a death sentence and distract them from relevant evidence).

70 *See* Payne v. Tennessee, 501 U.S. 808, 822–23 (1991) (quoting Woodson v. N. Carolina, 428 U.S. 280, 304 (1976) (plurality opinion)).

71 *See* Booth v. Maryland, 482 U.S. 496, 504 (1987), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991); Witherspoon v. Ill., 391 U.S. 510, 519 (1968).

loved-ones, etc., are relevant in a criminal court because they help inform a jury as to *why* a defendant may have committed the crime or *how* social disadvantages (for example) may have resulted in a lack of moral fortitude. A defendant with a severely tumultuous upbringing may be less culpable than a person with no evident "excuse" for his or her conduct.[72] Either way, evidence of the defendant's character or past conduct speaks directly to the moral blameworthiness at the moment the crime is committed (notwithstanding intoxication, etc.); the blameworthiness rests on what a defendant internally brought to the criminal act, not on who ends up the victim of such depravity.[73] Evidence of a particular defendant's background is relevant, therefore, to offer a jury the opportunity to mitigate the impending sentence if justified under the given circumstances.[74]

Chief Justice Rehnquist addresses this reasoning head-on in *Payne*, underlying the main thrust of the once-dissenting, now-majority philosophical attitude toward the admissibility of VIS: "*Booth* and *Gathers* were based on two premises: that evidence relating to a particular victim or to the harm that a capital defendant causes a victim's family do not in general reflect on the defendant's 'blameworthiness,' and that only evidence relating to 'blameworthiness' is relevant to the capital sentencing decision."[75] Chief Justice Rehnquist, however, claims that the "assessment of harm caused by the defendant" is an important concern in criminal law, "both in determining the elements of the offense and in determining the appropriate punishment."[76] Noting the different natures of murder and attempted murder, he illustrates how "two equally blameworthy criminal defendants may be guilty of different offenses solely because their acts cause differing amounts of harm. . . . [M]oral guilt in both cases is identical, but . . . responsibility in the former is greater."[77] Moral culpability, therefore, rests on the actual *consequences* of the act, not merely the intention behind it. Permitting jurors to hear the full spectrum of resulting damage allows them to fully—and for *Payne* supporters, more accurately—assess and weigh the extent of the damage against any character evidence offered on the defendant's behalf. The underlying

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72 Society has "long held" the belief that "defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." S. Carolina v. Gathers, 490 U.S. 805, 817 (1989) (O'Connor, J., dissenting) (quoting California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991); *see also* Eddings v. Oklahoma, 455 U.S. 104, 113–15 (1982) (holding that the sentencer may not refuse, as a matter of law, any relevant mitigating factors including, in this case, evidence of the defendant's age (sixteen-years-old), turbulent family history, physical abuse, and severe emotional disturbance).

73 *See Booth*, 482 U.S. at 504–05. When a jury hears testimony that "may be wholly unrelated to the blameworthiness of a particular defendant," this diverts the jury's attention "away from the defendant's background and record, and the circumstances of the crime." *Id.*

74 *Id.*

75 *Payne*, 501 U.S. at 819.

76 *Id.*

77 *Id.* (citation omitted).

theory is that a defendant cannot be judged properly without considering the full scope of the damage caused.

In contrast, however, as many commentators contend,[78] testimony lauding the character of a victim or detailing the emotional impact inflicted on each testifier forces a jury to first judge the *victim*. It follows that if a jury thinks the victim is worthy, it will hand down the harshest recommendation possible. If the victim is less sympathetic, or at least lacks a close network of loved ones willing to testify, the victim becomes the "faceless stranger" the Supreme Court seeks to protect.[79] The jury ultimately judges the defendant based on its opinion of the *victim*, rather than on a rational independent determination of blameworthiness stemming from the criminal act. An assessment of the victim's character promotes ethical-consequentialism,[80] weighing on the one hand the "quality" of the victim, and on the other evidence of the defendant's character prior to the act at issue.[81] Thus, a defendant's character is determined by factors over which he or she could not have had any control, rather than on factors for which the defendant is immediately responsible. This deep-rooted philosophical divide within the Supreme Court dominated all three opinions and their dissents, and set the stage for not only further debate, but for extensive empirical research to test the underlying assumptions.

B. The Research

In 2003, Cornell University held a symposium on victims and the death penalty.[82] Several of the articles focused on the leading research testing how the inclusion of VIS would affect death penalty sentencing.[83] At that time there were four published studies exploring the effect information regarding victims had on "variables relevant to capital

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78 *See supra* note 66.

79 *See Payne*, 501 U.S. at 825 (quoting S. Carolina v. Gathers, 490 U.S. 805, 821 (1989) (O'Connor, J., dissenting)), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991).

80 Without triggering a thorough discussion of Kantian deontology or Jeremy Bentham's consequential utilitarianism, the author intends this term to mean, roughly, judging the severity of a criminal act based on its consequences rather than the intentions of the criminal actor. Contrary to tort law, where a proceeding aims to make a victim whole, the criminal court is not similarly situated. "Ethical-consequentialism," as envisioned here, suggests there is no difference in moral culpability between a murder and an attempted murder, where the perpetrators' actions are otherwise identical; pointing a gun at a person and pulling the trigger with the intent to kill is the act that must be punished, not the resulting damage the bullet causes. To hold otherwise would reward the "failing" criminal whose aim is not as good as the "successful" one, but whose willingness to murder is no different.

81 *See, e.g.*, Nadler & Rose, *supra* note 65, at 421–22 (noting the common concern that VIS "highlight the perceived relative worth of the victim," and that the jury's judgment will be influenced by this "inappropriate factor"); *see also* Amy K. Phillips, Note, *Thou Shall Not Kill Any Nice People: The Problem of Victim Impact Statements in Capital Sentencing*, 35 AM. CRIM. L. REV. 93, 105–06 (1997).

82 Symposium, *Victims and the Death Penalty: Inside and Outside the Courtroom*, 88 CORNELL L. REV. 257 (2003).

83 *See, e.g.*, Blume, *supra* note 2, at 257; Beloof, *supra* note 11, at 282; Eisenberg et al., *supra* note 64, *passim*; Nadler & Rose, *supra* note 65, *passim*.

sentencing."[84] The first major study tested the hypothesis that the introduction of VIS would increase the number of subjects who voted for the death penalty.[85] College students were given two different first-degree murder scenarios, with only half receiving VIS at the sentencing phase.[86] The study supported the hypothesis, finding that fifty-one percent of those who heard VIS elected a death sentence, while only twenty percent of those not hearing VIS elected death.[87]

Edith Greene[88] conducted two other studies following *Payne*, focused not on sentencing outcomes, but rather on VIS and its relation to a variety of "intermediate" variables.[89] Her 1998 study played videotapes for participants during the mock sentencing phase, with one tape depicting the victims as a respectable elderly couple and the other showing them as less respectable.[90] The study concluded that jurors who saw the tape about respectable victims "rated those victims as more likable, decent, and valuable; felt more compassion for the victims' family; believed that the emotional impact of the murders on survivors was greater; and rated the crime as more serious."[91] Greene's 1999 study supported the findings of her first study, reaffirming that subjects exposed to "high-respectability" conditions thought more highly of victims and rated the suffering of the victim's survivors more highly than the subjects exposed to a low-respectability condition.[92]

In the same year as Greene's 1999 study, a fourth leading study tended to support the conclusion that the admission of VIS would affect sentencing

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84 *See* Eisenberg et al., *supra* note 64, at 317.

85 James Luginbuhl & Michael Burkhead, *Victim Impact Evidence in a Capital Trial: Encouraging Votes for Death*, 20 AM. J. CRIM. JUST. 1, 9 (1995).

86 *Id.* at 7. The subjects consisted of ninety-nine undergraduate students at North Carolina State University, none of whom were vetted for any propensity for or against the death penalty. *Id.* Each read descriptions of two crimes, one with a "moderately aggravated murder" involving the shooting of an innocent bystander during a robbery (the facts were unclear as to whether the shooting was intentional), and the other depicting a "severely aggravated murder" where the defendant tied an elderly man to a chair during a robbery and stabbed him multiple times. *Id.* at 6–7. All students were told that the defendants were convicted of first-degree murder. *Id.* at 7. Half in each group then read VIS modeled after *Booth*, which was used for both crimes and described "the reactions of the victim's children and grandchildren to the victim's death, their description of the qualities of the victim, as well as their opinions about a person who would commit such a murder." *Id.* at 7.

87 *Id.* at 9.

88 Edith (Edie) Greene is a Professor of Psychology at the University of Colorado, Colorado Springs (UCCS), Director of the Graduate Concentration in Psychology and Law, and Director of the Psychology Honors Program. *Edie Greene—Biographical Sketch*, U. OF COLO., COLO. SPRINGS, http://www.uccs.edu/egreene/biographical-sketch.html (last visited Sept. 14, 2012).

89 Edith Greene, *The Many Guises of Victim Impact Evidence and Effects on Jurors' Judgments*, 5 PSYCHOL., CRIME & L. 331, 336–37 (1999) [hereinafter Greene, *Many Guises*]; Edith Greene, et al., *Victim Impact Evidence in Capital Cases: Does the Victim's Character Matter?*, 28 J. APPLIED SOC. PSYCHOL. 145, 149–52 (1998) [hereinafter Greene, *Character*]. "Intermediate" variables, in this context, refers to the different ways subjects react to VIS without testing directly whether that reaction produces a tendency toward harsher punishment. *Id.* at 154–55. The "intermediate" variable is essentially the link between cognizing the VIS and making a sentencing recommendation. *Id.* at 155.

90 Greene, *Character*, *supra* note 89, at 150–51.

91 *Id.* at 154.

92 *See* Greene, *Many Guises*, *supra* note 89, at 345.

determinations, producing harsher penalties upon conviction.[93] This study grouped 416 mock jurors into forty-eight juries and asked them to deliver a verdict on both guilt *and* sentencing.[94] The authors of the study concluded that, consistent with the existing empirical research, "victim impact evidence . . . increased the likelihood that individual jurors would recommend the death penalty."[95]

Empirical studies conducted in the wake of *Payne* and up to the time of the Cornell symposium[96] appeared to support the fears of arbitrary and capricious capital sentencing resulting from placing a victim's quality of character at issue over a defendant's criminal act.[97] Two more studies in 2003 reopened the discussion and challenged some of the assumptions underlying VIS and their impact on capital sentencing.[98] While one study reinforced the theory that VIS would influence juries to recommend harsher sentences,[99] the other claimed that this theory was not supported when tested on actual jurors who had served in real death penalty cases.[100] Both, however, suggested that perhaps not all forms of VIS produced the direct sentencing results that Justice Powell and others had feared.[101]

Janice Nadler and Mary R. Rose[102] tested the hypothesis that the "severity of emotional harm described by a victim in a criminal proceeding is directly related to the severity of the sentence imposed on the defendant."[103] Specifically, this study focused not on the effect of testimony from a victim's family about the crime's effect on *them*, but rather on how testimony regarding a victim's own ability to cope with the effects of a crime would, in turn, determine the harshness of the

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93 Bryan Myers & Jack Arbuthnot, *The Effects of Victim Impact Evidence on the Verdicts and Sentencing Judgments of Mock Jurors*, 29 J. OFFENDER REHABILITATION 95, 95 (1999).

94 *Id.* at 99–100. The study involved undergraduate students in a psychology course at Ohio University, who were divided into four groups. *Id.* at 99. Group one watched a videotaped version of a capital trial with strong evidence of guilt and admissible VIS; group two with strong evidence of guilt but no VIS; group three with VIS but weak evidence of guilt; group four with weak evidence and no VIS. *Id.* at 100.

95 *Id.* at 108. An interesting wrinkle in the discussion emerged, however, from this study; while "jurors who were exposed to the victim impact evidence tended to apply harsher sentences than jurors not exposed," this tended to occur "only after deliberating with other jurors." *Id.* The authors guessed that individual juror confidence as to the guilt determination increased during deliberations with other similarly-minded jurors, which in turn increased their confidence in their verdicts; "those who felt the defendant deserved the death penalty may have been more willing to express it." *Id.*

96 *See* Eisenberg et al., *supra* note 64, at 317–19.

97 See, for example, the Supreme Court's *Booth* and *Gathers* majority opinions, and *Payne*'s dissenting opinions, as noted and detailed exhaustively throughout this Comment.

98 *See* Nadler & Rose, *supra* note 65, at 431–32; Eisenberg et al., *supra* note 64, at 308.

99 *See* Nadler & Rose, *supra* note 65, at 434–35.

100 *See* Eisenberg et al., *supra* note 64, at 308.

101 Nadler & Rose, *supra* note 65, at 431–32.

102 While conducting their research, Janice Nadler was a Professor of Law at Northwestern University School of Law and a Research Fellow for the American Bar Foundation. *Id.* at 419 n.a1. Mary Rose was an Assistant Professor of Sociology and of Law, University of Texas at Austin, and a Research Fellow for the American Bar Foundation. *Id.* at 419 n.aa1.

103 *Id.* at 432.

sentence.[104] Nadler and Rose tested participants' reactions to reading about either a robbery or a burglary, and randomly assigned one of three different VIS within each crime.[105] Two VIS described either "Severe Emotional Injury" or "Mild Emotional Injury", while the third VIS was the Control condition, which contained "no information about how the victim was coping with the crime."[106] Participants were not told that there were different VIS; rather, "each participant read and made judgments about only one version of the crime."[107] The Control condition allowed for the comparison between the average sentence judgment when no VIS were present and the average sentence judgment when VIS were present.[108]

The results confirmed the hypothesis that the "emotional severity of victim impact evidence influenced the severity of sentences imposed on defendants."[109] Participants, on average, chose longer prison terms when the VIS described Severe Emotional Injury.[110] In addition, the study revealed that mock jurors experienced more intense feelings of sympathy when a victim suffered Severe Emotional Injury; however, there were "no significant differences" in the reported feelings of "disgust or anger" based on the severity of the VIS.[111] Nadler and Rose concluded that "[t]hese data show that as the victim describes increasingly severe emotional harm, the sentence imposed on the defendant likewise increases."[112] Conversely, the defendant who "had the 'luck' of committing his crime on a victim who coped well benefitted from a shorter sentence" as compared even with the Control condition where the participant was given no information about the victim.[113] These results reinforce the theory that jurors are "more punitive

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104 *Id.* at 433–34. The study did not focus on capital murder, but rather on crimes where the victim lives, to ask "whether the emotional severity of victim impact evidence influenced the severity of sentences imposed on defendants," i.e., whether sentencing would increase or decrease depending on how well a victim "handled" the experience psychologically. *Id.* at 435.

105 Three-hundred-and-two adults, varying "widely along various demographic features," were given questionnaires during lunch hour in the lobby of a university administration building in downtown Chicago. Nadler & Rose, *supra* note 65, at 432–33.

106 *Id.* at 433–34. The Severe Emotional Injury statement stated that as a result of the crime the victim was then "afraid, vulnerable, depressed, [was] having problems sleeping, and [could not] stop thinking about the crime." *Id.* at 433. The Mild Emotional Injury statement claimed the victim was "angry when the crime first happened, but now has returned to her normal activities and no longer thinks too much about the crime." *Id.* at 433–34.

107 *Id.* at 433.

108 *Id.* at 434.

109 *Id.* at 435.

110 *Id.* For the burglary vignette, participants sentenced the defendant to 4.4 years versus 2.7 years, and in the robbery vignette the sentences were 4.8 years to 3.1 years, each with the longer term associating with Severe Emotional Injury and the shorter term correlating with Mild Emotional Injury. *Id.*

111 *Id.* at 435–36. Further, the percentage of participants rating the crime as "very serious" was much higher when VIS were Severe than when they were Mild, even though the average rating of crime seriousness did not differ significantly based on severity. *Id.* at 436.

112 *Id.* at 436 ("Even when all other circumstances . . . are held constant, the punishment is more severe when the victim is psychologically less able to deal with the crime in its aftermath.").

113 *Id.* The troubling inference here is that when a jury learns the crime victim copes well with the effects of the crime, the defendant's sentence is shorter, thus making the victim's reaction to the crime the determining factor in judging the severity of a crime rather than the criminal's actions or even

when the outcome of the crime reflects greater emotional harm to the victim."[114]

A second symposium study, while acknowledging that very little research existed, criticized the existing empirical studies as having "often-rehearsed limitations that stem primarily from a lack of verisimilitude."[115] While the existing research might have suggested certain tendencies in human behavior, it relied on data gathered in simulation studies rather than practical application in actual capital cases.[116] Eisenberg, Garvey, and Wells[117] therefore surveyed interviews of over two hundred jurors who sat on capital trials in South Carolina between 1985 and 2001 to analyze the influence of VIS on death sentence recommendations.[118] Several questions were posed to jurors that were "designed to assess" how VIS operated in that state, and to determine whether VIS affected sentencing outcomes in capital cases.[119]

The results varied. While there was "some correlation between victim admirability and jurors' perceived seriousness of the crime," the study found no "significant relation between the introduction of VI[S] and sentencing outcomes."[120] According to the study, even though VIS led to "increased empathy for victims and their families," it did "not appear to have been directed to, or to have had a direct and material effect on, sentencing outcomes."[121] These findings appeared to rebut earlier assumptions that increased VIS would result in increased rates of death penalties in capital cases.[122] While the study supported previous research concluding that jurors do often personally view victims in a more favorable light after VIS, and therefore view the crime as more serious,[123] it failed to show that these feelings translated to votes for the death penalty among real

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intention.

114 *Id.*

115 Eisenberg et al., *supra* note 64, at 307.

116 *Id.* at 307–08. While not expressly stated, the reasonable inference is that while mock-juror testimony might be helpful in pinpointing general reactions to hypothetical VIS, this data relies on a perhaps faulty assumption that hypothetical analysis will remain constant when jurors are actually faced with the real-life decision of whether to put another human being to death.

117 While conducting the research, Theodore Eisenberg and Stephen Garvey were Professors of Law at Cornell Law School. *Id.* at 306 n.a1–aa1. Martin Wells was a Professor of Statistics at Cornell University and Elected Member of the Law Faculty, Cornell Law School. *Id.* at 306 n.aaa1.

118 *Id.* at 307. The sample included thirty-three cases resulting in death sentences and thirty cases resulting in life sentences, with a total number of 214 jurors and a data set containing over 750 variables. *Id.* at 309–10.

119 *Id.* at 310–11. Questions included, for example: (1) how many of the victim's loved ones testified during the sentencing phase; (2) who testified; (3) what they testified about; (4) how jurors reacted emotionally to the testimony; and (5) how important such testimony was in sentencing deliberations. *Id.* at 311.

120 *Id.* at 308. While jurors tended to discuss the victim's suffering and reputation as presented by VIS during deliberations, they all but ignored recommendations by family members as to what sentence should be given. *Id.* at 313–16.

121 *Id.* at 316.

122 *Id.* at 316–19.

123 *See supra* notes 85–88, 89–92, 98–101 and accompanying text.

jurors tasked with making that ultimate and final determination.[124] Eisenberg and his associates ultimately conclude that the "modest effects" of VIS reflect real juries' reliance on "salient facts" rather than their opinions of the victim when deciding whether to vote for the death penalty or a life sentence.[125] Their findings thus call into question the role of the previous research that did not utilize actual jurors in real death penalty cases.[126]

III. MOVING FORWARD

As noted previously in this Comment, the *Payne* decision will not likely be overturned in the near future, and VIS will remain commonplace in the sentencing stages of capital trials.[127] As such, much of the recent literary focus has turned to finding means of "counteracting or reducing the influence of VIS on the capital jury."[128] Part III now turns its focus to recent proposals for states to consider when determining the role of victims' rights in criminal cases. The Comment concludes with the author's own suggestion for a possible approach to balancing the competing interests detailed in the foregoing sections.

A. A Survey of Recent Proposals Illustrates How Different States Approach VIS

Some scholars call for courts to narrow the scope of what is considered admissible information contained in VIS in order to "reduce the inherent arbitrariness of their effects," and recommend they not be used at all in death penalty hearings.[129] For example, until 1999, Maryland limited victim impact testimony to written form and barred live testimony.[130] While Maryland now allows live testimony under oath by a victim or victim representative,[131] the content of the testimony is subject to cross-

124 *See* Eisenberg et al., *supra* note 64, at 340 (noting that none of the data studied "generate[d] evidence that victim admirability affects South Carolina sentencing outcomes").

125 *Id.* at 341. The study challenges the idea that the use of VIS since 1991 made it easier to obtain death sentences; if that were so, post-1991 death sentence rates should have increased. *Id.* at 340. However, "[they] observe[d] no such increase and believe that this evidence supports the straightforward interpretation . . . that VI[S] ha[ve] a modest effect, if any, on sentencing outcomes." *Id.*

126 *Id.* at 307. Eisenberg et al., however, recognized some possible limitations in their research, namely (a) "erroneous recall," and (b) a "possible lack of candor" by some interviewees. *Id.* at 311. Since jurors were interviewed sometime after their sentencing votes, they could have tailored their answers to fit their vote. *Id.* at 339.

127 *See supra* notes 62, 64.

128 Blumenthal, *Affective Forecasting*, *supra* note 62, at 110–11; *see also* Nadler & Rose, *supra* note 65, at 452 (contending that "the political reality is that the use of victim impact statements in criminal trials is not likely to disappear entirely, at least not in the foreseeable future," and noting that "the victims' rights movement is already politically powerful and continues to gain momentum").

129 Nadler & Rose, *supra* note 65, at 452–53. Nadler and Rose focus on their concern that *Payne* places "virtually no limits" on the scope of VIS, and caution against overly-broad use, but fall short of offering more detailed solutions beyond simply "narrowing" the scope. *Id.* at 453.

130 MD. CODE ANN., Art. 41, § 4-609(d) (West 1997) (repealed 1999).

131 MD. CODE ANN., CRIM. PROC. § 11-403(b) (West 2012).

examination by defense counsel.[132] Another scholar suggests incorporating "credible expert testimony"[133] at the sentencing stage to explain how individuals often "overestimate the emotional impact" traumatic events have on their lives.[134] The purpose would be to remind jurors of the tendency to overreact to emotionally wrenching testimony and to consider the consequences of irrationally or arbitrarily voting for a death sentence.[135] Such a suggestion, however, faces serious obstacles when applied in an actual capital sentencing situation; jurors may bristle at being told that the death penalty is merely an overreaction to a brutal homicide.[136] This problem gains even more traction considering capital jurors are often vetted by prosecutors for their willingness to impose the death penalty.[137]

Other suggestions include prior judicial approval of VIS, restrictions on who can present the testimony in court, and restrictions on the number of those who may testify.[138] New Jersey, for example, provided all three safeguards prior to abolishing the death penalty in 2007,[139] having limited VIS to a statement by only a single family member, subject to judicial approval.[140] California allows only "the next of kin if the victim has died," but allows them to appear personally and to "reasonably express . . . their views concerning the crime, the person responsible, and the need for restitution."[141] Once admitted into evidence, however, a court may require

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132 *Id.* § 11-403(c).

133 *See* Blumenthal, *Affective Forecasting*, *supra* note 62, at 125.

134 *Id.* at 112–13.

135 *Id.* at 112–13, 115. Blumenthal's study supported the theory that VIS "increased the likelihood that mock jurors would impose a death sentence," but suggested that "the presence of expert testimony about affective forecasting tended to ameliorate that effect" and may help eliminate any resulting bias. *Id.* at 120.

136 *Id.* at 112 n.34. Blumenthal originally suggested several ways of conveying such information including "defense counsel argument, cross-examination of family members giving VIS, judicial instruction, or expert testimony." *Id.*; Jeremy A. Blumenthal, *Law and the Emotions: The Problems of Affective Forecasting*, 80 IND. L.J. 155, 192 (2005) [hereinafter Blumenthal, *Law and the Emotions*]. He conceded, however, that expert testimony was the most feasible of the group due to fact that most attorneys would not seriously consider the prospect of cross-examining a murder victim's family member on the status of his or her character. Blumenthal, *Law and the Emotions*, *supra* note 136, at 192.

137 *See* Witherspoon v. State of Ill., 391 U.S. 510, 519–20 (1968) (expressing the concern that juries do not accurately reflect a full range of community values when prosecutors dismiss potential jury members based on their views of capital punishment: "Culled of all who harbor doubts about the wisdom of capital punishment—of all who would be reluctant to pronounce the extreme penalty—such a jury can speak only for a distinct and dwindling minority").

138 State v. Muhammad, 678 A.2d 164, 180 (N.J. 1996) (holding that VIS must be subject to these procedural requirements prior to entering evidence).

139 Press Release, State of N.J., Office of the Governor, Governor Corzine Signs Legislation Eliminating Death Penalty in N.J. (Dec. 17, 2007); Jeremy W. Peters, *Death Penalty Repealed in New Jersey*, N.Y. TIMES (Dec. 17, 2007), http://www.nytimes.com/2007/12/17/nyregion/17cnd-jersey.html.

140 *Id.*

141 CAL. PENAL CODE § 1191.1 (West 2004). The court "shall consider the statements" when determining the sentence, and this statute may not be amended by the Legislature unless passed in each house by a two-thirds margin, or by plebiscite. *Id.*

the victim's family member to attend the "mitigation/aggravation phase of the hearing for the purposes of cross-examination."[142]

A different approach suggests that, rather than try to overturn *Payne*, states may simply impose their own prohibitions against VIS under the doctrine of "evolving standards of decency," which the Supreme Court uses to distinguish between "right expanding and right constricting" precedent.[143] Since *Payne* poses no *per se* bar against VIS, it does not create a constitutional right and may therefore be narrowed or eliminated by state statute.[144] Indiana, for example, limits VIS to only relevant information pertaining to mitigating and aggravating factors.[145] Mississippi remains consistent with *Payne* in that the state poses no *per se* bar on VIS, but it restricts evidence to that which is relevant to establishing aggravating (as well as mitigating) circumstances.[146] Other states, like Wyoming, reject the reasoning behind *Payne* outright, making its general victim impact statute inapplicable in capital cases.[147]

In contrast, many other commentators suggest that the Court struck the appropriate balance between competing interests, and VIS properly ensure that juries weigh the victim's individuality against the defendant's individualized sentencing determination.[148] Others even call for further and more consistent expansion of victims' rights in all stages of trial.[149] With the Crime Victims' Rights Act of 2004 ("CVRA"),[150] crime victims now have a codified federal right to receive timely notice of upcoming proceedings, the right not to be excluded from public proceedings, and the right to be heard at those proceedings within reason.[151] Some scholars laud the CVRA as evidence that "the public consensus is right and the law professors are wrong."[152] This claim is bolstered further by the adoption of

142 CAL. ST. B. P. R. 5.107(B).

143 *See* Frankel, *supra* note 9, at 126–28. Frankel contends that contrary to sound reasoning, "the *Payne* Court used a devolving standards argument to expand the pool of those that [sic] might be executed." *Id.* at 127. For more on the "evolving standards of decency" doctrine, see Trop v. Dulles, 356 U.S. 86, 101 (1958).

144 Frankel, *supra* note 9, at 126–28.

145 Holmes v. State, 671 N.E.2d 841, 848 (Ind. 1996).

146 Berry v. State, 703 So. 2d 269, 275 (Miss. 1997).

147 Olsen v. State, 67 P.3d 536, 594–95 (Wyo. 2003).

148 *See generally* Boland & Butler, *supra* note 9, at 8–9, 11 (contending that state victim impact statutes should align themselves with the provisions of the Crime Victims' Rights Act of 2004, which include the "right to be reasonably heard at any public proceeding in the district court").

149 *Cf.* Megan A. Mullett, *Fulfilling the Promise of Payne: Creating Participatory Opportunities for Survivors in Capital Cases*, 86 IND. L.J. 1617, 1617–19 (2011) (arguing that the "haphazard and inconsistent manner" in which crime victims are allowed to participate fails both federal and state victims' rights statutes by "re-victimizing survivors through exclusion and silencing," and proposing ways of avoiding exclusion based on due process concerns in order to maximize victim participation).

150 18 U.S.C. § 3771 (2011).

151 18 U.S.C. § 3771(a)(2–4) (2011).

152 Cassell, *supra* note 13, at 611 (contending that legal academics have given no support to what is already a "near-universal feature of criminal sentencing," and that VIS have "received such widespread support because they promote justice without interfering with any legitimate interests of criminal defendants").

the CVRA in federal cases and the fact that some form of VIS exist in "virtually all state sentencings."[153] Whether for or against the admission of VIS, this Comment illustrates how state legislatures, the courts, and legal scholars continue to address the *Payne* decision, now twenty years old. With that in mind, this author offers yet another suggestion.

B. Allowing But Limiting VIS Strikes the Right Balance Between Competing Interests

This Comment addresses two primary competing interests concerning VIS: (a) the risk of arbitrary and capricious sentencing if used; and (b) the risk of creating faceless victims if not used. While research generally suggests that VIS do contribute to harsher sentences in criminal cases,[154] decreasing overall death penalty rates suggest they have not had a substantial effect on death sentences on a large scale.[155] This observation, however, says nothing about the reality of VIS in an individual case. When one jury convicts one defendant of capital murder, what impact, if any, will the admission of VIS have on *that defendant*'s life? This is the moment *Payne* matters most, and it is the reason this author revisits the underlying philosophies behind it.

The problem of victim anonymity in capital cases is serious. The Supreme Court's argument that a victim has as much of a right as a defendant to be presented as a "uniquely individual human being" is compelling.[156] This author is not convinced, however, that unbridled admission of VIS is the solution. The risk of unfair prejudice is as great during the sentencing phase as it is during the guilt or innocence phase. If not restricted in some way, VIS do not merely balance the scale by "counteracting the mitigating evidence,"[157] but rather they tip the scale the other way, as the leading empirical research illustrates.[158] However, as noted in this Comment, *Payne* will not likely be overturned in the near future.[159] In addition, VIS remain politically popular enough that state legislatures will maintain their viability. But what still drives the VIS discussion is that *Payne* gives no instruction for their implementation. As such, the Supreme Court may one day soon have to decide what forms VIS may or may not take. The balance between the competing interests will likely be at the heart of that decision.

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153 *Id.*

154 *See supra* notes 93, 99.

155 *See supra* Part II.B. The author does not suggest that death sentence rates are directly linked to VIS. There are myriad factors contributing to the national attitude toward the death penalty. The point, rather, is that death sentence rates have gone down since the *Payne* decision, which suggests that *Payne* alone did not open the door to more death sentences.

156 *See* Payne v. Tennessee, 501 U.S. 808, 822–23; Booth v. Maryland, 482 U.S. 496 (1987), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991); Woodson v. N. Carolina, 428 U.S. 280, 304 (1976) (plurality opinion).

157 *Booth*, 482 U.S. at 517 (White, J., dissenting).

158 *See supra* Section II.B.

159 *See supra* notes 62, 64.

With that "balance" in mind, this author suggests a "proportionality test," which would limit the admissibility of VIS only to cases where a defendant offers others' testimony on his or her own behalf as a mitigating factor. Even in those circumstances, VIS should be limited, at the court's discretion, to an extent proportional to the defendant's proffered testimony. In other words, the *Payne* rationale is respected by allowing VIS, but the fears highlighted in *Booth* and *Gathers* are safeguarded by promoting balance. If a defendant chooses not to offer mitigating testimony, this lessens the need to counterbalance it with VIS. Victim anonymity may still persist in murder cases, but not as a result of the defendant's mitigating evidence. Further, when a defendant *does* offer mitigating testimony, VIS still could be admitted to counterbalance the testimony, but not to overpower it with a parade of horribles. A court may consider factors such as (a) the number of people admitted to testify on the defendant's behalf, (b) the nature of the testimony offered,[160] and (c) the physical form of the evidence.[161] The defendant, in a sense, sets the stage for the VIS—whatever the defendant offers, the victim's loved ones can counter-offer, proportionally.

Imagine a case where defense counsel for a convicted murderer presents the defendant's single working parent, who offers testimony that the defendant was a troubled youth who never had a fair opportunity to succeed in life due to hardship. The parent bolsters the testimony with a handwritten poem by the defendant as a child describing how, one day, he or she wanted to be a schoolteacher. This type of testimony unquestionably humanizes the defendant and aids in an individualized determination of his or her fate. It is difficult to argue, however, that a murder victim's parent ought to be denied the opportunity to tell a similar story on behalf of a murdered son or daughter. Allowing a proportional response meets the burden of finding an appropriate balance. A defendant who benefits from having family members willing to testify at trial may decide to offer their testimony as a mitigating factor. But, under the proportionality test, the understanding that a victim's family may provide a response would temper that decision and prevent a tipping of the scales in favor of one over the other. In addition, where a defendant offers no favorable character testimony, the proportionality test also would bar a victim's family from offering testimony, thus keeping the scales balanced. This approach would

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160 "Nature" is intended to reference the content of the testimony. Testimony could include anecdotes about a defendant's childhood, a list of good deeds the defendant performed, or an explanation of unfortunate events in a defendant's life that may have contributed to poor judgment or susceptibility to violent behavior. The point is that depending on the offered testimony, a prosecutor could tailor the admission of VIS to respond in kind to the defendant's offering.

161 Considering the various forms of VIS illustrated in this Comment, a court might allow physical exhibits in VIS only when the defendant offers physical exhibits, etc. in order to promote consistency in what a jury perceives in court. Courts may also, and likely will, place restrictions on what types of physical exhibits parties may present in order to avoid the most extreme examples noted in this Comment.

aid in protecting an indigent defendant from an arbitrary or capricious sentence at the hands of a jury overwhelmed by disproportionate VIS.

Even the proposed "proportionality test," however, fails to account for the indigent or unsavory victim with no family or loved ones to offer testimony. If a defendant exercises his or her constitutional right to offer mitigating testimony, a victim in this category still has no response. For example, prostitutes, victims involved in criminal activity, and certain subsets of homeless, mentally disabled, merely reclusive, or otherwise marginalized members of society will remain faceless victims in murder cases. While courts could offer jury instructions to mitigate any suggestive effect that an absence of VIS might create, they still open the door to a degrading judgment of the victim's character as a determinative factor in punishing the defendant. As long as character testimony is offered at all in capital sentencing phases, this may be an unavoidable problem.

Despite its inability to account for every variable, the "proportionality test" provides parity in several important ways: It (1) upholds a convicted defendant's right to offer mitigating testimony on his or her own behalf; (2) lessens the risk of victim anonymity when a defendant offers mitigating evidence; (3) gives deference to the victims' rights movement and its political force without abandoning the justice system's interest in providing rational and consistent sentencing methods; (4) provides states that allow VIS a more structured framework for implementation; and (5) addresses the Supreme Court Justices' philosophical divisions in a practical and balance-driven manner.

CONCLUSION

It is difficult to determine the actual effect of VIS on juries, and even more difficult to determine *Payne*'s overall influence on the imposition of death sentences in general. While much of legal academia remains opposed to VIS,[162] the political strength of the victims' rights movement suggests the court of public opinion may have aligned itself indefinitely with the Supreme Court of the United States. Doing so adds yet another variable to the already complicated struggle to determine which of the two competing interests—the risk of arbitrary and capricious sentencing and the problem of victim anonymity—matters most. Exhaustive legal scholarship has speculated at great length on the reasoning behind the reversal of *Booth* and *Gathers*.[163] Was it bad reasoning by a newly-stacked Court? Or, did the Court rightly overturn bad precedent in response to a shifting public view of the role of the criminal justice system? If the latter, has public opinion shifted again, considering drastic drops in death sentences across the country? Answers to these questions are beyond the scope of this current inquiry. This Comment merely explores the competing philosophies and

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162 *See supra* note 68.

163 *See, e.g.*, Nadler & Rose, *supra* note 65, at 426–27.

suggests that a "proportionality test" may offer a solution for both sides. For a conversation on capital punishment that is bound to continue, however, it surely may be said that we cannot learn without *Payne*.[164]

164 Adapted from a quote attributed to Aristotle: "Learning is not child's play; we cannot learn without pain." *See* ARISTOTLE, THE NICOMACHEAN ETHICS bk. II, at 71–78 (H. Rackham trans., Harvard Univ. Press rev. ed. 1962) (c. 384 B.C.E.).