Getting a Grip on *Payne* And Restricting the Influence of Victim Impact Statements in Capital Sentencing: The Timothy McVeigh Case and Various State Approaches Compared

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I. Introduction

In 1987[1] and 1989[2] the Supreme Court pronounced that the admission of victim impact statements at the sentencing stage of a criminal proceeding was cruel and unusual punishment. Then in 1991, the Supreme Court reversed course and upheld the admission of victim impact statements at capital sentencing in *Payne v. Tennessee*.[3] Since that time, federal and state jurisdictions throughout the country have permitted the introduction of victim impact testimony which allows family, friends, and members of the community to testify at the defendant's capital sentence hearing about the impact the crime had upon them personally. This testimony includes anything from the impact upon individual family members to the overall impact of the victim's death on the community. In capital cases the jury considers the testimony in determining whether to sentence the defendant to life in prison or death.

Though long allowed in civil trials and in non-capital cases, the use of victim impact testimony in capital sentencing poses a particular problem in capital punishment jurisprudence, for the effect of such testimony does not bear on damages or length of prison term, but instead, frequently determines life or death. Thus, the personalized nature of victim impact testimony, and the emotions that are at the crux

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1. *See* Booth v. Maryland, 482 U.S. 496 (1987).
2. *See* South Carolina v. Gathers, 490 U.S. 805 (1989).
3. 501 U.S. 808 (1991).

of such testimony, introduces what borders on an impermissible element of arbitrariness in capital sentencing. Despite the threat of caprice this evidence interjects in capital cases, the Supreme Court has not provided any clear guidance for the admission of victim impact testimony.

Many attribute the acceptance of victim impact testimony in capital sentencing to the Victims' Rights Movement, which started in the 1960s and has steadily gained momentum at the state and local level during the past four decades. What began as a women's rights movement toward fairer treatment of rape victims has evolved into a serious attempt to accommodate the needs and interests of crime victims without infringing upon the rights of defendants. Many states have responded to this important movement by enacting statutes that require, among other things, that victims be notified of the time and place of criminal proceedings, and that they receive restitution.

In addition to state legislation, the federal response to the victims' rights movement has been overwhelming.[4] In 1982, Congress enacted the Victim and Witness Protection Act.[5] This Act preceded the passage of the Comprehensive Crime Control Act of 1984[6] and the Crime Control Act of 1990.[7] Now, as a result of strong support at all levels, victims are less likely to fall prey to institutional insensitivity by the system that is intended to help them.[8]

The most dramatic example of the sweeping force of the victims' rights movement can be seen in the trial of Timothy McVeigh for the Oklahoma City bombing. Victims injured in the bombing of the Oklahoma City federal building and survivors of victims who died in the April 1995 explosion became angered when the judge who presided over the case barred those victims and family members planning to give victim impact testimony from sitting in the courtroom during

4. *See generally* Carrie L. Mulholland, *Sentencing Criminals: The Constitutionality of Victim Impact Statements*, 60 MO. L. REV. 731, 734-35 (1995); Ashley Paige Dugger, *Victim Impact Evidence in Capital Sentencing: A History of Incompatibility*, 23 AM. J. CRIM. L. 375, 377-80 (1996).

5. 18 U.S.C. § 1512 (1982). An amendment to the Federal Rules of Criminal Procedure requiring the inclusion of victim impact statements as part of a presentence report submitted to the sentencing authority.

6. 18 U.S.C. § 2113 (1984).

7. 28 U.S.C. § 509 (1990).

8. *See generally* Michael Chertoff, *Victims Attain a Voice in the Criminal Justice Process*, 159 N.J. LAW., Feb.-March 1994, at 49; Katie Long, *Community Input at Sentencing: Victim's Right or Victim's Revenge*, 75 B.U. L. REV. 187, 190 (1995) ("Since its rebirth in the middle of this century, the concept of 'victims' rights' has garnered support and momentum.").

the trial.[9] Victims' rights advocates appealed, arguing that they were forced to choose between attending the trial and testifying at sentencing. A three-judge panel of the Tenth Circuit upheld the judge's ruling, and the full circuit eventually affirmed.[10] Following the ruling, the victims' advocates took their campaign to Capitol Hill, where they were not disappointed. In response to lobbying efforts, Congress passed a bill that effectively overturned the judge's ruling.[11]

In spite of its important place in criminal jurisprudence, the victims' rights movement of the past forty years has been wrongly characterized as the driving force behind the statutorily sanctioned admission of victim impact statements at capital sentencing. Instead, this type of evidence is better justified as rightly equating the severity of a criminal's punishment with the totality of harm caused. Victim impact statements should not be admissible in capital sentencing as a means of vindicating victims' rights, or elevating a victim's sense of dignity through involvement with the criminal process. Nor should victim impact statements be justified in the name of fairness to the victim. State and federal legislation have already tended to these legitimate concerns.

Victim impact evidence serves a proper role only when it is used to apprise the jury of the total harm resulting from the criminal act. Guidelines are necessary to ensure the evidence is used for this purpose only. "Justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained until it is narrowed to a filament. We are to keep the balance true."[12] The *Payne* standard, which allows unfettered admission of victim impact statements, will not achieve the narrow goal of equating punishment with harm. Left unrestricted, *Payne* opens the courtroom door to a flood of prejudice, unconstitutional bias,[13] and death sentencing based on the ability

9. Federal evidence rules allow judges to exclude material witnesses from trial proceedings to prevent them from changing their testimony. Fed. R. Evid. 615. The judge was concerned that what the witnesses heard and saw in the courtroom could prejudice their victim impact testimony.

10. United States v. McVeigh, 106 F.3d 325 (10th Cir. 1997).

11. 18 U.S.C. §3510 (1997). President Clinton signed the Victim Rights Clarification Act of 1997 into law on March 20, 1997. The statute states that a United States District Court shall not order any victim of an offense excluded from the trial of a defendant accused of that offense because such victim may, during the sentencing hearing, testify as to the effect of the offense on the victim and the victim's family.

12. *Payne*, 501 U.S. at 827 (Rehnquist, J.)(citing Snyder v. Massachusetts, 291 U.S. 97, 122 (1934)).

13. *See generally* Jose Felipe Anderson, *Will the Punishment Fit the Victims? The Case for Pre-Trial Disclosure, and the Uncharted Future of Victim Impact Information in Capital Jury Sentencing*, 28 RUTGERS L.J. 367, 402 (1997) ("The Supreme Court's decision in Payne

of the victim's family to articulate a gut wrenching story of loss and sadness. The only way to achieve the justice envisioned in *Payne* is by placing parameters on the admission of victim impact testimony, thereby restricting its influence.

This paper will assess the history of victim impact testimony, and the problems associated with *Payne*'s overly broad admission standard as highlighted by Timothy McVeigh's trial following the Oklahoma City bombing. Analysis will be made of the several attempts by states to implement and tailor the *Payne* decision. Then methods will be proposed for restricting the prejudicial effect of victim impact statements. Part II of this comment provides a history of victim impact testimony in capital sentencing. Part III illustrates how several of the states are tailoring the *Payne* decision through statutory law. Part IV assesses the parameters of victim impact testimony after *Payne* by looking at last year's sentencing of Timothy McVeigh in the Oklahoma City bombing case. Part V puts forth leading criticisms of the admission of victim impact testimony. Part VI concludes that there is a place in capital jurisprudence for victim impact testimony, and proposes appropriate parameters for the admissibility of this evidence.

II. The History of Victim Impact Statements in Capital Sentencing

The Supreme Court first considered the admissibility of victim impact statements at capital sentencing in *Booth v. Maryland*, holding that the introduction of such evidence at the sentencing phase of a capital case violates the Eighth and Fourteenth Amendments.[14] Justice Powell, writing for the majority, reiterated the well-settled rule 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."[15] Powell further noted that the sentencing jury is required to focus on the defendant as a "uniquely individual human being."[16] He concluded that victim impact testimony is unconstitutional because it focuses the attention of the jury on the character and reputation of the victim rather than the defendant, which creates the potential for a jury to impose a death sentence based on factors un-

has opened the door to victim impact participation in capital jury sentencing and has not placed many tangible limits on that participation.").

14. 482 U.S. 496 (1987).

15. *Id.* at 502 (citing Gregg v. Georgia, 428 U.S. 153, 189 (1987)).

16. *Id.* at 504 (citing Woodsen v. North Carolina, 428 U.S. 280, 304 (1976)).

known to the defendant at the time of the crime and irrelevant to the defendant's decision to commit the crime.[17]

Justice Powell identified several factors that creates "an impermissible risk that the capital sentencing decision will be made in an arbitrary manner."[18] First, imposition of a death sentence could be swayed by the articulateness of a victim's family, or whether the victim left behind a family at all.[19] Second, capital sentencing could "turn on the perception that the victim was a sterling member of the community rather than someone of questionable character."[20] Third, it would be impossible to provide a fair opportunity for the defendant to rebut victim impact evidence without turning the sentencing hearing into a mini-trial of the victim's character.[21] Finally, the victim's opinions and characterizations of the crime serve "no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant."[22] Driven by these considerations, Justice Powell found that the admission of victim impact testimony is inconsistent with the reasoned decision making required in capital cases and mandated by the Eighth Amendment.[23]

The Supreme Court extended *Booth* two years later in *South Carolina v. Gathers*.[24] In *Gathers*, the Court held that the inadmissibility of victim impact statements includes a prohibition against a prosecutor's discussing matters related to the victim's character that are irrelevant to the circumstances of the crime.[25] The Court equated evidence which attested to the victim's character in *Gathers* with victim impact evidence in *Booth*: both diverted the sentencing jury's attention away from the defendant, and toward the victim.[26] The Court reaffirmed its prior holding that, in deciding whether to impose the death penalty, a jury must deliver a sentence proportionate to the defendant's personal responsibility, moral guilt and blameworthiness.[27]

Four years after *Booth*, the Supreme Court, in *Payne v. Tennessee*, reversed itself and held that victim impact testimony at the sen-

17. *See id.* at 504-05.
18. *Id.* at 505.
19. *See id.* at 504-05.
20. *Booth v. Maryland*, 482 U.S. at 506.
21. *See id.* at 506-07.
22. *Id.* at 508.
23. *See id.* at 508-09.
24. 490 U.S. 805 (1989).
25. *See id.* at 811-12.
26. *See id.*
27. *See id.* at 810.

tencing phase of a capital case is constitutional.[28] Chief Justice Rehnquist delivered the majority opinion in *Payne*, stating decisively that the Eighth Amendment erects no per se bar to the admission of victim impact evidence.[29]

The *Payne* Court began its analysis by examining the underlying premises of the *Booth* decision: that evidence relating to the harm a capital defendant causes a victim's family does not generally reflect on the defendant's blameworthiness; and that only evidence relating to blameworthiness is relevant to capital sentencing decisions.[30] However, the Court noted that the assessment of harm caused by the defendant as a result of the crime charged has long been an important concern of criminal law, in determining both the elements of the offense and the appropriate punishment. Victim impact evidence, it acknowledged, "is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question."[31] The Court explained that inequity would result if absolutely unfettered introduction of mitigating evidence were allowed and victim impact evidence was completely barred.[32] According to the Court, victim impact statements are designed to show an individual victim's uniqueness as a human being, and not the comparative worth or worthlessness of the victim's life.[33] Thus, victim impact evidence is merely another means of informing the sentencing jury about the specific harm caused by the crime in question, and not a method of injecting arbitrariness into capital sentencing as described in *Booth*.[34] Interestingly, the *Payne* court limited its analysis to evidence relating to the victim and the impact of the victim's death on the victim's family. *Booth* had also held that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment. The *Payne* court left this part of *Booth* undisturbed.

Payne noted that if, in a particular case, victim impact evidence so unduly prejudices the jury that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment would provide a mechanism for relief.[35] The Court, however, concluded that

28. 501 U.S. 808 (1991).
29. *See id.* at 824, 827.
30. *See id.* at 819.
31. *Id.*
32. *See id.* at 825-26.
33. *See id.* at 823-24.
34. *Payne*, 501 U.S. at 825.
35. *See id.*

in order 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."[36]

Justices O'Connor, Scalia and Souter each concurred separately in *Payne*. Justice O'Connor agreed with the majority's holding that the Eighth Amendment erects no per se bar against victim impact evidence, and a state may legitimately determine victim impact evidence is relevant to a capital sentencing proceeding.[37] It is within a state's discretion, according to Justice O'Connor, to decide whether the jury should know the full extent of the harm caused by the crime, including its impact on the victim's family and community.[38] She also noted that it was similarly within a state's discretion to decide whether the jury should be given a glimpse of the person whose life was taken.[39] "Certainly there is no strong societal consensus that a jury may not take into account the loss suffered by a victim's family or that a murder victim must remain a faceless stranger at the penalty phase of a capital trial[,]" rather "[j]ust the opposite is true."[40]

Justice O'Connor stated that testimony by the victim's grandmother could not have inflamed the passion of the jury any more than the facts of the crime itself.[41] Murder, she concluded, "transforms a living person with hopes, dreams, and fears into a corpse, thereby taking away all that is special and unique about the person. The Constitution does not preclude a State from deciding to give some of that back."[42] Significantly, however, O'Connor noted that the *Payne* decision did not reach a specific kind of victim impact evidence—opinions of the victim's family about the crime, the defendant, and the appropriate sentence—that had been addressed in *Booth*.[43] Rather *Payne* decided only that the Eighth Amendment does not prohibit a state from choosing to admit evidence concerning a murder victim's per-

36. *Id.* at 825. *See generally* Victor D. Vital, Payne v. Tennessee: *The Use of Victim Impact Evidence at Capital Sentencing Trials*, 19 T. MARSHALL L. REV. 497 (1994) (for a comprehensive analysis of the *Payne* decision).

37. *See Payne*, 501 U.S. at 830 (O'Connor, J., concurring, joined by White, J., and Kennedy, J.).

38. *See id.*

39. *See id.*

40. *Id.*

41. *See id.* at 832.

42. *Id.*

43. *See Payne*, 501 U.S. at 833. In other words, Payne does not expressly overrule the part of *Booth* that prohibits victim impact witnesses from expressing their opinion about what punishment the defendant should receive.

sonal characteristics or the impact of the crime on the victim's family and community.

Justice Scalia applauded the Court for correctly observing the injustice of requiring the exclusion of relevant aggravating evidence during capital sentencing while requiring the admission of all relevant mitigating evidence.[44] This imbalance, he stated, was "unworkable."[45] Scalia noted that while the Eighth Amendment permits parity between mitigating and aggravating factors, more fundamentally still, it permits the "People" to decide what is a crime and what constitutes aggravation and mitigation of a crime by placing all of the evidence in front of a jury.[46]

Justice Souter noted that the Court addressed two categories of facts previously excluded from consideration at capital sentencing proceedings by *Booth*: information revealing the individuality of the victim, and the impact of the crime on the victim's family, friends and community.[47] Souter recognized, as did Justice O'Connor, that *Payne* did not challenge the Court's holding in *Booth* that a sentencing authority should not receive a third category of testimony concerning a victim's family members' characterizations of and opinions about the crime, the defendant, and the appropriate sentence.[48]

Justice Souter rejected *Booth*'s blanket prohibition of evidence concerning the victim's individuality that may be unrelated to the circumstances of the crime. He stressed that traditionally, criminal conduct has been categorized and penalized differently according to consequences not specifically intended, but determined in part by conditions unknown to a defendant when he acted.[49] The prohibition of victim impact evidence, he stated, rests on the belief that such details about the victim may have been outside the defendant's knowledge at the time of the crime. But Justice Souter asserted that every defendant, with the mental competence for criminal responsibility, knows that the life he will take is that of a unique individual, and that the person to be killed will probably leave survivors who will suffer from the victim's death.[50] Thus, although a defendant may not know the details of a victim's life and characteristics, or the exact identities and

44. *See id.* at 833 (Scalia, J., concurring, joined in part by O'Connor, J., and Kennedy, J.)
45. *Id.*
46. *Id.*
47. *See id.* at 835 (Souter, J., concurring, joined by Kennedy, J.)
48. *See Payne*, 501 U.S. at 835 n.1.
49. *See id.* at 835-36.
50. *See id.* at 836-37.

needs of those who may survive, the moral relevance of foreseeable consequences should not be ignored.[51] "Harm to some group of survivors is a consequence of a successful homicidal act so foreseeable as to be virtually inevitable."[52]

In summary, the *Payne* decision marked a significant turn in capital jurisprudence by reversing *Booth*'s per se bar against victim impact evidence relating to the victim, and the impact of the victim's death on the victim's family at capital sentencing. As noted, part of *Booth* is left untouched by the *Payne* decision: the Eighth Amendment continues to prevent a victim's family from making characterizations of the crime or offering opinions about the crime, the defendant, and the appropriate sentence. The *Booth* court stated that "the formal presentation of this information by the State can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant."[53] The admission of such emotionally charged opinions, the Court reasoned, is inconsistent with the reasoned decision making required in capital cases. By not overturning this portion of *Booth*, the Payne court recognized the damaging potential of unrestricted victim impact testimony. Nonetheless, the Court failed to articulate standards which would keep the evidence it did admit from causing similar problems.

III. How Are the States Restricting *Payne*?

Of the thirty-eight states that currently utilize the death penalty,[54] most have incorporated victim impact statements into their capital sentencing proceedings. The statutory guidelines for the admission of victim impact testimony in capital proceedings in these states range from very broad to extremely narrow.[55] Discussed below are several examples of how these states have regulated the admission of victim impact testimony after *Payne*.

A case from the New York courts illustrates why many states have undertaken to restrict the inclusion of victim impact evidence. In New York, where the death penalty was reinstated in 1995, the relevant sentencing provision makes no mention of victim impact testi-

51. *See id.* at 837-38.

52. *Id.* at 838.

53. *Booth*, 482 U.S. at 508.

54. The jurisdictions that do not allow the death penalty are Alaska, the District of Columbia, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin.

55. *See* Brian J. Johnson, *The Response to* Payne v. Tennessee: *Giving the Victim's Family a Voice in the Capital Sentencing Process*, 30 IND. L. REV. 795, 803-07 (1997).

mony.[56] It is presumably allowable, however, under preexisting New York law, which states: "If the defendant is being sentenced for a felony[,] the court, if requested at least ten days prior to the sentencing date, shall accord the victim the right to make a statement with regard to any matter relevant to the question of sentence."[57] Aside from the language of *Payne*, New York has no guidelines governing the admission of victim impact statements.[58] This lack of guidance resulted in unbridled admission of victim impact testimony in the well-known case of Colin Ferguson, the gunman who opened fire on a Long Island commuter train in 1993.[59] The victims' families, and those victims who survived were allowed to testify in open court during the sentencing stage of the proceedings. Some testified that the defendant was evil, others threatened the defendant's life, and several called for his death.[60] Had the crime not occurred prior to the reinstatement of the death penalty, Ferguson could have been sentenced to death, thanks, in part, to the unguided, unbridled, and unrestricted admission of victim impact statements in New York.

New Jersey is one of twelve states that has revised its death penalty statute since *Payne* to provide for measured consideration of victim impact evidence during capital sentencing.[61] In New Jersey, the admission of victim impact statements in capital cases is statutorily proscribed, unless the defendant first presents evidence of his or her character.[62] According to New Jersey's death penalty statute:

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56. N.Y. CRIM. PROC. LAW § 400.27 (McKinney Supp. 1999).

57. *Id.* § 380.50(2)(b) (McKinney 1994). The statute states that for the purposes of this section, "victim" shall include, if the actual victim of the crime is deceased, a member of the family of such victim, or the legal guardian or representative of the legal guardian of the victim where such guardian or representative has personal knowledge of and a relationship with the victim, unless the court finds that it would be inappropriate for such person to make a statement on behalf of the victim. *See id.* § 380.50(2)(a). *See generally* William Hauptman, *Lethal Reflection: New York's Death Penalty and Victim Impact Statements*, 13 N.Y.L. SCH. J. HUM. RTS. 439, 474 (1997) (discussing the evolution of New York's victim impact evidence provision).

58. N.Y. CRIM. PROC. LAW § 380.50(2)(b) (McKinney 1994).

59. *See* Hauptman, *supra* note 57, at 440-41.

60. *See id.* at 441.

61. Those statutes are: ARK. CODE ANN. § 5-4-602 (Michie Supp. 1995); COLO. REV. STAT. ANN. § 16-11-103 (West Supp. 1998); FLA. STAT. ANN. § 921.141 (West Supp. 1999); LA. CODE CRIM. PROC. ANN. art. 905.2 (West Supp. 1999); MO. ANN. STAT. § 565.030 (West 1999); MONT. CODE ANN. § 46-18-302 (1999); N.J. STAT. ANN. § 2C:11-3 (West 1995); OKLA. STAT. ANN. tit. 21, § 701.10 (West Supp. 1996); OR. REV. STAT. § 163.150 (Supp. 1996); 42 PA. CONS. STAT. ANN. § 9711 (Purdon Supp. 1999); S.D. CODIFIED LAWS ANN. § 23A-27A-2 (Michie Supp. 1998); UTAH CODE ANN. § 76-3-207 (Lexis Supp. 1996).

62. N.J. STAT. ANN. § 2C:11-3(6) (West 1995).

> When a defendant at a sentencing proceeding presents evidence of defendant's character or record pursuant to subparagraph (h) of paragraph (5) of this subsection,[63] the State may present evidence of the murder victim's character and background and of the impact of the murder on the victim's survivors. If the jury finds that the State has proven at least one aggravating factor beyond a reasonable doubt and the jury finds the existence of a mitigating factor pursuant to subparagraph (h) of paragraph (5) of this subsection, the jury may consider the victim and survivor evidence presented by the State pursuant to this paragraph in determining the appropriate weight to give mitigating evidence presented pursuant to subparagraph (h) of paragraph (5) of this subsection.[64]

The defendant must open the door to his or her character before the state can introduce victim impact evidence. This approach is entirely consistent with Justice Souter's concurring opinion in *Payne* because the victim impact evidence in that case was used to rebut evidence offered in mitigation.[65]

By only admitting victim impact testimony when a defendant puts on mitigating evidence, the New Jersey statute gives the defendant an opportunity to avoid inflammatory victim impact evidence altogether by not presenting evidence of his own good character. Of course, practically speaking, it would be rare for a defendant facing capital sentencing to remain mute and not put on any mitigating evidence. The statute also gives the state the opportunity to rebut mitigating evidence, which by its very nature is difficult to cross-examine. Presenting victim impact evidence in this light thus balances the scales of justice during sentencing, giving both sides the opportunity to present relevant character evidence.

While there is no constitutional requirement to level the playing field between the defendant and the State, there seems little unfair in allowing the State to present evidence counterbalancing that of the defendant. "In capital sentencing, we see certain defendants spared a death sentence based upon what the jury perceives as mitigators. However, these mitigators themselves often have no connection to the actual crime in question and instead include evidence such as the de-

63. Subparagraph (h) of paragraph (5) reads: (5) The mitigating factors which may be found by the jury or the court are (h) Any other factor which is relevant to the defendant's character or record or to the circumstances of the offense. N.J. STAT. ANN. § 2C:11-3(5)(h).

64. *Id.* § 2C:11-3(6).

65. *Payne*, 501 U.S. at 838 ("given a defendant's option to introduce relevant evidence in mitigation, sentencing without such evidence of victim impact may be seen as a significantly imbalanced process") (citations omitted).

fendant's behavior while in jail and previous contributions to society."[66] None of this type of evidence relates to the defendant's culpability for the crime at issue. It follows that victim impact evidence—which may relate to facts outside the knowledge of the defendant, which are therefore irrelevant to his culpability—is no more prejudicial to the defense than mitigating evidence is to the prosecution.

After an attack on New Jersey's admission of victim impact evidence proved unsuccessful, the state supreme court voluntarily imposed restrictions on the type of statements that could be made.[67] In *State v. Muhammad*, the court held that only one relative could speak to the jury and that all remarks must first be approved by the presiding judge.[68] *Muhammad* established other guidelines governing the introduction of victim impact statements in New Jersey. For example, the "State will not be permitted to elicit testimony concerning the victim's family members' characterizations and opinions about the defendant, the crime, or the appropriate sentence. Similarly, statements that are grossly inflammatory, unduly prejudicial, or extremely likely to divert the jury from its focus on the aggravating and mitigating factors should be excluded."[69] The court also noted that jury instructions should explain that victim impact evidence may only be used to determine how much weight should be accorded to the catch all mitigating factor, and not to support aggravating factors or justify a death sentence.[70] New Jersey's imposed restrictions on victim impact statements properly respond to the overbroad admissibility standards of *Payne*.

Of the other eleven states that have revised their death penalty statutes since *Payne* to allow victim impact evidence during capital sentencing, few have been as articulate as New Jersey in promulgating parameters for its admission. For example, in Missouri the relevant

66. Dugger, *supra* note 4, at 403.

67. *See* State v. Muhammad, 678 A.2d 164 (N.J. 1996). *See generally* Aaron H. Galileo, *Article I, Paragraph 22—Victim's Rights Amendment—Victim Impact Evidence Does Not Violate the Eighth Amendment and is Permissible in a Capital Murder Case in New Jersey*— New Jersey v. Muhammad, 7 SETON HALL CONST. L. J. 723 (1997) (discussing New Jersey's leadership in the "nation-wide movement" towards greater victim participation through victim impact evidence).

68. *Muhammad*, 678 A.2d at 180.

69. *Id.* at 176.

70. *Id.* at 179. Although limiting instructions cannot eliminate the possibility that jurors will misuse victim impact evidence, that concern "does not justify a prophylactic, constitutionally based rule that this evidence may never be admitted." *Id.* (citing *Payne*, 501 U.S. at 831) (O'Connor, J., concurring).

state statute merely defines victim impact statements as "evidence concerning the murder victim and the impact of the crime upon the family of the victim and others,"[71] without providing guidance as to its admissibility. The Missouri statute's lack of guidance is illustrated by the broad spectrum of victim impact evidence that has been admitted under its auspices.

In several instances the Missouri Supreme Court admitted testimony that should have been rejected even under the lenient *Payne* jurisprudence. In *State v. Wise*, the first Missouri case to address the issue of victim impact evidence following *Payne*, the Missouri Supreme Court held that because the prosecutor's references to victim impact were "brief, light and general," they were not grounds for reversal.[72] The family members who testified did not describe their "loss or emotional distress."[73] The *Wise* court found that the statements did not "remove reason from the sentencing process, nor did they inject caprice and emotion," therefore the defendant was not prejudiced in a way which would render the trial fundamentally unfair.[74]

In *State v. Basile*, the mother and sister of a murder victim testified as to the effect of the victim's death on the family, commented on the victim's character and the nature of the crime, and prayed in the courtroom for justice to be served.[75] In *State v. Simmons*, the murder victim's family members articulated characterizations of and opinions about the crime.[76] A strong argument can be made that praying for justice to be served is the equivalent of calling for the death penalty, which was clearly prohibited in *Booth* and never overturned in *Payne*.[77] Until Missouri enacts a statute that provides serious guidance for the admission of victim impact statements the limits of *Payne* will be stretched.

Georgia's admission of victim impact statements is also statutorily prescribed.[78] Georgia law permits "evidence from the family of the victim, or such other witness having personal knowledge of the victim's personal characteristics and the emotional impact of the crime

71. MO. ANN. STAT. § 565.030(4) (West 1999).
72. 879 S.W.2d 494, 516 (Mo. 1994).
73. *Id.*
74. *Id.* (citing *Payne*, 501 U.S. at 825).
75. 942 S.W.2d 343, 358-60 (Mo. 1997) (en banc).
76. 944 S.W.2d 165, 185-87 (Mo. 1997) (en banc).
77. *See Payne*, 501 U.S. at 830 n.2.
78. GA. CODE ANN. § 17-10-1.1, 1.2 (West, WESTLAW through 1998 Reg. Sess.).

on the victim, the victim's family, or the community."[79] Having recognized that under some circumstances victim impact evidence has the potential to render a death penalty sentence constitutionally infirm, the Georgia legislature employed safeguards within the statute to ensure that only constitutionally relevant factors be admitted.[80] The Georgia courts may exercise discretion to bar victim impact evidence or to order that statements be made in a manner and to a degree that does not inflame or unduly prejudice the jury. This language alone did not reel in the potentially unfair inclusiveness of the statute, and more restrictive guidelines were needed. The content pertaining to "impact on the community" seems similar to placing a value on the victim's life and leaves the door to sentencing based on social status wide open. The criterion for who can testify also seems unnecessarily broad, and susceptible to bias based on social status.[81]

In response to the broad language of Georgia's victim impact statute, the Georgia Supreme Court has made efforts to curb the admission of unconstitutional statements. In *Livingston v. State*,[82] the court recognized that "under certain circumstances victim impact evidence could render a defendant's trial fundamentally unfair and could lead to the arbitrary imposition of the death penalty."[83] The *Livingston* court cautioned that prejudice, particularly racial prejudice or prejudice towards religious preference, is an arbitrary factor that would render a capital sentencing trial fundamentally unfair.[84] The court also held "that it would be constitutionally impermissible for a jury to base its death penalty recommendation on the victim's class or wealth."[85]

To prevent these potentialities, the *Livingston* court ordered that trial courts must have evidentiary hearings and rule prior to trial on the admissibility of the victim impact evidence sought to be offered.[86]

79. *Id.* § 17-10-1.2(a)(1).

80. The Georgia code gives the trial court discretion to exclude victim impact evidence altogether. GA. CODE ANN. § 17-10-1.2(a)(1) (victim impact evidence "shall be permitted only in such a manner and to such a degree as not to inflame or unduly prejudice the jury").

81. *See generally* Katharyne C. Johnson, *Sentencing and Punishment: Permit Judicial Consideration of Certain Evidence and Testimony in Cases in which the Death Penalty May be Imposed*, 10 GA. ST. U.L. REV. 113 (1993).

82. 444 S.E.2d 748 (Ga. 1994).

83. *Id.* at 751.

84. *See id.* (citing Conner v. State, 303 S.E.2d 266, 275 (Ga. 1983)).

85. *Id.* (citing Ingram v. State, 323 S.E.2d 801, 813-14 (Ga. 1984)).

86. *Livingston*, 444 S.E.2d. at 752. Furthermore, at the conclusion of the guilt-innocence phase of the trial, the trial court may reconsider any pre-trial decision regarding the admissibility of victim impact evidence. *See id.*

This requires the State to notify the defendant of victim impact evidence which it intends to offer, and the trial court to notify the defendant of the questions it intends to ask of the State's prospective witnesses.[87]

In *Turner v. State*,[88] the Supreme Court of Georgia added yet another procedural safeguard for the admission of victim impact evidence. It held that "in future cases in which victim impact evidence is given in the sentencing phase of a death penalty or life without parole case, the trial court should instruct the jury regarding the purpose of victim impact evidence."[89] The court gave a sample jury instruction which implores the jury to consider victim impact evidence only as an indication of the victim's uniqueness, and not as a substitute for reasonable doubt or an aggravating factor justifying death.[90] Providing such instruction to the jury, the court held, is essential to protecting against constitutionally impermissible bias in sentencing.[91] Thus, Georgia's victim impact statute, though very broad on its face, has been narrowly tailored by case law to impose procedural requirements on the admission of victim impact evidence.

Fourteen states have a general statute providing for a sentencing court to hear all evidence relevant to the crime or sentence.[92] Maryland's statute, for example, states that the court may admit "[a]ny

87. *See id.*

88. Turner v. State, 486 S.E.2d 839 (1997).

89. *Turner*, 486 S.E.2d at 842. Other states require that the jury be instructed on the purpose of victim impact evidence. *See* State v. Muhammad, 145 N.J. 23, 678 A.2d 164, 178 (N.J. 1996); Cargle v. State, 909 P.2d 806, 828-29 (Okla. Crim. App. 1995), *cert. denied*, 519 U.S. 831, 117 S. Ct. 100, 136 L. Ed. 2d 54 (1996); Evans v. State, 637 A.2d 117, 131 (Md. 1994), *cert. denied*, 513 U.S. 833, 115 S. Ct. 109, 130 L. Ed. 2d 56 (1994).

90. *Turner*, 486 S.E.2d at 842-43. For example, the trial court might charge: The prosecution introduced what is known as victim impact evidence. Victim impact evidence is not the same as evidence of a statutory aggravating circumstance. Introduction of victim impact evidence does not relieve the state of its burden to prove beyond a reasonable doubt the existence of a statutory aggravating circumstance. This evidence is simply another method of informing you about the harm caused by the crime in question. To the extent that you find that this evidence reflects on the defendant's culpability you may consider it, but you may not use it as a substitute for proof beyond a reasonable doubt of the existence of a statutory aggravating circumstance. *See id.*

91. *See id.*

92. Those 14 statutes are: ALA. CODE § 13A-5-45 (Michie 1994); CAL. PENAL CODE § 190.3 (West 1999); KAN. STAT. ANN. § 21-4624(c) (1995); MD. ANN. CODE art. 27, § 413 (1996); MISS. CODE ANN. § 99-19-101 (West 1994); NEB. REV. STAT. § 29-2521 (1995); NEV. REV. STAT. ANN. § 175.552(3) (Michie Supp. 1997); N.M. STAT. ANN. §§ 31-20A-1 and 20A-5 (Michie 1994); N.C. GEN. STAT. § 15A-2000 (1997); TENN. CODE ANN. § 39-13-204 (Lexis Supp. 1997); TEX. CODE CRIM. PROC. ANN. art. 37.071 (West Supp. 1997); VA. CODE ANN. §§ 19.2-264.4 and 264.5 (Michie 1995); WASH. REV. CODE ANN. § 10.95.060 (West 1990); WYO. STAT. ANN. § 6-2-102 (Michie Supp. 1996).

other evidence that the court deems of probative value and relevant to sentencing, provided the defendant is accorded a fair opportunity to rebut any statements."[93] California's statute states that "[i]n determining the penalty, the trier of fact shall consider the following factor[ ] if relevant: (a) The circumstances of the crime of which the defendant was convicted in the present proceeding . . . ."[94] Tennessee permits evidence that includes, "but [is] not . . . limited to, the nature and circumstances of the crime . . . ."[95] General statutes such as these permit the jury to hear virtually any type victim impact testimony that pertains to the death of the victim, and such ambiguity can lead to serious constitutional problems when attempting to impose fair sentencing.

IV. What Are the Parameters of Victim Impact Testimony After *Payne*? A Look at Timothy Mcveigh's Sentencing

Before the penalty phase of Timothy McVeigh's trial began, McVeigh filed an extensive motion in limine. He asserted that the admission of victim impact testimony in his case would inevitably lead to a violation of the Eighth Amendment and his right to a fair trial.[96] Alternatively, McVeigh requested that the court limit the admission of victim impact evidence, and employ specific procedural safeguards to ensure that the testimony did not render his trial fundamentally unfair.[97] The court granted some of McVeigh's requests to exclude certain victim impact evidence, but in general interpreted *Payne* to allow for the broad admission of most of the victim impact evidence offered.[98]

The trial judge acknowledged that under *Payne* "there simply is no clear guidance as to where the line between appropriate . . . victim

93. MD. ANN. CODE art. 27 § 413(c)(v) (1996). *See generally* Ilana Subar, *Emphasizing Victims' Rights at the Sentencing Phase of Criminal Proceedings*, 55 MD. L. REV. 722 (1996).

94. CAL. PENAL CODE § 190.3; *See also* People v. Edwards, 819 P.2d 436 (Cal. 1991) (concluding that victim impact evidence or "evidence of the specific harm caused by the defendant" is a circumstance of the crime admissible under § 190.3(a)).

95. TENN. CODE ANN. § 39-13-204(c).

96. *See* Defendant McVeigh's Motion for New Trial, Request for Evidentiary Hearing, and memorandum in support, 1997 WL 403417, at 83, United States v. McVeigh, 940 F. Supp. 1541 (D. Colo. 1996) (No. 96-CR-68M) [hereinafter *Motion*]. The motion included a discussion of victim impact testimony and exhibits (photographs, etc.). However, victim impact exhibits are beyond the scope of this comment.

97. *See id.*

98. *See id.* at 92.

impact evidence ends and an appeal to passion, the human reactions, emotive reactions of revenge, rage, empathy—all of those things—begins."[99] The court wrestled with the amorphous nature of *Payne*, and outlined what it considered to be the parameters of admissible victim impact testimony:

> I think it's got to be as objective as possible and it has got to be the consequences of the crime. And I don't believe that it can have as much emotional impact as some of the things that are being discussed here. . . . It can include the loss of a—people to an agency and can include the loss of a family member, what has happened, the empty chair, but not the emotional aspect of that, the grieving process, the mourning process. I don't think that's part of it. That's where I'm talking about objective, as opposed to subjective. The facts rather than the emotional impact.[100]

One may speculate as to whether the Justices in *Payne* envisioned that the federal standard for admissibility of victim impact statements in capital sentencing would be so amorphously defined by a court. What is clear, however, is how easily the line blurs between objective factual testimony and emotional response.

McVeigh recognized that victim impact testimony at capital sentencing was "a difficult area because of the lack of guidance and the lack of precision of guidelines."[101] McVeigh raised several concerns about several categories of victim impact evidence that the prosecutor sought to admit at sentencing. First, he was concerned "that some of the testimony appears to be the equivalent of eulogies."[102] McVeigh argued that this type of over idealizing implies a comparison of the victims' worth with the defendant's.[103] He was concerned that the testimony would resemble "statements that one might make at a funeral, designed to invoke empathetic identification with the person who has been lost" rather than the fact-based circumstantial evidence that the *Payne* Court thought proper.[104]

Second, McVeigh objected to graphic testimony about the nature of the injuries sustained by the victims. McVeigh asserted that it was

99. *See id.* at 91.

100. *See id.*

101. Hearings on motions (victims rights clarification, motion for voir dire of jury, motion for recess, motion in limine, motion for voir dire of witness), 1997 WL 290019, at 11, United States v. McVeigh, 940 F. Supp. 1541 (D. Colo. 1996) (No. 96-CR-68) [hereinafter *Hearings*].

102. *Id.*

103. *See id.*

104. *Id.* at 12.

"the verbal equivalent of gruesome photographs . . . [which would likely] evoke highly emotional and visceral responses."[105]

Third, McVeigh was concerned with what he called "highly charged emotional statements."[106] Specifically, he argued that detailed descriptions of a person's mourning, such as that gleaned from a letter or poem, goes "beyond the necessary description to depict the victim as an individual."[107]

Fourth, McVeigh raised several concerns over specific witnesses who were to give testimony during his sentencing. McVeigh objected to testimony describing two law enforcement officers who died.[108] He argued that testimony about the careers of the law enforcement officers, including history and length of employment, crosses the line. It gives the jury too much information about the life of the deceased person, thereby shifting the jury's focus from defendant to victim.[109] McVeigh also objected to testimony by the chief medical examiner involving graphic, and overly gruesome depictions of the crime scene.[110]

McVeigh contested specific testimony from several rescue workers about the impact of their rescue efforts on them. While acknowledging that the pain and emotional distress suffered by rescue workers bears some relation to the trial, McVeigh drew a distinction between them and the people who were directly affected by the explosion. "The larger question [raised] is if people who are indirectly affected, even grievously, by an incident, can be allowed to give victim impact testimony about their own condition, where does the line get drawn?"[111] McVeigh analogized the rescue worker testimony to that of the entire city. He pointed out that the city and its inhabitants had surely been affected by the explosion and the impact they felt was different only in degree from the rescue workers, not in kind.

Finally, McVeigh contested the testimony of a witness who came to the Victims Assistance Center daily to provide briefings for family

105. *Id.*

106. *Id.*

107. *Hearings*, 1997 WL 290019, at 12.

108. *See id.* at 14.

109. *See id.* The court responded to this contention by stating that one of the appropriate things to be considered was the impact the loss of the life of the person had on the community. In other words, "what this person would be doing today if he or she were still alive" is entirely appropriate testimony, which includes employment history and accomplishments. *Id.*

110. *See id.* at 15.

111. *Id.* at 16.

members awaiting news.[112] The witness wanted to testify about the responses to the information he was providing. McVeigh argued that "the detail in which family members' reactions are recounted and the emotionality that is inherent in those accounts . . . risks tipping the balance between emotion and reason."[113]

The Government's argument in opposition to McVeigh's motion was that its objective was limited to helping "the jury make [a] reasoned moral judgment as the conscience of the community as to the appropriate punishment."[114] The government asserted that the victim impact testimony would aid the jury by offering "objective factual testimony about the circumstances of the offense and the effects they felt from the offense."[115] The Government interpreted *Payne* to allow the State "the moral force of the evidence," meaning that it need not present evidence in the least prejudicial manner, as McVeigh had argued.[116] Nevertheless, the Government stated it did not intend to inflame the jury, but rather, it sought to assist the jury in making a reasoned moral judgment.

The Government maintained that it did not intend to offer any testimony in the nature of eulogies, as McVeigh had contended. Instead, the testimony was designed to portray "an objective story regarding a brief snapshot and understanding of the identity of the victim."[117] Such testimony could include the type of activities the victim was involved in, the way the witness interacted with the victim, and the effect the person had on the community.[118] The Government assured the court that this testimony would be brief, not to exceed 15 minutes:

> It will certainly be far less extensive about the background of any one individual or even all the individuals that we offer combined than the defendant will present about himself. The jury will certainly know more about the defendant individually at the end of the process than it knows about any one of these victims or even, I would say, the victims who testify all together. There will be far less known about all of them together than there is known about the defendant.[119]

112. *See id.* at 17.
113. *Hearings*, 1997 WL 290019, at 17.
114. *Id.* at 19.
115. *Id.* at 20.
116. *Id.* at 19.
117. *Id.* at 20.
118. *See id.*
119. *Hearings*, 1997 WL 290019, at 20.

The Government's intent not to belabor the proceedings with victim impact testimony is evidenced by the fact that it culled 40 to 45 persons from a list of 168 victims to provide such testimony.[120]

The Government successfully rebutted McVeigh's challenge that the testimony of the medical examiner would be overly graphic. The Government assured that he would only be testifying about a representative sampling of the causes of death. For example, he would testify as to whether the victim died instantaneously or whether life continued after the explosion.[121]

The Government argued unsuccessfully to admit testimony by victims about identifying their loved ones at the scene.[122] The proffered evidence would have included testimony from witnesses who "came in after the bombing when their loved one was identified," and descriptions of "the condition of the body and the arrangements that had to be made in terms of identifying the person and then in terms of putting the person to rest."[123] Contending that such testimony goes to the effect of the offense, the Government argued that the explosion caused not only the death of the victim but also forced the surviving family members to identify the deceased. The court excluded this evidence.

The Government indicated that it would offer testimony from two rescuers who were with two victims when they died.[124] The testimony would describe the emotional impact the rescue workers felt because of what they observed, including recurring nightmares.[125] The court admitted this testimony, reasoning that the rescue workers' reaction to the event was so foreseeable that they could be considered victims for victim impact testimonial purposes.[126]

The court also admitted the challenged testimony of the witness who came daily to the Victims Assistance Center and briefed family members on recovery efforts. The court approved of the Government's contention that the testimony would be a factual account of

120. *Id.* Of this number, only 25 to 30 witnesses were related to or testified on behalf of one particular deceased victim. *Id.*

121. *See id.* at 22.

122. *See id.*

123. *Id.* at 23.

124. *See id.*

125. *See Hearings*, 1997 WL 290019, at 23.

126. The judge stated: "Obviously a bombing of this type is going to require direct and immediate response .... [W]ithout permitting the matter to get cumulative, it seems to me that some aspects of the experience of those who were called to the scene qualifies them as victims within the concept here of victim impact testimony." *Id.* at 16.

who asked and said what, rather than a characterization of emotions.[127]

The final testimonial issue challenged by McVeigh was that of a minor who lost his mother. The Government explained that it "did not seek to introduce testimony from any children," but that this was a special circumstance.[128] The father of the minor indicated that it was very important for his son to testify as to the loss of his mother. The court allowed the child's testimony.[129] In contrast, a poem written by the father of one of the victims was excluded.[130]

Finally, McVeigh asked the court to consider state court decisions to define appropriate procedural parameters to the introduction of victim impact evidence.[131] McVeigh cited three state court decisions in which a preliminary voir dire with respect to victim impact witnesses was required, so that there would be less risk of unexpected emotion overtaking witnesses.[132] The court declined to hold such a hearing.[133] However, other procedural safeguards had been granted to McVeigh, including, most significantly, a running objection to all the victim impact testimony.[134]

The extensive attention given to victim impact evidence before McVeigh's sentencing phase demonstrates the ambiguity of guidelines governing its admission after *Payne*. The court admitted that the lack of clear guidance in federal courts would undoubtedly result in rulings which "are not going to be consistent with the views of many."[135] For example, testimony of rescue workers regarding their rescue mission and its aftermath was admitted, while testimony of family members who found or identified bodies of their loved ones was excluded. Similarly, testimony of a witness who briefed victims daily at a Victims Assistance Center was admitted, while a poem written by the father of

127. *See id.* at 24.
128. *See id.* at 24.
129. *See id.* at 25.
130. *See id.* at 23.
131. *See Motion*, 1997 WL 403417, at 91.
132. *See id. See also supra* text accompanying notes 67-9. The three state court decisions McVeigh cited were *State v. Mohammed*, 678 A.2d 164, 180 (N.J. 1996), *State v. Bernard*, 608 So. 2d 966, 968 (La. 1992), and *Cargle v. State*, 909 P.2d 806, 828 (Okla. Crim. App. 1999).
133. The court stated: "With all due respect to that court, that's an appellate view of things, and it's not a trial judge's view of things. We can't do dress rehearsals, so I'm not going to do that." *Hearings*, 1997 WL 290019, at 33.
134. *See Motion*, 1997 WL 403417, at 93. A running objection spared McVeigh the inconvenience, and potential for prejudice, of mounting an individual objection to each witness in front of the jury.
135. *See id.* at 92.

a deceased victim was excluded. These examples do more than demonstrate the blurred line between what is and is not admissible; they raise questions as to how directly a witness needs to be affected in order to provide victim impact testimony.

The need for objective testimony must be balanced with fairness in who gets to testify. In addition, under *Payne*, admitting testimony about employment history and accomplishments sets the stage for valuation of the victim's worth. Perhaps the greatest ambiguity associated with *Payne*, and epitomized in McVeigh's sentencing, concerns the sheer volume of witnesses. *Payne* addressed victim impact testimony for one victim; whereas in McVeigh's case, liberal admission of victim impact testimony relating to multiple victims must have had an exponential impact at sentencing. McVeigh's sentencing illustrates many problems associated with *Payne* that must be addressed.

V. Criticism of Victim Impact Statements

In order to determine the appropriate parameters for victim impact statements in capital sentencing, an understanding of its major criticisms is necessary. Leading critics of victim impact testimony have cited many of the same arguments raised by McVeigh during his trial.

A leading criticism of victim impact statements is that they violate the defendant's right to equal protection by leading to disparate treatment of similarly situated defendants.[136] Victim impact statements shift the sentencing jury's focus from the defendant to the victim, leading ultimately to arbitrary sentencing based on perceptions of the victim's family, or, perhaps more commonly, whether the victim left behind a family at all. "As long as victim impact plays a role in capital sentencing, comparison of the victim to the defendant by jurors is inevitable. Jurors will use their personal views and experiences to make such comparisons."[137] For example, in *Livingston v. State*, Chief Justice Benham stated in his dissent that the broad scope of victim impact evidence "creates a grave risk that the jury may conclude that it is permissible for its decision to impose the death penalty to be based on such constitutionally impermissible factors as race, religion,

136. This aspect of victim impact evidence was raised in *Booth*. 482 U.S. at 506 n.8. *See also* Cecil A. Rhodes, *The Victim Impact Statement and Capital Crimes: Trial by Jury and Death by Character*, 21 S.U. L. REV. 1, 27 (1994) ("Equally troublesome for the [*Booth*] Court was the disparate and unequal treatment the victim impact statement would present during sentencing in capital cases."). Justice Stevens also addressed this issue in his dissenting opinion in *Payne*. *See Payne*, 501 U.S. at 856.

137. Anderson, *supra* note 13, at 420.

class, or wealth."[138] Such evidence encourages distinctions about the personal worth and social status of victims, which conflicts with the notion that every person's life is equally precious.[139]

Victim impact statements may also bias the jury in favor of those who grieve most, or best.[140] When the sentencing jury hears victim impact testimony from a family member, "the eloquence of that speaker may play a role in the jury's decision. In fact, some states even allow victim's family members to hire an attorney to present their statements for them. Consequently, a wealthy family would be able to secure an articulate speaker, while a poor family may not be able to afford one at all."[141] Thus, arbitrary and capricious imposition of the death penalty could be easily exacerbated based on the victim's perceived status in society.

Additionally, critics assert that the introduction of victim impact evidence will perpetuate racial discrepancies in the capital sentencing process.[142] The Baldus studies already demonstrate that juries value white victims more than they do black victims.[143] "If the statistics indicating racial disparity reflect subconscious racism in the sentencing process, there is no reason to expect that such factors will not continue."[144] Thus, victim impact evidence only further exacerbates the risk of bias in a capital sentencing scheme that is already haunted by racial discrimination. Justice Stevens raised this same concern in his dissenting opinion in *Payne*. Stevens likened victim impact evidence intended to identify some victims as more worthy of protection than others to "decisions based on the same invidious motives as a prosecutor's decision to seek the death penalty if a victim is white but to accept a plea bargain if the victim is black."[145]

Critics also assert that victim impact statements evoke emotions inappropriate in the context of capital sentencing. "[V]ictim impact statements appeal to hatred, the desire for undifferentiated ven-

138. Livingston v. State, 444 S.E.2d 748, 760 (Ga. 1994) (Benham, P.J., dissenting) (citations omitted). *See supra* text accompanying note 85.

139. *See id.*

140. *See id.*

141. Hauptman, *supra* note 57, at 476.

142. Vital, *supra* note 36, at 515 ("Practically, Payne has the potential of fueling racism in the capital sentencing process."). *See also* Vivian Berger, Payne *and Suffering: A Personal Reflection and a Victim-Centered Critique*, 20 FLA. ST. U. L. REV. 21 (1992).

143. McKleskey v. Kemp, 481 U.S. 279, 353-56, 107 S.Ct. 1756 (1987).

144. Anderson, *supra* note 13, at 419.

145. *Payne*, 501 U.S. at 866.

geance, and even bigotry."[146] This inhibits the jury's ability to consider dispassionately the defendant's story.[147] The decision to impose the death penalty must be based on reason, not emotion or the emotional impact on a victim's family.

Some argue that capital sentencing is not the appropriate arena for victims to tell their story because "[e]motionally charged tales of woe or financial ruin carry a high risk of bias."[148] They potentially "strike chords of sympathy" that ignite "smoldering feelings of outrage and frustration" in the jury, thus making it more likely that the jury will inflict an "unduly harsh penalty."[149] The jury's resort to emotion makes for arbitrary judgements in capital cases at best.[150] Moreover, since victim impact statements are a purely emotional presentation, it would be difficult to counteract its effect through testimony or other judicial restraints.[151] Strategically, tactically, and from a practical standpoint, a defendant who casts stones on his victim's character cannot possibly ingratiate a jury.[152]

Another argument against victim impact statements is that such evidence does not further the goals of criminal punishment.[153] To begin with, critics argue victim impact statements do not further the goal of incapacitation.[154] The purpose of incapacitation is to separate those individuals who cannot live by society's rules from those who can.[155] In other words, remove the offenders so that they cannot continue to wreak havoc on society.[156] In determining the length of incapacitation, the sentencing jury must consider the nature of the crime, and the likelihood of future dangerousness. Victim impact statements are wholly unrelated to the issue of future dangerousness, and the na-

146. Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 365 (1996).

147. *See id.*

148. *See* Long, *supra* note 8, at 222.

149. *Id.* at 223.

150. *See id.*

151. *See id.*

152. Rhodes, *supra* note 136, at 27 ("putting a convicted murderer in a position of trying to rebut the testimony of positive character of the murdered victim is at best extremely risky, and almost damning to the defense"). *See also* Thomas J. Phalen & Jane L. McClellan, *Speaking for the Dead at Sentencing*, 31-NOV ARIZ. ATT'Y 12, 33, Nov. 1994, *available in* WESTLAW AZATT database ("Almost by definition, victim impact statements in a capital case will be highly inflammatory, emotional, prejudicial, and impossible to rebut.").

153. Dugger, *supra* note 4, at 403 ("Victim impact evidence is simply not consistent with the traditional goals of sentencing. It furthers none of the historically considered ambitions of punishment.").

154. *See id.* at 401.

155. *See id.*

156. *See id.* at 401-03.

ture of the crime has already been gleaned from, and established in, the guilt/innocence phase of the trial. Furthermore, in a capital sentencing hearing, incapacitation is already guaranteed: the issue now being whether the defendant will be incapacitated for life, behind bars, or incapacitated by death. With or without victim impact statements, the goal of incapacitation will be met after capital sentencing.[157]

Secondly, victim impact statements do not achieve the sentencing goal of deterrence.[158] Under the deterrence principle, society discourages participation in criminal activity through punishment. The theory is that a potential offender will not commit a crime if the offender knows the consequences of the crime are grave.[159] However, with the proliferation of victim impact statements, criminals may believe they will be treated differently based on the identity of their victim. Since a criminal is generally unaware of the victim's characteristics at the time of the crime, this will hardly deter that criminal. Deterrence cannot be effective when those who society seeks to deter do not know what factors will be considered at sentencing.[160]

Nonetheless, an argument can be made that victim impact testimony accomplishes some retributive goals. Retribution involves the State "standing in" for the victim and seeking "payment" to society in general for what damage the defendant has done.[161] If retribution involves mending the social tear or somehow restoring balance to society, then surely there is a need to calculate the loss suffered by victims of the crime. There is no person who can better calculate the cost of a crime than one who has been directly affected by it. However, when retribution means seeking payment to society for what harm the defendant has caused, the line begins to blur between the theory of retribution and the theory of vengeance.[162] "[I]t seems that retribution allows the thoughts of the victim's loved ones to become a form of compensation, for no other productive reason than to allow the expression of their anger."[163] If retribution, and not vengeance, is to be achieved as a goal of capital sentencing, it will be achieved more suc-

157. *See id.* at 402.

158. *See id.* at 401.

159. *See* Dugger, *supra* note 4, at 400. Under the "specific" deterrence principle, one who committed a crime may be deterred from further criminal actions based solely on his own experiences with punishment. *Id.*

160. *See id.*

161. *See* Charles E. Torcia, 1 Wharton's Criminal Law 2, at 8 (14th ed. 1978).

162. *See* Bandes, *supra* note 146, at 398 ("the idea of venting collective outrage diverges sharply from traditional retributive theory").

163. *See* Dugger, *supra* note 4, at 399.

cessfully by appropriate sentencing, and less so by victim participation in sentencing.

Finally, victim impact statements do not further the goal of rehabilitation.[164] Rehabilitation turns on the likelihood society can reform the defendant, with the underlying intent to rehabilitate the offender with society.[165] Victim impact statements do not enlighten this determination. In fact, critics contend that victim impact statements undermine this sentencing goal by obviating the jury's ability to view the defendant compassionately, emphatically, and with mercy.[166] "Victim impact statements appeal to hatred, the desire for undifferentiated vengeance, and even bigotry. In doing so, they block the sentencer's ability to perceive the essential humanity of the defendant."[167] Victim impact statements impinge upon the jury's ability to entertain compassion for the defendant. By undermining the perception that the defendant may be capable of reform, victim impact statements run the risk of subverting this sentencing goal.

VI. Defining the Parameters of Appropriate Victim Impact Testimony in Capital Sentencing

If admission of victim impact statements is narrowly tailored, it will accomplish its important objective of equating punishment with harm. The impact of a crime should be a factor at sentencing, but its introduction at capital sentencing must be carefully scrutinized so as not to inflame or unduly prejudice the jury. The ungoverned admission of victim impact statements articulated in *Payne*, and exemplified in Timothy McVeigh's trial as well as in various state cases, has no place in capital jurisprudence. *Payne* allows for the introduction of evidence without imposing a procedure, and as such *Payne* alone cannot possibly guide federal or state law.[168]

While it is difficult to determine the appropriate parameters of victim impact testimony, consideration of how some of the states are responding to *Payne* certainly provides some guidance. For example, Georgia's admission of evidence by any individual with "personal

164. *See id.* at 402. ("Victim impact evidence is simply not consistent with the traditional goals of sentencing. It furthers none of the historically considered ambitions of punishment").

165. *See id.*

166. Bandes, *supra* note 146, at 401-05.

167. *See id.*

168. Anderson, *supra* note 13, at 403 ("The Supreme Court's decision in *Payne* has opened the door to victim participation in capital jury sentencing and has not placed many tangible limits on that participation.").

knowledge" extends the definition of who can testify too far.[169] This same broad standard was applied in Timothy McVeigh's sentencing.[170] On a practical level, this standard opens the door to volumes of testimony by multiple witnesses. Additionally, allowing any person with "personal knowledge" to give victim impact evidence enables the potential for bias to run with the status of the person who testifies. In other words, some witnesses will command more respect in the courtroom than others. However, since "[t]he feeling of identification with the victim of a crime often comes naturally,"[171] it is likely that if testimony were limited to family members (or at least those directly effected by the crime), every witness would command equal respect. Of course, even here certain families will invariably have more articulate representatives than others. However, it is difficult to imagine a scenario where an otherwise impartial juror would not seriously consider testimony of a family's loss, regardless of that witness's ability to articulate such loss. By restricting testimony to family members, or at least those directly related by the crime, the risk of arbitrariness based on who best articulates their loss is diminished.

Another practice that seems unnecessarily broad is Georgia's admission of evidence relating to "impact on the community."[172] To begin with, some communities will be better situated to articulate their loss by the victim's death.[173] For example, members of a well-educated and organized professional community would be in a better position to articulate their loss than members of an unemployed, impoverished, migrant community. Additionally, testimony as to impact on the community potentially opens the door to shades of socio-economic discrimination. It increases the possibility of correlating the victim's standing in the community with the defendant's punishment, thus escalating the risk of arbitrary sentencing. For example, the loss of a town physician or a chairman of the board would likely generate more witnesses who could speak to impact on the community than an individual in a less prominent professional or social position.

However, the potential for any resulting socio-economic bias could be diminished by restricting testimony to impact on one unit: the family. In fact, it is possible that the potential for socio-economic discrimination could be alleviated significantly, as sympathy for a fi-

169. *See supra* text accompanying notes 80-85.

170. *See supra* note 126.

171. Bandes, *supra* note 146, at 400.

172. *See supra* text accompanying notes 80-85.

173. Long, *supra* note 8, at 224 ("Undoubtedly, certain communities will be better poised to take advantage of community-input opportunities.").

nancially impoverished family who has lost its sole provider may run even more rampant than sympathy for a financially secure family who has lost one of many sources of income.

By narrowing who can testify, and on what, the sheer number of witnesses will inevitably be reduced. Nothing illustrates the need to reduce volume as clearly as Timothy McVeigh's sentencing. In addition to being cumulative, each additional witness who testifies to the same loss is likely to move the jury one step further from reason and one step closer to passion.

If there is one aspect of *Payne* that is not ambiguous, it is that victim impact witnesses should not be allowed to express their opinion as to the punishment of the defendant.[174] Arguably, this could include prayers in the courtroom, either to God, or simply for justice to be done. In this respect, Missouri's statutory allowance of all "evidence concerning the murder victim" crosses the line in terms of appropriate victim impact testimony.[175] Certainly, victims are entitled to confer with prosecutors in terms of whether they wish the death penalty to be sought. However, these discussions should be held behind closed doors, and not in a court of law in front of a jury. This kind of testimony could inflame the jury, making any reasoned decision unrealistic.

Opinion as to the punishment a defendant should receive is different from a characterization of the crime, although admittedly the line can easily blur. With regard to characterizations of the crime, there is no reason why victims who were directly involved with the crime—who were witnesses, or who found the evidence—should not have the opportunity to testify to the nature of the crime. The criminal who perpetrates a crime with knowledge that witnesses are involved can reasonably foresee the harm caused by such an act, and must be confronted by its impact.

New Jersey's procedural requirement of having the defendant open the door to his character before victim impact statements shall be heard also seems to be an appropriate parameter narrowing the introduction of victim impact testimony. While the practical result may be a reluctance on the defendant's part to introduce any mitigation, allowing victim impact statements in response to character evidence at least gives the State an alternative to its traditional role of silence during mitigation. Moreover, since neither mitigation nor vic-

174. *See supra* note 43, and accompanying text.

175. *See supra* note 75, and accompanying text.

tim impact evidence is directly refutable, each side will introduce evidence that stands on its own as opposed to rebuttal evidence.

If a jury is to hear this type of evidence, the clearest and most consistent instruction is necessary. New Jersey provides a good model for proffering adequate jury instructions to help the jury weigh the evidence it hears at sentencing. The New Jersey Supreme Court mandated that all capital sentencing jury instructions explain that victim impact evidence is to be used only to determine how much weight to ascribe to a catch-all mitigating factor, and not as supporting the aggravating factors or as a general justification for the death penalty.[176] Consider also an instruction promulgated by the Court of Criminal Appeals of Oklahoma, to be used in all future capital murder cases in which victim impact evidence is presented:[177]

> The prosecution has introduced what is known as victim impact evidence. This evidence has been introduced to show the financial, emotional, psychological, or physical effects of the victim's death on the members of the victim's immediate family. It is intended to remind you as the sentencer that just as the defendant should be considered as an individual, so too the victim is an individual whose death may represent a unique loss to society and the family. This evidence is simply another method of informing you about the specific harm caused by the crime in question. You may consider the evidence in determining an appropriate punishment. However, your consideration must be limited to a moral inquiry into the culpability of the defendant, not an emotional response to the evidence.[178]

Jury instructions such as this would provide a necessary safeguard against impermissible consideration of victim impact evidence.

Other pre-trial procedures that states have adopted seem to be appropriate safeguards. Both Georgia and New Jersey require the trial court to hear and rule on the admissibility of victim impact evidence sought to be offered before trial. This guards against any surprise testimony, and prevents highly prejudicial evidence from coming to a jury's attention at all. Of course, if all else fails, the defendant will always be able to raise a claim under the Due Process Clause.

VII. Conclusion

There is no doubt that the victim's voice creates fairness in a capital sentence proceeding. Although this is a voice that can never be

176. *See supra* note 70 and accompanying text.
177. Cargle v. State, 909 P.2d 806, 828 (Okla. Crim. App. 1995).
178. *Id.*

rebutted, there is no requirement of parity in the treatment of victim and defendant. However, there is a requirement that the defendant's rights not be grossly disproportionate to the State's right. While the defendant already has extra safeguards to counteract the awesome power of the State, the defendant is still entitled to have some parameters placed on the victim's voice.

Thanks in part to poorly articulated parameters in *Payne*, victim impact testimony in capital sentencing walks a fine line between allowing particularized attention to the damage caused by the crime on the one hand, and leaving the jury to be inundated with prejudicial outpourings irrelevant to the defendant's guilt on the other. If the courts can control the influence of victim impact testimony by placing restrictions on its admission, then the "account of the suffering of the victim's survivors in individual cases [would serve as] a particularization of a generally foreseeable harm."[179] There is a strong argument that such an articulation will accomplish the backward-looking goal of retribution. By its very goal of "seeking payment," retribution allows for a form of retaliation by those affected by the crime.[180] Since the only available role at trial for those affected by the crime is recounting the harm that has been experienced, victim impact testimony does have a retributive quality. As such, there is a clear role for such evidence in capital sentencing.

Capital punishment jurisprudence is already unavoidably emotional. Nevertheless, this does not mean there is a place for unbridled, emotional testimony in capital sentencing. There is a place for testimony about the impact of the crime, and the harm perpetrated by the defendant. After all, the sentencing phase is no longer about the crime; it is about the defendant. The defendant does not perpetrate his crime in a vacuum. He alters the balance of many lives. This harm is reasonably foreseeable, and the defendant must be made to account for it. By narrowly defining the parameters of *Payne,* this accountability will fall within the limits of other constitutional guarantees.

179. Paul Gewirtz, *Victims and Voyeurs at the Criminal Trial*, 90 Nw. U. L. Rev. 863, 873 (1996).

180. Dugger, *supra* note 4, at 398.