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Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials

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THROUGH THE PAST DARKLY: A SURVEY OF THE USES AND ABUSES OF VICTIM IMPACT EVIDENCE IN CAPITAL TRIALS

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I. INTRODUCTION

Traditionally, the American criminal justice system has been guided by the principle that personal harm is properly avenged by the State, acting in the name of the individual harmed. Only by interposing the State between the victim and the accused, the thinking has been, can punishment be fairly measured and imposed,[1] and the unseemly and socially destabilizing specter of privatized justice and revenge thereby avoided.[2]

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1. *See* SUSAN JACOBY, WILD JUSTICE: THE EVOLUTION OF REVENGE 1–4 (1983) (discussing historic evolution of State control over criminal prosecutions). *See also* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 24–30, 66–71 (1993) (discussing early evolution of criminal adjudications in Colonial America and the gradual professionalization of criminal justice actors); Abraham S. Goldstein, *History of the Public Prosecutor*, *in* ENCYCLOPEDIA OF CRIME AND JUSTICE 1286–89 (S. Kadish ed. 1983) (tracing historic role of public prosecutors from vindicators of private wrongs to seekers of public justice).

2. *See* Harold J. Berman, *The Background of the Western Legal Tradition in the Folklaw of the Peoples of Europe*, 45 U. CHI. L. REV. 553, 559 (1978) (describing early common law where disputes were commonly settled by "blood-feuds," whereby the criminal was submitted to the victim's family for retribution). In the United States, it was not until after the Revolution that the State assumed predominant control over criminal prosecutions, replacing an age-old system where victims not only played a direct role in securing the arrest of their assailants, bore the burden of investigating alleged wrongs, and retained private counsel to prosecute their cases, but also received any damages awarded. *See* ROGER LANE, POLICING THE CITY: BOSTON 1822–1885, at 6–9 (1967); Phillip B. Kurland & D.W.M. Waters, *Public Prosecutions in England 1854–79: An Essay in English Legislative History*, 1959 DUKE L.J.

With the forceful emergence of the victims' rights movement in recent years, however, this State-dominated view has undergone radical transformation. Starting in the early1970s,[3] victims' advocates successfully made their case for an increased role for crime victims in the criminal justice process, and achieved rapid and widespread changes in state and federal law.[4] Although initially limited to ensuring that crime victims receive monetary compensation, be kept better informed of procedural developments, and treated with more attentiveness by the justice system as a whole,[5] the changes soon were directed toward permitting significantly greater involvement in actual prosecutions themselves.[6] Perhaps most prominent and controversial among these measures was the advent of "victim impact evidence" in criminal trials.[7]

493, 512.

3. Commentators have noted that the victims' movement stemmed from several legal and historical forces. *See* Shirley S. Abrahamson, *Redefining Roles: The Victims' Rights Movement*, 3 UTAH L. REV. 517, 528 (1985) ("[S]upporters were reacting to the Warren Court's expansion of defendants' rights."); Richard L. Aynes, *Constitutional Considerations: Government Responsibility and the Right Not to Be a Victim*, 11 PEPP. L. REV. 63, 64 (1984) (arguing that movement sprang from "the women's rights movement and its efforts to protect the welfare of rape victims").

One commentator in the early 1980s suggested that the Burger Court purposely exercised its certiorari power to select cases designed to champion the rights of victims. *See* Timothy P. O'Neill, *The Good, the Bad, and the Burger Court: Victims' Rights and a New Model of Criminal Review*, 75 J. CRIM. L. & CRIMINOLOGY 363 (1984); *see also id.* at 364 (characterizing the Court's perspective as that of a "zero-sum game" between "the rights of the law-abiding ('good citizens') and the criminals ('bad citizens')").

4. The constitutions of at least 29 states now contain "victim's rights amendments," and similar legislation has been introduced at the federal level. *See* Alice Koskela, Comment, *Victim's Rights Amendments: An Irresistible Political Force Transforms the Criminal Justice System*, 34 IDAHO L. REV. 157, 158–60 (1997). The Victim and Witness Protection Act of 1982, 18 U.S.C. § 1512 (1994), was the first of several federal initiatives to heighten the role of victims in the criminal justice process. *See* Ashley P. Dugger, *Victim Impact Evidence in Capital Sentencing: A History of Incompatibility*, 23 AM. J. CRIM. L. 375, 376–81 (1996) (describing same).

5. *See* William F. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AM. CRIM. L. REV. 649, 669–72 (1976) (describing developments).

6. *See* Donald J. Hall, *Victims' Voices in Criminal Court: The Need for Restraint*, 28 AM. CRIM. L. REV. 233, 234–35 (1991) (discussing proliferation of "victim participation" provisions); Michael I. Oberlander, *The* Payne *of Allowing Victim Impact Statements at Capital Sentencing Hearings*, 45 VAND. L. REV. 1621, 1626 (1992) (noting that recent victims' initiatives have been directed toward the creation of a justice system that "assists rather than manages the victim").

Acceding to the wishes of survivors to "see justice done," several jurisdictions have provided family members the express right to attend executions. *See* Michael L. Goodwin, *An Eyeful for Eye: An Argument Against Allowing the Families of Murder Victims to View Executions*, 36 BRANDEIS J. FAM. L. 585, 587 (1998) (noting that Alabama, Delaware, Louisiana, Nevada, Ohio, Oklahoma, Texas, and Washington grant such a right). According to Goodwin, some family members view attendance as an opportunity for "closure," while others see it as a "final opportunity to represent their murdered family members in the criminal justice process." *Id.* at 588–89.

7. *See* Maureen McLeod, *Victim Participation at Sentencing*, 22 CRIM. L. BULL.

This Article examines the recent history of victim impact evidence in capital sentencing, as permitted by the United States Supreme Court's landmark 1991 decision in *Payne v. Tennessee*,[8] which overruled two other recent holdings of the Court squarely prohibiting such evidence.[9] The state of the law seven years since *Payne* establishes two things beyond peradventure. First, victim impact evidence—in the manifold, highly emotional forms in which it is introduced—is here to stay, despite initial assessments that the *Payne* Court's lifting of the "per se" bar against such evidence would inspire relatively little interest.[10] Second, many of the worst fears imagined in the wake of *Payne* have been realized. Highly prejudicial victim impact evidence is now routinely put before capital juries, with precious little in the way of substantive limits, procedural controls, or guidance in how it is to be used in assessing the "deathworthiness" of defendants.[11] Worse yet, appellate courts nationwide have in effect abdicated their oversight function relative to the deployment of impact evidence,[12] adding further uncertainty to the already delicate, high-stakes capital decision making process.

After a brief overview of the Supreme Court's recent treatment of victim impact evidence, culminating in *Payne*, the Article canvasses the ways in which impact evidence is now being conveyed to juries, and discusses the results of the author's analysis of the several hundred state and federal appellate opinions issued since *Payne* regarding the admission of impact evidence in capital trials. As will be clear, a dramatic and immediate need now exists for meaningful controls in the areas of what impact evidence should be admitted, what form it should take, and to what use it can and should be put by capital jurors. Rather than revisiting the numerous compelling theoretical arguments against the introduction and use of victim impact evidence, forcefully made by others elsewhere,[13] the Article then suggests several basic ways in which death penalty jurisdictions can impose limits that, while not eliminating the inherent risks associated with victim impact evidence, at least decrease

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501, 507 (1986) (noting that as of the mid-1980s at least 36 states permitted the use of victim impact evidence).

In the interest of economy, the phrases "victim impact evidence," or "impact evidence," used here throughout, are intended to encompass the broad range of evidentiary sources used to convey "victim impact" information, including statements, live or pre-recorded witness testimony, and physical evidence.

8. 501 U.S. 808 (1991).

9. *See* South Carolina v. Gathers, 490 U.S. 805 (1989); Booth v. Maryland, 482 U.S. 496 (1987). *See infra* notes 14–22 and accompanying text for a discussion of *Booth* and *Gathers*.

10. *See* Robert P. Mosteller, *The Effect of Victim-Impact Evidence on the Defense*, 8 CRIM. JUST. 24, 25 (1993) (asserting that although the effects of *Payne* "are beginning to be felt in a number of states already...the use of victim-impact evidence is not as prevalent as was expected").

11. *See infra* notes 88–140 and accompanying text.

12. *See infra* notes 252–70 and accompanying text.

13. *See, e.g.*, Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361 (1996); Catherine Bendor, *Defendants' Wrongs and Victims' Rights:* Payne v. Tennessee, 27 HARV. C.R.-C.L. L. REV. 219 (1992); Vivian Berger, Payne *and Suffering–A Personal Reflection and a Victim-Centered Critique*, 20 FLA. ST. U. L. REV. 21 (1992); Angela P. Harris, *The Jurisprudence of Victimhood*, 1991 SUP. CT. REV. 77 (1992).

the likelihood that death sentences will be arbitrarily imposed on the basis of its use. Finally, the Article evaluates current shortcomings in the manner in which appellate courts are addressing impact evidence, and suggests important changes in this area as well.

II. THE ROLE OF THE VICTIM TRANSFORMED

A. Booth v. Maryland *and* South Carolina v. Gathers

In *Booth v. Maryland*, the United States Supreme Court addressed whether the Eighth Amendment precluded the application of a Maryland statute that permitted information relating to the (1) personal characteristics of the murder victim and the emotional impact of the killing on the victim's family and (2) family members' opinions and characterizations of the crime and the defendant.[14] Writing for the majority, and characterizing both types of evidence as irrelevant, Justice Powell flatly rejected the State's assertion that such information was needed to allow jurors to assess the "gravity" of the offense.[15] According to Justice Powell, impact evidence improperly served to refocus the sentencing decision from the defendant and his criminal act to "the character and reputation of the victim and the effect on his family," despite the fact that the defendant was perhaps wholly unaware of the personal qualities and worth of the victim.[16] In so doing, Justice Powell asserted, the State created "a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner" in violation of the Eighth Amendment.[17] Testimony concerning survivors' personal opinions of the defendant and their impressions of the crime was equally objectionable to the *Booth* Court. Citing to survivor testimony that likened defendants to "animals," and that the elderly decedents had been "butchered," Justice Powell was at once sympathetic to the survivors yet clear in his condemnation of the testimony:

> One can understand the grief and anger of the family caused by the brutal murders in this case, and there is no doubt that jurors are generally aware of these feelings. But 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.... The admission of these emotionally-charged opinions as to what conclusions the jury should

14. 482 U.S. 496, 502–03 (1987). Under Maryland law, both forms of evidence, gathered by the State Division of Probation and Parole, could be presented by means of survivors' live testimony or by means of the "victim impact statement" compiled by the Division. *Id.* at 499. However, at the request of Booth's lawyer, who feared that the "use of live testimony would increase the inflammatory effect of the information," the prosecutor read the statement to the jury. *Id.* at 501.

15. *Id.* at 504.

16. *Id.*

17. *Id.* at 503.

> draw from the evidence clearly is inconsistent with the reasoned decisionmaking we require in capital cases.[18]

Only two years later, in *South Carolina v. Gathers*,[19] the Court addressed yet another Eighth Amendment claim over the use of victim impact evidence. This time the Court addressed the propriety of an emotional closing statement by a prosecutor that praised, *inter alia*, the religiosity and civic-mindedness of the decedent, a self-styled "Reverend Minister."[20] Although not testimony from survivors, as in *Booth*, the Court considered the statements "indistinguishable" in their effect.[21] Permitting the jury to take account of the victim's traits, the five-member *Gathers* majority held, "'could result in imposing the death sentence because of factors about which the defendant was unaware, and that were irrelevant to the decision to kill.'"[22]

B. Payne v. Tennessee

Despite the unequivocal holding of *Booth*, the State of Tennessee employed victim impact evidence in its 1988 capital trial of Pervis Payne for the stabbing deaths of Charisse Christopher and her two-year-old daughter. Upon winning convictions on both counts, the State presented the testimony of Christopher's mother, who testified how her grandson, who himself had been stabbed by Payne and witnessed the gruesome events, had been affected by the murders of his mother and sister:

> He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandma, do you miss my Lacie. And I tell him yes. He says, I'm worried about my Lacie.[23]

The prosecutor elaborated as follows on the boy's condition during the State's closing argument at sentencing:

> Nicholas was alive...[h]is eyes were open...[h]e was able to hold his intestines in as he was carried to the ambulance. So he knew what happened to his mother and baby sister.
>
> There is nothing you can do to ease the pain of any of the families involved in this case.... But there is something you can do for Nicholas.
>
> Somewhere down the road Nicholas is going to grow up, hopefully.... He is going to want to know what kind of justice was done. He is going to want to know what happened. With your verdict you will provide the answer.[24]

In his rebuttal to the closing argument of the defense, the prosecutor argued:

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18. *Id.* at 508–09.
19. 490 U.S. 805 (1989).
20. *Id.* at 808–10.
21. *Id.* at 811.
22. *Id.* at 811 (quoting *Booth*, 482 U.S. at 505).
23. Payne v. Tennessee, 501 U.S. 808, 814–15 (1991).
24. *Id.* at 815.

> No one will ever know about Lacie Jo because she never had the chance to grow up.... And there won't be anybody there–there won't be her mother there or Nicholas' mother there to kiss him at night. His mother will never kiss him goodnight or pat him as he goes off to bed, or hold him and sing him a lullaby.
>
> [Petitioner's attorney] wants you to think about...people who love the defendant and things about him. He doesn't want you to think about the people who love Charisse Christopher, her mother and daddy who loved her. The people who loved little Lacie Jo, the grandparents who are still here. The brother who mourns for her every single day and wants to know where his best little playmate is. He doesn't have anybody to watch cartoons with him, a little one. These are the things that...that child will carry forever.[25]

The jury sentenced Payne to death on both murder counts and the Supreme Court of Tennessee affirmed.[26] The United States Supreme Court granted certiorari to reconsider its holdings in *Booth* and *Gathers* barring victim impact evidence relating to the personal characteristics of the murder victim and the emotional impact of the loss on the victim's family.[27] Over the vigorous dissents of Justices Stevens and Marshall, with Justice Marshall describing the majority's opinion as the triumph of "[p]ower, not reason,"[28] a six-member majority of the Court reversed *Booth* and *Gathers*, in part, and affirmed Payne's death sentences.[29]

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25. *Id.* at 816.

26. *See* State v. Payne, 791 S.W.2d 10, 19 (Tenn. 1990) (holding that the admission of the victim impact evidence was harmless error).

27. *Payne*, 501 U.S. at 817.

28. *Id.* at 844 (Marshall, J., dissenting). Justice Blackmun joined in Justice Marshall's dissent. *Id.* Justice Stevens dissented separately, with Justice Blackmun joining in his dissent as well. *Id.* at 856 (Stevens, J., dissenting). In the intervening years between *Booth* and *Payne*, Justice Anthony Kennedy replaced *Booth's* author, Justice Lewis Powell, and Justice David Souter took the seat of Justice William Brennan. With Justice White, who had grudgingly sided with the majority in *Gathers* on stare decisis grounds, the six-to-three majority in *Payne* took form.

Justice Marshall acidly commented on the majority's "debilitated conception of stare decisis," and warned that the Court's blithe rejection of its very recent precedent, in the absence of any compelling intervening change in legal doctrine or experience, would "signal" to lower courts and the states a basic willingness by the Court to reconsider prior constitutional rulings. *Id.* at 853 (Marshall, J., dissenting) (noting that the Tennessee Supreme Court did nothing to "disguise its contempt for [the Court's] decisions in *Booth* and *Gathers*," and observing that "the majority's disposition of this case nicely illustrates the rewards of such a strategy of defiance." *Id.* at 854.). *Payne* was handed down on the final day of Justice Marshall's 24-year tenure on the Court. It has been reported that *Payne's* about-face was unusually divisive, with Justice Marshall being especially embittered. *See* DAVID G. SAVAGE, TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT 418–20 (1992); *see also* CARL T. ROWAN, DREAM MAKERS, DREAM BREAKERS: THE WORLD OF JUSTICE THURGOOD MARSHALL 403 (1993) (noting "rancor" on the Court and "blood on the conference room floor" during *Payne's* deliberation).

29. Bespeaking the determination of the nascent *Payne* majority, the Court's grant of certiorari specified expedited consideration of the appeal and explicitly directed the parties to address whether *Booth* and *Gathers* should be overruled, matters not raised in either the

Writing for the majority, Chief Justice Rehnquist first disputed the premise of *Booth* and *Gathers* that "evidence relating to a particular victim or to the harm that a capital defendant causes a victim's family" is immaterial to capital sentencing.[30] Rather, harm traditionally has served as a factor in assessing blameworthiness in punishment decisions; although "this particular evidence—designed to portray for the sentencing authority the actual harm caused by a particular crime—is of recent origin, this fact hardly renders it unconstitutional."[31] According to the Chief Justice, "[v]ictim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities."[32]

A second, more practical reason to the *Payne* majority for admitting victim impact evidence was to "'keep the balance true'" in the capital decision making process.[33] Because *Lockett v. Ohio*[34] and *Woodson v. North Carolina*[35] grant capital defendants the virtual unfettered right to proffer mitigating evidence, in the name of showing their "uniqueness" and lessened personal culpability, fairness dictates that evidence relating to the "uniqueness" of the lives taken by defendants be considered as well.[36] Citing Justice White's dissent in *Booth*, Chief Justice Rehnquist endorsed the leveling effect that such emotional evidence can have:

> [T]he state has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family.[37]

To the *Payne* majority, *Booth* "unfairly weighted the scales in a capital trial,"[38] insofar as precluding victim impact evidence "deprives the State of the full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder."[39] In the name of keeping the "balance true," the State must be permitted to offer "'a quick glimpse of

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petition for certiorari or the State's response. *See* Payne v. Tennessee, 498 U.S. 1076 (1991).

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

31. *Id.* at 821.

32. *Id.* at 825.

33. *Id.* at 827 (citing Snyder v. Massachusetts, 291 U.S. 97, 122 (1934) (Cardozo, J.)).

34. 438 U.S. 586 (1978).

35. 428 U.S. 280 (1976).

36. *Payne*, 501 U.S. at 826 ("[T]here is nothing unfair about allowing the jury to bear in mind that harm at the same time as it is considers the mitigating evidence introduced by the defendant.").

37. *Id.* at 825 (quoting Booth v. Maryland, 482 U.S. 496, 517 (1987) (White, J., dissenting)).

38. *Id.* at 809. This same sentiment was echoed in the concurrences of Justices O'Connor and Souter. *See id.* at 832 (O'Connor, J., concurring) (Murder takes "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."); *id.* at 839 (Souter, J., concurring) ("[G]iven 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.").

39. *Id.* at 825.

the life' which a defendant 'chose to extinguish.'"[40] For identical reasons, the majority reversed *Gathers*, thereby permitting jury arguments by the prosecution relating to victim impact evidence.[41]

III. *PAYNE'S* AFTERMATH

With the "per se" Eighth Amendment bar against victim impact evidence lifted,[42] and despite the ostensibly neutral position adopted by the *Payne* majority on whether impact evidence should play a role in death decisions,[43] impact evidence has proven enormously popular. Today, at least thirty-two of the thirty-eight death penalty states,[44] as well as the federal government,[45] permit victim impact evidence in capital trials, on the basis of either judicial or legislative authority.[46] That impact evidence has proven so popular should not come as a surprise given the enormous political (and perhaps moral) appeal of giving a "voice" to those silenced by their killers,[47] and the

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40. *Id.* at 822 (quoting Mills v. Maryland, 486 U.S. 367, 397 (1988) (Rehnquist, C.J., dissenting).

41. *See id.* at 827.

42. *Payne*, 501 U.S. at 827 ("We thus hold that if the State chooses to permit the admission of victim impact evidence...the Eighth Amendment erects no per se bar.").

43. *See id.*; *see also id.* at 831 (O'Connor, J., concurring) ("We do not hold today that victim impact evidence must be admitted, or even that it should be admitted.").

44. *See* Amy K. Phillips, Note, *Thou Shalt Not Kill Any Nice People: The Problem of Victim Impact Statutes in Capital Sentencing*, 35 AM. CRIM. L. REV. 93, 99–100 (1997); *see also* Brian J. Johnson, Note, *The Response to* Payne v. Tennessee*: Giving the Victim's Family a Voice in the Capital Sentencing Process*, 30 IND. L. REV. 795, 809 (1997) (noting that seven states in 1995 alone enacted legislation to permit impact evidence in capital trials). New York's recently enacted death penalty law is unclear on the admissibility of impact evidence in capital trials. *See* N.Y. PENAL LAW § 125.27 (McKinney 1998). Significantly, however, in his Annual Message to the New York Legislature, Governor George Pataki urged "changing the law to allow for victim impact evidence so juries can hear about the devastation the killer has caused in the lives of family members," tacitly signaling the absence of legislative authority. *See* 1998 N.Y. Laws, Governor's Annual Message (McKinney's Session Law News, May, 1998).

Ironically, appellate holdings in Tennessee, where *Payne* arose, for a time reflected a decided ambivalence over impact evidence. *See* State v. Williams, No. 02-C-01-9602CR00048, 1997 WL 613677, at *13–14 (Tenn. Crim. App. Oct. 7, 1997) (deeming impact evidence "not relevant" but noting several opinions of Tennessee Supreme Court permitting impact evidence). In response, the 1998 Tennessee General Assembly pointedly characterized impact evidence as "extremely relevant to the jury's sentencing decision," and expressly allowed its use. *See* TENN. PUB. ACTS 916 (amending TENN. CODE ANN. § 39-13-206 (1998)).

45. *See* 18 U.S.C. § 3593(a) (1994).

46. The argument that impact evidence requires specific statutory authorization has been rejected by the courts. *See, e.g.*, State v. Hill, 501 S.E.2d 122, 128 (S.C. 1998); State v. Rhines, 548 N.W.2d 415, 446 (S.D. 1996). *But see* Commonwealth v. Fisher, 681 A.2d 130, 146 (Pa. 1996) ("The imposition of capital punishment may not rest on a mere supposition that the Legislature intended victim impact evidence to be considered by a jury, but only upon the clear and unambiguous language of the death penalty statute.").

47. As Lynn Henderson has asked: "Who could be anti-victim?" Lynn N. Henderson, *The Wrongs of Victims Rights*, 37 STAN. L. REV. 937, 952 (1985). *See also Payne*, 501 U.S. at 834 (Scalia, J., concurring) (asserting that the characterization of victim impact evidence as "'irrelevant,'" as in *Booth*, "conflicts with a public sense of justice keen enough

asserted psychological value to survivors of having a chance to testify (and emote) about their loss.[48] What is surprising, as discussed next, is that the emotionally charged evidence, received by jurors already psychologically predisposed to identify with the murder victim,[49] is being absorbed free of any meaningful limits or controls, and at the most delicate time in the capital punishment process—when jurors are poised to decide whether the convicted capital defendant is to live or die.

A. Procedural Controls on the Presentation of Victim Impact Evidence

Consistent with *Payne's* modest admonition that victim impact evidence only not be so "unduly prejudicial that it renders the trial fundamentally unfair" under Fourteenth Amendment due process principles,[50] few procedural limits have been imposed on impact evidence. Among the handful of jurisdictions to impose procedural limits is Oklahoma, where the State must notify the defendant of its intent to introduce impact evidence, "detailing" the evidence sought to be introduced, and a preliminary in-camera hearing must be held as to admissibility.[51] In addition, in Oklahoma "the trial court may wish to consider whether a question-and-answer format may be a preferable method of controlling the way relevant victim impact evidence is presented

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that it has found voice in a nationwide 'victims' rights' movement."); *id.* at 867 (Stevens, J., dissenting) (recognizing the "'hydraulic pressure' of public opinion" favoring victim-oriented measures, especially with regard to capital punishment).

48. *See* Susan E. Gegan & Nicholas Rodriguez, *Victims' Roles in the Criminal Justice System: A Fallacy of Victim Empowerment?*, 8 ST. JOHN'S J. LEGAL COMMENT. 255, 225, 242 n.83 (1992) (discussing "positive catharsis" among victims). *See also* Paul Gewirtz, *Victims and Voyeurs at the Criminal Trial*, 90 NW. U. L. REV. 863, 892 (1996) (arguing that the public at-large has an affirmative interest in permitting impact evidence inasmuch as "the victim and the victim's survivors are proxies for the general public, because people at large tend to see themselves as potential crime victims").

Other commentators have questioned the overall benefit to victims of providing such testimony. *See, e.g.*, Berger, *supra* note 13, at 59 (asserting that *Payne* "encourages the prosecution to urge mourning family and friends to present their grief in a forum ill-suited to respond to it, yet holding out a seductive (if illusory) capacity to do so"). One newspaper columnist, whose younger brother had been murdered, recently argued against the proliferation of victim impact evidence, stating: "Healing is a spiritual process for which bloodlust and revenge play no useful role. To convince yourself otherwise is to dwell in a place where there is only pain." *See* Brent Staples, Editorial, *When Grieving "Victims" Can Sway the Courts*, N.Y. TIMES, Sept. 22, 1997, at A26. *See also* Goodwin, *supra* note 6, at 589 (asserting that execution "[r]ight-to-view statutes, intended to benefit victims' families, may instead revictimize those families. After viewing an execution, some families have felt disappointment and increased vengeance rather than closure"); Henderson, *supra* note 47, at 998 ("Emphasizing individual vengeance and blame can undermine, rather than facilitate, recovery from a violent crime...even a harsh sentence does not end the matter for the victim.").

49. *See* Bandes, *supra* note 13, at 403 (describing intrinsic imbalance between capital defendant and the State and the basic empathetic bond between deceased victim and jurors).

50. *See* Payne v. Tennessee, 501 U.S. 808, 825 (1991).

51. Cargle v. State, 909 P.2d 806, 828 (Okla. Crim. App. 1995). Georgia and Tennessee also require that a pre-trial, in-camera hearing as to admissibility be held. *See* Livingston v. State, 444 S.E.2d 748, 752 (Ga. 1994); State v. Nesbit, 978 S.W.2d 872, 891 (Tenn. 1998).

to a jury."[52] Similarly, Maryland requires that all victim impact evidence be incorporated in a presentence investigation report, assembled by investigators of the State Division of Probation and Parole, that is to be considered by the judge or jury in sentencing.[53] New Jersey imposes the strictest controls of all, requiring that defendants be notified of the State's desire to proffer impact evidence, and permitting testimony from only one family member, and then on the basis of a written statement that is reviewed in advance by the court for prejudicial content.[54] Furthermore, New Jersey trial courts are required to admonish witnesses that they will not be permitted to testify if they cannot control their emotions, and minors typically are not permitted to testify.[55]

Such controls, however, are comparatively rare. In the vast majority of jurisdictions the prosecution enjoys virtual free reign over the method by which impact evidence is conveyed. Indeed, not all jurisdictions require that capital defendants be provided advance notice of the content, form, or extent of impact evidence the prosecution intends to proffer,[56] or otherwise require that impact evidence be subject to advance in-camera judicial review.[57] Videotape presentations, often quite lengthy and sophisticated in form, are also commonly used,[58] and the courts regularly admit photos to convey various aspects of the victim's "uniqueness."[59]

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52. *Cargle*, 909 P.2d at 828.

53. MD. ANN. CODE of 1957 Art. 41, § 4-609(d) (1998); Williams v. State, 679 A.2d 1106 (Md. 1996) (construing same). The role of the Division of Probation and Parole is to "exclude known false information or that furnished by the mentally ill and delusional." Clermont v. State, 704 A.2d 880, 887 (Md. 1998).

54. *See* State v. Muhammad, 678 A.2d 164, 180 (N.J. 1996).

55. *Id.*

56. *See, e.g.*, Bowling v. Commonwealth, 942 S.W.2d 293, 302 (Ky. 1997); State v. Humphries, 479 S.E.2d 52, 55 (S.C. 1996). *See generally* Jose F. 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, 422 (1997) (urging requirement of pre-trial disclosure of "how many persons wish to provide information, the contents of their statement, and whether their statement would be offered in oral or written form").

57. *See, e.g.*, State v. Powers, 501 S.E.2d 116, 120 (S.C. 1998) ("This court has never required an in-camera hearing prior to admitting victim impact evidence....").

Even in those jurisdictions expressly requiring advance judicial review, such as Oklahoma, there is no assurance that such review will in fact take place. *See* Welch v. State, 968 P.2d 1231, 1243 (Okla. Crim. App. 1998) (finding harmless error when court failed to conduct in-camera review because defense objections at trial supposedly provided sufficient protection).

58. *See, e.g.*, Hicks v. State, 940 S.W.2d 855, 857 (Ark. 1997) (approving of 14-minute video narrated by victim's brother spanning victim's life, containing 160 photos, nearly half of which included his now-orphaned sons); Whittlesey v. State, 665 A.2d 223, 251 (Md. 1995) (permitting a 90-second videotape of the victim playing the piano); State v. Gray, 887 S.W.2d 369, 389 (Mo. 1994) (en banc) (permitting video of victims' "family Christmas").

59. *See, e.g.*, Burris v. Parke, 948 F. Supp. 1310, 1338 (N.D. Ind. 1996) (permitting photo of victim wearing U.S. Navy uniform); State v. Parker, 886 S.W.2d 908, 926–27 (Mo. 1994) (en banc) (permitting photo of the victim and her daughter); State v. Tucker, 478 S.E.2d 260, 267 (S.C. 1996) (allowing photos of the victim at various places on vacation, the Christmas decorations in her yard, holding her godchild, and fishing); Penry v. State, 903

Less technological but no less compelling methods have also met with approval, such as in a recent Missouri case where the mother and sister of the victim conveyed their emotional loss by means of pictures, letters, stories, diary entries, and a poem,[60] and another Missouri case where the State used several "handcrafted items" made by the victim.[61] The Arkansas Supreme Court recently upheld a mother's reading of a poem she wrote entitled "Wishes From the Heart," which, in her words, she "used as a tool to suppress the hurt and pain because sometimes it is so overwhelming...."[62]

B. Who Qualifies as a "Victim" Impact Witness?

Enormous latitude also exists relative to the scope of persons authorized to speak to "impact." Although *Payne* itself addressed the emotional and psychological impact on a three-year-old boy who witnessed the murders of his mother and baby sister, as briefly testified to by his grandmother, few jurisdictions have imposed limits on who qualifies as a "victim" to testify,[63] and vagueness and overbreadth challenges to statutes that fail to define "victim" have met with uniform rejection.[64] In Arkansas, for instance, those qualified to testify "may range from the victim's family to those close to that person who were profoundly impacted by his death."[65] In Virginia, despite the existence of a narrow statutory definition of "victim," the Virginia Supreme Court recently justified its approval of testimony from family, co-workers and friends as follows: "While statements from immediate family members will normally be the best source" of impact evidence, the Eighth Amendment does not "restrict the trial court from looking to statements of others well acquainted with the victim."[66] According to the Virginia court, an impact witness must only not be "so far

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S.W.2d 715, 752 (Tex. Crim. App. 1995) (permitting photo of victim and her dog). *But see* Al-Mosawi v. State, 929 P.2d 270, 285 (Okla. Crim. App. 1996) (excluding photos of victims because they did not show how their deaths had "financial, emotional, psychological and physical effects," as required by statute).

60. State v. Basile, 942 S.W.2d 342, 358 (Mo.) (en banc), *cert. denied*, 118 S. Ct. 213 (1997).

61. State v. Roberts, 948 S.W.2d 577, 604 (Mo. 1997) (en banc), *cert. denied*, 118 S. Ct. 711 (1998).

62. Noel v. State, 960 S.W.2d 439, 446 (Ark. 1998).

63. A handful of states have limited the scope of witnesses to "family" or "immediate family." *See* LA. CODE CRIM. PROC. ANN. art. 905.2(A) (West 1997) (family); MISS. CODE ANN. § 99-19-155 (1998) (immediate family); State v. Muhammad, 678 A.2d 164, 180 (N.J. 1996) (family); Cargle v. State, 909 P.2d 806, 828 (Okla. Crim. App. 1997) (immediate family). *See also* DEL. CODE ANN. tit. 11, § 9401(5) (1995) (designating victim witness as a "single representative who may be the spouse, parent, child or sibling" of victim).

64. *See, e.g.*, Kemp v. State, 919 S.W.2d 943, 955–56 (Ark. 1996) (construing ARK. CODE ANN. § 5-4-602(4) (Michie 1993)).

65. Nooner v. State, 907 S.W.2d 677, 688–89 (Ark. 1995). Similarly, Tennessee broadly permits "a member or members, or a representative or representatives of the victim's family to testify at the sentencing hearing about the victim and about the impact of the murder on the family of the victim and other relevant persons." *See* TENN. CODE ANN. § 39-13-204 (1998).

66. Beck v. Commonwealth, 484 S.E.2d 898, 904–05 (Va. 1997) (construing VA. CODE ANN. 19.2-11.01(B), which defines "victim" as "a spouse, parent or legal guardian of such a person who...was the victim of a homicide").

removed from the victims as to have nothing of value to impart to the court about the impact of these crimes."[67] The Texas Court of Criminal Appeals recently deemed not "viable" the imposition of "an absolute rule limiting testimony to family members within a certain degree of relationship...."[68]

As a result of this broad conceptualization, family,[69] friends,[70] neighbors,[71] and even co-workers[72] all regularly provide impact evidence. Some courts even permit impact evidence by proxy—allowing persons not immediately affected by the killing to testify on behalf of one who is so affected.[73] Stretching "victim" status further still, jurors in the trials of Timothy McVeigh and Terry Nichols, convicted of the Oklahoma City Murrah Federal Building bombing in which 168 people were killed, heard graphic impact testimony from paid emergency rescue workers and police. In the McVeigh sentencing hearing, eight such professionals testified, including one police officer who spoke of the "life ebbing from the hand of a dying woman trapped by concrete rubble, whose gurgling blood was mistaken for running water."[74] In the

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67. *Id.* at 906. Similarly, in Illinois, statutory law expressly limits "victim" status to the "[s]pouse, parent, child or sibling of a person killed," 725 ILL. COMP. STAT. ANN. 120/3(a)(3) (West 1998), yet Illinois courts regularly ignore this limitation. *See* People v. Benford, 692 N.E.2d 1285, 1289 (Ill. Ct. App. 1998) (construing 725 ILL. COMP. STAT. ANN. 120/3(a)(3) and holding that statutory limit was not "to be used as a sword by criminal defendants seeking appellate relief").

68. Mosley v. State, 983 S.W.2d 249, 262 (Tex. Crim. App. 1998) (en banc). The *Mosley* court added:

> More distantly related family members, close friends, or co-workers may, in a given case, provide legitimate testimony. That will depend on the closeness of the personal relationship involved, the nature of the testimony, and the availability of other witnesses to provide victim-related testimony. We do note that...testimony from strangers, including those who learned about the case in the media and those who did so as participants in a criminal investigation, will rarely, if ever, be admissible under Rule 403.

Id.

69. *See, e.g.*, Lee v. State, 942 S.W.2d 231, 236 (Ark. 1997); Moore v. State, 701 So. 2d 545, 550–51 (Fla. 1997); State v. Simpson, 479 S.E.2d 57, 60 (S.C. 1996).

70. *See, e.g.*, Hicks v. State, 940 S.W.2d 855, 857 (Ark. 1997); State v. Roberts, 948 S.W.2d 577, 604 (Mo. 1997).

71. *See, e.g.*, Sullivan v. State, 636 A.2d 931, 939–40 (Del. 1994); Wesley v. State, 916 P.2d 793, 804 (Nev. 1996).

72. *See, e.g.*, State v. Byram, 485 S.E.2d 360, 365 (S.C. 1997); *Beck*, 484 S.E.2d at 903–04.

73. *See, e.g.*, Greene v. State, 931 P.2d 54, 67–68 (Nev. 1997) (mother of one victim testifying to how family members of other victim were affected, even though family members of other victim were available to testify); Jones v. State, 963 S.W.2d 177, 182 (Tex. Crim. App. 1998) (upholding admission of minister's testimony that killing was a "disaster" for family). *Cf.* State v. Nelson, 705 So. 2d 758, 763 (La. Ct. App. 1997) (approving trial court's permitting victim's friends and family members to sit in the courtroom with t-shirts bearing the victim's picture), *writ denied*, 720 So. 2d 677 (La. 1998).

74. Scott Robinson, Editorial, *Stacking the Deck: Heart-Wrenching "Victim Impact" Statements Make It Virtually Impossible for Jurors to Set Emotions Aside*, ROCKY MTN. NEWS, June 8, 1997, at 1B. Another rescue worker testified of having clutched a hand in the rubble "only to feel the pulse stop." Michael Fleeman, *Judge in Oklahoma Bombing*

Nichols sentencing hearing, rescue workers testified to seeing "children who had been torn apart and watched blood and remains run down the walls of the ruined building."[75]

Finally, jurisdictions are notably reluctant to impose limits on the number of persons allowed to provide information of impact. New Jersey alone limits the number of impact witnesses allowed. "[A]bsent special circumstances," in New Jersey, the impact testimony of one family member is believed "adequate to provide the jury with a glimpse of each victim's uniqueness...."[76] Elsewhere, near total discretion on the question is the norm,[77] a situation permitting one Louisiana prosecutor to proclaim that he could have mounted "dozens of those witnesses," but elected not to do so because, as he told the jury, "I didn't want to put you through any more of it because I know it's hard."[78] In Illinois, despite the existence of statutory law providing that only a "single representative" is to provide impact evidence, courts have refused to impose any numeric limit.[79] In *McVeigh*, the Tenth Circuit lauded the Government's restraint in calling a mere thirty-eight impact witnesses when "these witnesses comprised an extremely small percentage of the number of potential witnesses...."[80] Rather than trying to assess whether the indisputably large number of witnesses was excessive for due process purposes, the *McVeigh* court added:

> The sheer number of actual victims and the horrific things done to them necessarily allows for the introduction of a greater amount of victim impact testimony in order for the government to show the "harm" caused by the crime. In addition, the jury could not have been shocked to learn that some victims had exemplary backgrounds and poignant family relationships, nor that they left behind grief-stricken loved ones.[81]

Vows to Avoid "Lynching," Pares Back Hearing, ASSOCIATED PRESS, June 3, 1997, *available at* 1997 WL 4869060.

75. Jo Thomas, *Emotion Fills Courtroom as Judge Calls for None*, N.Y. TIMES, Jan. 1, 1998, at A13. *Compare* State v. Smith, Nos. 94-65-44-906, 94-65-44-907, 1995 WL 702707, at *8 (S.C. Ct. Gen. Sess. July 26, 1995) The judge in the capital trial of Susan Smith, convicted of murdering her two boys by drowning them in a lake, refused to permit officers to testify about the emotional impact associated with recovering the boys' bodies from the water. *Id.*

76. State v. Muhammad, 678 A.2d 164, 180 (N.J. 1996).

77. *See, e.g.*, Pickren v. State, 500 S.E.2d 566, 567 (Ga. 1998) ("In previous cases, we did not and could not establish any rigid limitations on the volume of victim impact statements."); Loveless v. State, 642 N.E.2d 974, 978 (Ind. 1994) ("While it may be best for purposes of judicial economy and objectivity to use one witness to communicate the impact of the crime on the victims...[Indiana law does not require it].").

78. State v. Scales, 655 So. 2d 1326, 1334 (La. 1995).

79. *See* People v. Gonzales, 673 N.E.2d 1181, 1183 (Ill. Ct. App. 1996). *See also* People v. Benford, 692 N.E.2d 1285, 1289 (Ill. Ct. App. 1st Dist. 1998) (permitting 12 impact statements).

80. United States v. McVeigh, 153 F.3d 1166, 1216 (10th Cir. 1998).

81. *Id.* at 1221. *Compare* State v. Mosley, 983 S.W.2d 249, 263 (Tex. Crim. App. 1998) (en banc) ("[W]e caution that victim impact and character evidence may become unfairly prejudicial through sheer volume. Even if not technically cumulative, an undue amount of this

In the sentencing phase of Terry Nichols' trial, the government called fifty-five victim impact witnesses,[82] a volume the Tenth Circuit likewise will not deem improper.

C. What Evidence Is Relevant and When Is It "Unduly Prejudicial"?

Even more fundamental than the confusion over "victim" spokesperson status, utter disorder reigns over what forms of "impact" are appropriate for consideration in sentencing decisions. Under *Payne*, the State is permitted to introduce evidence relating to the personal characteristics of the victim and the "emotional impact of the murder on the victim's family."[83] The sole limit imposed by the *Payne* majority was that any such evidence not be "unduly prejudicial" for Fourteenth Amendment due process purposes.[84] However, as discussed below, the boundaries of the Court's due process standard remain quite elusive, requiring trial and appellate courts alike to engage in vague, open-ended examinations into whether the inherently prejudicial evidence is "unduly prejudicial."[85]

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type of evidence can result in unfair prejudice under Rule 403.").

Arguably, as a practical matter, humanity's essential interconnectedness militates against any limit being placed on who can testify. As famously observed by John Donne, "[n]o man is an island, entire of itself; every man is a piece of the continent, a part of the main...[A]ny man's death diminishes me because I am involved in mankind...." John Donne, *Devotions on Emergent Occasions, No. 17, in* JOHN BARTLETT, FAMILIAR QUOTATIONS 254 (Emily M. Beck ed., 15th ed. 1980)). Compounding this indeterminacy is the compelling emotional and political appeal of a broad conception of "victim" status. *See* Anderson, *supra* note 56, at 407 (observing that "[a] state may place limits on those eligible to participate in capital sentencing proceedings, but reforms that would limit victim participation are unlikely to garner much political support").

82. *See* Thomas, *supra* note 75.

It bears mention that the open-ended approach contrasts sharply with how "victim" is conceived under the U.S. Sentencing Guidelines. Under Guideline § 5K2.3, for instance, the court may depart upward from the structured sentence prescribed "[i]f a victim or victims suffered psychological injury much more serious than that normally resulting from commission of the offense." *See* U.S. SENTENCING GUIDELINES MANUAL § 5K2.3 (1998). The Ninth Circuit has held that the provision applies "only to the direct victim of the crime and not to others affected by the crime, such as the [direct victims'] family." United States v. Hoyungowa, 930 F.2d 744, 747 (9th Cir. 1991). The Fourth Circuit recently held that the term "victims" encompasses "both direct and indirect victims" but also held that "an indirect victim must have some nexus or proximity to the offense. Put simply, an individual is an indirect victim because of his relationship to the offense, not because of his relationship to the direct victim." United States v. Terry, 142 F.3d 702, 710, 712 (4th Cir. 1998). In *Terry*, the defendant argued against imposition of a three-level sentence increase for his convictions on two counts of involuntary manslaughter, based on the "extreme psychological impact" on family members of the two decedents (who died in a multi-car accident). *Id.* at 705. The *Terry* court agreed, finding that there was "no evidence that the families in question had any relationship to the offense beyond their relationship to the direct victims." *Id.* at 712 (citing, in contrast, as examples of "indirect victims," bank tellers and patrons who are present at a robbery, and credit card holders affected by a scheme to defraud their credit card issuers).

83. Payne v. Tennessee, 501 U.S. 808, 827 (1991).

84. *Id.* at 825.

85. The lack of a meaningful standard has resulted in obvious judicial frustration.

1. Victim "Characteristics" Evidence

Evidence relating to the victim's personal characteristics, *Payne* instructs, "is designed to show...*each* victim's 'uniqueness as an individual human being,' whatever the jury might think the loss to the community resulting from his death might be."[86] Despite the verity of Justice Stevens' observation that "[t]he fact that each of us is unique is a proposition so obvious that it surely requires no evidentiary support,"[87] courts routinely admit such evidence, and in highly prejudicial forms. Testimony to the effect that the decedent was a "good man";[88] a "martyr" (while defendant was "evil");[89] a nationally recognized piano player;[90] a "minister who read and carried a Bible every day";[91] a "smart person" with a "higher I.Q." than the witness;[92] or a police officer (although not a statutory aggravating factor),[93] has all been admitted. While troubling in itself for its basic prejudicial nature, victim "characteristics" evidence carries the even greater threat that capital jurors, privy to

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As Judge Richard Matsch has noted, "Congress expressly provided for victim impact consideration in the Death Penalty Statute but it did not put any limits on what can be considered." United States v. McVeigh, 944 F. Supp. 1478, 1491 (D. Colo. 1996). To Judge Matsch, victim impact evidence is "the most problematic of all the aggravating factors and may present the greatest difficulty in determining the nature and scope of the 'information' to be considered." *Id. See also* Hicks v. State, 940 S.W.2d 855, 860 (Ark. 1997) (Brown, J., concurring) (urging the legislature to "fashion criteria on the introduction" of impact evidence and commenting on lack of certainty relative to due process analysis: "The guidance in this area is sparse indeed"); Seals v. State, 684 So. 2d 368, 377 (La. 1996) (noting that the "standards for admissibility of victim impact testimony in capital trials have varied greatly in recent years").

86. *Payne*, 501 U.S. at 823 (emphasis in original).

87. *Id.* at 866 (Stevens, J., dissenting).

88. *See, e.g.*, Moore v. State, 701 So. 2d 545, 550–51 (Fla. 1997); Le v. State, 947 P.2d 535, 551–52 (Okla. Crim App. 1997). *See also* State v. Hurley, 876 S.W.2d 57, 67 (Tenn. 1994) (victim was "mother of five children and her father was a retired Sergeant Major who had served 26 years in the special forces as a Green Beret").

89. *See* State v. Larry, 481 S.E.2d 907, 925–26 (N.C. 1997). *See also* Powell v. State, 906 P.2d 765, 776 (Okla. Crim. App. 1995) (characterization of victim *inter alia* as "good kid" who was "clean cut" and "active in his church" and defendants as "bad kids" held harmless error).

90. Whittlesey v. State, 665 A.2d 223, 250–51 (Md. 1994).

91. State v. Shurn, 866 S.W.2d 447, 470 (Mo. 1993). *See also* Turner v. State, 486 S.E.2d 839, 842 (Ga. 1997) (victim had "new found faith and spirituality" and was "dedicated member of his church family"); State v. Koon, 704 So. 2d 756, 773–74 (La. 1997) (approving of statement that "[r]eligion was very paramount" in the victims' lives and extensive testimony that victims were extremely dedicated to the Catholic Church and its activities); Lucas v. Evatt, 416 S.E.2d 646, 648 (S.C. 1992) (victims were "good honest God fearing people"). The Georgia Supreme Court, faced with extensive references to the religiosity of the deceased, a deputy sheriff, recently concluded that just as there is "[no] limit on the number of pages of victim impact statements, neither [is there an] outer limit[] for religious references." Pickren v. State, 500 S.E.2d 566, 568 (Ga. 1998).

92. *See* State v. Frost, 1998 WL 827279, at *12 (La. Dec. 1, 1998).

93. *See* Davis v. State, 660 So. 2d 1228, 1249 (Miss. 1995) (stating that the court "saw no need to exclude evidence of the victim's occupation simply because...the victim was a police officer").

a stream of witnesses extolling the virtues of the victim,[94] will be tempted to weigh the relative worth of the victim against the defendant they have just found guilty of murder.[95] This is especially so when impact evidence relates to "community" loss, which almost inescapably invites such comparisons,[96] or when evidence relates to the religious devotion of the decedent.[97]

Not surprisingly, the courts have struggled with the obvious line-drawing problems arising from *Payne's* declaration that victim uniqueness can be shown yet comparative judgments are impermissible.[98] For instance, the Texas Court of Criminal Appeals, after acknowledging that it could not "draw a bright and easy line," could only offer that "[w]hen the focus of the evidence shifts from humanizing the victim and illustrating the harm caused by the defendant to measuring the worth of the victim compared to other members of society then the State exceeds the bounds of

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94. *See* Gewirtz, *supra* note 48, at 882 ("[F]or survivors to be asked to tell about the victim's particular characteristics in this context invites a predictable selectivity in detail. Typically...people have complex and conflicting feelings about family members. But how frequently does impact evidence after a family member's murder dwell on these complexities?").

95. Indeed, considerable empirical evidence supports that such evaluative appraisals are already at work. *See, e.g.*, David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, With Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638 (1998) (finding socioeconomic status to have direct effects on death decisions); James C. Beck & Robert Shumsky, *A Comparison of Retained and Appointed Counsel in Cases of Capital Murder*, 21 LAW & HUM. BEHAV. 525 (1997) (same).

For a "law and economics" treatment of the propriety of giving sentencing consideration to victim and defendant characteristics, see David D. Friedman, *Should the Characteristics of Victims and Criminal Count?:* Payne v. Tennessee *and Two Views of Efficient Punishment*, 34 B.C. L. REV. 731, 769 (1993) (arguing that "[o]ne factor relevant to punishment is how bad particular criminals have revealed themselves to be, but an arguably more important factor might be how much damage they have done").

96. *See, e.g.*, State v. Gray, 887 S.W.2d 369, 389 (Mo. 1994) (upholding testimony that "the victims held liberal political views, were caring, community involved, excellent students, advocates of social change," and that one victim "'was without a hateful bone in her body'"); State v. Simpson, 479 S.E.2d 57, 60 (S.C. 1996) (upholding testimony from victim's wife and son regarding victim's "standing in the community"); Riddle v. State, 443 S.E.2d 557, 563 (S.C. 1994) (upholding testimony of victim's stepdaughter regarding victim's "standing in the community"). *See also infra* at nn. 109–114 and accompanying text (discussing breath of evidence allowed relating to "community impact" of murders).

97. *See supra* note 91 and accompanying text.

The potential prejudicial nature of such evidence, especially among religiously devout jurors, would appear self-evident. *See* Berger, *supra* note 13, at 49 n.144 (noting that "because Americans accord unambivalent esteem to religious devotion or its appearance, prosecutors show no hesitation in extolling the pious nature of victims"); Brian C. Duffy, Note, *Barring Foul Blows: An Argument for a Per Se Reversible-Error Rule for Prosecutors' Use of Religious Arguments in the Sentencing Phase of Capital Cases*, 50 VAND. L. REV. 1335, 1356–60 (1997) (discussing widespread religiosity of Americans and the prejudicial effects of religion-based prosecutorial arguments more generally).

98. The Utah Legislature alone has expressly proscribed the use of victim impact evidence for comparative purposes. *See* UTAH CODE ANN. § 76-3-207(2)(a)(iii) (1997).

permissible testimony."[99] For its part, the Oklahoma Court of Criminal Appeals has specified that impact evidence is designed in part to convince the jury *"why the victim should not have been killed."*[100] Moreover, while the courts are not oblivious to the danger that "victim worth" evidence will translate into "comparative worth" evidence, and the obvious Equal Protection concerns thereby presented, they are reluctant to impose meaningful controls. As the Washington Supreme Court recently acknowledged:

> While we recognize the [danger of "comparative worth" evidence], it is not of such consequence that we should disallow all evidence by which a jury learns of the harm caused by the defendant's crime. [This] involves a policy issue and not a legal issue and we defer to the judgment of the Legislature and the voters on the wisdom of allowing victim impact evidence.[101]

Predictably, when faced with a stream of witnesses extolling the positive qualities of the decedent, capital defendants have requested that they be permitted to challenge or rebut victim character evidence. Although several states provide defendants the express right to cross-examine victim impact witnesses,[102] defense efforts to mount "bad" victim evidence in rebuttal typically are rebuffed by the courts,[103] raising concern

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99. Mosley v. State, 983 S.W.2d 249, 262 (Tex. Crim. App. 1998) (en banc). *See also id.* (stating that "Rule 403 limits the admissibility of such evidence when the evidence predominantly encourages comparisons based upon the greater or lesser worth or morality of the victim.... Trial judges should exercise their sound discretion....").

100. Cargle v. State, 909 P.2d 806, 828 (Okla. Crim. App. 1995) (emphasis added).

101. State v. Gentry, 888 P.2d 1105, 1141 (Wash. 1995) (en banc). *See also* Burns v. State, 699 So. 2d 646, 653 (Fla. 1997) (denying Equal Protection claim that impact evidence "may encourage the jury to give different weight to the value of different victims' lives").

102. *See, e.g.*, GA. CODE ANN. § 17-10-1.2(c) (1997) (permitting right to "cross-examine and rebut the evidence presented of the victim's personal characteristics and the emotional impact of the crime...."); LA. CODE CRIM. PROC. ANN. art. 905.2 (West 1998) ("[F]amily members...after testifying for the state, shall be subject to cross-examination."); Truehitt v. State, 916 S.W.2d 721, 723 (Tex. Crim. App. 1996) ("[W]e find nothing in [the impact statute] that prohibits appellant from exercising his right to confrontation and cross-examination by calling any victim impact statement author as a witness."). *See also* ARK. CODE ANN. § 5-4-602(4) (Michie 1998) (ensuring right to "rebut" impact evidence).

103. *See, e.g.*, United States v. Beckford, 962 F. Supp. 804, 822 (E.D. Va. 1997) ("*Payne* cannot be read to sanction a defense argument that a defendant is undeserving of the death penalty simply because his victim was a drug dealer."); People v. Frye, 959 P.2d 183, 208 n.1 (Cal. 1998) (denying due process claim based on trial court's refusal of defendant's request to "rebut" impact evidence); Barnes v. State, 496 S.E.2d 674, 689 (Ga. 1998) (barring evidence of victim's "bad character" at sentencing); Grandison v. State, 670 A.2d 398, 412 (Md. 1995) (denying defendant right to cross-examine wife of victim regarding her alleged emotional devastation and her civil suit against the government, the latter implying a financial motive with respect to the underlying prosecution); State v. Southerland, 447 S.E.2d 862, 867 (S.C. 1994) (affirming preclusion of evidence relating to victim's involvement in drugs and prostitution); State v. Hurley, 876 S.W.2d 57, 67 (Tenn. 1993) (upholding denial of defendant's request to introduce evidence regarding decedent's solicitation of prostitute); Goff v. State, 931 S.W.2d 537, 556 (Tex. Crim. App. 1996) (upholding denial of defendant's request to introduce "reciprocal" character evidence, in this instance that the victim was a "fag"). The Louisiana Supreme Court has stated that impact evidence may include the "'personal qualities

over whether the due process[104] and confrontation rights of defendants are being protected.[105] Further, as the *Payne* majority noted, given the high risk of offending jurors, counsel are naturally loath to object to positive victim character testimony.[106] In this sense, early predictions that *Payne* would inspire a defense cottage industry geared toward "besmirching the deceased's memory"[107] appear to have been unfounded.

2. "Impact" Evidence

Jurisdictions also take a decidedly free-wheeling approach to the permissible bounds of "impact," in other words, the toll a murder has taken. This expansiveness is evident relative to both the scope and nature of evidence admitted.

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of the victim,'" but defendants cannot proffer "'lack of worth'" unless the State first puts on evidence of the "victim's worth." State v. Cooks, 720 So. 2d 637, 645 n.6 (La. 1998).

In Oklahoma, *Conover v. State*, 933 P.2d 904 (Okla. Crim. App. 1997), presented unusual facts on this point. The trial court in *Conover* permitted the defendant to cross-examine the State's impact witnesses, except as to the victim's illegal drug use. The defendant also unsuccessfully sought to introduce the testimony of a police officer who found drugs in the victim's home at the time of the murder. The Oklahoma Court of Criminal Appeals held the exclusions to be prejudicial error concluding that the information was "relevant in giving the jury a complete picture of the entire crime...providing a 'quick glimpse of the life' the defendant 'chose to extinguish.'" *Id.* at 922 (quoting *Payne*, 501 U.S. at 822).

104. *See* Simmons v. South Carolina, 512 U.S. 154, 160 (1994) (holding that due process requires that defendants be permitted the opportunity to deny or challenge evidentiary basis for capital sentence); Gardner v. Florida, 430 U.S. 349, 362 (1977) (same).

105. *See* Davis v. Alaska, 415 U.S. 308, 315 (1974) (holding that Sixth Amendment right to cross-examine State's witnesses is a fundamental right).

It bears mention that some disagreement exists over whether the right to cross-examine extends to capital sentencing phase proceedings. *See* United States v. Hall, 152 F.3d 381, 406 (5th Cir. 1998) (assuming without deciding that such a right exists); Bassette v. Thompson, 915 F.2d 932, 939 (4th Cir. 1990) (no right exists); Profitt v. Wainwright, 685 F.2d 1227, 1255 (11th Cir. 1982) ("reliability" dictates that such a right exists).

106. *See* Payne v. Tennessee, 501 U.S. 808, 823 (1991) (observing that "for tactical reasons, it might not be prudent...to rebut impact evidence...."). *See also* Patrick M. Fahey, Note, Payne v. Tennessee*: An Eye for an Eye and Then Some*, 25 CONN. L. REV. 205, 255 (1992) ("At capital sentencing, the jury has already convicted the offender of murdering the victim. By attempting to impeach the testimony relating to the victim or impugn the victim's character, the offender will only incense the jury."). One recent Oklahoma case highlights this phenomenon. In *Hooper v. State*, 947 P.2d 1090 (Okla. Crim. App. 1997), although defense counsel made a general objection at the outset of the impact testimony, the Court of Appeals held that plain error analysis nonetheless prevailed. On appeal, defendant argued that further objection "would alienate the jury, and counsel had to choose between annoying the sentencer and preserving issues for appeal." The appellate court flatly rejected the claim, holding that "[n]othing in the record suggests this jury could not separate counsel's trial conduct from the issues it had to decide." *Id.* at 1104–05.

107. Berger, *supra* note 13, at 51. However, at the same time, there arguably exists a constitutional duty of evidentiary disclosure on the part of the State in this regard. *See* Mosteller, *supra* note 10, at 29 (arguing that "[i]nformation that impugns the character of the victim or the loss suffered by the family now falls within the *Brady* doctrine and should be requested from the prosecutor").

As for scope, despite the narrow facts of *Payne*, which granted certiorari to reexamine the permissibility of "evidence relating to the personal characteristics of the victim and the emotional impact of the crime *on the victim's family*,"[108] jurisdictions commonly permit evidence of impact on the "community,"[109] however nebulously or broadly conceived.[110] The Alabama Court of Criminal Appeals, for instance, recently approved of impact evidence regarding the impact of the victim's death on the "law enforcement community."[111] Likewise, Indiana has permitted state troopers to testify that, because one of their fellow troopers was killed, their chief could no longer function properly, and that some troopers henceforth began dealing with the public in violent and illegal ways.[112] Even more broadly, the Georgia Supreme Court has permitted testimony from listeners of a radio call-in talk show to show "community"

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108. *Payne*, 501 U.S. at 817 (emphasis added). *See also id.* at 830 n.2 ("Our holding today is limited to the holdings of [*Booth* and *Gathers*], that evidence and argument relating to the victim and the impact of the victim's death on the victim's family are admissible at a capital sentencing hearing."); *id.* at 823 (impact evidence is designed to show "each victim's 'uniqueness as an individual human being' whatever the jury might think the loss to the community...might be...."); *id.* at 835 (Souter, J., concurring) (addressing "information revealing the individuality of the victim and the impact of the crime on the victims' survivors"). *But see id.* at 830 (O'Connor, J., concurring) (evidence includes "impact on the victim's family and community").

109. *See, e.g.*, FLA. STAT. ch. 921.141(7) (1998) (impact evidence is "designed to demonstrate the victim's uniqueness...and the resultant loss to the community's members by the victim's death"); GA. CODE ANN. 17-10-1.2(a)(1) (1997) ("[T]he court may allow 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 on the victim, the victim's family, or the community"); MO. ANN. STAT. § 565.030 (West 1997) (permitting evidence going to the "impact of the crime upon the family of the victims and others."); PA. STAT. ANN. tit. 42 § 9721(b) (West 1998) (permitting evidence regarding the "gravity of the offense as it relates to the impact on the life of the victim and the community").

Florida case law is evolving in a interesting way in this regard. The Florida Supreme Court recently signaled that the nature of a given "community" can influence the permissible bounds of impact evidence. *Compare* Moore v. State, 701 So. 2d 545, 551 (Fla. 1997) (holding that with respect to a socio-economically disadvantaged area with few positive adult role models, "because of the community in which the victim lived, the evidence was admissible to show a loss to that community") *with* Windom v. State, 656 So. 2d 432, 438 (Fla. 1995) (police officer's testimony regarding the effect of the killing on elementary school students, not "community" as a whole, deemed irrelevant because it did not relate to victim's "uniqueness" or the "loss" to the "community's members by the victim's death..."). *Cf.* Bonifay v. State, 689 So. 2d 413, 419 (Fla. 1996) ("A loss to the family is a loss to both the community of the family and to the larger community outside the family.").

110. *See* Katie Long, Note, *Community Input at Sentencing: Victim's Right or Victim's Revenge?*, 75 B.U. L. REV. 187, 214–24 (1995) (discussing difficulties associated with "community" testimony, including choosing from the "myriad of potentially affected communities," and the unreliability, variability and frequently prejudicial nature of such evidence).

111. Hyde v. State, No. CR-95-2036, 1998 WL 32605, at *10 (Ala. Crim. App. Jan. 30, 1998).

112. Lambert v. State, 643 N.E.2d 349, 354–56 (Ind. 1994).

impact,[113] and courts also regularly admit testimony from community members to the effect that they began locking their doors and windows in the wake of the murder.[114]

As for the nature of impact evidence allowed, although a handful of death penalty jurisdictions have specified what aspects of impact can be considered,[115] the vast majority (like *Payne* itself) provide little or no express guidance on the permissible bounds of "impact." Federal law, for instance, vaguely states that the prosecution can introduce evidence relating to "the extent and scope of the injury and loss suffered by the victim and the victim's family, and any other relevant information."[116] As a result, in *McVeigh*, the Government successfully proffered "last contacts" with the victim evidence, "efforts to discover the fate of victims" evidence, and "pure love and innocence of children" evidence.[117] The latter category included the testimony of a little girl who had been outside the Murrah Building when the bomb exploded, and later approached a police officer, hugged the officer's dog, and asked "Mr. Police Dog, will you find my friends?"[118]

Most compelling of all forms of impact evidence, and that which jurisdictions admit almost without virtual limit, is that relating to "emotional impact."[119] In *McVeigh*, for instance, the mother of a four-year-old girl testified that

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113. McClain v. State, 477 S.E.2d 814, 824 (Ga. 1996).

114. *See, e.g.*, Sullivan v. State, 636 A.2d 931, 939–40 (Del. 1994); State v. Burns, 979 S.W.2d 276, 282–83 (Tenn. 1998).

115. *See* MISS. CODE ANN. § 99-19-155(b) (1997) (impact includes "the financial, emotional and physical effects of the crime on the victim and the victim's family..."); State v. Muhammad, 678 A.2d 164, 180 (N.J. 1996) ("The testimony can provide a general factual profile of the victim, including information about the victim's family, employment, education, and interests. The testimony can describe generally the impact of the victim's death on his or her immediate family."); Cargle v. State, 909 P.2d 806, 828 (Okla. Crim. App. 1995) ("Those unique characteristics which define the individual who has died, the contemporaneous and prospective circumstances surrounding that death, and how those circumstances have financially, emotionally, psychologically, and physically impacted on members of the victim's immediate family...."); PA. STAT. ANN. tit. 71, § 180-9.3(5) (West 1997) ("The physical, psychological and economic effects of the crime on the victim and the victim's family...."); State v. Nesbit, 978 S.W.2d 872, 891 (Tenn. 1998) (the "contemporaneous and prospective circumstances surrounding the individual's death, and how those circumstances financially, emotionally, psychologically or physically impacted upon members of the victim's immediate family").

116. *See* 18 U.S.C. § 3593(a) (1994).

117. United States v. McVeigh, 153 F.3d 1166, 1219–21 (10th Cir. 1998).

118. *Id.* at 1220. In a decidedly perverse twist, the Tenth Circuit used the uncertainty over the legitimate bounds of "impact" to McVeigh's disadvantage, stating: "[e]ven if we found error, it would not rise to the level of plain error given the lack of clear guidance on the appropriate limits of victim impact testimony under *Payne* that existed at the time of the trial." *Id.* at 1219 n.46.

119. Despite the obvious prejudicial quality of emotional impact evidence, the courts have only rarely singled it out for special concern:

> The realities are, virtually everyone who is murdered is going to be missed by someone; and to that degree is not unique from any other victim. The more a jury is exposed to the emotional aspects of a victim's death, the less likely their verdict will be a 'reasoned moral response' to the question of

after enduring several days of excruciating delay while waiting for bodies to be exhumed from the rubble, and then burying her daughter, she received a phone call from the medical examiner's office: "He said, 'We have recovered a portion of Ahsley's hand...and we wanted to know if you wanted that buried in the mass grave or if you would like to have it.' And I said, 'Of course, I want it. It's part of her."[120] In response to this gripping testimony, which the witness was unable to complete because she was sobbing uncontrollably, "jurors wept openly, survivors wailed, reporters groped for hankies and sodden bits of tissue."[121]

The emotional potency of such evidence is manifest in the unguarded comments of supposedly impartial presiding trial judges. In Delaware, the State Supreme Court approved of a trial judge's summary of victim impact evidence that the victim was a "humble, gracious man who will be missed,"[122] while the Illinois Supreme Court was not troubled by a trial judge's comment that he had "never heard victim impact statements that were so moving or so eloquent."[123] In *McVeigh*, even the normally stoic Judge Richard Matsch openly wept during the course of the two days of impact evidence presented,[124] after he substantially limited the nature and form of the impact evidence the Government was permitted to present.[125] Defendants hoping to rebut this type of evidence face a virtually insurmountable task: not only would huge strategic risks attend any effort to challenge the veracity of survivors' emotional loss, but such intrinsically subjective emotional testimony is virtually immune to

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> whether a defendant deserves to die; and the greater the risk a defendant will be deprived of due process.

Cargle, 909 P.2d at 830. *See also Nesbit*, 978 S.W.2d at 891:

> [E]vidence regarding the emotional impact of the murder on the victim's family should be most closely scrutinized because it poses the greatest threat to due process and risk of undue prejudice, particularly if no proof is offered on the other types of victim impact.... However, there is no bright-line test, and the admissibility of specific types of victim impact evidence must be determined on a case-by-case basis.

120. Eric Pooley et al., *Death or Life? McVeigh Could Be the Best Argument for Executions, But His Case Highlights the Problems that Arise When Death Sentences Are Churned Out in Huge Numbers*, TIME, June 16, 1997, at 31.

121. *Id.*

122. Sullivan v. State, 636 A.2d 931, 940 (Del. 1994).

123. People v. Ratzke, 625 N.E.2d 1004, 1017 (Ill. 1993). *See also* State v. Baston, No. L-95-087, 1997 WL 570896, at *3 (Ohio App. 6th Dist. Sept. 12, 1997) (condemning lower court's remark that, while denying undue influence of improper impact evidence, "'it is a matter of special poignancy that [defendant's] cold act of gratuitous violence ended the life of a man of uncommon accomplishment, courage, enterprise and decency. It is important for reasons having nothing to do with legal analysis to note the panel's recognition of that'").

124. John Gibeaut, *The Last Word: Jury Is Still Out on Impact Evidence*, A.B.A. J. 42, 43, Sept. 1997. *See also* Peter Gorner, *Empathy v. Impartiality in the Courtroom: Victims Leave Lasting Impact on the System*, CHI. TRIB., June 15, 1997, at 1 (noting that "[w]ithin minutes, six of the jurors had begun to weep").

125. Gibeaut, *supra* note 124, at 43 (noting that Judge Matsch barred testimony regarding the deaths of 19 children, the conditions of victims' bodies, funeral arrangements, holiday photos of the victims, and a video of a typical day in the credit union in the Murrah Building where six of the victims worked).

cross-examination or rebuttal.[126] As a result, as noted by one commentator, a defendant's right to cross-examine the testimony of impact witnesses is "more apparent than real."[127]

In addition to allowing evidence of emotional loss, a predictable consequence associated with the killing of a loved one, courts very often permit evidence of a decidedly more remote and unforeseeable nature. The Texas Court of Criminal Appeals, for instance, has deemed "tenuous" but relevant the adverse impact a murder had on the marriage of the decedent's sister which resulted in divorce,[128] while the Missouri Supreme Court has upheld testimony from a victim's mother that the family had previously endured the loss of another child, one suffering from cerebral palsy.[129] Heart attacks and other untoward medical developments experienced by loved ones are also the common subject of impact testimony.[130] Even more remotely, prosecutors have sought to introduce impact evidence relating to prior, unrelated killings committed by capital defendants. Although such efforts for the most part have been unsuccessful,[131] the North Carolina Supreme Court has approved of impact evidence relating to the children of another woman murdered by the defendant many years before on the reasoning that the evidence "readily applie[d] to the motherless child resulting" from the instant murders.[132]

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126. *See* Booth v. Maryland, 482 U.S. 496, 506 (1987) (noting that "rarely would [defendants] be able to show that the family members have exaggerated the degree of sleeplessness, depression, or emotional trauma suffered").

127. Randall Coyne, *Inflicting* Payne *on Oklahoma: The Use of Victim Impact Evidence During the Sentencing Phase of Capital Cases*, 45 OKLA. L. REV. 589, 599 (1992). *See also* Anderson, *supra* note 56, at 409 (referring to decision as "Hobson's Choice" and noting that although "[t]he law may provide the basis to challenge the victims...in most cases, a defense attorney has no true choice but to accept what has been offered").

128. McDuff v. State, 939 S.W.2d 607, 620 (Tex. Crim. App. 1997).

129. State v. Clay, 975 S.W.2d 121, 132 (Mo. 1998).

130. *See, e.g.*, Young v. State, 1998 WL 812950, at *8 (Okla. Crim. App. Nov. 6, 1998) (fatal heart attack suffered by victim's aunt upon receiving news of killing); Griffith v. State, 983 S.W.2d 282, 289 (Tex. Crim. App. 1998) (en banc) (father of victim "quit fighting" previously diagnosed cancer after victim's killing).

131. *See, e.g.*, People v. Hope, 702 N.E.2d 1282, 1288 (Ill. 1998) (admission of impact evidence relating to other, prior killing held reversible error); Cantu v. State, 939 S.W.2d 627, 637 (Tex. Crim. App. 1997) (deeming inadmissible impact evidence regarding rape and murder of another victim, stating that the "admission of such evidence would open the door to victim impact evidence arising from any extraneous offense committed by a defendant"). *Compare* Sherman v. State, 965 P.2d 903, 914 (Nev. 1998) (deeming irrelevant but harmless State's evidence of emotional impact of prior murder on survivors of that murder); Gilbert v. State, 951 P.2d 98, 117 (Okla. Crim. App. 1997) (deeming irrelevant but harmless impact survivors' testimony regarding murders allegedly committed by defendant in two other states).

132. State v. Robinson, 451 S.E.2d 196, 205 (N.C. 1994). *See also Hope*, 702 N.E.2d at 1291 (Miller, J., concurring and dissenting in part) ("I do not believe that *Payne* forecloses introduction of [such evidence]. Just as evidence of the circumstances of a defendant's other offenses is admissible in aggravation, so too should be victim impact testimony from the victims of those crimes."); *id.* at 1291 (Bilandic, J., concurring and dissenting in part) (agreeing that such impact evidence should be admitted, but only if not "too attenuated" in nature). *Cf.*

Admission of evidence going to such fortuitous, unforeseeable outcomes raises the real risk, recognized by the *Booth* majority, of permitting the jury to "impos[e] the death sentence because of factors about which the defendant was unaware, and that were irrelevant to the decision to kill."[133] This concern notwithstanding, to date Tennessee is the sole jurisdiction to attach special probative weight to the fact that a capital defendant had prior "specific knowledge about the victim's [immediate] family."[134] Tennessee courts can now use such advance knowledge, to the extent it can be surmised, to assess whether the relative probative value of the impact evidence is substantially outweighed by its admittedly prejudicial effect.[135]

Finally, "impact" often assumes a remarkably macabre form. In a recent South Carolina case, for instance, the State was permitted to introduce photos of a stillborn child dressed in clothes the victim-mother "intended for him to wear home from the hospital" in the name of "portray[ing] the individuality of the unborn child."[136] In neighboring North Carolina, the State Supreme Court approved of the introduction of photos of the victims' partially decomposed bodies, and the prosecutor's request that the jury should remember the "condition of the victim's bodies when they were removed from the woods seven days after the murders."[137] Citing *Payne*, the Court reasoned that the stratagem was part of the State's "argument to the jury that the victims were unique individuals whose deaths represented a unique loss to their families,"[138] and "merely served to remind the jury that the victims were sentient beings with close family ties before they were murdered by defendant."[139] Similarly, in *People v. Kitchen* the Illinois Supreme Court upheld admission of impact evidence of the funeral arrangements of two mothers and their children who died as a result of a fire set by the defendant, detailing that the children were buried in the same caskets as their mothers.[140]

D. The Proliferation of "Opinion" Testimony

Another recurring concern arises from the common admission of the two forms of "opinion" evidence that remain barred, even in the wake of *Payne*.[141] Such

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Stephen P. Smith, Note, *Unreliable and Prejudicial: The Use of Extraneous Unadjudicated Offenses in the Penalty Phases of Capital Trials*, 93 COLUM. L. REV. 1249 (1993) (surveying differing judicial views on the admissibility of unadjudicated offenses and arguing that such evidence should be barred on Eighth and Fourteenth Amendment grounds).

133. Booth v. Maryland, 482 U.S. 496, 505 (1987).

134. State v. Nesbit, 978 S.W.2d 872, 892 (Tenn. 1998).

135. *Id.* In the view of the Tennessee Supreme Court, "probative value is particularly great, where the proof shows...that a defendant had specific knowledge about the victim's family when the crime was committed...." *Id.*

136. State v. Ard, 505 S.E.2d 328, 332 (S.C. 1998).

137. State v. Conaway, 453 S.E.2d 824, 849 (N.C. 1995).

138. *Id.* (citing *Payne*, 501 U.S. at 825).

139. *Id.* at 850.

140. 636 N.E.2d 433, 447 (Ill. 1994). *See also* Lee v. State, 942 S.W.2d 231, 236 (Ark. 1997) (permitting sister of victim to testify, *inter alia*, of the painful experience of selecting her sister's wig for her funeral).

141. *See* Payne v. Tennessee, 501 U.S. 808, 830 n.2 (1991) (noting that *Booth's*

evidence comes in two basic forms: (1) characterizations and opinions about the crime and the defendant, and (2) witnesses' opinions as to the appropriate sentence that should be imposed.[142]

Trial courts now regularly admit, and appellate courts condone, plainly improper evidence falling under the first category.[143] The Mississippi Supreme Court, for instance, has concluded that "[v]ictim impact statements are those which describe the victim's personal characteristics, the emotional effect of the crimes on the victim's family, *and the family's opinions of the crimes and the defendant.*"[144] The Oklahoma Court of Criminal Appeals has stated that opinion evidence is admissible, but has cautioned that it "will be viewed with a heightened degree of scrutiny."[145] On this basis, the court has upheld the admission of a husband's testimony that a "cur" or a "stray dog" did not "deserve" the death suffered by his wife, and a grieving daughter's reference to the defendant as a "piece of trash."[146] In an earlier case, the Oklahoma Court of Criminal Appeals condoned witness characterizations of the murder as a "selfish act" in which the decedent was "butchered like an animal."[147]

Opinions as to appropriate sentence also commonly get before juries. Indeed, in Oklahoma, the Court of Criminal Appeals has held that such opinions are admissible but should "be limited to a single statement of the recommended sentence without amplification."[148] More often, however, the admission of such testimony is

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prohibition of opinion evidence remains in effect); *id.* at 835 n.1 (Souter, J., concurring) (same).

142. *Id.* at 830 n.2.

143. This is perhaps due to the fact that, as the Delaware Supreme Court has noted, "[a]lthough the focus on victim impact evidence should be on the crime itself...it is difficult to separate the events in the minds of victim's relatives." Gattis v. State, 637 A.2d 808, 820 (Del. 1994).

144. Wells v. State, 698 So. 2d 497, 512 (Miss. 1997) (emphasis added).

145. Conover v. State, 933 P.2d 904, 920–21 (Okla. Crim. App. 1997).

146. Willingham v. State, 947 P.2d 1074, 1085–86 (Okla. Crim. App. 1997).

147. Ledbetter v. State, 933 P.2d 880, 891 (Okla. Crim. App. 1997). For an interesting discussion of the various purposes and effects of prosecutorial use of such derogatory terms, see Martha G. Duncan, *In Slime and Darkness: The Metaphors of Filth in Criminal Trials*, 68 TUL. L. REV. 725 (1994). The non-capital trial of Colin Ferguson, convicted of killing 6 and wounding 19 on a Long Island, New York commuter train, was a showcase for such epithets. One survivor erupted: "You're nothing but a piece of scum. You're an animal." *See* Eleanor Randolf, *Victims Rage at Gunman: Survivors of NY Shooting Address Court*, WASH. POST, Mar. 22, 1995, at A1. Similarly, in the non-capital sentencing hearing of serial killer Jeffrey Dahmer, one survivor shouted his wish that Dahmer "go to hell," while another called Dahmer "Satan" and shouted "I hate you," while being physically restrained by court officers. *See* Rogers Worthington, *Dahmer Says He's Sorry, Gets 15 Life Terms*, CHI. TRIB., Feb. 18, 1992, at 3.

148. *Conover*, 933 P.2d at 921 (finding that *Payne* "implicitly" overruled *Booth* limit on such opinion testimony). *See also* Cargle v. State, 909 P.2d 806, 827 (Okla. Crim. App. 1995) (construing Oklahoma impact statute and concluding that scope of testimony "includes information about the victim, circumstances surrounding the crime, the manner in which the crime was perpetrated, and the victim's opinion of a recommended sentence"). *Compare* People v. Towns, 675 N.E.2d 614 (Ill. 1996) (finding that *Payne* did not overrule *Booth* limit on witness opinion regarding appropriate sentence); State v. Bernard, 608 So. 2d 966 (La. 1992)

regarded as error, but harmless or non-prejudicial error.[149] This is especially so when sentencing is carried out by the trial judge,[150] despite increasing evidence of the influence of public sentiment and political pressures on judicial behavior in the death penalty context.[151] In one recent Alabama case, for instance, the victim's father and

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(same); State v. Muhammad, 678 A.2d 164 (N.J. 1996) (same).

Indiana takes a different approach to the "opinion" issue. In Indiana, impact evidence is not presented to the jury, but rather to the judge who decides whether it warrants punishment enhancement. The Indiana Supreme Court recently approved of the lower court's consideration of survivors' opinion testimony, stating:

> [Survivors'] opinions, arising from the crime's profound and unalterable affect [sic] on their lives and that of the victim's, are acceptable considerations when determining the appropriate sentence. Recommendations from a victim's family for leniency or severity are not mitigating or aggravating circumstances as those terms are used in the sentencing statute.... They may, however, properly assist a court in "determining what sentence to impose for a crime."

Edcombe v. State, 673 N.E.2d 1185, 1199 (Ind. 1996) (citations omitted).

149. *See, e.g.*, State v. Scales, 655 So. 2d 1326, 1336 (La. 1995) (prosecutor's relating that victim's family "requests" death penalty deemed harmless error); Smith v. State, 932 P.2d 521, 537 (Okla. Crim. App. 1996) (decedent's father beseeching jury "what is it going to take? More people got to be victims of these crimes that are being committed?" held harmless error); State v. Middlebrooks, No. 01C01-9606-CR-00230, 1998 WL 13819, at *13 (Tenn. Ct. Crim. App. Jan. 15, 1998) (opinion evidence deemed harmless error). The role of harmless error analysis in capital trials is discussed at length *infra* notes 226–70 and accompanying text.

150. *See, e.g.*, State v. Mann, 934 P.2d 784, 792 (Ariz. 1997) (en banc); Davis v. State, 586 So. 2d 1038, 1041 (Fla. 1991); State v. Card, 825 P.2d 1081, 1089 (Idaho 1991); People v. Harris, 695 N.E.2d 447, 467 (Ill. 1998); State v. Hough, 690 N.E.2d 267, 271 (Ind. 1997); State v. Gideon, 894 P.2d 850, 864 (Kan. 1995); Johnson v. State, 703 A.2d 1267, 1277 (Md. 1998); State v. Taylor, 944 S.W.2d 925, 938 (Mo. 1997) (en banc); State v. Fautenberry, 650 N.E.2d 878, 882 (Ohio 1995); Beck v. Comm., 484 S.E.2d 898, 906 (Va. 1997). *Compare* McWilliams v. State, 666 So. 2d 89 (Miss. 1994) (admitted opinion evidence held reversible error because trial judge did not expressly disavow on the record reliance on such impermissible testimony) *with* People v. Brown, 1998 WL 778120, at *15 (Ill. Nov. 10, 1998) (non-prejudicial error because "the trial judge did not refer to the victim impact statements when he announced his decision to impose the death penalty").

151. *See* Harris v. State, 513 U.S. 504, 523 (Stevens, J., dissenting) ("Not surprisingly, given the political pressures they face judges are far more likely than juries to impose the death penalty."); Haney v. State, 603 So. 2d 368, 382 (Ala. Crim. App. 1991) ("While we might be inclined to rely on the presumption that a trial court is presumed to have disregarded improper factors in sentencing in non-capital cases, we are reluctant to do so in capital cases."); People v. Vecchio, 819 P.2d 533, 535 (Colo. Ct. App. 1991) (noting that "retribution at the polls is a risk undertaken by every judicial candidate upon acceptance of appointment in a judicial position."); State v. Charboneau, 774 P.2d 299, 320 (Idaho 1989) (pre-*Payne* case finding admission of impact evidence in bench trial to be reversible error because "[t]he risk of [an] arbitrary and capricious decision[] exists whether the sentence is determined by a judge or a jury"). For a discussion of pre-*Payne* decisions discerning no difference in the risks arising with judge versus jury trials, see Dina Hellerstein, *The Victim Impact Statement: Reform or Reprisal?*, 27 AM. CRIM. L. REV. 391, 412–16 (1989).

This concern over politicization is also the subject of a large body of scholarly commentary. *See, e.g.*, RICHARD C. DIETER, KILLING FOR VOTES: THE DANGERS OF POLITICIZING

the local chief of police (the latter also serving as the chief investigator in the case) recommended that the defendant be sentenced to death; notwithstanding this testimony, the jury sentenced defendant to life without possibility of parole.[152] The trial court, however, overrode the jury's recommendation and imposed death. Rejecting defendant's argument that the opinion testimony "was intended as much for the court as for the jury," the Alabama Court of Criminal Appeals upheld the death sentence because nothing in the sentencing order reflected that the court expressly considered the opinion evidence, raising the presumption that the court disregarded any improper evidence.[153]

Furthermore, courts are adopting a decidedly cramped view of what constitutes "opinion" with regard to sentencing recommendations.[154] In *Witter v. State*,[155] for instance, the wife of the decedent read a statement in which she asked that the jury "show no mercy." The Supreme Court of Nevada, after acknowledging that opinion testimony was impermissible in capital trials, unanimously concluded that the witness' comment did not amount to an "opinion" but rather constituted a request that the jury return the most severe sentence it felt appropriate.[156] In another case, the Illinois Supreme Court affirmed the admissibility of the following statement offered by the decedent's wife in relation to the murder of her husband, who was a police officer:

> My family and I are very confident that all of you will return a quick verdict which will send a message to my children, society, and the law enforcement community that we simply not tolerate or accept our last means of protection being annihilated on our streets. Renew our faith in the criminal justice system and bring a phase of closure to this ongoing nightmare that fills our lives.[157]

THE DEATH PENALTY PROCESS (1996); Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.C. L. REV. 759 (1995); Gerald F. Uelman, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133 (1997).

152. Hyde v. State, 1998 WL 32605, at *7 (Ala. Crim. App. Jan. 30, 1998).

153. *Id.* at *8. *See also* State v. Goodwin, 703 N.E.2d 1251, 1262–63 (Ohio 1999) (inferring that "the trial judge remained uninfluenced, since his sentencing decision never referred to the brother's opinion").

154. This difficulty can be fairly traced to *Payne* itself. In *Payne*, the prosecution's sentencing rebuttal urged the jury that "[Nicholas] is...going to want to know what type of justice was done.... With your verdict, you will provide the answer." Payne v. Tennessee, 501 U.S. 808, 815 (1991). Plainly, the foregoing implied that the survivors wished that the death penalty be imposed and that the jury was empowered to fulfill that desire. Despite this the *Payne* majority concluded that "opinion" evidence was absent from the record, and on this basis neglected to squarely address what constitutes improper opinion under *Booth*.

155. 921 P.2d 886 (Nev. 1996).

156. *Id.* at 896.

157. People v. Williams, 692 N.E.2d 1109, 1124 (Ill. 1998). *See also* People v. Shaw, 1998 WL 734484 *20–22 (Ill. Oct. 22, 1998) (affirming virtually identical statement of same witness in trial of co-defendant).

According to the Court, the testimony was permissible because the requests for "closure" and a "quick verdict" did not relate to the death penalty, which was ultimately imposed, but rather to the witness' "desire that the jury deliberate in an expedient manner so that she and her family could move on with their lives."[158]

E. Enduring Questions Over the Use of Victim Impact Evidence

In addition to the foregoing obvious concerns, even more fundamental uncertainties exist with respect to the systemic role victim impact evidence plays in capital decision making.

1. The Purpose and Function of Victim Impact Evidence

Payne specified only that victim impact evidence is "*relevant* to the jury's decision as to whether or not the death penalty should be imposed";[159] jurors are free "*to bear in mind*" impact evidence to "*remind[]*" them of the victim's "uniqueness" as they "*consider[]* the mitigating evidence introduced by the defendant."[160] As a result of these spare directions, uncertainty reigns over the place of impact evidence in capital trials, a situation at obvious odds with the Supreme Court's presupposition that "the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement."[161]

As a threshold matter, it is apparent that no consensus exists on the basic purpose of victim impact evidence. This, of course, is consistent with *Payne's* ambiguous rationale that impact evidence is admitted both to "counteract" any mitigating evidence offered by the defendant and to assess the "specific harm" caused by the predicate killing.[162] Some jurisdictions adhere to the view that the purpose of impact evidence is to rebut mitigation evidence,[163] while others use it to evaluate the "specific harm" caused by the murder.[164] In Oklahoma, one of the few jurisdictions to provide any guidance, juries receive the vague instruction that impact evidence

> 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

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158. *Williams*, 192 N.E.2d at 1124. *See also* State v. Basile, 942 S.W.2d 342, 358 (Mo. 1997) (en banc) (approving of statement by victim's sister at the end of testimony: "And I Pray to God now that justice will be served").

159. *Payne*, 501 U.S. at 827 (emphasis added).

160. *Id.* at 825–26 (emphasis added).

161. Maynard v. Cartwright, 486 U.S. 356, 362 (1988).

162. *Payne*, 501 U.S. at 825.

163. *See, e.g.*, State v. Mann, 934 P.2d 784, 792 (Ariz. 1997) (impact evidence is not to be used as an aggravator but rather to "rebut the defendant's mitigation evidence"); Mosley v. State, 983 S.W.2d 249, 263–64 (Tex. Crim. App. 1998) ("Victim-related evidence is relevant to show that the mitigating circumstances are not 'sufficient' to warrant imposing a life sentence. Such evidence would be wholly irrelevant if appellant affirmatively waived submission and reliance upon the mitigation special issue.").

164. *See, e.g.*, State v. Wooten, 931 S.W.2d 408, 411 (Ark. 1996); Burns v. State, 699 So. 2d 646, 653 (Fla. 1997).

> family. This evidence is simply another method of informing you about the specific harm caused by the crime in question. You may consider this evidence in determining an appropriate punishment.[165]

Furthermore, even if capital jurors receive instruction on the basic purpose of victim impact evidence, they typically receive little guidance on its procedural function in the intricate death penalty decision making process. Most jurisdictions expressly reject that victim impact evidence constitutes an aggravating circumstance[166] or even a "super-aggravator,"[167] but fail to provide much more in the way of insight. The Supreme Court of Missouri, for instance, has advised unhelpfully that it "is sufficient that [impact evidence] is relevant to inform the jury as to the effect of the crime...even if no instruction is given regarding the evidence."[168] In Florida, impact evidence "is neither aggravating nor mitigating evidence. Rather, it is *other* evidence, which is not required to be weighed against, or offset, by statutory factors."[169] Tennessee permits impact evidence because it goes to the "'nature and circumstances of the crime,'" as generally permitted at sentencing proceedings.[170]

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165. Cargle v. State, 909 P.2d 806, 828–29 (Okla. Crim. App. 1995). The court elaborated on the purpose of impact evidence as follows:

> Evidence supporting an aggravating circumstance is designed to provide guidance to the jury in determining whether the defendant is eligible for the death penalty; victim impact evidence informs the jury why the victim should have lived.... The two kinds of evidence are not similar: that a victim may have been a great person who will be missed...does not go toward proving...[any] aggravating circumstance the prosecution might allege.

Id. at 828 n.15.

166. *See, e.g.*, State v. Gulbrandson, 906 P.2d 579, 599 (Ariz. 1995) (en banc); Noel v. State, 960 S.W.2d 439, 445–46 (Ark. 1998); Windom v. State, 656 So. 2d 432, 438 (Fla. 1995); State v. Turner, 486 S.E.2d 839, 842–47 (Ga. 1997); Byram v. State, 485 S.E.2d 360, 365 (S.C. 1997); State v. Nesbit, 978 S.W.2d 872, 887 (Tenn. 1998); Weeks v. Comm., 450 S.E.2d 379, 389 (Va. 1994).

The Tennessee Supreme Court, faced with a prosecutor's invocation of impact evidence to "remind the jury to consider the aggravating circumstances," has instructed that this strategy is to be used "advisedly." *See* State v. Shepherd, 902 S.W.2d 895, 907–08 (Tenn. 1995).

167. *See, e.g.*, Toles v. State, 947 P.2d 180 (Okla. Crim. App. 1997); Whittlesey v. State, 665 A.2d 223 (Md. 1995).

168. State v. Basile, 942 S.W.2d 342, 359 (Mo. 1997) (en banc). Pennsylvania statutory law similarly provides that the jury "shall consider, in weighing the aggravating and mitigating circumstances, any evidence presented about the victim and about the impact of the murder on the victim's family." *See* 42 PA. STAT. ANN. tit. 42 § 9711(c)(2) (West 1998).

169. State v. Maxwell, 647 So. 2d 871, 872 (Fla. Dist. Ct. App.1994) (emphasis added). *See also* Noel v. State, 960 S.W.2d 439, 446 (Ark. 1998) ("[V]ictim impact evidence is not an additional aggravating circumstance but rather is relevant evidence which informs the jury of the toll the murder has taken on the family."); State v. Humphries, 479 S.E.2d 52, 56 (S.C. 1996) ("[V]ictim impact evidence is neither an aggravating nor a mitigating circumstance, but simply relevant evidence that they jury may consider in determining an appropriate penalty.").

170. *Nesbit*, 978 S.W.2d at 889 (citing TENN. CODE ANN. § 39-13-204 (1997)).

At the same time, however, in some jurisdictions impact evidence is deemed a "non-statutory" aggravating circumstance,[171] and in others impact evidence is used by jurors in conjunction with other existing statutory aggravators. California, for example, permits consideration of impact evidence in support of the statutory aggravator relating to the "circumstances of the crime";[172] Indiana permits impact evidence only if it is relevant to a statutory aggravating or mitigating circumstance;[173] and North Carolina has permitted impact evidence in favor of the statutory aggravator that the murder was committed in an "especially heinous, atrocious or cruel" manner.[174]

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171. *See, e.g.*, 18 U.S.C. § 3593(a) (1994); Gattis v. State, 637 A.2d 808, 820 (Del. 1994); Bucklew v. State, 973 S.W.2d 83, 96 (Mo. 1998) (en banc); United States v. Thomas, 43 M.J. 550, 599 (N.M. Ct. Crim. App. 1993). *See also* William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1044 (1995) (citing *Payne* as "broaden[ing] the scope of constitutionally acceptable aggravating considerations beyond the blameworthiness of the defendant to include the character of the victim and the impact of the crime on the victim's survivors"). *Compare Windom*, 656 So. 2d at 438 (rejecting characterization of impact evidence as "non-statutory aggravator").

To the extent impact evidence is categorized as an express aggravating circumstance, such a categorization would appear to contravene the basic constitutional expectation that aggravators be "*objectively provable* and rationally related to the criminal conduct in the offenses proven at trial." United States v. McVeigh, 944 F. Supp. 1478, 1487 (D. Colo. 1996) (emphasis added). One can certainly ask: in what way can "impact," weighed in terms of the victim's characteristics and the consequences of her death, be "objectively provable"?

172. People v. Stanley, 897 P.2d 481, 523 (Cal. 1995); People v. Kirkpatrick, 874 P.2d 248, 265 (Cal. 1994).

173. Holmes v. State, 671 N.E.2d 841, 848 (Ind. 1996). *See also* Lambert v. State, 675 N.E.2d 1060, 1064 (Ind. 1996) ("extensive testimony" by police officer's Chief and a fellow officer held impermissible because extended "far beyond" the permissible statutory aggravator that the victim was a police officer); Burris v. State, 642 N.E.2d 961, 966 (Ind. 1994) (deeming irrelevant impact testimony by victim's mother regarding the victim's marital status, that he had children, and his military and work records).

Indiana trial judges, upon receiving the jury's sentence recommendation, are permitted "to hear evidence of the crime's impact on members of the victim's family before making [their] final determination on sentencing." *Lambert*, 675 N.E.2d at 1063 n.1 (citing IND. CODE § 35-50-2-9(e)). The Indiana Supreme Court recently elaborated on this requirement:

> [W]hen a court uses victim impact statements as aggravating circumstances in order to justify a sentence enhancement, the court must provide an explanation.... The murder of a person carries with it an expected impact upon the family members and other acquaintances of the victim. This impact is accounted for in the presumptive sentence for murder.... In order to validly use victim impact evidence to enhance a presumptive sentence, the trial court must explain why the impact in the case at hand exceeds that which is normally associated with the crime.

Davenport v. State, 689 N.E.2d 1226, 1232–33 (Ind. 1997) (citations omitted).

174. State v. Fisher, 445 S.E.2d 866, 874–75 (N.C. 1994). This lack of express classification can inspire appellate courts, obviously reluctant to reverse on the basis of improperly admitted impact evidence, to be quite creative. For instance, in *Pitsonbarger v. Gramley*, 141 F.3d 728 (7th Cir.), *cert. denied*, 119 S. Ct. 448 (1998), on habeas review, the Seventh Circuit addressed whether an Illinois trial court properly admitted evidence at the

New Jersey's elaborate approach permits impact testimony as to the "character of the victim and impact of the crime" to rebut and give "appropriate weight" to the "catch-all" mitigating evidence offered by defendant.[175] In a scathing dissent, New Jersey Supreme Court Justice Handler criticized his colleagues for creating "a de facto aggravating factor that will counterbalance all mitigating factors,"[176] and offered the following assessment of the procedure:

> The statute imposes an irrational requirement, one that is impossible of fulfillment and one that will be explosively prejudicial when it is attempted to be followed.... The statute yields no clue about how descriptions of the impact on the victim's family or descriptions of the victim's uniqueness as a human being contribute to deciding how much weight [the "catch-all"] mitigating evidence deserves.... Evidence of the defendant's abusive childhood and blighted life...would in no way be offset by evidence of the victim's social value or how much the victim's friends and family miss the victim and suffer from the victim's death. They are completely different subjects....[177]

2. The Timing of the Admission of Victim Impact Evidence

Another recurring uncertainty concerns the timing of the admission of victim impact evidence. *Payne* itself addressed itself to the propriety of the admission and consideration of impact evidence at the *sentencing phase* of capital trials,[178] a position mirrored by the vast majority of jurisdictions that now permit impact evidence.[179] The

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death eligibility stage relating to the two victims' "ages and birthdays, testimony from their daughter, life photographs, and evidence that [defendant] sexually assaulted one of them." *Id.* at 735. Although the Illinois Supreme Court had found the admission of the evidence to be erroneous (but not prejudicial), the Seventh Circuit concluded that the testimony was permissible because it supported the "multiple murder" eligibility criterion of the Illinois Death Penalty Act. *Id.*

175. State v. Muhammad, 678 A.2d 164, 179–80 (N.J. 1996) (interpreting N.J. STAT. ANN. § 2C:11-3 (West 1995)).

176. *Id.* at 198 (Handler, J., dissenting).

177. *Id.* Justice Handler further argued that because impact evidence is permitted only upon finding the existence of a "catch-all" mitigating circumstance, defined to include factors relevant "to the defendant's character or record or the circumstances of the offense," New Jersey "discourage[s] and impermissibly burden[s], a defendant from proffering mitigating evidence." *Id.* at 188. *See also id.* at 183 (O'Hern, J., concurring and dissenting) (expressing identical concern).

178. *See* Payne v. Tennessee, 501 U.S. 808, 827 (1991) (holding that impact evidence can be "relevant to the jury's decision as to whether or not the death penalty should be imposed").

179. *See, e.g.*, State v. Keene, 693 N.E.2d 246, 262–63 (Ohio 1998) (impact evidence is only admissible in sentencing phase of capital proceedings); Powell v. State, 906 P.2d 765, 777 (Okla. Crim. App. 1995) (same); Weeks v. Commonwealth, 450 S.E.2d 379, 389–90 (Va. 1994) (same); Armstrong v. State, 826 P.2d 1106, 1116 (Wyo. 1992) (same). *See generally* Phyllis L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 66 FORDHAM L. REV. 21 (1997) (describing varied purposes and goals of guilt versus sentencing stages).

case law, however, contains numerous instances of victim impact evidence being successfully introduced at the guilt phase. The Mississippi Supreme Court, for instance, has upheld the admission of guilt phase evidence that the victim was a mother, married four years, and reluctant to wear skirts because she was shy, concluding that such evidence was "proper and necessary to a development of the case and the true characteristics of the victim...."[180] In *People v. Frye*, the California Supreme Court recently condoned a prosecutor's guilt phase opening statement in which she referred to the victims as "kind and trusting people."[181] According to the *Frye* court, "the challenged statements were made at the guilt phase of trial, a stage of the proceedings that does not implicate the same considerations regarding the deliberative role of the capital sentencing jury underlying the Court's decision in *Payne*."[182]

Other courts have latched onto *Payne's* recognition that at times impact-type information is unavoidably admitted at the guilt phase due to its relevance.[183] For instance, in *Bennett v. Angelone* the Fourth Circuit upheld the introduction of guilt stage impact evidence because the *Payne* majority "noted that various pieces of evidence regarding the victim's background *probably* would get presented during the guilt phase of the trial."[184] This recognition of the occasional inadvertent admission of impact evidence, however, was adopted for a strikingly more ambitious use. The prosecutor's statement approved by the Fourth Circuit was as follows:

> Now, that's the Defendant sitting right over there. This is the victim Anne Keller Vaden, attractive, intelligent, successful, and dead. Who was she? Well, in 1975 she graduated from Clover Hill High School as class valedictorian. Two years later she married; she married Joey Vaden. In 1979, she went to college, William and Mary, and had a 3.8 grade average—an intelligent girl. She was also a guest minister at Tomahawk Church in Chesterfield—a guest minister.
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> I said she was successful. She had a type of real estate venture. She was voted outstanding businesswoman of the year. She

180. Jenkins v. State, 607 So. 2d. 1171, 1183 (Miss. 1992). *See also* Crawford v. State, 716 So. 2d 1028, 1046 (Miss. 1998) (holding that "evidence about the characteristics of the victim is relevant to the crime charged").

181. People v. Frye, 959 P.2d 183, 226 (Cal. 1998).

182. *Id.* at 227.

183. *See Payne*, 501 U.S. at 823 ("In many cases the evidence relating to the victim is already before the jury at least in part because of its relevance at the guilt phase of the trial.").

184. Bennett v. Angelone, 92 F.3d 1336, 1348 (4th Cir. 1996) (emphasis added) (citing *Payne*, 501 U.S. at 823; *id.* at 840 (Souter, J., concurring)). *See also* State v. Fautenberry, 650 N.E.2d 878, 883 (Ohio 1995) (holding that evidence that "depicts both the circumstances surrounding the commission of the [crime] and also the impact of the murder on the victim's family may be admissible during both the guilt and sentencing phases.").

To the extent this overlap occurs, repetition of such emotional facts during sentencing can only further inflame jurors' reactions and promote arbitrary decision making. *See* Bendor, *supra* note 13, at 237 (same).

> finished second in the national oratory contest; that was Anne Vaden.[185]

Relying on *Payne's* acknowledgment of the possible admission of "limited victim background evidence" at the guilt phase, the Fourth Circuit concluded that it was "not clear" that the prosecutor's remarks were improper.[186]

If not expressly approved by the reviewing courts, guilt stage impact evidence otherwise is often regarded as harmless error.[187] In *McVeigh*, for instance, the Tenth Circuit found harmless the admission of extensive guilt stage impact evidence, including "long-term impact" evidence from a stream of highly emotional witnesses.[188] The rationale commonly underlying this judicial view was perhaps best expressed by the Supreme Court of Alabama, which, discounting the introduction of impact evidence at the guilt stage of one capital trial, commented that: "It is presumed that jurors do not leave their common sense at the courthouse door. It would elevate form over substance...[to reverse] simply because the jurors were told what they probably already had suspected—that [the victim] was not a 'human island,' but a unique individual...."[189] Or, as the Seventh Circuit has pointed out, a finding of harmlessness is justified because "[e]very criminal case involving a victim will create some sympathy."[190]

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185. *Bennett*, 92 F.3d at 1348.

186. *Id.* The Fifth Circuit also recently signaled its uncertainty over limiting impact evidence to sentencing. *See* Castillo v. Johnson, 141 F.3d 218, 224 (5th Cir.), *cert. denied*, 119 S. Ct. 28 (1998) (finding *Payne* "authorized states to allow victim impact evidence as a measure of harm to be admitted in the guilt phase of a capital case...").

187. *See, e.g.*, Parker v. Norris, 859 F. Supp. 1203, 1226 (E.D. Ark. 1994) (finding harmless error in State's use of biographical sketches in guilt phase opening argument); Odle v. Calderon, 884 F. Supp. 1404, 1430 (N.D. Cal. 1995) (harmless error because evidence introduced "early in the guilt phase"); Burns v. State, 609 So. 2d 600, 605–06 (Fla. 1992) (upholding impact testimony at guilt phase by victim's boss regarding victim's character and background as a police officer); State v. Taylor, 669 So. 2d 364, 372 (La. 1996) (guilt phase impact testimony from friend and coworker deemed harmless); Powell v. State, 906 P.2d 765, 776–77 (Okla. Crim. App. 1995) (extensive guilt phase impact evidence including reference to victim as a "good kid" and defendant as a "bad kid" deemed harmless error); State v. Bigbee, 885 S.W.2d 797, 808–09 (Tenn. 1994) (guilt phase impact testimony by daughter and victim's boss deemed harmless error).

188. United States v. McVeigh, 153 F.3d 1166, 1203 (10th Cir. 1998).

189. *Ex parte* Rieber, 663 So. 2d 999, 1006 (Ala. 1995). Consistent with this indulgent view, Alabama case law is rife with approved instances of prosecutorial use of impact evidence at the guilt stage. *See, e.g.*, Hyde v. State, 1998 WL 32605, at *10 (Ala. Crim. App. Jan. 30, 1998) (father's guilt stage testimony about the feelings of his wife and surviving son in wake of murder; police chief's testimony about victim's family and the family's involvement in law enforcement; and brother's testimony of how long his family was involved in law enforcement, closeness of victim's family and how victim's death affected him); Price v. State, No. CR-92-0882,1997 WL 337140, at *30 (Ala. Crim. App. June 20, 1997) (approving prosecutor's comments at guilt stage closing argument about suffering of decedent's family); Gaddy v. State, 698 So. 2d 1100, 1139 (Ala. Crim. App. 1995) (affirming guilt stage prosecutorial argument that emphasized impact of victim's death on his mother).

190. Pierson v. O'Leary, 959 F.2d 1385, 1391 (7th Cir. 1992).

Finally, it is increasingly evident that *Payne* is being invoked in conjunction with other substantive or procedural rules to justify introduction of basic victim impact evidence at the guilt phase. Although evidence relating to victims' physical or mental traits traditionally has played some limited role in the guilt phase, typically going to the nature and circumstances of the crime (for example, that the victim was physically disabled and hence less able to flee),[191] prosecutors are now bootstrapping *Payne* to introduce sympathetic victim traits at the guilt phase.[192] In *State v. Sexton*, for instance, the jury heard evidence in the guilt stage of the victim's character for "marital fidelity."[193] In a notable instance of circular reasoning, the North Carolina Supreme Court affirmed because (1) under state statutory law all guilt phase evidence is competent for the jury's consideration at sentencing, and (2) because under *Payne* "the Eighth Amendment does not prohibit either the admission of evidence or prosecutorial argument concerning a murder victim's personal characteristics."[194] Likewise, in *State v. Gradley*, the Louisiana Supreme Court upheld the State's guilt phase use of a videotaped family reunion featuring the eighty-two-year-old victim, ostensibly to prove that the victim was over age sixty-five (an element of the crime), despite the fact that defendant was willing to stipulate to the victim's age and age was established by the emotional testimony of several other family members.[195] Further evidence of this blurring effect is found in Virginia, where prosecutors can introduce plain victim

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191. *See, e.g.*, Libby v. State, 859 P.2d 1050, 1057 (Nev. 1993) (holding evidence that victim wore leg braces relevant to guilt phase decision).

192. *See, e.g.*, State v. Lorraine, 613 N.E.2d 212, 218–19 (Ohio 1993) (upholding as non-prejudicial State's introduction at guilt stage of decedents' advanced age, length of marriage, physical weakness, mental alertness and suffering because "[t]he victims cannot be separated from the crime"). The majority's acceptance of the prosecution's strategy prompted one Ohio justice to state to his colleagues: "Why we see a continuing pattern of prosecutorial misconduct in capital cases is beyond me. There simply is no rational or just reason for prosecutors to overtry these cases. Trial tactics such as were used in this case are deplorable and reflect no credit on our criminal justice system." *Id.* at 224 (Wright, J., concurring).

193. 444 S.E.2d 879 (N.C. 1994).

194. *Id.* at 908. *See also Ex parte* Slaton, 680 So. 2d 909, 927 (Ala. 1996) (upholding prosecutor's statement at guilt phase closing argument that he represented the victim's family because such argument would be permissible at sentencing pursuant to *Payne*).

195. State v. Gradley, No. 97-KA-0641, 1998 WL 252461, at *8 (La. May 19, 1998). *See also* Burris v. Parke, 948 F. Supp. 1310, 1338 (N.D. Ind. 1996) (using *Payne* to buttress argument in favor of admitting photo of victim in U.S. Navy uniform to establish victim's identity); State v. Fautenberry, 650 N.E.2d 878, 883 (Ohio 1995) (holding that evidence that "depicts both the circumstances surrounding the [crime] and also the impact of the murder on the victim's family may be admissible during both the guilt and sentencing phases."); Barnes v. State, 858 P.2d 522, 534–35 (Wyo. 1993) (permitting guilt phase impact evidence because it was "relevant as bolstering the credibility of the witness after an attack upon that credibility").

The whipsaw effect of this evidentiary outcome is highlighted by a recent Oregon case. *See* State v. Hayward, 963 P.2d 667 (Or. 1998). In *Hayward*, at guilt phase, the State introduced a photo of the decedent taken while she was alive, and her husband identified the decedent as his wife. Liberally characterizing the foregoing as victim impact evidence because "it related to a personal characteristic" of the decedent, and noting that the defense failed to raise any objection, the *Hayward* court held that the defendant waived any right to challenge ensuing impact evidence proffered at the penalty phase. *Id.* at 677.

impact evidence at the guilt stage because under Virginia law the jury recommends punishment for any non-capital offenses also charged at the close of the guilt phase.[196]

IV. LIVING WITH *PAYNE*

Some eight years after *Payne* was decided, it is now readily apparent that victim impact evidence is here to stay and, indeed, will likely come to enjoy even broader use in capital trials. At the same time, it is also clear that the increasing use of the emotionally potent testimony is occurring in a context almost entirely free of procedural controls and substantive limits, raising the specter of a return to the era of unfettered decisionmaking condemned over twenty-five years ago by the Supreme Court in *Furman v. Georgia*.[197] Death penalty jurisdictions, eager to give a "voice" to otherwise silenced murder victims, have exhibited a glaring inability (or unwillingness) to address the most basic questions associated with victim impact evidence, including: Who should be qualified to testify? What are the legitimate bounds of "impact"? What is the basic purpose of impact evidence? And how should it bear on jurors' death penalty decisions?

The absence of answers to these basic questions has, on a regular basis, led to the admission of highly prejudicial and plainly improper evidence in capital prosecutions nationwide.[198] Perhaps more troubling still is what is not apparent from the appellate opinions—the threat impact evidence has to exacerbate already existing "invisible" biases in the death penalty system, which include not only race,[199] but also class, because of the inherent propensity of impact evidence to induce "comparative worth" discriminations as between defendants and victims, and even among victims

196. *See* George v. Angelone, 100 F.3d 353, 359–60 (4th Cir. 1996) (upholding prosecutor's guilt phase argument relating to impact of murder on victim's mother and father because it pertained to non-capital crimes charged); George v. Comm., 411 S.E.2d 12, 23 (Va. 1991) (permitting guilt phase argument that jury should consider victim's "human qualities and the impact of his death" in relation to non-capital crimes charged). *Cf.* Cooey v. Anderson, 988 F. Supp. 1066, 1090–91 (E.D. Ohio 1997) (construing Ohio law and upholding death sentences because defendant failed to "specifically demonstrate" that the trial court relied on victim "opinion" testimony when imposing death sentences because such testimony was admissible in relation to non-capital crimes charged).

197. 408 U.S. 238, 310 (1972) (Stewart, J., concurring) (finding death penalty violative of the Eighth Amendment because, in the absence of procedural controls and limits on juror discretion, it is "wantonly and...freakishly imposed").

198. *See supra* notes 88–140 and accompanying text.

199. *See* State v. Muhammad, 678 A.2d 164, 203 (N.J. 1996) (Handler, J., dissenting) ("Victim-impact evidence will be the Trojan horse that will bring into every capital prosecution a particularly virulent and volatile form of discrimination."); Anthony V. Alfieri, *Race Trials*, 76 TEX. L. REV. 1293, 1321 (1998) ("The resurgence of victim impact statements in capital cases...increases the likelihood of racial distortion."). *See also* Stephen L. Carter, *When Victims Happen to Be Black*, 97 YALE L.J. 420, 439–43 (1988) (suggesting that jurors are influenced by victim's race); David E. Rovella, *Race Pervades Death Penalty*, NAT'L LAW J., June 6, 1998, at A20 (discussing recent two-year study conducted by Death Penalty Information Center confirming results of earlier empirical studies to the effect that blacks who kill whites are far more likely to be sentenced to death).

themselves.[200] In a real sense, the widespread and unfettered admission of inflammatory victim impact evidence bespeaks what one commentator has called an "acute system overload," symbolizing "a system that has thrown up its hands in frustration with its inability to accommodate all relevant interests within a framework of meaningful rules."[201]

This recognition, however accurate, cannot substitute for a solution. Without conceding a need to rectify the "imbalance" in capital trials conceived by the *Payne* majority,[202] or that "specific harm" should be relevant in death decisions,[203] an urgent need now exists to refine the ways in which death penalty jurisdictions employ victim impact evidence in its manifold and highly emotional forms.

The beginnings of this needed change are taken up next, the first suggestion relating to several substantive and procedural controls that can be imposed on the presentation and use of impact evidence, and the second relating to important changes that should come in the way appellate courts address claimed errors in the admission of impact evidence at capital sentencing proceedings.

A. The Need for Procedural Controls and Substantive Limits on Victim Impact Evidence

Despite *Payne's* blithe assurance to the contrary, the reality is that victim impact evidence is not "simply another form or method" of imparting information to the sentencer.[204] Rather, it is perhaps the most compelling evidence available to the State—highly emotional, frequently tearful testimony coming directly from the hearts

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200. *See supra* notes 88–97 and accompanying text. *See also* Phillips, *supra* note 44, at 105–13 (raising concern of class bias and noting strong yet variable influence that the appealing characteristics of particular witnesses can have on juror perceptions).

201. Markus D. Dubber, *Regulating the Tender Heart When the Axe Is Ready to Strike*, 41 BUFF. L. REV. 85, 155 (1993). *See also* Payne v. Tennessee, 501 U.S. 808, 866 (1991) (Stevens, J., dissenting) ("The notion that the inability to produce an ideal system of justice in which every punishment is precisely married to the defendant's blameworthiness somehow justifies a rule that completely divorces some capital sentencing determinations from moral culpability is incomprehensible to me.").

202. As noted by Justice Stevens in his *Payne* dissent, in reality, scant need exists to "balance" the playing field between the victim's family and the defendant: the latter has just been convicted of capital murder, hardly an enviable strategic position, and the State is already empowered to rebut any mitigating evidence and can designate aggravating factors consistent with the law. *See Payne*, 501 U.S. at 859 (Stevens, J., dissenting).

203. As Justice Stevens also noted in *Payne*, the use of impact evidence at capital sentencing is "a classic non sequitur: The victim is not on trial; her character, whether good or bad, cannot therefore constitute either an aggravating or mitigating circumstance." *Id.*

204. *Id.* at 825. The *Payne* Court further declared, "there is no reason to treat [impact] evidence differently than other relevant evidence is treated." *Id.* at 827.

Professor Susan Bandes has persuasively argued that impact evidence has a much larger purpose than merely showing the "uniqueness" of the victim: "The victim impact statement was never intended simply to provide more information; rather, it has a political and strategic purpose all its own. The victim impact statement dehumanizes the defendant and employs the victim's story for a particular end: to cast the defendant from the human community." Bandes, *supra* note 13, at 410.

and mouths of the survivors left behind by killings. And it arrives at the precise time when the balance is at its most delicate and the stakes are highest—when jurors are poised to make the visceral decision of whether the offender lives or dies—[205]after the defendant has been convicted of the most horrendous crime possible.[206] Even given the Supreme Court's increasing tolerance for flaws in capital decision making,[207]and the increasing currency of permitting "emotion" to play a role in capital decisions,[208] while denying that "sympathy" as to defendants should play a role,[209] the time has come to set some limits on evidence that can ignite the "natural desire to avenge the outrage and to eliminate its perpetrator."[210]

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205. *See* Joan W. Howarth, *Deciding to Kill: Revealing the Gender in the Task Handed to Capital Jurors*, 1994 WIS. L. REV. 1345, 1396–98 (describing emotionally volatile nature of capital decisions).

206. As Susan Bandes has noted:

> [F]or the jury to empathetically connect with the defendant during the sentencing phase of a capital trial is an extremely difficult task. Not only has the defendant been convicted of a heinous crime—a fact that by itself sets him very much apart from the jury's experience—but he may be from a radically different socioeconomic milieu as well.

Bandes, *supra* note 13, at 400. *See also* Bowers, *supra* note 171, at 1100–01 (discussing empirical results of the national Capital Jury Project indicating significant relation between juror guilt determinations and juror votes in favor of death sentences); Gewirtz, *supra* note 48, at 870 ("Introducing victim impact evidence at the proceeding on whether the defendant should live or die almost always increases the chance that the jury will impose a death sentence."). *See also* State v. Muhammad, 678 A.2d 164, 200 (N.J. 1996) (Handler, J., dissenting) (citing State v. Erazo, 594 A.2d 232 (N.J. 1991), decided before *Payne*, which involved testimony that victim was a "religious" and "wonderful" woman; upon being reversed, and retried without such testimony, the defendant received a life term instead of death).

207. *See, e.g.*, Tuilaepa v. California, 512 U.S. 967, 973 (1994) (holding that the State need not eliminate all risk of prejudice; it need only minimize such risk); McCleskey v. Kemp, 481 U.S. 279, 313 (1987) (dismissing statistical evidence of racial bias in capital sentencing as not "constitutionally significant"); Gregg v. Georgia, 428 U.S. 153, 226 (1976) (White, J., concurring) ("Mistakes will be made and discrimination will occur which will be difficult to explain."). *Compare* California v. Ramos, 463 U.S. 992, 998–99 (1983) (stating that "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination"); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (recognizing need for "greater degree of reliability" in capital sentencing).

208. *See* Dubber, *supra* note 201, at 110 ("Once it is accepted that certain emotional responses have a place in capital sentencing, the focus shifts to distinguishing between appropriate and inappropriate emotional responses."). *See also* Morris R. Cohen, *Moral Aspects of the Criminal Law*, 49 YALE L.J. 987, 1010–12 (1940) (regarding it as "sentimental foolishness" to ignore the significance of retributive will in criminal decision making); Dan Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269 (1996) (discussing the role of emotion in punishment decisions); Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655 (1989) (same).

209. *See* Saffle v. Parks, 494 U.S. 484, 490 (1990) (upholding capital instruction that jurors "must avoid any influence of sympathy" in deciding upon a sentence); California v. Brown, 479 U.S. 538, 542 (1987) (upholding instruction that jurors must not be swayed by "mere sympathy").

210. Harris v. Vasquez, 943 F.2d 930, 967 (9th Cir. 1991) (Noonan, J., dissenting).

First, some practical limit must be placed on the range of those persons permitted to testify to "impact." As several states have already done, a reasonable limit is found in those fairly categorized as "family."[211] Also, as New Jersey has done, only under exceptional circumstances should children be permitted to testify to impact,[212] and unless exceptional circumstances are present, only one witness should be permitted to provide testimony.[213] The testimony itself should be committed to writing, subject to pre-trial, in-camera review under Rule of Evidence 403 standards of prejudice,[214] and read in verbatim form to the sentencing authority.[215] During the in-camera hearing, the trial court should admonish the prospective witness that the testimony will not be permitted if the witness is not able to control his or her emotions on the witness stand.[216]

As for substantive limits, jurisdictions should specify in advance what forms of evidence can be considered. As discussed, *Payne* permits both "victim characteristics" evidence and more general "impact" evidence relating to the toll the murder has had. The New Jersey Supreme Court has provided the following helpful guideline on the permissible scope of the State's evidence:

> [A] general factual profile of the victim [can be provided], including information about the victim's family, employment and education, and interests. The testimony can describe generally the impact of the victim's death on his or her immediate family. The testimony should be factual, not emotional, and should be free of inflammatory comments or references.[217]

Because of the inherent difficulty of placing any meaningful constraints on its nature and scope, testimony regarding the effect of the victim's death on any "community," however defined, should not be permitted.[218] Nor should "family members' characterizations and opinions about the crime, the defendant, [or] the appropriate sentence," as still prohibited by *Payne*, be allowed.[219] Furthermore, some limit should be imposed on the general scope of permissible impact evidence, such as in Oklahoma and Tennessee, where consideration is given only to the *financial, emotional, psychological, and physical impacts* of the murder on the victim's family.[220] With

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211. *See supra* note 63 (describing such approaches). For a definition of "family," see BLACK'S LAW DICTIONARY 604 (6th ed. 1990) (stating that the term "[m]ost commonly refers to a group of persons consisting of parents and children; father, mother and their children; immediate kindred, constituting fundamental social unit in civilized society").

212. State v. Muhammad, 678 A.2d 164, 180 (N.J. 1996) (stating that "minors should not be permitted to present victim impact evidence except under circumstances where there are no suitable adult survivors and thus the child is the closest living relative").

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *See* discussion at *supra* notes 109–14 and accompanying text.

219. *See* Payne v. Tennessee, 501 U.S. 808, 830 n.2 (1991).

220. *See* Cargle v. State, 909 P.2d 806, 828 (Okla. Crim. App. 1995); State v. Nesbit, 978 S.W.2d 872, 891 (Tenn. 1998).

"emotional" impact evidence in particular, however, the reviewing court should exercise special care due to the inherently inflammatory nature of such testimony.[221]

Finally, there is the issue of what role impact evidence should play in death decisions. The approach recently adopted by Tennessee has the greatest appeal of any now used. Tennessee permits the introduction of impact evidence only when, on the basis of an in-camera hearing, the trial judge "determines that evidence of one or more aggravating circumstances is already present in the record."[222] The jury is then instructed as follows:

> 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. You may consider this evidence in determining an appropriate punishment. However, your consideration must be limited to rational inquiry into the culpability of the defendant, not an emotional response to the evidence.
>
> Victim impact evidence is not the same as an aggravating circumstance.... Introduction of this victim impact evidence in no way relieves the State of its burden to prove beyond a reasonable doubt at least one aggravating circumstance which has been alleged. You may consider this victim impact evidence in determining the appropriateness of the death penalty only if you first find that the existence of one or more aggravating circumstances has been proven beyond a reasonable doubt by evidence independent from the victim impact evidence, and find that the aggravating circumstance(s) found outweigh the finding of one or more mitigating circumstances beyond a reasonable doubt.[223]

However futile these instructions might prove in ultimate effect,[224] due process and fair play require explicit acknowledgment by the trial court that jurors are not to make use of impermissible impact evidence.[225]

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221. *See supra* note 120.

222. *Nesbit*, 978 S.W.2d at 891.

223. *Id.* at 892. Similar instructions are provided in Georgia and Oklahoma. *See* Turner v. State, 486 S.E.2d 839, 843 (Ga. 1997); *Cargle*, 909 P.2d at 828.

224. Empirical studies indicate a pervasive failure among capital jurors to understand and follow sentencing instructions. *See* Bowers, *supra* note 171, at 1093 (noting that three-quarters of the preliminary sample of jurors reported that instructions "simply provided a framework for a decision already made by most jurors"); James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing: Guided or Misguided?*, 70 IND. L.J. 1161, 1176 (1995) (concluding that juror misunderstandings of instructions "increases the likelihood of the jury returning a verdict of death"). *See also* Peter M. Tiersma, *Dictionaries and Death: Do Capital Jurors Understand Mitigation?*, 1995 UTAH L. REV. 1, 10–11 (describing other research findings of widespread juror misunderstanding of pattern jury instructions). At the same time, however, "judicial instructions are frequently employed as persuasive arguments in group decision-making...." Valerie P. Hans, *How Juries Decide Death: The Contributions of the Capital Jury Project*, 70 IND. L.J. 1233, 1238 (1995).

225. *See* State v. Hightower, 680 A.2d 649, 661 (N.J. 1996) ("Allowing victim impact information to be placed before the jury without proper limiting instructions has the

Although the aforementioned measures would by no means ensure that impact evidence is not unduly inflammatory and irrelevant, they can provide at least a modicum of protection against the arbitrary introduction and use of impact evidence, in sharp contrast to the current state of the law.

B. The Need for Meaningful Appellate Review

The second area of needed reform concerns the woefully inadequate appellate review currently exercised over the admission of victim impact evidence. Concurring in *Payne*, Justice O'Connor expressed obvious optimism over the capacity of appellate courts to oversee the admission of impact evidence:

> The possibility that this evidence may in some cases be unduly inflammatory does not justify a prophylactic, constitutionally based rule that this evidence may never be admitted. Trial courts routinely exclude evidence that is unduly inflammatory; where inflammatory evidence is improperly admitted, appellate courts carefully review the record to determine whether the error was prejudicial.[226]

The case law, however, makes clear that Justice O'Connor's confidence in the appellate process was excessive, if not misplaced altogether. Trial courts now regularly admit evidence in contravention of *Booth's* still-applicable Eighth Amendment prohibition of "family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence,"[227] and evince little interest in enforcing *Payne's* nebulous "unduly prejudicial" due process proscription.[228] Moreover, appellate courts regularly affirm death sentences based on such evidence, because the admission amounts to "harmless error," or, in instances when no objection was made by defense counsel, does not rise to "plain error."

Although the proliferation of harmless and plain error review is not unique to capital sentencing,[229] the consequences of the phenomenon are indisputably most

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clear capacity to taint the integrity of the jury's decision on whether to impose death.").

226. Payne v. Tennessee, 501 U.S. 808, 831 (1991) (O'Connor, J., concurring).

227. *Id.* at 830 n.2. According to the *Booth* Court, this evidence "creates an impermissible risk that the capital sentencing decision will be made in an arbitrary manner," in violation of the Eighth Amendment. Booth v. Maryland, 482 U.S. 496, 505 (1987).

228. *Payne*, 501 U.S. at 825.

229. Judge Harry T. Edwards, Chief Judge of the D.C. Court of Appeals, recently commented on this evolution as follows:

> [Harmless error] now stands as the inevitable last resort of government lawyers—and, too often, I think, of appellate judges—confronted with undeniable trial error in criminal cases. At the same time, judicial application of the plain-error rule has made it ever more difficult for criminal defendants to bring an objection not raised at trial. The net result is that appellate courts have deemed more errors harmless and fewer errors plain.

Harry T. Edwards, *To Err is Human, But Not Always Harmless: When Should Legal Error Be Tolerated*, 70 N.Y.U. L. REV. 1167, 1173 (1996). *See also id.* at 1171 ("As a result, defendants asserting violations of individual rights and liberties on appeal frequently receive a standard response: the errors to which they objected at trial were harmless; the errors to which they

dire there. The Supreme Court on at least two occasions has invoked harmless error principles to address constitutional error arising in the capital sentencing context, while also making clear its unease in doing so. In *Satterwhite v. Texas*,[230] the Court addressed whether harmless error analysis should apply in an appeal involving an undisputed Sixth Amendment violation of a defendant's right to have counsel present when undergoing a psychiatric evaluation, the results of which would be weighed by the capital jury at sentencing.[231] The *Satterwhite* Court concluded that, indeed, harmless error analysis did apply but articulated a stringent test: harmless error is present only "if the prosecution can prove beyond a reasonable doubt that [the] constitutional error did not contribute to the verdict...."[232] Stating that the "evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer,"[233] the Court reversed and remanded Satterwhite's death sentence for evaluation of whether admission of the psychiatric evaluation results was harmless.[234] "The question," the Court stated, "is not whether the legally admitted evidence was sufficient to support the death sentence, which we assume it was, but rather, whether the State has proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'"[235]

Two years later, in *Clemmons v. Mississippi*,[236] the Court addressed whether the Constitution bars a State from upholding a death sentence that is based in part on an invalid aggravating circumstance either by reweighing the otherwise admissible aggravating and mitigating evidence in the record or by assessing whether the error was harmless.[237] The *Clemmons* Court reversed and remanded the death sentence because it was unclear whether the Mississippi Supreme Court properly applied the *Satterwhite* harmless error standard.[238] In so doing, the Court cautioned that harmless error analysis is not always appropriate in the appellate review of death sentences: "In some situations, a state appellate court may conclude that peculiarities in a [capital]

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failed to object were not plain."); John M. Walker, Jr., *Harmless Error Review in the Second Circuit*, 63 BROOKLYN L. REV. 395, 395 (1997) ("It is quite possible that [harmless error] principles determine the outcome of more criminal appeals than any other doctrine.").

For a discussion of the recent historic origin and proliferation of harmless error see David McCord, *The "Trial"/"Structural" Error Dichotomy: Erroneous, and Not Harmless*, 45 U. KAN. L. REV. 1401, 1403–07 (1997). The author notes that "[f]rom the beginning of the American republic until well into the twentieth century, American courts generally operated under the Exchequer Rule adopted from England that any error in the trial court proceedings, no matter how trivial, mandated appellate reversal." *Id.* at 1403.

230. 486 U.S. 249, 254 (1988).

231. Several years before, in *Estelle v. Smith*, 451 U.S. 454, 471 (1981), the Court held that the failure to notify counsel of such an examination violated a defendant's Sixth Amendment right to assistance of counsel.

232. *Satterwhite*, 486 U.S. at 256.

233. *Id.* at 258.

234. *Id.* at 260.

235. *Id.* at 258–59 (citing Chapman v. California, 386 U.S. 18, 24 (1967)).

236. 494 U.S. 738 (1990).

237. The aggravating circumstance at issue, whether the killing was "especially heinous, atrocious or cruel," was previously found constitutionally invalid in *Maynard v. Cartwright*, 486 U.S. 356, 363–64 (1988).

238. *Clemmons*, 494 U.S. at 754.

case make appellate reweighing or harmless-error analysis extremely speculative or impossible."[239]

The speculation alluded to by the *Clemmons* and *Satterwhite* Courts stems from the very nature of the capital punishment decision itself. At the penalty phase, capital juries must arrive at a "reasoned moral response" to defendants' murderous acts,[240] and make highly qualitative and delicate decisions that turn on their interpretations of the evidence. In this sense, the job of penalty phase capital juries is distinctly different from that of guilt phase juries,[241] and how they are affected by the evidence—most especially emotionally powerful victim impact evidence—defies easy evaluation.[242] According to Judge Patrick Higginbotham, "the ultimate [death decision] is visceral...it necessarily reflects a gut-level hunch as to what is just."[243] The challenge of assessing harm in capital proceedings is exacerbated by the inherent interpretative difficulties attending the "cold record" on which appellate courts must rely. As Chief Judge Harry Edwards of the D.C. Circuit Court of Appeals recently noted:

> An appellate judge's view of the trial is limited to the record, and, as any observer of the judicial process is aware, many events pass without

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239. *Id.* The Alabama Supreme Court, in a case decided seven years before *Payne*, expressed identical concern over the use of harmless error in capital appellate review, stating: "The harmless error rule is to be applied with extreme caution in capital cases. We hold that caution must also be observed when reviewing error committed at the penalty phase of the trial. After all, it is the penalty which distinguishes these cases from all other cases." Whisenhant v. State, 482 So. 2d 1247, 1249 (Ala. 1984). Fifteen years after its issuance, *Whisenhant* appears strikingly ironic given the notable indulgence of recent Alabama courts in their use of harmless error review of improper impact evidence. *See supra* note 189 and accompanying text.

240. California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

241. *See* California v. Ramos, 463 U.S. 992, 1007 (1983) (noting the "fundamental difference between the nature of the guilt/innocence determination...and the nature of the life/death choice at the penalty phase of a capital trial"); Burlington v. Missouri, 451 U.S. 430, 450 (1981) (Powell, J., concurring) ("Underlying the question of guilt or innocence is an objective truth: the defendant, in fact, did or did not commit the acts constituting the crime charged.... The sentencer's function is not to discover a fact, but to mete out just deserts [sic] as he sees them."). *See also* Linda E. Carter, *Harmless Error in the Penalty Phase of a Capital Case: A Doctrine Misunderstood and Misapplied*, 28 GA. L. REV. 125, 153 (1993) ("The effect of the variability in the penalty phase decision on the use of the harmless error doctrine cannot be underestimated...the use of evidence in the penalty phase is unpredictable."); Mark Costanzo & Sally Costanzo, *Jury Decision Making in the Capital Penalty Phase*, 16 LAW & HUM. BEHAV. 185, 189–90 (1992) (describing the penalty phase as a "value-laden decision" heavily influenced by "fairness or group values," in contrast to a guilt decision which is "factual" and driven by "facts and information").

242. *See* Burns v. State, 609 So. 2d 600, 607 (Fla. 1992) (remanding for new sentencing because harmlessness of impact evidence could not be determined with "certainty"); State v. Hightower, 680 A.2d 649, 662 (N.J. 1996) (noting that "[t]he impact that improperly introduced victim impact evidence has on a jury is difficult to gauge"). *See also* Hays v. Arave, 977 F.2d 475, 481 & n.12 (9th Cir. 1992) (noting that inability to accurately assess prejudicial effect is heightened given the "increasing use of victim impact testimony").

243. Patrick E. Higginbotham, *Juries and the Death Penalty*, 41 CASE W. RES. L. REV. 1047, 1048–49 (1991).

> casting so much as a shadow upon the printed transcript.... Most importantly, an appellate panel cannot possibly know what a jury might have done if the case had been tried without error.[244]

The foregoing concerns have prompted calls for the repudiation of harmless error doctrine in the review of capital sentences.[245] While such a view has considerable merit, given the profound difficulty of assessing "harm" in the delicate calculus of capital decisionmaking,[246] and the deterrent value it might have for prosecutors,[247]

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244. *See* Edwards, *supra* note 229, at 1193–94. Justices Marshall and Brennan, concurring in *Satterwhite*, expressed a similar sentiment. Characterizing the death decision as a "profoundly moral evaluation of the defendant's character and crime," they were at pains to caution that "predicting the reaction of a sentencer...on the basis of a cold record is a dangerously speculative enterprise." Satterwhite v. Texas, 486 U.S. 249, 261–62 (1988) (Marshall, J., concurring).

245. *See, e.g.*, State v. DiFrisco, 645 A.2d 734, 781 (N.J. 1994) (Handler, J., dissenting) (arguing that it "is virtually impossible to reconstruct [the capital decision making] process after it has been completed"); Louis D. Bilionis, *Moral Appropriateness, Capital Punishment, and the* Lockett *Doctrine*, 82 J. CRIM. L. & CRIMINOLOGY 283, 316–26 (1991) (arguing that violation of capital defendant's right to introduce relevant mitigating evidence warrants per se reversal); James C. Scoville, Comment, *Deadly Mistakes: Harmless Error In Capital Sentencing*, 54 U. CHI. L. REV. 740, 749–50 (1987) (asserting that "when error—whether constitutional or not—is found in the sentencing phase of a capital case, the sentence must be reversed").

246. This difficulty, exacerbated by the compelling emotional quality of impact evidence, strongly militates in favor of classifying improperly admitted impact evidence as "structural" error, which the Supreme Court in *Arizona v. Fulminante*, 499 U.S. 279 (1991), held warrants per se reversal because its uncertain yet permeating influence defies analysis by harmless error standards. *Id.* at 309. The other category, "classic trial error," the harmlessness of which can be "quantitatively assessed in the context of other evidence," is reversible only if the State is unable to establish harmlessness beyond a reasonable doubt. *Id.* at 307–10. As the Idaho Supreme Court stated in reversing a pre-*Payne* use of victim impact evidence: "It is a rare capital case where the inclusion of a victim impact statement will not fatally flaw the entire sentencing procedure." State v. Paz, 798 P.2d 1, 17 (Idaho 1990). *See also* Sullivan v. Louisiana, 508 U.S. 275, 282 (1993) (holding harmless error inapplicable when error is "unquantifiable and indeterminate"); People v. Frank, 700 P.2d 415, 428 (Cal. 1985) (admission of improper evidence at penalty phase of capital trial "infected the entire proceeding on this question, and was therefore prejudicial under any test"); Cannaday v. State, 455 So. 2d 713, 724 (Miss. 1984) (improper admission of incriminating statement at capital trial "so infected the sentence phase that reversal of that phase must be ordered").

Further, in instances of flagrant prosecutorial use of improper impact evidence, there might exist an example of "deliberate and especially egregious error of the trial type" deemed per se reversible by the Court in *Brecht v. Abrahamson*, 507 U.S. 619 (1993). In *Brecht*, which addressed the proper standard of harmlessness in federal habeas filings by state prisoners, the Court did not "foreclose the possibility that in an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict." *Id.* To date, at least two federal circuit courts have recognized this approach as a third type of constitutional error, one requiring automatic reversal. *See* Cupit v. Whitley, 28 F.3d 532, 538 (5th Cir. 1994); Hardnett v. Marshall, 25 F.3d 875, 879 (9th Cir. 1994).

247. *See* Rose v. Clark, 478 U.S. 570, 588–89 (1986) (Stevens, J., concurring) ("An

wholesale abandonment is not in order. This is as much for practical as for jurisprudential reasons for at this point there is a solid body of Supreme Court precedent relating to harmless error review of capital penalty phase errors.[248] Furthermore, the truth is, the very benefits attending harmless error analysis in non-capital cases—finality, conservation of judicial resources, and the value of not allowing non-prejudicial errors to compromise adjudications[249]—apply in capital sentencing, notwithstanding the "awesome severity" of the capital sanction.[250]

What is called for, however, is actual observance of the principles and rules enunciated by the Court in its harmless error cases, an adherence that is now palpably absent in the case law regarding victim impact evidence.

1. The Predominance of "Verdict-Based" or "Quantitative" Harmless Error Review

A review of the hundreds of appellate victim impact cases handed down since *Payne* convincingly establishes the overwhelming use of what can best be described as a "verdict-based" or "quantitative" method of appellate review. This predisposition was obvious in Justice O'Connor's concurring opinion in *Payne*, where she reasoned:

> I do not doubt that the jurors were moved by this testimony—who would not have been? But surely this brief statement did not inflame their passions more than did the facts of the crime.... In light of the jury's unavoidable familiarity with the facts of Payne's vicious attack, I cannot conclude that the additional information provided by [the grandmother's] testimony deprived petitioner of due process.[251]

Justice O'Connor's relativistic approach has been adopted by appellate courts nationwide in their review of impact evidence.[252] In resolving appeals, these courts

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automatic application of harmless-error review in case after case, and for error after error, can only encourage prosecutors to subordinate the interest in respecting the Constitution to the ever-present and always powerful interest in obtaining a conviction in a particular case."). *See also* Edwards, *supra* note 229, at 1198:

> We send a message through our criminal justice system each time we reverse or remand a conviction on the ground that the police or prosecutors have violated a defendant's individual rights. Upon receiving such a message, the criminal justice system corrects itself accordingly. Thus, when we shrink from our duty to overturn convictions in individual cases, we accomplish nothing less than a subversion of the rules that we have devised to protect our shared values.

248. *See, e.g.*, Clemmons v. Mississippi, 494 U.S. 738 (1990); Satterwhite v. Texas, 486 U.S. 249 (1988).

249. *See Rose*, 478 U.S. at 577.

250. *Satterwhite*, 486 U.S. at 263 (Marshall, J., concurring).

251. Payne v. Tennessee, 501 U.S. 808, 832 (1991) (O'Connor, J., concurring).

252. *See, e.g.*, Alston v. State, 723 So. 2d 148, 160 (Fla. 1998) (stating that "given the strong case in aggravation and the relatively weak case for mitigation, we find that the claimed error...is harmless beyond a reasonable doubt"); Evans v. State, 637 A.2d 117, 131 (Md. 1994) (citing Justice O'Connor's concurrence and finding harmless error "[i]n light of

typically compare the volume of allegedly improper impact evidence vis-à-vis the evidence otherwise properly put before the jury.[253] In an apparent effort to rationalize outcome, many courts actually count the number of transcript pages consumed by impermissible impact evidence, and then compare this number of pages against the pages of the sentencing-phase transcript as a whole[254] or the impact evidence in otherwise properly admitted.[255]

This approach flies in the face of the basic harmless error teachings of the Supreme Court for at least two reasons. First, under *Satterwhite*, the State must establish "beyond a reasonable doubt that the error complained of did not contribute to the [death sentence],"[256] rather than merely that the "legally admitted evidence was sufficient to support the death sentence."[257] The question, *Satterwhite* teaches, "is not whether the legally admitted evidence was sufficient to support the death sentence...but rather, whether the State has proved 'beyond a reasonable doubt' that the error complained of did not contribute to the verdict obtained."[258] Despite this

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the jury's extensive knowledge about the facts of these murders..."); State v. Simmons, 944 S.W.2d 165, 187 (Mo. 1997) (en banc) (citing at length the gruesome facts of the case and alluding to Justice O'Connor's deference to "the jury's unavoidable familiarity with the facts...").

253. *See, e.g.*, Williams v. Chrans, 945 F.2d 926, 947 (7th Cir. 1991) (stating that the "[v]ictim impact statement was relatively brief, especially when compared to the overwhelming amount of aggravating evidence admitted"); People v. Kitchen, 636 N.E.2d 433, 448 (Ill. 1994) (finding that improper impact evidence was harmless because it "was not stressed or emphasized"); Harrison v. State, 644 N.E.2d 1243, 1261 (Ind. 1995) (impact evidence "brief and not likely to have influenced [the] jury"); Hooper v. State, 947 P.2d 1090, 1104–05 (Okla. Crim. App. 1997) (only "a small portion of the victim impact testimony was overly emotional and prejudicial...."). *See also* Cargle v. State, 909 P.2d 806, 835 (Okla. Crim. App. 1995) (admission of improper impact evidence was "classic trial error... which may therefore be quantitatively assessed in the context of other evidence presented...").

254. *See, e.g.*, *Harrison*, 644 N.E.2d at 1261 (harmless error when impact evidence constituted seven sentences); Bivins v. State, 642 N.E.2d 928, 957 (Ind. 1994) (harmless when impact evidence consumed mere 12 lines of transcript); State v. Williams, No. 96-KA-1023, 1998 WL 271832, at *14–16 (La. May 19, 1998) (harmless when impact evidence "brief" relative to defendant's 72 pages of mitigation evidence); State v. Taylor, 669 So. 2d 364, 371 (La. 1996) (harmless when impact evidence consumed 10 pages and defendant put on 20 penalty phase witnesses); State v. Humphries, 479 S.E.2d 52, 56 (S.C. 1996) (harmless when impact evidence consumed 20 of 271 pages of penalty phase transcript); Cantu v. State, 939 S.W.2d 627, 637–38 (Tex. Crim. App. 1997) (harmless when impact evidence consumed 20 of 700 pages).

255. *See, e.g.*, State v. Frost, 1998 WL 827279, at *11 (La. Dec. 1, 1998) (improper impact testimony "comprised less than half the entire victim impact testimony adduced during the penalty phase"). *Cf.* Miller v. State, 1998 WL 812940, at *15 (Okla. Crim. App. Nov. 5, 1998) (finding harmless error because properly admitted impact evidence "was much more compelling").

256. *Satterwhite*, 486 U.S. at 256. *See also* Jackson v. Dugger, 547 So. 2d 1197, 1199 (Fla. 1989) (pre-*Payne* case vacating death sentence because reviewing court could not "say beyond a reasonable doubt that the jury would have recommended a sentence of death had it not heard the victim impact evidence presented here").

257. *Satterwhite*, 486 U.S. at 258.

258. *Id.* at 258–59 (citing Chapman v. California, 386 U.S. 18, 24 (1967)). *See also*

plain directive, as just noted, courts routinely fail to ensure that the improperly admitted impact evidence did not "contribute" to the death verdict, and look instead to the properly admitted evidence.[259] Worse yet, appellate courts commonly misdesignate the burden of proof in the harm analysis, expressly or tacitly placing the burden of establishing harm on the appellant-defendant rather than the State.[260]

Second, the approach lacks any semblance of the prevailing concern in *Satterwhite* and *Clemmons* that reviewing courts should not be quick to assess whether erroneously admitted penalty phase evidence "contributed" to a death sentence.[261] Indeed, Justice O'Connor's approach perversely operates to blind appellate courts to possible undue prejudice in the very context in which the most keen supervisory oversight is needed, gory death penalty cases. Under Justice O'Connor's reasoning, as noted by one dissenting New Jersey appellate judge, "whenever the impact evidence is brief and the [admissible] facts of the case extreme...victim impact evidence is always admissible because it could not impact upon the fact finder's decision."[262] The judge added:

Kotteakos v. United States, 328 U.S. 750, 764 (1964):

> [T]he question is, not were [the fact-finders] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting.

Whether the reviewing court focuses on the improperly admitted evidence, or on that properly admitted, has enormous practical effect. As noted by one commentator:

> When the Court has focused on the erroneously admitted or excluded evidence, emphasizing the significance of that evidence and analyzing whether the evidence "contributed" to the verdict, the Court has found that the error was not harmless. In contrast, when the Court has focused on the properly admitted evidence and analyzed whether that evidence created an overwhelming case against the defendant, the Court has found the error harmless.

Carter, *supra* note 241, at 137–38.

259. *See supra* notes 252–55 and accompanying text.

260. *See, e.g.*, Charm v. State, 924 P.2d 754, 766 (Okla. Crim. App. 1996) (noting that defendant had "not demonstrated that the jury's sentencing discretion was not properly channeled, that the victim impact evidence influenced the jury to impose a sentence not supported by the evidence, or that the evidence was insufficient to support the three alleged aggravators the jury found to have existed"). *But cf.* O'Neal v. McAnnich, 513 U.S. 432, 436–37 (1995) (stating that both collateral and direct harmless error review do not involve "burdens of proof" per se; rather, reviewing judges must determine on the basis of the record whether harm exists, irrespective of whether either party has borne its "burden").

261. *See supra* notes 231–39 and accompanying text. A recent Ohio case underscores this tendency. In stark contrast to *Satterwhite*, the Ohio Supreme Court stated:

> We agree that the prosecutor's remarks imploring the jury to consider the effect of the crime...were likely improper. It is impossible to determine the weight given the victim-impact evidence by the jury. We conclude that the outcome of the penalty phase would not clearly have been otherwise but for the imploring of the prosecutor.

State v. Reynolds, 687 N.E.2d 1358, 1369 (Ohio 1998).

262. Evans v. State, 637 A.2d 117, 144 (Md. 1994) (Bell, J., dissenting). *See also*

> it is at best simplistic to assume that, because a reference to one type of evidence in a trial is brief and the references to the other evidence in the case are extensive, that the former can never have any impact.... More important than the quantity of the evidence or the number of references is the quality of the evidence; the subject of the reference[;] and, in context, its potential significance on the decision the jury is called upon to make....[263]

By adopting a quantitative or verdict-based approach, appellate courts focus not on the effect of the impermissible evidence, but rather on the overall strength of the State's case, an approach surely at odds with the Court's accepted harmless error analysis, which turns on whether the error "contributed" to the sentencing outcome.[264]

Jonathan H. Levy, Note, *Limiting Victim Impact Evidence and Argument After* Payne v. Tennessee, 45 STAN. L. REV. 1027, 1057 (1993) (noting same).

Dissenting in *Payne*, Justice Marshall sharply criticized the harmless error analysis undertaken by the Tennessee Supreme Court, which had concluded that "'the death penalty was the only rational punishment available' in light of the 'inhuman brutality'...of the murder." Payne v. Tennessee, 501 U.S. 808, 854 n.4 (1991) (Marshall, J., dissenting) (citing State v. Payne, 791 S.W.2d 10, 19 (Tenn. 1990)). To his mind, the Tennessee approach amounted to a form of mandatory capital punishment; because the State introduced no additional penalty phase evidence, other than a video of the crime scene, it was "simply impossible to conclude that this victim-impact testimony, combined with the prosecutor's extrapolation from it in his closing argument, was harmless beyond a reasonable doubt." *Id.* at 854. *See also Evans*, 637 A.2d at 145 (Bell, J., dissenting) ("It is not the law of Maryland that a sentence of death may be imposed, as a matter of law, whenever the circumstances of the crime reveal that it was perpetrated in a vicious and brutal fashion. But that is the effect of the majority's harmless error analysis.").

263. *Evans*, 637 A.2d at 144. *See also* State v. Bey, 645 A.2d 685, 726 (N.J. 1994) (Handler, J., dissenting) ("Such a quantitative review does not, indeed cannot, take into account the complex value judgments that constitute juror determinations in the penalty-phase."); Le v. State, 947 P.2d 535, 551 (Okla. Crim. App. 1997) (stating that "[o]f course, prejudice is determined not by testimony's length but by its contents").

The Supreme Court of Pennsylvania exemplified just such an aversion in *Commonwealth v. McNeil*, 679 A.2d 1253 (Pa. 1996). In *McNeil*, the capital defendant raised an ineffective assistance of counsel claim based on his lawyer's failure to object to the admission of impact evidence, reasoning that Pennsylvania law at the time of his trial did not permit impact evidence. *Id.* at 1259. After first finding the failure to object to be error, the *McNeil* Court reversed because it was

> unable to determine how the sentencing jury considered the testimony in weighing the aggravating and mitigating circumstances. As only one aggravating and one mitigating circumstance were found, the jury may have improperly relied upon [the witness'] testimony to tilt the balance of evidence in favor of the death penalty. A new sentencing hearing is therefore required.

Id. at 1259–60.

264. *See Chapman*, 386 U.S. at 23 ("The question is whether there is a reasonable probability that the evidence complained of might have contributed to the conviction."). *See also* Satterwhite v. Texas, 486 U.S. 254, 260 (1988) (same).

Needless to say, the effect of improper arguments or evidentiary admissions does not admit of easy empirical validation. In one of the few studies conducted to date, however,

2. Perpetuating the Uncertain Bounds of Constitutional Error

In addition to being contrary to fundamental tenets of harmless error analysis, the "quantitative" or "verdict-based" approach is problematic for the stunting influence it has on the development of victim impact evidence case law. With very rare exception,[265] courts employing the approach altogether fail to reach the substantive merits of the particular constitutional claims raised by capital defendants. This is evident both with respect to Eighth Amendment challenges to inadmissible "characterization and opinion" evidence (prohibited by *Booth*), and the broad realm of evidence implicating the more nebulous "unduly prejudicial" Fourteenth Amendment due process standard (established by *Payne*). Rather than squarely addressing the merits of such claims, appellate courts now regularly undertake a quantitative assessment and focus instead on whether, absent the purported error, the sentence is justified.[266]

This avoidance has at least two unfortunate consequences. First, by failing to provide guidance on the parameters of acceptable impact evidence, appellate courts add further uncertainty to death adjudications. This lack of appellate guidance lessens the capacity of trial courts to rule on evidentiary claims,[267] and makes defense counsel all the more reluctant to raise objections to impact evidence at trial, which itself further impedes development of the law because of the exacting standard of review associated with "plain error."[268]

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researchers detected a significant effect. Upon presenting test subjects with an appellate record containing 12 concededly improper prosecutorial remarks made in the penalty phase of a capital trial, deemed harmless by the Eleventh Circuit, a control group reviewing the same record minus the erroneous remarks voted for death at a frequency 27% less than a group reviewing the record with the errors intact. *See* Judith Platania et al., *Prosecution Misconduct During the Penalty Phase of Capital Trials: Harmless Error?*, THE CHAMPION, July 1994, at 19.

265. The case law contains a mere handful of successful claims in the face of harmless error analysis. *See* Burns v. State, 609 So. 2d 600, 607 (Fla. 1992) (reversing when "testimony was extensive and it was frequently referred to by the prosecutor"); State v. Lambert, 675 N.E.2d 1060, 1065 (Ind. 1996) (finding harm when testimony "not brief"—29 transcript pages—and the "State did not play a silent part in the testimony"); State v. Hightower, 680 A.2d 649, 662 (N.J. 1996) (finding harm when court failed to provide limiting instruction when juror related to other jurors that the victims had children); Conover v. State, 933 P.2d 904, 922 (Okla. Crim App. 1997) (finding harm, in conjunction with other errors, when trial court refused to permit defendant to rebut impact evidence); State v. Metz, 887 P.2d 795, 803 (Or. Ct. App. 1994) (finding harm at time when Oregon law did not yet permit impact evidence, concluding: "after reviewing the poignant and compelling family impact evidence, we cannot say that there is 'little likelihood' that the jury's determination...would have been different if that evidence had been excluded").

266. *See supra* notes 252–55 and accompanying text.

267. *See* Edwards, *supra* note 229, at 1182 ("This practice leaves unresolved the question of whether an error even occurred, thus offering no guidance to trial courts.... Nothing suggests that the harmless-error rule was meant to serve such a purpose.").

268. The "plain error" doctrine is intended to provide redress for "miscarriages of justice" and is "to be used sparingly." *See* United States v. Frady, 456 U.S. 152, 163 & n.14 (1982). Plain error is a common basis for appellate courts to deny impact evidence claims when

Second, by failing to squarely address constitutional challenges, appellate courts in effect encourage questionable conduct among prosecutors. Confident in the knowledge that the possible impropriety of their tactics will not be squarely addressed (and condemned) by an appellate tribunal, prosecutors find themselves far freer to introduce highly inflammatory and improper evidence in capital trials.[269]

In sum, even if the nature of impact evidence precludes creation of a "bright-line" rule (other than the clear prohibition of witness "opinions and characterizations" as prohibited by *Booth*),[270] a critical need remains for the incremental development of the case law in this area, consistent with the historic common law mission of appellate decision making. Unfortunately, because of their current approach to resolving claims over impact evidence, appellate courts are failing to uphold this tradition.

V. CONCLUSION

To a greater extent than ever before, the barrier between violent criminal offenders and their victims is now showing wear in American justice. Although yet short of vigilante "blood feuds" of bygone times,[271] the system increasingly bears the unmistakable earmarks of self-help and emotionalism.[272] In this new era, the survivors of murder victims play a critical role. As Markus Dubber has observed, "[i]n the past, capital sentencing pitted the defendant against the State.... In the new paradigmatic sentencing hearing, the capital defendant now encounters an even more formidable opponent: the person whose death made her eligible for the death penalty, the capital victim."[273]

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no objection was raised below. *See, e.g.*, Weaver v. State, 678 So. 2d 260, 281 (Ala. Crim App. 1995) (erroneous admission of impact evidence at guilt phase did not "affect a substantial right of the appellant"); Sullivan v. State, 636 A.2d 931, 939 (Del. 1994) (improper impact evidence did not amount to plain error); People v. Kitchen, 636 N.E.2d 433, 447 (Ill. 1994) (improper impact evidence did not "deprive defendant of a fair trial, for the irrelevant evidence was not stressed or emphasized").

269. *See* ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 23 (1970) ("In the long run there would be a closer guard against error at the trial, if appellate courts were alert to reverse, in case of doubt, for error that could have contaminated the judgment."); Edwards, *supra* note 229, at 1194 ("[W]e can hardly expect prosecutors to respect the rights of criminal defendants...when we as judges are unwilling to do so.").

270. Yet even on this seemingly clear-cut question the courts have had difficulty, in particular, with regard to what amounts to an "opinion" on recommended sentence. *See supra* notes 141–58 and accompanying text.

271. *See supra* note 2 (describing historical evolution away from direct victim involvement in criminal prosecutions).

272. *See, e.g.*, Rick Bragg, *Union, S.C. is Left a Town Torn Asunder*, N.Y. TIMES, July 24, 1995, at A6 (noting that a major influence on the local prosecutor's decision to seek the death penalty in the Susan Smith murder trial was that the father of the two victims desired it, although community was ambivalent about its desire for death penalty).

Self-help is also evident among victims of sexual assault. Monetary "settlements" are increasingly being tendered by the defense, and accepted by victims, raising obstacles to effective criminal prosecutions. *See Prosecuting Sexual Assault* (Nat'l Pub. Radio, Morning Edition, Apr. 21, 1998).

273. *See* Dubber, *supra* note 201, at 86. Despite the undisputed success of the

Surely chief in significance among the many recent victim-oriented changes within the criminal justice system is the use of "victim impact evidence," an emotionally potent brand of evidence modestly designed to provide "a quick glimpse" of the "unique" life taken by the convicted murderer. Eight years after *Payne v. Tennessee* permitted the use of impact evidence in capital trials, however, it is obvious that far more than a mere "quick glimpse" is being offered jurors.[274] Capital jurors now regularly absorb extensive, highly inflammatory victim impact evidence, and, receive precious little in the way of guidance as to its purpose and function in death decisions. Compounding these problems, appellate courts have effectively disavowed any meaningful role in the review of the emotionally potent evidence, making the permissible bounds of impact evidence all the more uncertain.

While this permissive state of affairs can perhaps be understood, given the considerable appeal of giving a "voice" to the victims of violent crime,[275] it has immeasurably heightened the risk of arbitrary and capricious behavior in the very context our justice system can least afford it: the already supremely complex, delicate, and visceral decision of whether capital defendants are to live or die.[276] If death

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victims' movement, there is increasing concern that the movement's basic salutary humanitarian goals are being betrayed, if not coopted, by larger political and social forces that seize upon compelling images of "victimhood" for their own ends. As Joseph Amato has written, "[v]ictims have a changing worth on the political agenda. Available money, changing sensibilities, pressing problems all shape the vagaries of politics." JOSEPH A. AMATO, VICTIMS AND VALUES: A HISTORY AND A THEORY OF SUFFERING 197 (1990). *See generally* Lynne Henderson, *Co-Opting Compassion: The Federal Victim's Rights Amendment*, 10 ST. THOMAS L. REV. 579 (1998); Robert P. Mosteller, *Victims' Rights and the United States Constitution: An Effort to Recast the Battle in Criminal Litigation*, 85 GEO. L.J. 1691 (1997).

274. Indeed, the Supreme Court of Missouri has expressly rejected the idea that the State is limited in the volume of impact evidence it can present. According to the court, "to suggest...that *Payne* stands for the proposition that only a brief glimpse of the victim's life is constitutionally permissible is to misread that case." Kansas v. Knese, 1998 WL 62422, at *9 (Mo. Feb. 9, 1999) (en banc). Rather, without delineating how such a test applies, the question is whether the particular evidence in question makes the sentencing "fundamentally unfair." *Id.*

275. The influence of the victims' movement was starkly manifest in the McVeigh trial. Concerned that the testimony of prospective victim impact witnesses would be unfairly influenced, Judge Matsch excluded such witnesses from the guilt phase. *See* United States v. McVeigh, 958 F. Supp. 512, 514 (D. Colo. 1997). In response to survivors' pleas, on the eve of trial, Congress quickly enacted, and President Clinton signed, the "Victim Rights Clarification Act" designed to ensure their right to be present. *See* 18 U.S.C. § 3510 (Supp. 1997). *See also* 143 CONG. REC. S2507-01, S2507 (Mar. 19, 1997) (legislation makes it "indisputable that district courts cannot deny victims and surviving family members the opportunity to watch the trial merely because they will provide information during the sentencing phase of the proceedings").

276. The Supreme Court itself has noted the singular emotional and intellectual challenges facing capital jurors:

> A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide the issue on behalf of the community. Moreover, they are given only partial guidance as to how their judgment should be exercised, leaving them with

penalty jurisdictions persist in their desire to admit victim impact evidence, notwithstanding the verity of Justice Stevens' observation in *Payne* that "[t]he fact that each of us is unique is a proposition so obvious that it surely requires no evidentiary support,"[277] fairness and fundamental respect for our system of justice demand that steps be taken immediately to impose meaningful limits on what impact evidence is to be allowed, how it is to be presented, and to what use it is to be put.

Although permitted in the name of rendering the "balance true" between capital defendants and their victims, impact evidence has thrown the high-stakes process of capital decision making entirely out of kilter. The time has arrived to look anew at this radical new form of evidence and recalibrate the system once again.

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substantial discretion.

Caldwell v. Mississippi, 472 U.S. 320, 333 (1985). *See also* Gregg v. Georgia, 428 U.S. 153, 192 (1976) (Stewart, J.) (noting that "[s]ince the members of a jury will have had little, if any, previous experience in sentencing, they are unlikely to be skilled in dealing with the information they are given").

277. Payne v. Tennessee, 501 U.S. 808, 866 (Stevens, J., dissenting).