Victims' Voices and Constitutional Quandaries: Life After Payne v. Tennessee

Cait Clarke

Thomas Block

Follow this and additional works at: https://scholarship.law.stjohns.edu/jcred

Recommended Citation
Available at: https://scholarship.law.stjohns.edu/jcred/vol8/iss1/3

This Symposium is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in Journal of Civil Rights and Economic Development by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact lasalar@stjohns.edu.
As some day it may happen that a victim must be found, I’ve got a little list—I’ve got a little list. Of society offenders who might well be underground, And who never would be missed—who never would be missed.¹

Few issues have stirred such emotionally charged debates as the death penalty and its connection to victims’ rights. An escalation of violent crimes and overwhelming frustration with the judicial system have forced a diverse spectrum of American people to demand a change in both the state and federal criminal justice systems. Some believe that changes have not been swift enough, nor have the courts and legislatures been sensitive to the needs of victims.

The following dialogue between a law student and his professor² focuses upon some of the central issues regarding the admissibility of victim impact statements in capital sentencing cases. This dialogue will explore the relevant constitutional concerns and personal reflections upon the criminal justice process. This debate does not offer a panacea, but is intended to provide a personal, introspective examination of the words and effect of United States Supreme Court decisions in this area. Moreover, the debate will focus on the State of Louisiana’s struggle to protect a defendant’s constitutional rights in the most serious of all cases, capital sen-

* Associate Professor, Loyola University School of Law, New Orleans. J.D. Catholic University of America; LL.M. Georgetown University Law Center.

** B.A. English, University of Georgia 1988; J.D. expected 1993, Loyola University School of Law, New Orleans.


² Professor Clarke; Mr. Block. The authors wish to extend their most sincere gratitude to Lori A. Robinson, who stealthily and patiently guided us through this discourse. She will affectionately remain our “personal E.I.C.”
tencing cases, while at the same time protect and further victims' rights within the criminal justice system.

In New Orleans, a city where 490,000 people live and work, there were 345 homicides during 1991. My wife Beth was one of them. On August 28, 1991, at approximately 9:00 P.M., three young robbers approached us on bicycles as we were leaving our apartment. One of them, Melvin Green, a twenty year old, pulled a gun and told us to "give it up." Seconds later Beth ran for our car. Scared and fleeing for protection, she tried to lock herself inside. Through the car window, Green shot her once in the neck with a .357 magnum as she cowered inside the car. Beth died in my arms, never regaining consciousness. She was only 24 years old. Though we had been in love for seven years, we had been married only ten weeks. Melvin Green took from me the most important part of my life that night; he took my future and that of the woman I loved. With that single gunshot many lives were forever changed, if not destroyed. Today, two of the men have been tried and convicted; the third may not be prosecuted for lack of evidence.

On July 21, 1992, almost one year after shooting my wife, Green was brought to trial on a first degree murder charge. The State sought the death penalty. In a bifurcated capital punishment trial, the jury convicted Green of first degree murder. At the sentencing phase, the jury did not sentence Green to death. He was sentenced to life imprisonment without the opportunity for parole. In October of 1992, the second robber was tried for second degree murder under the Louisiana felony-murder doctrine. The jury convicted him of manslaughter.

I. VICTIM IMPACT STATEMENTS

Victim impact statements (VIS) are written or oral testimony introduced by the prosecution describing the effect of the crime upon the victim or her family including suffering, economic loss, medical expenses, physical impairment, and any other relevant information at the sentencing phase. The admissibility of VIS often

---

3 Statistics provided by the New Orleans Police Department, Public Information Officer.
4 See, e.g., LA. REV. STAT. ANN. § 46:1844 (West 1992). The statute states in pertinent part:

A. All judicial and law enforcement agencies shall provide the following services to victims, as specified: . . .

. . . .

(9) Before disposition or sentencing in any case where a defendant has been charged with or found guilty of a felony, the court shall notify the victim of the time
depends on whether the statements are proffered in a felony or capital sentencing case. The underlying constitutional claim raised in these capital sentencing cases is the Eighth Amendment prohibition of cruel and unusual punishment.⁶

All victim impact statements were excluded from Melvin Green's capital sentencing trial. During this "process" that began the night of August 28, 1991, I find that I have worn three hats—that of a law student, eyewitness, and victim. As a law student, I understand and acknowledge the necessity of a system in which certain protections attach to persons so that no arbitrary action may deny them their rights. I also understand that it was essential that the defendant be protected by the mantle of our Constitution. It was clear to me then and it still is today. As an eyewitness, however, I continually grapple with the nightmare of that night. The memory alone is something that most people can never begin to comprehend. The most frustrating role has been that of a victim because I have been left with many unanswered questions. I came to know a system which all but locked the victim out of the proceedings. It was the State of Louisiana against Melvin Green, but the State of Louisiana had not been murdered by Melvin Green, Beth had. The procedural safeguards in place for the defendant never took into account the thoughts of the victim or her immediate surviving family members. In the midst of this constitutional quandary, the Supreme Court of the United States allowed the states to decide when capital sentencing juries may hear the victims' voices.⁶

and place of sentencing and of the victim's right to make a victim's impact statement. The victim's impact statement may be made orally or in writing by the victim, the victim's family, the district attorney, or any or all of them. It shall be filed with the court and shall include the following:
(a) The name of the victim.
(b) Documentation of the net financial loss resulting from the crime.
(c) A statement of psychological impact on the victim's personal welfare or family relationships.

C. The family members of all homicide victims shall be afforded all of the rights under this Section accruing to victims.
Id. See also LA. CODE CRIM. PROC. ANN. art. 875(B) (West 1992) (VIS must include any monetary loss, medical expenses, physical impairment any other relevant information).
⁶ See U.S. Const. amend. VIII. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Id.; see also Gregg v. Georgia, 428 U.S. 153 (1976). In Gregg, the Supreme Court held that in comporting with societal standards of decency there must not be excessive infliction of pain nor must the penalty be grossly out of proportion to the severity of the crime. Id. at 173.
The Supreme Court of the United States has addressed the admissibility of victim impact statements three times within the past five years. In Booth v. Maryland, the defendant was convicted of first degree murder for the slaying of an elderly couple. In the sentencing phase of the capital case, the prosecution read to the jury a written VIS prepared by the State Division of Parole and Probation based on interviews with the victims’ son, daughter, son-in-law, and granddaughter.

The VIS contained two types of information. The first type described "the personal characteristics of the victims and the emotional impact of the crimes on the family." The VIS "emphasized the victims' outstanding personal qualities, and noted how deeply the [victims] would be missed." Also included were those statements that explored the emotional damage experienced by the surviving family members, such as sleep disorders, depression, fear and mental anguish haunting the survivors' daily lives, and the need for professional counseling. The second type of VIS introduced in Booth focused on "the family members' opinions and characterizations of the crimes and the defendant."

The Supreme Court concluded that both types of VIS were "irrelevant to a capital sentencing decision, and that its admission..."
create[d] a constitutionally unacceptable risk that the jury might impose the death penalty in an arbitrary and capricious manner." The Court stated that a jury must consider the defendant’s record, personal characteristics, and the circumstances of the crime in order to determine whether the defendant should receive the penalty of death for the murder conviction. The Court emphasized that the jury must focus on the defendant and his personal characteristics as a unique human being prior to imposing a sentence of death. The Court noted that VIS may impermissibly shift the focus away from the defendant and the victims’ family.

The Supreme Court considered this type of evidence irrelevant to the defendant’s blameworthiness, and expressed its disapproval of punishing more harshly those defendants whose victims had a greater relative worth within the community. Finally, the Court noted how difficult it is to rebut VIS “without shifting the focus of the sentencing hearing away from the defendant.” For example, it would be difficult to establish that the family members “exaggerated the degree of sleeplessness, depression or emotional trauma suffered.”

The Court also held that the second type of VIS was inadmissible because it could only “inflame the jury” and unconstitutionally divert the jury’s attention away from “deciding the case based on relevant evidence.” The Booth Court reasoned that courts could not admit VIS at the sentencing phase because of the impermissible risk that the capital sentencing decisions might be made arbi-

16 Booth, 482 U.S. at 503.
17 Id. at 502.
18 Id. at 504 (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion)).
19 Id. The Booth Court reasoned that the evidence of the victims’ characteristics and the harm done to the victims’ family is not probative of the defendant’s blameworthiness, which is the focus of the sentencing hearing. Id.
20 Id.
21 See Booth, 482 U.S. at 504-05.
22 Id. at 506. The Court attempted to avoid a “mini-trial” on the victims’ characters which would shift the jury’s attention away “from its constitutionally required task—determining whether the death penalty is appropriate in light of the background and record of the accused and the particular circumstances of the crime.” Id. at 507.
23 Id. at 506.
24 Id. at 508. “The admission of these emotionally charged opinions as to what conclusions the jury should draw from the evidence clearly is inconsistent with the reasoned decisionmaking we require in capital cases.” Id. at 508-09 (footnote omitted).
The Court was concerned that the VIS might not be related to the defendant's blameworthiness and that the jury would consider factors that were not relevant to the decision to kill. At the time of the killing, the defendant generally does not know the victim nor any of her personal characteristics. The Court reasoned that the victim's identity, and her relative "worth" in society, were beyond the defendant's knowledge and control. The defendant's "culpability depends not on fortuitous circumstances such as the composition of his victim's family, but on circumstances over which he has control." The sentencing jury must consider relevant information about the defendant and the decision to kill, not on how well the surviving victims can articulate their grief and their loss. More importantly, the inflammatory nature and varied quality of this information "creates an impermissible risk that the capital sentencing decision will be made in an arbitrary manner." The Booth reasoning set guidelines regarding VIS admissibility to ensure that capital sentencing juries adhere to the law, apply the facts presented, and avoid arbitrary sentences. Nevertheless, the Booth Court indicated that VIS might be admissible if it is related to the circumstances of the crime.

Two years later, the Supreme Court extended Booth in South Carolina v. Gathers. The Gathers Court held that VIS made by a prosecutor at closing argument to a sentencing jury had to be excluded pursuant to Booth. The prosecutor could not draw infer-

---

23 Id. at 503.
24 See Booth, 482 U.S. at 502.
25 Id. at 504.
26 Id. at 506 n.8.
27 Id. at 504 n.7 (quoting People v. Levitt, 203 Cal. Rptr. 276, 287-88 (Cal. Ct. App. 1984)).
28 Id. at 505. The victims' ability or inability to express their grief and the "worth" of the victim were held to be irrelevant to the jury's decision whether to impose a death sentence or a life sentence. Id.
29 Booth, 482 U.S. at 505.
30 Id. at 502.
31 Id.; see also id at 507 n. 10. In dicta, the Court noted that the event VIS's were related to the circumstances of the crime, it would conceivably be allowed. Id. To impose a sentence of death, the "jury must make an 'individualized determination' whether the defendant in question should be executed, based on 'the character of the individual and the circumstances of the crime.' " Id. at 502 (quoting Zant v. Stephens, 462 U.S. 862, 879 (1983)).
33 Id. at 807. In Gathers, the defendant and three other youths, killed a homeless, self-proclaimed preacher. Id. The statement regarding the personal characteristics of the victim
ences about the victim's character based on objects and papers found at the scene of the murder. The Gathers Court further held that the prosecutor's comments were unnecessary to understand the circumstances of the crime.

In 1991, the United States Supreme Court reconsidered the Booth and Gathers holdings in Payne v. Tennessee. The defendant was convicted, inter alia, of two counts of first degree murder of a twenty-eight year old mother, Charisse, and her two-year old daughter, Lacie. Nicholas, her three-year old son, survived the attack. At the sentencing phase Charisse's mother testified about the effect of the murder upon Nicholas. During closing argu-

in Gathers was indistinguishable from that type of statement introduced in Booth. Id. at 811. In the course of the murder, the defendant rummaged through the victim's belongings, including his voter registration card, two bibles, rosaries, plastic statues, and religious tracts, apparently looking for items to steal. Id. The Court stated that the jury should not be allowed to rely on information that "could result in imposing the death sentence because of factors about which the defendant was unaware, and that were irrelevant to the decision to kill." Id. at 811. "Under these circumstances, the content of the various papers the victim happened to be carrying when he was attacked was purely fortuitous and cannot provide any information relevant to the defendant's moral culpability." Id. at 812.

During closing arguments at the sentencing phase, the prosecutor remarked at length about the personal belongings of the victim present at the scene. Id. He read from one of the religious tracts carried by the victim and drew inferences about the victim's character from the items found in the victim's possession. Id. For example, he inferred from the victim's voter registration card his commitment to the community. Id. at 810.

Although the prosecutor, and not the surviving family members introduced the victim's personal characteristics, the Court found that the analysis turned on the content of the statement and not the manner in which the statements were presented to the jury. Id. at 811. Arguably, based on the prosecutor's remarks the jury voted to impose the death penalty. Id. at 810. On appeal, the state supreme court held that the prosecutor's remarks regarding the victim's character and inferences drawn from the victim's belongings were necessary to understand the circumstances of the crime, and were therefore inadmissible under Booth. Id. at 811.

On appeal before the United States Supreme Court, the government argued that the prosecutor's remarks were directly related to the circumstances of the crime and therefore admissible. Id. at 811. The Court held that the prosecutor's statements that the defendant threw the victim's belongings around the area were directly related to the circumstances of the crime and therefore relevant to the defendant's blameworthiness. Id. However, the Court objected to the prosecutor's extended commentary and inferences drawn from the victim's personal belongings. Id. The Court stated that there was no evidence that the defendant read any of the victim's personal papers, and thus the content of the papers was not directly related to the circumstances of the crime. Id. at 811-12.

Id. at 2601.
Id.
Id. at 2603. The VIS included the following testimony: "He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I tell him yes. He says, I'm worried about my Lacie." Id.
ments at the sentencing, the prosecutor commented on the continuing effects of the crime on Nicholas's daily life, referred to the atrocious and cruel nature of the crime, and speculated about the lost future of the victims.41

The Supreme Court granted certiorari42 to reconsider the "holdings in Booth and Gathers that the Eighth Amendment prohibit[ed] a capital sentencing jury from considering ‘victim impact’ evidence relating to the personal characteristics of the victim and the emotional impact of the crimes on the victim’s family."43 The Payne Court analyzed the rationale of Booth and concluded that it was an incorrect interpretation of the Eighth Amendment and should be overruled.44

Since the Supreme Court has held that the Eighth Amendment does not provide a per se bar to the introduction of VIS in the sentencing phase of capital offense cases,45 it is now an issue for the states to decide whether to include victim impact evidence in assessing the defendant’s culpability in a capital sentencing case.46 The Court expressly noted that its decision applied only to the first type of evidence addressed in Booth (VIS relating to the victim and the impact on the family).47 The second type of VIS (characterizations and opinions about the crime, the defendant, and the appropriate sentence) are unchanged by the holding in Payne.48 In the wake of this decision many states are exploring the admissibility of VIS in capital cases in light of the Payne decision.49

41 Id. "[T]here won't be a high school principal to talk about Lacie Jo Christopher, and there won't be anybody to take her to her high school prom. And there won't be anybody there—there won't be her mother there or Nicholas's mother there to kiss him at night. His mother will never kiss him good night or pat him as he goes off to bed, or hold him and sing him a lullaby." Id.


43 Payne, 111 S. Ct. at 2604. This was the first type of VIS discussed in Booth.

44 Id. at 2609.

45 Id. (holding Eighth Amendment erects no per se bar to states permitting admission of victim impact evidence and related prosecutorial argument on that subject).

46 Id. at 2608.

47 Id. at 2614-17 (Souter, J., concurring). Justice Souter divides VIS into three categories: 1) information revealing the "individuality of the victim;" 2) the impact of the crime on the victim's survivors; and 3) information concerning a victim's family members' characterization of and opinions about the crime, the defendant, and the appropriate sentence. Id.

48 Payne, 111 S. Ct. at 2611 n.2.

49 See infra text and accompanying notes 114-154.
II. Parity Through Payne

Like many of you, I have participated in the criminal justice system as part of my legal education. Few of you, however, have participated as a witness, and fewer still (I hope) have participated as a victim. It is largely in my role as victim that I hope to provide insight. In my opinion, the issues raised in this essay and in this symposium should not be debated in an academic vacuum. Just as the victim's voice must be heard in court, it must necessarily be heard here. To some, my comments may be inflammatory, but I do that purposely. Sometimes a person must scream in order to be heard.

The Supreme Court in Payne at last recognized the relevance of the impact on the victim in assessing the defendant's culpability. The decision also emphasized the distinction between the guilt and sentencing phases of a bifurcated trial. The reader must always remember that, by the time the sentencing phase of a trial is reached, twelve jurors have found the defendant guilty of murder beyond a reasonable doubt. At the sentencing phase, the defendant can no longer assert his innocence. In determining the appropriate sentence for the defendant, the jury must now consider the severity of the criminal act, its effect on society, and the full consequences of the defendant's actions, which necessarily include the harm done to the victim's family.50 As the majority in Payne explained, "two equally blameworthy criminal defendants may be guilty of different offenses solely because their acts cause differing amounts of harm."51 Ultimately, Payne "level[ed] the playing field" and ensured that the sentencing hearing applied equally to both the victim's and defendant's interests. The following are the major arguments used by proponents of the Booth and Gathers decisions to exclude VIS.

A. Personalized Punishment

There are several traditional justifications for punishment, including rehabilitation, deterrence, retribution, and incapacitation.52 The latter two justifications are the major theories underlying the death penalty.53 "The relevance of a particular type of
evidence is determined, in part, by the reason for which society seeks to punish.” Laws were enacted, and courts held prior to Payne, that only select information, such as the defendant’s prior criminal history, his propensity to commit violent crimes, and the circumstances of the crime, are relevant to determining a defendant’s blameworthiness as an individual member of society.

An important goal of capital sentencing hearings is to provide a comprehensive picture of the individual being sentenced and of the individual’s particular conduct in the criminal act. The sentence of death must reflect an individualized determination of the defendant’s “personal responsibility and moral guilt.” Thus, the sentencing phase must necessarily focus upon the defendant in order for the jury to ascertain the extent of the defendant’s culpability. Testimony and other evidence that diverts the jury’s attention away from the defendant as an individual and to the victim and the victim’s family risks denial of the defendant’s due process rights and raises other significant constitutional quandaries.

The admission of VIS does not divert the juror’s attention away from the crime and the defendant. There is no greater individualized determination than one which considers fully the loss or harm to society caused by the guilty party’s conduct. “[I]ndividualized consideration [is not] consideration wholly apart from the crime which [the defendant] has

86 See Gregg, 428 U.S. at 189. “We have long recognized that ‘[f]or determination of sentences, justice generally requires ... that there be taken into account the circumstances of the offense together with the character and propensities of the offender.’ ” Id. (citations omitted); Woodson v. North Carolina, 428 U.S. 280, 304 (1975) (stating that “individual sentencing determinations” mandate an analysis of defendant’s character, his previous record, and the surrounding circumstances of the crime).
88 See Woodson, 428 U.S. at 304 (“A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration ... the possibility of mitigating factors.”).
89 See Booth, 482 U.S. at 508 (indicating that presenting victim impact evidence by prosecution can only “inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant.”). But see id. at 516-17 (White, J., dissenting). “[I]f punishment can be enhanced in noncapital cases on the basis of the harm caused, irrespective of the offender’s specific intention to cause such harm, I fail to see why the same approach is unconstitutional in death cases.” Id.
committed." 

"[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 was an individual whose death represents a unique loss to society and in particular to his family.'" 

As the Payne Court explained, VIS reflect "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." 

B. The Sentence of Death Must Not Be Imposed Arbitrarily

Constitutional limitations are imposed at the sentencing phase to ensure that the defendant's sentence is based upon evidence of his conduct and not upon arbitrary factors or the passion and prejudice of the jury. The Supreme Court opinions in Booth and Gathers have promoted knowing and informed decision-making by capital sentencing juries. By prohibiting the admission of emotionally charged VIS at the sentencing phase, the Court fostered deliberate and careful construction of state capital sentencing statutes rather than a visceral decision to sentence a defendant to death.

The Supreme Court has stated that "[e]vidence about the victim and survivors can be so inflammatory as to risk a verdict impermissibly based on passion not deliberation." Legislatures and the judiciary require the jury to consider both mitigating and aggravating circumstances carefully and follow the statutory mandates. This prevents juries from creating their own law regard-

---

61 Id. at 2608 (quoting Booth v. Maryland, 482 U.S. 496, 517 (1987) (White, J., dissenting)).
62 Id. at 2607.
63 See, e.g., Booth, 482 U.S. at 504-05 (noting jury's attention is to be directed to "defendant's background and record, and the circumstances of the crime"); South Carolina v. Gathers, 490 U.S. 805, 810-11 (1989) ("[f]or purposes of imposing the death penalty . . . [the defendant's] punishment must be tailored to his personal responsibility and moral guilt.").
64 See Booth, 482 U.S. at 508. 
65 Id. (quoting Gardner v. Florida, 430 U.S. 349, 358 (1977)).
67 See Gregg v. Georgia, 428 U.S. 153, 193 (1976). "[I]t is within the realm of possibility to point to the main circumstances or aggravation and of mitigation that should be weighed and weighed against each other when they are presented in a concrete case."
ing what crimes are punishable by death on an ad hoc basis. The law and statutes are a reflection of society’s moral judgments; the jury’s duty is to enforce those moral judgments, not their own personal decisions and interpretations of the law.

For example, the Excessiveness Clause of the Louisiana State Constitution states that “[n]o law shall subject any person . . . to cruel, excessive, or unusual punishment.” This constitutional protection has been codified by Louisiana Supreme Court rules mandating the exclusion of evidence that could inject passion, prejudice or arbitrary factors into the jury’s deliberative process. VIS are intrinsically inflammatory. In order to protect a defendant’s due process rights, the jury must not be distracted nor base their verdict on an emotional response.

Therefore, by excluding VIS, courts and legislatures ensure that the imposition of the death penalty is a product of reasoned justice, not a result of “vigilante justice” administered by the jury. Reasoned and deliberate decision-making, which is mandated by the Due Process Clause, occurs when relevant and noninflammatory facts are presented to the jury about the individual defendant and the criminal act. The judge instructs the jury to apply this information to the statutory law in reaching its verdict of life imprisonment or death. VIS have therefore been excluded to protect the defendant’s fundamental constitutional rights to a fair

(quoting ALI Model Penal Code § 201.6 cmt. 3 (Tent. Draft No. 9, 1959)); GA. CODE ANN. §§ 17-10-2, 17-10-30 (1992) (jury must find statutorily based aggravating circumstance before recommending death sentence but need not find mitigating circumstances).

See Gregg, 428 U.S. at 198 (stating jury discretion regulated within objective statutory standards).

LA. CONST. art. 1, § 20.

See, e.g., LA. SUP. CT. R. 28 § 1 (West 1992). “Every sentence of death shall be reviewed by this court to determine if it is excessive. In determining whether the sentence is excessive the court shall determine: a) whether the sentence was imposed under the influence of passion, prejudice of any other arbitrary factors . . . .” Id.; see also State v. Brogdan, 457 So. 2d 616, 626 (La. 1984) (declaring that the court, pursuant to Supreme Court Rule 28, must review each capital sentence to determine if the jury’s determination was reasonable).

See Booth v. Maryland, 482 U.S. 496, 504 (1987). The Booth Court stated that “[t]he focus of a VIS, however, is not on the defendant, but on the character and reputation of the victim and the effect on his family. These factors may be wholly unrelated to the blameworthiness of a particular defendant.” Id.

See Payne v. Tennessee, 111 S. Ct. 2597, 2612 (1991) (O’Connor, J., concurring). Justice O’Connor observed, “If, in a particular case, a witness’ testimony or a prosecutor’s remark so infects the sentencing proceeding as to render it fundamentally unfair, the defendant may seek appropriate relief under the Due Process Clause of the Fourteenth Amendment.” Id.
trial, and to prevent sentencing under the influence of passion, prejudice, or arbitrary factors.\textsuperscript{72}

My response is two-fold: First, I do not concede that VIS impose an impermissible risk of arbitrariness. VIS are but one piece of evidence among dozens or more which are often introduced to mitigate the guilty party's conduct. "Victim 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."\textsuperscript{73} Moreover, if a family member is a fact witness, as I was, the jury has already been exposed to some of the information in the VIS during the guilt phase of the trial. Finally, the due process protections present throughout the defendant's trial remain in full effect; any sentence imposed arbitrarily will be reversed.\textsuperscript{74} The possibility that the evidence may be inflammatory does not warrant a per se bar to any evidence labelled VIS.\textsuperscript{75} Additionally, to the extent that VIS are inflammatory, they are often made so by the circumstances of the crime—a fact which should not be used against the victim, the only party who truly had no control.\textsuperscript{76}

My second response is far more personal, but no less relevant: There can be no more arbitrary sentence of death than that imposed on my wife. Unlike her murderer, my wife, Beth, has no appeal or constitutional right of review of her death sentence.\textsuperscript{77} There was no jury who dispassionately and rationally determined her sentence; there was only one

\textsuperscript{72} See South Carolina v. Gathers, 490 U.S. 805, 811-12 (1989) (excluding victim impact evidence); Booth, 482 U.S. at 505-06 (same).

\textsuperscript{73} Payne, 111 S. Ct. at 2608.

\textsuperscript{74} See id. at 2608. "In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." Id. (citations omitted).

\textsuperscript{75} See id. at 2612. (Souter, J., concurring). "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." Id.

\textsuperscript{76} See id. (O'Connor, J., concurring). Justice O'Connor recognized that the brief testimony of the victim's mother, albeit moving, "did not inflame [the jurors'] passions more than did the facts of the crime." Id.

\textsuperscript{77} The defendant's due process protections are firmly established in both stages of a bifurcated trial and, more importantly, in post-trial proceedings. The Louisiana Code of Criminal Procedure provides that the "Supreme Court of Louisiana shall review every sentence of death to determine if it is excessive. The court rules shall establish such procedures as are necessary to satisfy constitutional criteria for review." LA. CODE CRIM. PROC. ANN. art. 905.9 (West 1984 & Supp. 1992). Pursuant to article 905.9, the Louisiana Supreme Court enacted rule 28 to provide judicial review of every sentence of death to ensure its fairness. LA. SUP. CT. RULE 28 (West 1992); see also supra note 69 (discussing Rule 28).
man who decided her fate, and with it, my own.

C. The Defendant Has No Control Over and is Likely Unaware of the Personal Circumstances of the Victim

Another reason to exclude VIS at capital sentencing hearings is that the characteristics of the victim and the emotional impact to the family are, in most cases, unintended or unknown by the defendant and, thus, do not factor into a defendant's moral blameworthiness. The Booth Court warned that the admission of VIS would permit the jury to hand down a death sentence based upon the social status of the victim. Only those victims and victims' families who are able to articulate their grief, either orally or in writing, will "benefit" from the use of victim impact statements. Those victims and families who cannot articulate their thoughts and feelings because of a lack of education, or financial or social status will not have the same impact at sentencing. This allows for a defendant to be more harshly sentenced based on the social worth or perceived "value" of the victim. Considerations of the social position of the victim are irrelevant factors in deciding who should be punished and who is more blameworthy. Social stratification of victims runs contrary to our constitutional notions of due process and fundamental fairness, especially in death penalty cases.

It is not a violation of a defendant's rights whether one victim can articulate their grief better than another. When a defendant takes a life, he is fully responsible for taking an innocent person's life, which necessarily includes culpability for denying that victim's role in society. This is analogous to the tort maxim: "You take your victim as you find him." Furthermore, the statement, from the Booth decision, that the defendant has no control over and is likely unaware of the personal circumstances of the victim ignores the defendant's concededly knowing and in-

---

78 See Booth v. Maryland, 482 U.S. 496, 504-05 (1989) (observing that victim impact evidence introduces factors which defendants were typically unaware or were irrelevant to defendant's decision to kill).
79 Id. at 506.
80 Id. at 505-06.
81 Id.
tentional decision to murder. As Justice Souter explained,

[m]urder has foreseeable consequences. When it happens, it is always to distinct individuals, and after it happens other victims are left behind. Every defendant knows, if endowed with the mental competence for criminal responsibility, that the life he will take by his homicidal behavior is that of a unique person, like himself, and that the person to be killed probably has close associates, "survivors," who will suffer harms and deprivations from the victim's death. . . . Thus, when a defendant chooses to kill, or to raise the risk of a victim's death, this choice necessarily relates to a whole human being and threatens an association of others, who may be distinctly hurt. The fact that the defendant may not know the details of a victim's life and characteristics, or the exact identities and needs of those who may survive, should not in any way obscure the further facts that death is always to a "unique" individual, and harm to some group of survivors is a consequence of a successful homicidal act so foreseeable as to be virtually inevitable.

The full impact of murder is foreseeable—therefore, "evidence of the specific harm caused when a homicidal risk is realized is nothing more than evidence of the risk that the defendant originally chose to run despite the kinds of consequences that were obviously foreseeable."85

D. Sentence of Death is Unique and Irreversible

The imposition of a death sentence is the ultimate, irreversible punishment.86 Consequently, when a defendant is sentenced to death, the Supreme Court correctly mandates that "it should be as a result of a decision based on reason and reliable evidence."87 Because capital punishment denies a defendant of his life, not just liberty or property, the process is carefully circumscribed by legislative enactments.88 By statute, sentencing juries must consider

83 See Booth, 482 U.S. at 504.
85 Id. at 2616 (Souter, J., concurring).
86 Furman v. Georgia, 408 U.S. 238, 286 (1972) (per curiam).
87 Payne, 111 S. Ct. at 2614 (citing Gholson v. Estelle, 675 F.2d 734, 738 (5th Cir. 1982)).
88 Because the death penalty is irrevocable, the cases and sentencing procedures merit different considerations and solid constitutional protections. See, e.g., Gregg v. Georgia, 428 U.S. 153, 189 (1976) ("[f]or the determination of sentences, justice generally requires . . . 

both mitigating and aggravating circumstances at the sentencing hearing.\textsuperscript{88} Admissibility standards for introducing relevant mitigating evidence are often generously applied by judges; conversely, courts have curtailed the admission of aggravating circumstances to those specifically mandated by statute to protect the defendant's due process rights and avoid the introduction of highly inflammatory evidence.\textsuperscript{89} The scope of admissible mitigating evidence appropriately tips the scales in favor of ensuring that all of the defendant's constitutional rights are afforded before the irreversible punishment of death is carried out.

Only death is irreversible.\textsuperscript{91} No one understands this better than me, and those like me, who must live without a loved one who has been murdered. Few can grasp the emotional injury and magnitude of the loss. For me, the aching void and the numbness inside my heart, the sorrow and anguish of my wife's murder will shadow me for the rest of my life.

As a result of Booth and Gathers, victims who survive crimes have greater rights than those victims who lose their lives, which is the most precious of all "possessions." Because VIS are inadmissible in Louisiana capital cases, murder victims are silenced in every respect. "Murder is the ultimate act of depersonalization." It transforms a living person with hopes, dreams, and fears into a corpse, thereby taking away all that is special and unique about the person. The Constitution does not preclude a State from deciding to give some of that back."\textsuperscript{92}

E. The Risk of a Mini-Trial of Irrebuttable Evidence

Due process attaches only to the defendant who is on trial, not that there be taken into account the circumstances of the offense together with the character and propensities of the offender."\textsuperscript{92} (citations omitted)); Jurek v. Texas, 428 U.S. 262, 271 (1976) ("A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed."); Roberts v. Louisiana, 428 U.S. 325, 335 (1976) (state statute found unconstitutional for failing to provide jury with proper standards determining when death penalty is appropriate and "little or no evidence concerning the personal characteristics and previous record of an individual defendant").

\textsuperscript{88} See, e.g., LA. CODE CRIM. PROC. art. 905 (West 1992). "Following a verdict of guilty in a capital case, a sentence of death may be imposed only after a sentencing hearing as provided herein." The statutes include a specific list of aggravating circumstances, LA. CODE CRIM. PROC. art. 905.4 (West 1984 & Supp. 1992), and mitigating circumstances, LA. CODE CRIM. PROC. art. 905.5. (West 1984 & Supp. 1992), to be considered by the jury.

\textsuperscript{89} See Gregg, 428 U.S. at 196-97.

\textsuperscript{91} The capital defendant has the right to appeal within the state court system and also the limited right to appeal pursuant to a writ of habeas corpus in the federal courts.

to the victim or to the victim's family. Overriding constitutional due process concerns arise for the defendant in a capital case who is denied an adequate opportunity to rebut the potentially inflammatory victim impact statements. Without the opportunity to rebut, the focus on the sentencing hearing may unconstitutionally shift from the defendant to the victim and family members.\(^9\) Given the uniqueness of the death penalty, courts must be vigilant to ensure that the defendant's procedural due process rights and Eighth Amendment rights are protected at all stages, especially at the sentencing phase.

As discussed earlier, much of the VIS is admitted during the guilt phase and is often overshadowed by the steady stream of mitigating evidence introduced by the guilty defendant.\(^9\) Moreover, the mitigating evidence presented by the defendant is often irrebuttable; for example, the testimony regarding the defendant's positive character, attitude, and behavior is difficult to disprove. In Payne, Mr. Payne's parents and a friend testified that he did not abuse drugs or alcohol, that he loved children, and that he was a good person.\(^9\) Where is the balance?

\textbf{F. Evidence Must Be Limited to the Defendant and the Circumstances of the Crime}

Imposition of a death sentence clearly must be based on relevant information. Booth and Gathers established that the sentencing jury may hear evidence that \textit{relates directly to the nature of the crime}.\(^9\) The jury may also decide whether to impose a sentence of life or death \textit{based upon the character of the defendant}.\(^9\) VIS do not meet either of these criteria. Moreover, prior to the Payne decision, the Supreme Court acknowledged that VIS do not qualify as evidence related to the "circumstances of the offense."\(^9\) Even the Payne decision recognized that only certain types of VIS can be admissible without violating the Eighth Amendment.\(^10\)

\(^9\) See Booth v. Maryland, 482 U.S. 496, 502-06 (1989). "The focus of a VIS, however, is not on the defendant, but on the character and reputation of the victim and in effect on his family." \textit{Id.} at 504.

\(^9\) Payne, 111 S. Ct. at 2607. "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." \textit{Id.} at 2602-03.

\(^9\) Payne, 111 S. Ct. at 2607 n.10.

\(^9\) See id. at 502.

\(^9\) See id. at 504.

\(^10\) Payne v. Tennessee, 111 S. Ct. 2597, 2611 n.2 (1991) (admitting VIS relating to
statements of surviving family members regarding what should happen to the defendant at sentencing and characterizations about the crime (as well as the defendant) are presently inadmissible. The distinction painstakingly drawn by the Court between types of VIS implicitly recognizes the danger of admitting VIS, demonstrates that VIS are inherently unrelated to the "circumstances of the crime," and should therefore be held inadmissible.

Proper punishment requires a full assessment of the criminal conduct: "noxiae poena par esto!" This assessment includes not only the defendant's character and the circumstances of the crime, but it must also reflect the harm caused to society. Society's collective judgment of the harm caused by specific conduct forms the basis for our criminal justice system. For each crime, certain conduct is enumerated and the degree of the harm reflected by the range of applicable sentences. Society has similarly assessed the loss in terms of the type of victim murdered. Victims under 12 years old and peace officers, for example are treated differently than others. Their unique personal characteristics are relevant. In Louisiana, the defendant who kills someone under 12 years old may be sentenced to death—regardless of whether the defendant was aware of the person's age.

"[C]riminal conduct has traditionally been categorized and penalized differently according to consequences not specifically intended, but determined in part by conditions unknown to a defendant when he acted."

G. Sifting Evidence to Ensure Due Process

The victim, and the victim's family, are an integral part of the criminal justice process. Nevertheless, the victim's perspective is limited by the courts to preserve the fundamental fairness of the trial and sentencing process, which includes both aggravating and mitigating circumstances. At the sentencing phase, the court has discretion to consider a wide range of information. States may not exclude any relevant mitigating evidence that the defendant prof-

---

101 Id. at 2611 n.2.
102 "Let the punishment match the offense."
103 Payne, 111 S. Ct. at 2605. "[L]egislatures [grade] the severity of crimes in accordance with the harm done by the criminal." Id.
104 See LA. REV. STAT. ANN. § 14:30 (West 1986).
105 Payne, 111 S. Ct. at 2614 (Souter, J., concurring).
fers in support of a sentence less than death. However, the court must take steps to curtail prejudicial and passionate decision-making by the jury. Constitutional protections, and exclusion of some evidence, is integral to the judicial process and must be enforced. Admittedly, this may leave the victim’s family frustrated and isolated from full participation in the process. Nonetheless, the court has a constitutional mandate to balance the defendant’s personally attached constitutional rights against the victim’s interest in the criminal justice process.

“States cannot limit the sentencer’s consideration of any relevant circumstance that could cause it to decline to impose the penalty.” The state “must allow it to consider any relevant information offered by the defendant.” As the Court recognized in Payne, this unfairly weights “the scales in a capital trial” in favor of a defendant. Payne also presented an excellent (and typical) example of the system’s potential unfairness under Booth and its progeny:

The capital sentencing jury heard testimony from Payne’s girlfriend that they met at church, that he was affectionate, caring, kind to her children, that he was not an abuser of drugs or alcohol, and that it was inconsistent with his character to have committed the murders. Payne’s parents testified that he was a good son, and a clinical psychologist testified that Payne was an extremely polite prisoner and suffered from a low IQ. None of this testimony was related to the circumstances of Payne’s brutal crimes. In contrast, the only evidence of the impact of Payne’s offenses during the sentencing phase was Nicholas’s grandmother’s description—in response to a single question—that the child misses his mother and baby sister.

My own experience is similar. During the sentencing phase of Green’s trial, my family, Beth’s family, and our friends watched and listened silently to witness after witness who tried to exculpate the man who killed my wife. We were there for Beth, but our voices were silenced; we were not

106 Id.
108 Payne, 111 S. Ct. at 2607.
110 Id. at 2608-09.
allowed to "breathe" life into her.\textsuperscript{111} Never did the inequity and unfairness cut so deeply—if Beth had survived, it is undisputed that she could have testified as to who she was and how she was hurt. But when she died, her rights died with her. In effect, the court rewarded Green for killing Beth by excluding any testimony that humanized her. The Payne Court noted this inequity:

\[ \text{[T]here is nothing unfair about allowing the jury to bear in mind [the] harm at the same time as it considers the mitigating evidence introduced by the defendant. . . . "[i]t is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of Defendant (as was done in this case), without limitation as to relevancy, but nothing may be said that bears upon the character of, or the harm imposed, upon the victims.' . . . 'J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."}\textsuperscript{112}

As a victim, I will concede that the criminal justice system demands neutrality in dispensing justice, but in order to be neutral, the trier of fact should hear from both the victim of the crime and the accused. I am not advocating a new form of justice that favors the concerns of the victim over the constitutionally recognized rights of the defendant. As a victim and as the voice of a deceased victim, my wife, we demand equal treatment by providing a limited opportunity to be heard at the sentencing phase: "All we ask is that we be treated just like a criminal."\textsuperscript{113}

III. \textit{Payne} and Suffering for the States

Following the \textit{Payne} decision, issues surrounding the admissibility of VIS in capital cases are determined statutorily or jurisprudentially. In adhering to the earlier jurisprudence of \textit{Booth} and

\textsuperscript{111} The only evidence before the jury during the guilt phase was that the victim was indeed dead. An overwhelming majority of the testimony regarding the victim was forensic testimony. The only testimony that related directly to the victim was my testimony during the guilt phase of the trial that we were married for ten weeks and brief questioning regarding our careers. Had I not witnessed this crime my testimony would have been prohibited.

\textsuperscript{112} \textit{Payne}, 111 S. Ct. at 2609 (quoting Snyder v. Massachusetts, 291 U.S. 97, 122 (Cardozo, J.)).

Gathers, several states continue to exclude VIS in noncapital cases.\textsuperscript{114} Consistent with Payne, other states have begun to admit VIS at the sentencing stage in capital cases.\textsuperscript{116} Recently, the Louisiana Supreme Court was challenged in \textit{State v. Bernard}\textsuperscript{116} to decide whether VIS are admissible during capital sentencing in Louisiana courts.

A. Legislative History

Historically, Louisiana courts excluded VIS at capital sentencing hearings,\textsuperscript{117} based on the evidentiary ground that VIS lacked


\textsuperscript{116} 608 So. 2d 966 (La. 1992).

\textsuperscript{117} See, e.g., \textit{State v. Henry}, 198 So. 910 (La. 1940). In \textit{Henry}, the prosecutor, in addition to several other highly prejudicial acts, "virtually introduce[d] the widow and daughter into the evidence before the jury... and had the benefit of the family's continuous, even though silent, plea to the jury for the 'hanging verdict.'" \textit{Id.} at 920. The Louisiana Supreme Court cited \textit{Swindle v. State}, 176 So. 372, 373 ( Ala. Ct. App.), \textit{cert. denied}, 176 So. 375 ( Ala. 1937), for the proposition that in trials involving great human interest, judges must exercise cautious discretion to ensure that no extraneous influences are injected into the trial process and jury deliberations. \textit{Henry}, 198 So. at 920-21. The \textit{Henry} court held that the prosecutor staged an exhibition by pointing to the bereaved wife and daughter of the victim "when neither one of them took the stand to testify nor could they have done so for that purpose... These extraneous circumstances and influences were prejudicial to the substantial rights of the accused." \textit{Id.} at 921; see also \textit{State v. Broughton}, 105 So. 59, 61 (La. 1925) (holding that fact that victim left a family is irrelevant and evidence establishing that fact inadmissible). But see infra note 141 (citing case law holding that introduction of victim impact evidence nonreversible error).
relevance.\textsuperscript{118}

In 1986, Louisiana enacted legislation which specifically addressed victims' rights. The legislation provided for VIS inclusion in sentencing defendants "convicted of a felony offense or a misdemeanor offense that has been reduced from a felony."\textsuperscript{119} However, despite these statutory changes authorizing the inclusion of VIS, prosecutors refrained from introducing VIS at capital sentencing fearing that to do so would constitute grounds for subsequent reversal.

One year later, in 1987, the Booth opinion erected a per se constitutional bar against victims' statements at capital sentencing hearings. Moreover, in 1989, Booth's prohibition against the victim's statement at capital sentencing was extended by Gathers to the prosecutor. Amid this exclusionary milieu, Louisiana amended its VIS statutory language in 1989. The result was that the language of the statute was changed to provide that VIS could be included in sentencing persons "convicted of an offense other than a capital offense."\textsuperscript{120} Since the Booth prohibition against VIS admissibility in capital sentencing was in effect at that time, it appears that the legislature could not have expanded the scope of the statute to expressly include the introduction of VIS at capital sentencing hearings. Rather, it seems clear that the language was changed to bring Louisiana's capital sentencing scheme into compliance with constitutional constraints.

However, Booth and Gathers were overruled by Payne in 1991. Consequently, interpretation of Louisiana's statutory scheme specifically requiring VIS admissibility at felony sentencing hearings\textsuperscript{121} except capital sentencing hearings\textsuperscript{122} was ambiguous. Capi-

\textsuperscript{118} See supra note 117.

\textsuperscript{119} LA. Code Crim. Proc. art. 875(A)(1) (West 1984 & Supp. 1992); see LA. Rev. Stat. Ann. § 46:1844(A)(9)(a)-(c) (West Supp. 1992). The statement may be written or oral, and made by the victim, his family, or the district attorney, or all of them. \textit{Id}. It shall include the victim's name, the net financial loss due to the crime, and a psychological impact statement reflecting the victim's welfare. \textit{Id}. This statutory provision overlaps with the procedures provided in LA. Code Crim. Proc. art. 875(B) (West 1984 & Supp. 1993) (requiring court to order victim impact statement).

\textsuperscript{120} LA. Code Crim. Proc. art. 875(A)(1). The legislature rewrote the initial language of the first sentence of this section in 1986 and then revised it again in 1989, substituting "convicted of a felony offense or a misdemeanor offense that has been reduced from a felony" for "convicted of an offense other than a capital offense, for which the punishment may be imprisonment for more than six months, or if a defendant is convicted of a second or subsequent misdemeanor." Act 1989, No. 16, § 1.

\textsuperscript{121} See LA. Code Crim. Proc. art. 875(B):
tal defendants could argue that the statutory language which mandates VIS admissibility, except in capital sentencing, excludes VIS admissibility in capital sentencing. Prosecutors could argue that the same statutory language does not prevent VIS admissibility and was modified to its current form in response to the overruled Booth rationale.

Because of the resultant statutory ambiguity a bill was introduced in June 1992, which would have amended the Louisiana Code of Criminal Procedure “to allow for the introduction of victim impact evidence at the penalty phase of a capital trial.” The legislative committee voted to take no action on the proposal, effectively blocking the amendment.

This left the Louisiana state courts with the problem of interpreting VIS admissibility in light of statutes which had been enacted within the exclusionary milieu created by Booth and Gathers, but which now had to be applied in the non-exclusionary environment created by Payne. Faced with this uncertainty, in 1992, the Louisiana Supreme Court agreed to hear the case of State v. Bernard to decide the admissibility of victim impact testimony in capital sentencing.

B. Judicial Determination of Admissibility of Victim Impact Evidence

In Bernard, the defendant was indicted for first degree murder if a defendant is convicted or pleads guilty to an offense involving a victim, the court shall require that a victim impact statement be included in the presentence report. The victim impact statement shall include factual information as to whether the victim or his family has suffered, as a result of the offense, any monetary loss, medical expense, physical impairment, and any other information deemed relevant. The district attorney may also file a victim impact statement with the court.

Id.  


130 608 So. 2d 966 (La. 1992).
for striking the victim several times on the head with a pipe during an armed robbery.\textsuperscript{125} Prior to trial, the prosecutor notified the defense of his intention to introduce victim impact testimony during the sentencing phase, but did not specify in the record the exact evidence he planned to introduce.\textsuperscript{126}

The trial court held that victim impact evidence was inadmissible, reasoning that the Louisiana capital sentencing statute demands a focus only on the "circumstances of the offense and character and propensities of the offender."\textsuperscript{127} Thus, inclusion of victim impact evidence was outside the statutory scope.\textsuperscript{128} The prosecutor applied for, and was granted, supervisory writs by the court of appeal, which reversed the trial court, stating that: "\textit{Payne} does not require the existence of a statute \textit{specifically} authorizing the admission of such evidence in order for the evidence to be admitted. Because victim impact evidence comprises part of the 'circumstances of the offense,' such evidence would be admissible during the capital phase of a capital trial . . . ."\textsuperscript{129}

Because of the reversal and conflicting case law, the Louisiana Supreme Court granted certiorari\textsuperscript{130} to determine whether Louisiana's capital sentencing statute authorized the use of victim impact evidence and, similarly, whether the statute, as applied by the trial court was unconstitutional under the federal and state constitutions.

Under the Louisiana capital sentencing statute, the outer limits of admissibility of evidence proffered by the prosecution borders on that evidence which is relevant to the circumstances of the murder, or to the character and propensities of the murderer.\textsuperscript{131} In allowing only evidence which is relevant to the circumstances of the crime, the Louisiana statute is narrower than the Tennessee statute scrutinized in \textit{Payne}, which allowed admission of any evidence "relevant to the punishment."\textsuperscript{132}

The \textit{Bernard} court based their examination of the admissibility of VIS at capital sentencing on relevance. They summarily as-

\textsuperscript{125} See id. at 967.
\textsuperscript{126} Id.
\textsuperscript{127} Id. (citing LA. CODE CRIM. PROC. art. 905.2 (West 1982 & Supp. 1992)).
\textsuperscript{128} See Bernard, 608 So. 2d at 967.
\textsuperscript{130} 596 So. 2d 541 (La. 1992).
\textsuperscript{131} LA. CODE CRIM. PROC. art. 905.2 (West 1982 & Supp. 1992).
\textsuperscript{132} TENN. CODE ANN. § 39-13-204(c) (1982).
asserted that the Booth dissenters conceded that a victim's survivors' opinions about the crime and the murderer are unquestionably irrelevant to any issue pursuant to a capital sentencing hearing. However, the court then deliberated to decide whether the character of the victim, the impact of the murder on the victim's family, and the character and propensities of the offender were relevant to the circumstances of the offense. Having examined Justice Souter's concurrence in Payne, the Bernard court agreed with his reasoning that a murderer with specific intent either knew, or reasonably should have foreseen, some of the repercussions of his victim's death, and that this general knowledge at the instant of the crime should be a fact bearing on the murderer's moral culpability. To this extent, the court stated that victim impact evidence was relevant both to the circumstances of the crime and to the murderer's character and propensities.

"[T]he prosecutor, within the bounds of relevance under the statute, may introduce a limited amount of general evidence providing identity to the victim and... demonstrating the harm done to the victim's survivors." The Bernard court further

---

133 See State v. Bernard, 608 So. 2d 966, 970-71 (La. 1992). But see Booth v. Maryland, 482 U.S. 496, 518-19 (1987) (White, J., dissenting): To the extent that the Court determines that in this case it was inappropriate to allow the victims' family to express their opinions on, for example, whether petitioner could be rehabilitated, that is obviously not an inherent fault in all victim impact statements and no reason to declare the practice of admitting such statements at capital sentencing hearings per se unconstitutional.

Id.; see also id. at 519 (Scalia, J., dissenting):

To require, as we have, that all mitigating factors which render capital punishment a harsh penalty in the particular case be placed before the sentencing authority, while simultaneously requiring, as we do today, that evidence of much of the human suffering the defendant has inflicted be suppressed, is in effect to prescribe a debate on the appropriateness of the capital penalty with one side muted. If that penalty is constitutional, as we have repeatedly said it is, it seems to me not remotely unconstitutional to permit both the pros and the cons in the particular case to be heard.

Id. at 520-21.


135 Id. at 969-70.

136 Id. at 972.

137 Id.

138 Id. at 971. The statute referred to by the court was article 905.2 of the Louisiana Code of Criminal Procedure, which limited the admissibility of evidence presented by the prosecution at capital sentencing to evidence relevant to "the circumstances of the murder or to the character and propensities of the murderer." Id. at 970 (quoting LA. CODE CRIM. PROC. art. 905.2). "Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Id. (quoting LA. CODE. EVID. art.
noted that the more detailed the evidence relating to the character of the victim or the harm to the survivors, the less relevant such information was with regard to the circumstances of the crime and the character and propensities of the defendant.\textsuperscript{139} The court likened victim impact evidence to a double-edged sword: "the more marginal the relevance of the victim impact evidence, the greater is the risk that an arbitrary factor will be injected into the jury's sentencing deliberations."\textsuperscript{140}

Reconciling its prior jurisprudence with the Payne decision,\textsuperscript{141} the Bernard court fashioned the following guidelines for Louisiana trial courts to apply to the issue of the admissibility of VIS during the sentencing phase of a capital trial: "[S]ome evidence of the murder victim's character and of the impact of the murder on the victim's survivors is admissible as relevant to the circumstances of


\textsuperscript{140} Id. at 971. But see LA. CODE CRIM. PROC. art. 905.9 (West 1992); LA. SUP. CT. R. 28 (requiring Supreme Court to review every death sentence to determine whether sentence imposed under influence of passion, prejudice or any other arbitrary factor).

\textsuperscript{141} See Bernard, 608 So. 2d at 971-72. In State v. Prejean, 379 So. 2d 240 (La. 1979), cert. denied, 449 U.S. 891 (1980), the Louisiana Supreme Court refused to reverse a death sentence on the grounds, inter alia, that the victim's wife had testified at the sentencing phase that her husband's death had left her alone and with the burden of supporting their two children. Id. at 244. Defense counsel objected to the prosecution asking the victim's widow how many children she had. Id. The objection was sustained after the witness's response was entered in the record. Id. On appeal, defendant assigned the sustaining of the objection by his own counsel as error. Id.

The same court, in State v. Williams, 392 So. 2d 619 (La. 1980), held that the mere fact that the victim's wife took the stand during the sentencing phase and told the jury that the victim had been a faithful, loving, and loyal husband for nineteen years, supporting her and their three children (despite being partially paralyzed), did not inject enough arbitrariness in the sentencing phase to warrant reversal of the defendant's death sentence. See id. at 625 (citing Prejean, 379 So. 2d 240).

Finally, in State v. Rushing, 464 So. 2d 268 (La. 1985), cert. denied, 476 U.S. 1153 (1986), sentence vacated sub. nom Rushing v. Butler, 868 F.2d 800 (5th Cir. 1989), the prosecutor proffered four witnesses at the sentencing hearing who expressed their various opinions on the appropriateness of the death penalty for the defendant. Id. at 275. The court held that such evidence should be prohibited; however, the court refused to reverse the jury's sentence, finding the witnesses' testimony to be harmless error. Id. at 275-76. In failing to reverse the defendant's death sentence the court stated:

[The victim's aunt] did not express an unqualified opinion that the defendant should be sentenced to death, but stated: "My mother always told me that vengeance is mine sayeth the Lord. But I also believe in an eye for an eye." . . . Considering no witness expressed an unqualified opinion that defendant should be sentenced to death and four of the witnesses stated he should not be sentenced to death, we do not believe nor are we of the opinion that . . . [the victim's aunt's] testimony standing alone injected an arbitrary factor such that it influenced the jury to return with a death sentence.

\textit{Id.}
the offense or to the character and propensities of the offender.” However, the court qualified this general rule by stating that “detailed descriptions of the good qualities of the victim or particularized narrations of the emotional, psychological and economic sufferings of the victim’s survivors” promotes the possibility of arbitrariness in the jury’s sentencing deliberations and “treads dangerously” close to the possibility of reversible error.

In 1985, the Louisiana Legislature enacted a comprehensive system of rights of crime victims to remedy the inequities of the current criminal law system. In its statement of legislative intent, the Legislature explicitly recognized the importance of citizen cooperation to law enforcement efforts and the overall effectiveness and well-being of the criminal justice system.

The Legislature made its intent clear: the voice of the victim must be heard and their rights “vigorously” protected. This stated intent mirrors the majority’s reasoning in Payne. The victims’ rights Chapter applies to all felony cases and mandates that the court must notify the victim of her right to submit VIS. Moreover, those rights which accrue to the victim also accrue to the family of homicide victims.

In addition to the 1985 victims’ rights statute, in 1989 the Louisiana Legislature amended Louisiana’s general sentencing procedures. This amendment can be interpreted as another legislative enactment reinforcing victims’ rights and permitting the use of VIS in capital sentencing.

---

143 Bernard, 608 So. 2d at 972.
In recognition of the civic and moral duty of victims of crime to cooperate fully and voluntarily with law enforcement and prosecutorial agencies, and in further recognition of the continuing importance of such citizen cooperation to state and local law enforcement efforts and the general effectiveness and well-being of the criminal justice system of this state, the legislature declares its intent, in this Chapter, to ensure that all victims of crime are treated with dignity, respect, courtesy, and sensitivity, and that the rights extended in this Chapter to victims of crime are honored and protected by the law enforcement, agencies, prosecutors, and judges in a manner no less vigorous than the protection afforded the criminal defendants.

Id.
146 Id. The victim’s rights must be protected “in a manner no less vigorous than the protection afforded criminal defendants.” Id.
147 See La. Rev. Stat. Ann. § 46:1844(A)(9) (West 1992). “Before disposition or sentencing in any case where a defendant has been charged with or found guilty of a felony, the court shall notify the victim of the time and place of sentencing and of the victim’s right to make a victim’s impact statement.” Id. (emphasis added).
cases.

The 1989 legislative amendments permit a judge to order a pre-sentence investigation (PSI) report in certain cases.149 Once the judge has ordered a PSI, the inclusion of a victim impact statement in the PSI is mandatory.150 The amendment focused on the types of cases in which PSI, and accompanying VIS are admissible. Specifically, the legislature changed the language of the statute from "convicted of an offense other than a capital offense, for which the punishment may be imprisonment for more than six months, or if a defendant is convicted of a second or subsequent misdemeanor," to "convicted of a felony offense or a misdemeanor offense that has been reduced from a felony."151 Thus, PSI reports may be ordered and victim impact statements are admissible in all felony cases. The Louisiana Code of Criminal Procedure defines the term "felony" as "an offense that may be punished by death or by imprisonment at hard labor."152 Thus, victim impact statements are admissible in capital cases pursuant to the statutory authority of article 875.153

IV. CONCLUSION

The exclusion of VIS "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."154 "The violation of a law is not only an offense against society, but is also an invasion of the personal rights of the victim."155

Arguably, the framers of the Fourteenth Amendment recognized that government has a duty to protect its citizens. However, the government

If a defendant is convicted of a felony offense or a misdemeanor offense that has been reduced from a felony, the court may order . . . a presentence investigation . . . .
In making the investigation, the probation officer shall inquire into the circumstances attending the commission of the offense, the defendant's history of delinquency or criminality, his family situation and background, economic and employment status, education, and personal habits.

Id.

150 LA. CODE CRIM. PROC. art. 875(B) (West 1984 & Supp. 1992). "If a defendant is convicted or pleads guilty to an offense involving a victim, the court shall require that a victim impact statement be included in the presentence report." Id. (emphasis added).

151 See supra note 149 (quoting art. 875 (A)(1) of the Louisiana Code of Criminal Procedure).


has a duty to give full and efficient protection to the rights of all of its citizens. The rights protected by the Due Process Clause should include my rights and my wife's rights, as well as her murderer's rights. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."\(^\text{168}\) So long as courts impose little or no restriction on the admissibility of mitigating evidence, then justice and equity demand that the victim have a voice at least in the sentencing procedure.\(^\text{157}\)

The need for parity, fairness, and justice results from the Court's earlier decisions granting the defendant carte blanche in presenting mitigating evidence, evidence which is often irrelevant to the crime. Under this system, the silence of the victim's voice never rang so loudly. The victim and her family were denied their "day in court" by the exclusion of VIS. The victim once again feels victimized, but this time by the criminal justice system. Ultimately, this frustration and feeling of powerlessness will undermine society's overall confidence in the judicial process.

A reasonable compromise is possible in admitting mitigating evidence and VIS aggravating circumstances. We acknowledge that the second type of Booth evidence is irrelevant (family's comments on the crime and the appropriate sentence). Regarding the first type of Booth evidence (personal characteristics of the victim and the impact upon the victim's family), we propose a revised system of restraint for Louisiana and all states: the convicted defendant should not be allowed to introduce tangentially related witnesses who testify to his good character. The trial judge shall exercise discretion in deciding which witnesses are relevant to the sentencing proceedings and the defendant reserves his right to appeal. At the same time, a limited amount of VIS should be admissible at the capital sentencing hearing. Courts should allow testimony or written statements regarding the impact of the crime on the victim's immediate family along with information about the victim's personal characteristics. The trial judge shall limit VIS to brief and unemotional statements to minimize the risk of prejudice to the defendant.\(^\text{168}\) The VIS shall not be lengthy nor highly emo-

\(^\text{168}\) Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

\(^\text{167}\) See Payne, 111 S. Ct. at 2609 (discussing unfairness of admitting mitigating evidence of defendant's character while excluding evidence of harm imposed on victims).

tional. If the judge, or the attorneys, believe that the victim impact testimony is likely to be highly emotional and inflammatory, the judge may require that the VIS be submitted in writing prior to the trial. Both sides shall have an opportunity to review the VIS and excise sections that are inflammatory or irrelevant to the sentencing decision. In this post-Payne constitutional quandary, the Louisiana courts and other states legitimately seek to protect the capital defendant’s constitutional rights and at the same time to strike a compromise to acknowledge victims’ roles in the criminal justice process, because in the end, “[r]igid justice is the greatest injustice.”

187 THOMAS FULLER, GNOMOLOGIA (1732).