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Tipping the Scales: Seeking Death Through Comparative Value Argumentst

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[*] Candidate for J.D., Washington and Lee University School of Law, May 2006. I thank my editor, John Hagan, for his advice, and Professor David Bruck and Timothy J. Heaphy for their suggestions. I dedicate this Note to my advisor and mentor, Professor Roger D. Groot. I will always be a better lawyer and a better person for having worked with him.

I. Introduction

In describing to the jurors of a capital trial the type of analysis that the law requires them to use during sentencing deliberations, one prosecutor stated:

> Why do we have the death penalty? The reason we have the death penalty . . . comes down to one basic thing. Whose life is more important to you? Whose life has more value? The Defendant's or [the victim's]?[1]

Is this the type of analysis that the law requires jurors to use? Most likely, it is not.[2] Arguments of this nature, known as "comparative value arguments,"[3] are widely used by prosecutors throughout the United States. These arguments have been described as the most effective tool a prosecutor has to obtain a death verdict.[4] It is uncertain, however, whether these arguments are constitutionally permissible.

This Note examines the constitutional validity of these arguments, which remains unaddressed in most capital sentencing jurisdictions. Part II begins with a discussion of a change in the legal landscape that eventually led to the use of comparative value arguments—namely, the Supreme Court's decision to permit presentation of victim impact evidence.[5] Part II also discusses the aftermath of the Supreme Court's decision and describes and defines as one of its results the use of comparative value arguments.[6] Part III explores the constitutional duties of prosecutors, including the duty to refrain from arguments that mislead jurors on the law.[7] This limitation on the powers of

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1. State v. Storey, 901 S.W.2d 886, 902 (Mo. 1995).

2. *See infra* Part IV (arguing that comparative value arguments mislead jurors on the analysis that the law requires them to use during capital sentencing deliberations).

3. For detailed treatment of this phrase, see *infra* Part II.C (discussing comparative value arguments).

4. *See* Humphries v. Ozmint, 397 F.3d 206, 246 (4th Cir. 2005) (Wilkinson, J., dissenting) (quoting the trial court judge, who stated that the comparative value argument in question was one of the best arguments he had ever heard, "in terms of . . . effectiveness").

5. *See infra* Part II.A (discussing the rise of victim impact evidence as an admissible category of evidence).

6. *See infra* Part II.B (describing the effects of the Supreme Court's decision to permit the presentation of victim impact evidence in capital sentencing trials).

7. *See infra* Part III (discussing prosecutors and their duties).

prosecutors is discussed in relation to precedent under both the Eighth Amendment and the Due Process Clauses.[8] Part IV argues that comparative value arguments mislead jurors in several ways, thereby violating both constitutional doctrines.[9] Finally, this Note concludes that, in the event a challenge to the use of comparative value arguments reaches the Supreme Court, the Court should hold these arguments unconstitutional.[10]

II. The Rise of Comparative Value Arguments

To understand the significance of comparative value arguments, some context is necessary. Comparative value arguments have emerged as one of the uses of victim impact evidence.[11] Victim impact evidence is evidence that is said to inform the capital sentencing jury of the victim's "uniqueness as an individual human being."[12] This evidence is presented to inform jurors of the full impact of the crime on the victim, the victim's loved ones, and the victim's community.[13] This Part discusses the development of victim impact evidence, the push for its admission into criminal trials, its limitations, and its uses. Then, this Part explores at length one of its evolved uses—comparative value arguments.

A. The Development of Victim Impact Evidence

The push for the admission of victim impact evidence into criminal trials originated within the victims' rights movement of the 1960s and 1970s.[14] This

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8. *See infra* Part III.B–C (discussing various arguments that violate the Eighth and Fourteenth Amendments).

9. *See infra* Part IV (arguing that comparative value arguments are unconstitutional because by using these arguments prosecutors mislead jurors in violation of the Eighth Amendment and the Due Process Clauses).

10. *See infra* Part V (concluding that comparative value arguments are unconstitutional).

11. *See infra* Part II.B (noting that prosecutors use this evidence to make comparative value arguments).

12. Payne v. Tennessee, 501 U.S. 808, 823 (1991) (describing victim impact evidence as indicative of the victim's "uniqueness").

13. *See id.* at 825 (describing victim impact evidence as demonstrative of the total harm suffered by the victim, the victim's family, and society).

14. *See* JENNIFER CULBERT, *The Sacred Name of Pain: The Role of Victim Impact in Death Penalty Sentencing Decisions, in* PAIN, DEATH, AND THE LAW 111 (Austin Sarat ed., 2004) (describing victim impact evidence as resulting from the victims' rights movement); Wayne A. Logan, *Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials*, 41 ARIZ. L. REV. 143, 144 (1999) (describing victim impact

movement formed "based on the idea that the criminal justice system has generally ignored the needs and interests of victims of crime and should become more responsive to these concerns."[15] Numerous nationwide victims' rights groups formed to further this goal.[16] They lobbied for an "increased role for crime victims in the criminal justice process,"[17] and were largely successful.[18] The admission of victim impact evidence into criminal trials is described as the most "prominent and controversial" change to occur as a result of the victims' rights movement.[19]

The admission of victim impact evidence into criminal trials only recently gained the Supreme Court's approval.[20] This approval represents a major change in the Supreme Court's treatment of this evidence. In 1987, the Court first addressed the constitutionality of victim impact evidence in *Booth v. Maryland*,[21] holding introduction of this evidence into capital sentencing

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evidence as directly linked to the victims' rights movement of the 1960s and 1970s).

15. CULBERT, *supra* note 14, at 111.

16. *See id.* (noting the formation of the National Organization for Victim Assistance (NOVA), the National Victim Center, Mothers Against Drunk Driving (MADD), Society's League Against Molesters (SLAM), the Victims' Assistance Legal Organization (VALOR), and Parents of Murdered Children).

17. Logan, *supra* note 14, at 144.

18. *See* CULBERT, *supra* note 14, at 111 (describing the movement as succeeding in both state and federal legislatures); Logan, *supra* note 14, at 144 (describing as one success of the movement, the "significantly greater involvement in actual prosecutions" by victims and their families).

19. *See* Logan, *supra* note 14, at 145 (describing the significance of the Court's decision to permit presentation of victim impact evidence).

20. *See* Payne v. Tennessee, 501 U.S. 808, 827–30 (1991) (holding the admission of victim impact evidence constitutional under the Eighth Amendment and overturning two prior Court decisions that held otherwise).

21. Booth v. Maryland, 482 U.S. 496 (1987). In *Booth*, the Court considered the validity of the presentation of victim impact evidence at the sentencing phase of a capital murder trial. *Id.* at 501–02. The Court held that this information is "irrelevant to a capital sentencing decision," thereby creating the risk of arbitrary sentencing. *Id.* at 502–03. This evidence is irrelevant because a sentencing jury "is required to focus on the defendant as a uniquely individual human bein[g]" while victim impact evidence focuses on the victim. *Id.* at 504. Evidence related to the victim's uniqueness "may be wholly unrelated to the blameworthiness of a particular defendant." *Id.* at 504. This result occurs because the "defendant often will not know the victim" or the "characteristics of the victim's family" or "whether the murder will have an effect on anyone other than the person murdered." *Id.* at 504. The Court feared that jury consideration of this evidence could result in imposition of the death sentence "because of factors about which the defendant was unaware." *Id.* at 505. The Court also expressed concerns about the potential negative effects that this evidence could have on the justice obtained by certain victims. *Id.* at 505–07. Not all victims leave behind an articulate family or even any family at all to describe the harm that they suffer. *Id.* at 505. That the "imposition of the death sentence may turn on such distinctions," stated the Court, "illustrates the danger of allowing

hearings unconstitutional.[22] Two years later the Court reinforced its position, holding both evidentiary presentations and related prosecutorial arguments unconstitutional.[23] It is important to note, however, that both decisions resulted from 5–4 splits.[24] In 1991, the Court overturned these earlier decisions in *Payne v. Tennessee*.[25] The Court held that the Eighth Amendment erects no per se bar to the admission of victim impact evidence into capital sentencing hearings.[26] States may permit prosecutors to present evidence of the victim's uniqueness to inform sentencing jurors of the "specific harm caused by the defendant."[27] The only limitation *Payne* placed upon presentation of this evidence is a Due Process Clause prohibition on any evidence that is "so unduly prejudicial that it renders the trial fundamentally unfair."[28] After *Payne*,

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juries to consider this information." *Id.* Additionally, the Court feared that during prosecutions of crimes committed against victims who are not "sterling member[s] of the community," defense attorneys might engage in mini-trials on the victim's character. *Id.* at 506–07. The Court found this possibility "simply unappealing." *Id.* at 507.

22. *Id.* at 509 (holding that the Eighth Amendment prohibits presentation of victim impact evidence during sentencing).

23. South Carolina v. Gathers, 490 U.S. 805, 811–12 (1989) (holding unconstitutional any arguments by prosecutors that use victim impact evidence).

24. *Booth*, 482 U.S. at 515–19 (dissenting opinion of Justice White, with whom Chief Justice Rehnquist, Justice O'Connor, and Justice Scalia joined); *id.* at 519–21 (dissenting opinion of Justice Scalia, with whom the Chief Justice, Justice White, and Justice O'Connor joined); *Gathers*, 490 U.S. at 812–23 (dissenting opinions by Justice Scalia and Justice O'Connor, with whom the Chief Justice and Justice Kennedy joined).

25. Payne v. Tennessee, 501 U.S. 808 (1991). In *Payne*, the Court reconsidered its position on the admissibility of victim impact evidence in criminal trials. *Id.* at 817–27. Overruling *Booth* and *Gathers*, the Court held that the Eighth Amendment erects no per se bar to the admission of victim impact evidence and prosecutorial arguments upon it. *Id.* at 827. The Court recognized the long standing requirement that capital sentencing juries must give defendants "individualized consideration." *Id.* at 822. The Court held that *Booth* misinterpreted this requirement. *Id. Booth* banned victim impact evidence under the mistaken belief that any evidence unrelated to the defendant must be excluded. *Id.* Instead, held the Court, this requirement only means that this evidence cannot be excluded. *Id.* The admission of evidence related to victims does not violate this principle. *Id.* To protect defendants from impermissible uses of this evidence, the Court stated that "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.* at 825 (citing Darden v. Wainwright, 477 U.S. 168, 179–83 (1986)).

26. *See id.* at 827 (holding that the Eighth Amendment does not bar admission of victim impact evidence).

27. *See id.* at 825 (holding that the state has a "legitimate interest" in counteracting the mitigating evidence with evidence of the "specific harm caused by the defendant").

28. *See id.*

the admission of victim impact evidence became—and remains—constitutionally valid.[29]

B. The "Impact" of Victim Impact Evidence on Capital Sentencing

Payne had an enormous effect on sentencing within capital punishment jurisdictions. The majority of these jurisdictions permit prosecutors to introduce victim impact evidence.[30] Usually, this evidence is presented during the penalty phase of capital trials.[31] The victim's survivors—known as collateral victims—inform the jurors of the victim's personal characteristics and the harm suffered by the collateral victims as a result of the crime.[32] These presentations and arguments based upon them are considered the best tool a prosecutor has to obtain a death verdict.[33]

A review of the permitted uses of victim impact evidence in capital punishment jurisdictions reveals great diversity.[34] Jurisdictions vary as to the procedural protections afforded to defendants concerning use of this evidence.[35] Jurisdictions differ in their classification of the individuals who qualify as collateral victims[36] and the number of collateral victims permitted

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29. *See* John H. Blume, *Ten Years of* Payne*: Victim Impact Evidence in Capital Cases*, 88 CORNELL L. REV. 257, 278 (2003) (noting that "*Payne* is not going away").

30. *See id.* at 268 (noting that "thirty-three states allow [victim impact evidence] . . . and five states have yet to rule on the admissibility of [victim impact evidence]").

31. *See* Logan, *supra* note 14, at 172 (stating that most jurisdictions only permit presentation of victim impact evidence at the sentencing phase of capital trials but that some jurisdictions approve of guilt phase presentations as well, and arguing that use during the guilt phase seems to contradict *Payne*).

32. *See id.* (describing the role of collateral victims during sentencing proceedings).

33. *See id.* at 177–78 (describing victim impact evidence as "the most compelling evidence available to the State" and noting that it comes "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—after the defendant has been convicted of the most horrendous crime possible").

34. *See* Blume, *supra* note 29, at 268–78 (describing significant differences in the types of evidence that states permit and variation in the procedural protections available to defendants).

35. *See* Logan, *supra* note 14, at 174–78 (noting that only eight of the thirty-three states that use victim impact evidence require some form of notice to defendants by prosecutors of the prosecutors' intent to use victim impact evidence, that only five of the thirty-three states require a pretrial admissibility hearing to determine the admissibility of the victim impact evidence, that only a handful of states require trial judges to give sentencing juries limiting instructions on the evidentiary purpose of victim impact evidence, and further noting that the procedural requirements with which federal prosecutors must comply in order to use victim impact evidence in federal death penalty prosecutions vary per district and circuit).

36. *See id.* at 154–56 (stating that a few states limit the scope of witnesses to family

to testify.[37] Jurisdictions disagree over the types of evidence that are admissible as demonstrative of the "victim's uniqueness" or the "impact on the victim's family."[38] Jurisdictions also disagree about the categories of evidence they permit to be admitted beyond these two traditional categories.[39] Lastly, jurisdictions vary as to the permitted purposes for using this evidence[40] and how juries may use it during deliberation.[41]

Immediately following *Payne*, scholars and judges began expressing concerns regarding the potential effects of this decision on due process rights. Critics of *Payne* feared nearly limitless uses of victim impact evidence.[42] Further, scholars believe the decision will encourage capital sentencing juries to consider factors that have long been held arbitrary and irrelevant to sentencing

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members, whereas in the majority of jurisdictions the scope is so broad that it includes friends, neighbors, co-workers, and in the cases of Timothy McVeigh and Terry Nichols, even "paid emergency rescue workers and police").

37. *See id.* at 155 (noting that the number of witnesses permitted to testify is a matter of judicial discretion in both state and federal trials, and stating that an example of the high side is the federal prosecutions of Timothy McVeigh and Terry Nichols—fifty-five collateral victims testified).

38. *See id.* at 269–72 (describing the broad range of evidence admitted to show the victim's uniqueness as including evidence about the "victim's good character . . . talents, intelligence, spirituality, work ethic . . . educational background, standing in the community, and numerous other traits," and listing the range of evidence showing the impact of the homicide on the victim's family as including evidence of resulting health complications and emotional and financial problems and noting that this evidence has been presented in the form of "poems, videotapes, pre-death photographs and handcrafted items").

39. *See* Blume, *supra* note 29, at 271–73 (stating that some jurisdictions permit presentation of evidence of the harm to the "larger community" and that even against *Payne*'s holding, three states permit the victims to state their opinions on the appropriate sentence for the defendant); Logan, *supra* note 14, at 166 (describing the unconstitutional, yet admitted opinion evidence as divided into two categories, "characterizations and opinions about the crime and the defendant, and . . . witnesses' opinions as to the appropriate sentence").

40. *See* Logan, *supra* note 14, at 169 (describing the purposes served by admission of victim impact evidence as spanning from evidence used "to rebut mitigation evidence," "to evaluate the specific harm caused by the murder," and more generally, to show the "victim's uniqueness").

41. *See id.* at 170–72 (stating that most jurisdictions ban jurors from using victim impact evidence as a statutory aggravating factor, but noting that these jurisdictions do not give jurors any useful guidance on their consideration of it, and that some jurisdictions even permit jurors to use it as a non-statutory aggravating factor).

42. *See* Blume, *supra* note 29, at 268 (stating that the trend in the use of victim impact evidence is towards "the unfettered admission of a wide array of [it] and arguments" upon it because few jurisdictions provide any substantive or procedural limitations upon its uses); Logan, *supra* note 14, at 145 (describing the uses of victim impact evidence and noting that there is "precious little in the way of substantive limits, procedural controls, or guidance in how it is to be used").

decisions: rage and hatred,[43] the inequalities between the defendant's and the jurors' backgrounds,[44] and race.[45] Moreover, many expressed concern that the use of victim impact evidence will encourage jurors to make capital sentencing decisions based on their assessment of the defendant's and victim's comparative societal values.[46]

C. *Comparative Value Arguments as a Use of Victim Impact Evidence*

As predicted by scholars, comparative value arguments have developed as one of the ways in which prosecutors use victim impact evidence.[47] The phrase "comparative value" is a term of art. There are two types of comparative value arguments: comparative life and comparative worth. This section discusses the development of these arguments and the differences between them. The distinction between these two types of arguments is not always clear.[48] At

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43. *See* Susan Bandes, *Reply to Paul Cassell: What We Know About Victim Impact Statements*, 1999 UTAH L. REV. 545, 545 (stating that the admission of this evidence inflames the jurors by invoking "emotions toward the defendant like rage, hatred").

44. *See id.* (noting that this evidence will "exacerbate existing inequalities in the jury's attitudes toward the parties . . . on the fact that the defendant generally comes from a very different background from the jury's").

45. *See* State v. Muhammad, 678 A.2d 164, 203 (N.J. 1996) (Handler, J., dissenting) (arguing that "[v]ictim-impact evidence will be the Trojan horse that will bring into every capital prosecution a particularly virulent and volatile form of discrimination . . . discrimination based on the victim's race"); Blume, *supra* note 29, at 280 (concluding that victim impact evidence will interject racial discrimination in the jury's life or death decision).

46. *See Muhammad*, 678 A.2d at 203 (Handler, J., dissenting) (noting that the admission of victim impact evidence "encourages jurors to examine and use, both consciously and unconsciously, the *comparative worth* of the defendant and the victim") (emphasis added); Blume, *supra* note 29, at 279 (stating that victim impact evidence "can only invite the type of '*comparative worth* considerations' dismissed by the Payne majority") (emphasis added); Logan, *supra* note 14, at 157–58 (noting concern that "capital jurors, privy to a stream of witnesses extolling the virtues of the victim, will be tempted to *weigh the relative worth* of the victim against the defendant") (emphasis added); Bandes, *supra* note 43, at 545–46 (stating that victim impact evidence "encourage[s] irrelevant or invidious distinctions about the *comparative worth* of different victims, based on the social position, articulateness, and race of the victims and their families") (emphasis added); Vivian Berger, *Payne and Suffering: A Personal Reflection and a Victim-Centered Critique*, 20 FLA. ST. U. L. REV. 21, 46 (1992) (describing potential uses of victim impact evidence as "inviting jurors to make . . . *comparative* judgments . . . between the victim and the defendant") (emphasis added).

47. *See* Humphries v. Ozmint, 366 F.3d 266, 269 (4th Cir. 2004) (describing a comparative life argument as "the use to which the 'victim impact' evidence was put in this case").

48. *See* Hall v. Catoe, 601 S.E.2d 335, 340–41 (S.C. 2004) (stating that a cursory review of *Humphries* and *Hall* would lead a reader to think that these distinct argument styles are the same); *see also* Jackson v. Warden of Sussex I State Prison, 2005 WL 1404939, at *8 (Va.

times, even courts mislabel them.[49] In its analysis, this Note generally treats both arguments the same.[50] Therefore, the phrase "comparative value arguments" will be used as inclusive of both types of arguments, unless otherwise noted. Any subsequent reference to "comparative life" or "comparative worth" is used for the purpose of distinguishing one type of argument from the other.

Comparative life arguments encourage jurors to impose a death sentence on the grounds that the victim led a better life than the defendant.[51] Prosecutors contrast the ways in which the defendant and victim lived their lives at identical points in time.[52] This contrast is intended to show that "at the very instant one life was being put to worthwhile use, the other was not."[53] Comparative life arguments are the subtler of the two comparison arguments.[54] Prosecutors do

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2005) (holding a comparative worth argument proper under the Fourth Circuit's *Humphries* rationale, yet failing to notice that the argument at issue in *Humphries* is a comparative life argument).

49. Applying the analysis outlined in this Note, one could conclude that *Humphries* is a comparative life argument. *But see Humphries*, 366 F.3d at 272 (describing the argument in this case as one of "comparative *worth*") (emphasis added).

50. The author recognizes that some courts consider comparative life arguments less prejudicial than comparative worth arguments and that these courts treat the arguments differently for analysis. *See* Humphries v. Ozmint, 397 F.3d 206, 222–23 (4th Cir. 2005) (stating that comparative life arguments are less prejudicial than comparative worth arguments); *Hall*, 601 S.E.2d at 341 (holding comparative worth arguments unconstitutional because of their highly prejudicial nature, yet permitting the less prejudicial comparative life arguments). The arguments, however, are nearly indistinguishable to most. *See id.* (noting the fine line between these two types of arguments). Further, by permitting comparative life arguments and banning comparative worth arguments, courts give prosecutors an impermissible incentive. Prosecutors are permitted to present unlimited comparative biographies as long as they do not mention values or worth. *See Humphries*, 397 F.3d at 239 (Wilkinson, J., dissenting) (noting the prosecutor's lengthy comparative biography argument and criticizing the majority, because under their holding, prosecutors may encourage worth comparisons so long as they avoid using words such as "compare" or "value" or "worth"). Yet these arguments are highly prejudicial because they, too, invite worth comparisons. *See id.* at 244 (describing the comparative life argument at issue as urging death by "weighing . . . relative worth of a human"). Thus, because the two types of comparative value arguments are practically indistinguishable and yet both are highly prejudicial, the author will treat them the same for analytical purposes.

51. *See Humphries*, 397 F.3d at 239 (Wilkinson, J., dissenting) (describing the prosecutor's argument as "hammer[ing] home" the point that the defendant "had led a worthless life, [the victim] a worthy one, and a death sentence was warranted on this basis").

52. *See id.* at 238 (Wilkinson, J., dissenting) (describing comparative life arguments as "point-by-point, side-by-side, and year-by-year" comparisons between the lives of the victim and the defendant).

53. *Id.* (Wilkinson, J., dissenting).

54. *See id.* at 222–23 (stating that comparative life arguments are less prejudicial than comparative worth).

not explicitly urge jurors to assign a value or a weight to the lives of the victim and defendant.[55] Instead, it is the point-by-point manner in which the evidence is presented—and the lack of guidance to the jurors as to its proper use—that results in jurors making their sentencing decision at least in part on value comparisons.[56] For example, one prosecutor argued the following:

> [I]n 1984 [the victim] met Pat, and they fell in love, and they got married. That's the same year [defendant] committed two house break-ins at age 13. . . . Then in 1988, July the 4th, [the victim and his wife] have a little baby girl named Ashley. . . . That's the same year [defendant] went to jail for two years. . . . [W]hen you look at the character of this Defendant, and when you look at [the victim], how profane when you look at all the circumstances of this crime and of this Defendant, how profane to give this man a gift of life under these circumstances.[57]

The prosecutor did not explicitly advise the jurors to compare the two lives and render a death sentence if the jurors found the defendant's life less valuable.[58] Yet, as noted by some appellate judges, it is conceivable that the jurors did precisely that.[59] These arguments are an extremely effective tool for prosecutors to obtain a death verdict.[60] In fact, as one trial judge stated, the closing argument made by a prosecutor, which included a comparative life argument, was "one of the best arguments I have ever heard in my life . . . in terms of [its] . . . *effectiveness*."[61]

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55. *See* Hall v. Catoe, 601 S.E.2d 335, 340–41 (S.C. 2004) (distinguishing comparative life arguments from comparative worth arguments on the grounds that comparative worth arguments assign values to the lives of the defendant and victim, whereas comparative life arguments do not).

56. *See* Humphries v. Ozmint, 397 F.3d 206, 238 (4th Cir. 2005) (Wilkinson, J., dissenting) (noting that even though prosecutors do not expressly use words such as "worth" or "value," comparative life arguments are so persuasive that they create an impermissible risk that jurors engage in comparative value balancing).

57. *Id.* at 213–14.

58. *See Hall*, 601 S.E.2d at 340–41 (discussing the difference between *Humphries*, a comparative life argument, and *Hall*, a comparative worth argument, noting that the difference is that the prosecutor in *Humphries* did not urge the jury to balance the comparative worth of their lives, whereas the prosecutor did in *Hall*).

59. *See Humphries*, 397 F.3d at 230 (Wilkinson, J., dissenting) (stating that the "point-by-point" nature of comparative life arguments makes these arguments just as persuasive as arguments that explicitly urge jurors to compare worth and noting that these arguments are quite effective with the jurors). *Cf.* State v. Muhammad, 678 A.2d 164, 180–81 (N.J. 1996) (holding comparative life arguments unconstitutional because jurors might misuse victim impact evidence in a manner that renders trials fundamentally unfair).

60. *See Humphries*, 397 F.3d at 246 (noting the effectiveness of these arguments).

61. *Id.* (quoting the state trial judge who presided over defendant Humphries' capital trial).

Comparative worth arguments are slightly different. Like comparative life arguments, prosecutors usually present the victims' and the defendants' personal qualities in a comparative manner. Prosecutors do not, however, stop there.[62] They explicitly encourage jurors to assign a weight or a value to the lives of the defendant and the victim.[63] If the jurors conclude that the victim's life is worth more than the defendant's, they are urged to reach a death verdict.[64] For example, one prosecutor asked the jury:

> What are the lives of these two [victims] worth? Are they worth at least the life of a man, the psychopath, this killer who stabs and stabs and kills and rapes and kidnaps?[65]

Further, the evidence admitted usually highlights the defendant's negative qualities and the victim's positive qualities.[66] Consequently, the jury is supplied with the information it needs to assign value to the lives of the defendant and the victim.[67] These arguments, too, greatly aid prosecutors in obtaining death verdicts.[68]

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62. *Cf.* Hall v. Catoe, 601 S.E.2d 335, 340–41 (S.C. 2004) (describing the prosecutor's argument as going beyond *Humphries*, meaning solely the presentation of comparative biographies).

63. *See id.* (noting that the prosecutor's argument directed jurors to assign weights to the defendant's and victim's lives based on the evidence presented); State v. Storey, 901 S.W.2d 886, 902 (Mo. 1995) (quoting the following part of the prosecutor's argument: "The reason we have the death penalty is because the right of the innocent people to live outweighs . . . the right of the guilty not to die. . . . Whose life is more important to you? Whose life has more value? The Defendant's or the [victim's]?").

64. *See Hall*, 601 S.E.2d at 341 (describing the prosecutor's argument as direction to the jury to use "an arbitrary formula whereby if the jury finds Hall's life worth less than his victims" they must conclude that death is the appropriate penalty); *Storey*, 901 S.W.2d at 902 (noting that the prosecutor attempted to "simplify the death sentence" to one basic question: "[w]hose life has more value?").

65. *Hall*, 601 S.E.2d at 337.

66. *See* Logan, *supra* note 14, at 157–60 (listing the variety of evidence admitted to show the virtues of the victim and the negative nature of biographical evidence presented about the defendant and further noting that courts typically do not bar presentation of evidence of the victim's bad character, which taken altogether, leaves the jury with only positive thoughts of the life of the victim and negative thoughts of the life of the defendant).

67. *See* State v. Koskovich, 776 A.2d 144, 182 (N.J. 2001) (describing the prosecutor's comparative worth argument as supplying jurors with facts to use to balance the victim's and defendant's comparative values).

68. *See* Hall v. Catoe, 601 S.E.2d 335, 341 (S.C. 2004) (stating that by following the prosecutor's comparative worth formula the "jury could reach no other conclusion than that the death penalty is justified").

III. Prosecutors as Servants of the Constitution

This Part addresses the role of prosecutors in the criminal legal system and the duties the law imposes on them. This Part focuses in depth on the outer bounds of effective prosecution, namely prosecutorial misconduct. This discussion outlines several types of arguments impermissible under the Eighth and Fourteenth Amendments.

A. The Role of Prosecutors

In the United States criminal legal system, prosecutors fulfill a unique role[69] by serving two honorable purposes.[70] They ensure that those who commit crimes are prosecuted and convicted.[71] In this sense, prosecutors work to protect society from harm and to enforce its laws.[72] Their second purpose is to ensure that "justice shall be done."[73] In this sense, prosecutors serve as protectors of the Constitution and all of the rights that it affords criminal defendants.[74] Prosecutors do not serve justice by "tacking as many skins of

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69. *See* Berger v. United States, 295 U.S. 78, 88 (1935) (describing the role of prosecutors as unique because they are "representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all").

70. *See id.* at 88 (stating that prosecutors have a "two-fold aim . . . that guilt shall not escape or innocence suffer"); Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 376–77 (2001) (summarizing literature on the roles of prosecutors and labeling them "administrators of justice, advocates, and officers of the court"); Robert H. Jackson, *The Federal Prosecutor*, 31 AM. INST. CRIM. L. & CRIMINOLOGY 3, 6 (1940) (stating that "the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility").

71. *See* United States v. Agurs, 427 U.S. 97, 110 (1976) (stating that prosecutors "must prosecute the accused with earnestness and vigor").

72. *See* Donnelly v. DeChristoforo, 416 U.S. 637, 649 (1974) (Douglas, J., dissenting) (describing this purpose of the prosecutor's role as "vindicat[ing] the right of people as expressed in the laws").

73. *See Agurs*, 427 U.S. at 111 (describing justice as an "overriding interest" to which the prosecutor must be faithful); Catherine Ferguson-Gilbert, *It is not Whether You Win or Lose, It is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors?*, 38 CAL. W. L. REV. 283, 285 (2001) (describing the prosecutor's duty to serve justice as including "a duty to seek to reform and improve the administration of criminal justice," "a duty to take action to correct substantive or procedural inadequacies or injustices," and a "duty to make sure the process is fair").

74. *See Berger*, 295 U.S. at 88 (stating that the prosecutor is a "servant of the law" meaning prosecutors must "refrain from improper methods calculated to produce a wrongful conviction"); Bruce A. Green, *Why Should Prosecutors "Seek Justice?"*, 26 FORDHAM URB. L.J.

victims as possible to the wall," but rather by performing their duties in a manner consistent with providing "those accused of a crime a fair trial."[75]

Scholars and judges have noticed that the dual roles of prosecutors are conflicting in nature—that there is a tension between diligently and yet fairly prosecuting defendants.[76] Sometimes when these roles collide, the duty to enforce trumps the duty to serve justice.[77] The legal community acknowledges this fact—that justice is not served at all times.[78] At the same time, the legal community reinforces the directive of the courts—that justice should always prevail.[79]

As safeguards against improper prosecution, a defendant may raise a variety of constitutional challenges to the prosecutor's performance.[80] These safeguards include challenges to improper remarks made by prosecutors during closing arguments.[81] Further, the Supreme Court recognizes that it has an

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607, 637 (1999) (noting that as a representative of the sovereign, prosecutors must obey the client's objectives as "reflected in the constitution and statutes, as well as history and tradition").

75. *See Donnelly*, 416 U.S. at 649 (Douglas, J., dissenting) (describing the relationship between prosecutors and the federal Constitution).

76. *See* Viereck v. United States, 318 U.S. 236, 253 (1943) (Black, J., dissenting) (noting that prosecutors must be careful not to cross the fine line between "fair[ness] and earnestness"); Smith, *supra* note 70, at 377 (discussing the dual roles of advocate and administrator of justice and asking "[h]ow does one balance these competing and sometimes inconsistent obligations?"); Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121, 1183 (1998) (suggesting policies to resolve the internal conflicts between "convicting the guilty and being fair to defendants").

77. *See* Darden v. Wainwright, 477 U.S. 168, 206 (1986) (Blackmun, J., dissenting) (criticizing the majority for not reversing the conviction because without fear of reversal, prosecutors who are "eager to win victories, will gladly pay the small price of a ritualistic verbal spanking"); Green, *supra* note 74, at 643 (recognizing that the objective of justice might lose to the objective of enforcement).

78. *See Viereck*, 318 U.S. at 247–48 (describing the dual roles of the prosecutor and stating that the prosecutor in the case at hand chose to address the jury with "highly prejudicial" remarks at the expense of fairness and justice); Smith, *supra* note 70, at 388–91 (stating that the overriding self-interest of prosecutors to win a case at times trumps their obligation to seek justice); Ferguson-Gilbert, *supra* note 73, at 295 (arguing that because prosecutors' promotions are based upon conviction rates, "prosecutors seek convictions to boost their 'score' rather than seeking justice").

79. *See* United States v. Agurs, 427 U.S. 97, 110–11 (1976) (directing prosecutors to serve the "overriding interest" of justice before consideration of its secondary interest—vigorous prosecution).

80. *Cf., e.g., Darden*, 477 U.S. at 168 (discussing one of the numerous protections given to defendants by the Due Process Clause's fair trial standards).

81. *See* Caldwell v. Mississippi, 472 U.S. 320, 328–41 (1985) (holding that the Eighth Amendment protects defendants from prosecutorial arguments that misinform juries on their roles in sentencing phase of capital trials); *see also Darden*, 477 U.S. at 181 (holding that the Due Process Clause of the Fourteenth Amendment protects defendants from prosecutors'

ongoing duty to reevaluate capital sentencing schemes for procedural fairness.[82] This duty to review includes examinations of any newly developed argument techniques that might violate fair trial principles.[83] The following sections explore the Court's treatment of arguments by prosecutors that improperly influence jurors.

B. The Eighth Amendment and the Prohibition on Misleading Juries

The Eighth Amendment prohibits federal and state governments from inflicting "cruel and unusual punishments"[84] on defendants.[85] The Amendment includes protection from punishments that are either physically inhumane[86] or arbitrarily determined.[87] Of all available punishments, death is the most severe.[88] Moreover, it is of a significantly different nature than any other

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remarks that are so improper as to render trials fundamentally unfair).

82. *See* Gardner v. Florida, 430 U.S. 349, 356–57 (1977) (stating that because society's views of procedural fairness change over time, re-examining capital-sentencing procedures is necessary and mandatory).

83. *See* Payne v. Tennessee, 501 U.S. 808, 831 (1991) (O'Connor, J., concurring) (stating that "[i]f, in a particular case . . . 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"); *Caldwell*, 472 U.S. at 339 (stating that the Court must review prosecutor's arguments for techniques that might violate the "Eighth Amendment's heightened need for reliability in the determination that death is the appropriate punishment in a specific case").

84. U.S. CONST. amend. VIII, cl. 3.

85. *See Payne*, 501 U.S. at 831 (O'Connor, J., concurring) (noting that "[t]he Eighth Amendment stands as a shield against those practices and punishments which are either inherently cruel or which so offend the moral consensus of this society as to be deemed cruel and unusual") (quoting South Carolina v. Gathers, 490 U.S. 805, 821 (1989) (O'Connor, J., dissenting)); Furman v. Georgia, 408 U.S. 238, 270 (1972) (per curiam) (Brennan, J., concurring) (noting that "[w]hile the State has the power to punish, the [cruel and unusual punishment clause of the Eighth Amendment] stands to assure that this power be exercised within the limits of civilized standards").

86. *See Furman*, 408 U.S. at 258–64 (per curiam) (Brennan, J., concurring) (reviewing the history of the Clause and concluding that it protects individuals from punishments which may be torturous or barbarous and that the determination of which punishments violate it will vary based upon the evolving standards of decency).

87. *See id.* at 249 (per curiam) (Douglas, J., concurring) (describing an "unusual" penalty as one which "is [imposed] arbitrarily or discriminatorily"); *id.* at 274–75 (Brennan, J., concurring) (noting that "the English history of the Clause reveals a particular concern with the establishment of a safeguard against arbitrary punishments" and later noting that "[t]his principle has been recognized in our cases").

88. *See id.* at 287 (per curiam) (Brennan, J., concurring) (stating that "[n]o other existing punishment is comparable to death in terms of physical and mental suffering").

punishment; once carried out, death is final for the defendant.[89] Because of this finality, the Eighth Amendment imposes a "heightened need for reliability in the determination that death is the appropriate punishment in a specific case."[90] Protection from the arbitrary infliction of death is of the highest importance.[91] Therefore, Eighth Amendment challenges to capital sentencing determinations require "a correspondingly greater degree of scrutiny."[92]

One protection defendants have under the Eighth Amendment's arbitrariness prong is protection against improper arguments by prosecutors. Defendants may bring Eighth Amendment challenges to arguments made by prosecutors that mislead jurors on their role, as recognized in *Caldwell v. Mississippi*.[93] Comments by the prosecutor that minimized the role served by jurors were "fundamentally at odds with the role that a capital sentencer must perform."[94] The Eighth Amendment's reliability requirement is violated when prosecutors make improper arguments that are of such a nature as to infect the

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89. *See id.* at 289–90 (Brennan, J., concurring) (stating that the "unusual severity of death is manifested most clearly in its finality" and later distinguishing death from other punishments on the grounds that only a defendant sentenced to death "has indeed lost the right to have rights").

90. Caldwell v. Mississippi, 472 U.S. 320, 340 (1985).

91. *See* Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (holding that because of its finality "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case"); *Furman*, 408 U.S. at 277 (per curiam) (Brennan, J., concurring) (stating that the "more significant function of the Clause . . . is to protect against the danger of their arbitrary infliction").

92. *Caldwell*, 472 U.S. at 329.

93. Caldwell v. Mississippi, 472 U.S. 320 (1985). In *Caldwell*, the Court considered whether the prosecutor telling the jury that their decision was merely one step in a long appellate process, rather than their assigned role—decision maker—violated the Eighth Amendment's protection against arbitrary sentencing. *Id.* at 325–26. The Court held that this argument violated the Eighth Amendment. *Id.* at 341. The prosecutor's argument, stated the Court, is neither "accurate [n]or relevant to a valid state penological interest." *Id.* at 336. The comment is inaccurate because jurors are to determine the defendant's appropriate sentence, and leading jurors to believe that it is another body, such as an appellate court that makes the ultimate decision, is misleading. *Id.* at 333. The Court recognized that jurors respecting the gravity of their decision and the importance of their role is an important state penological goal. *Id.* at 336. The Court then stated that by downplaying and degrading the role of the jury, the prosecutor's comment was not only irrelevant to, but in contradiction of this important penological goal. *Id.* The Court ruled that a prosecutor's comment that is inaccurate and irrelevant is improper. *Id.* at 340. Improper comments are an Eighth Amendment violation if they create a fundamentally unfair sentencing procedure because the Amendment's need for heightened reliability in death sentences is not met. *Id.* Because the Court could not say that the prosecutor's improper argument had no effect on the jury's decision to impose the death penalty, the Court held that the reliability standard of the Eighth Amendment had been violated. *Id.*

94. *Id.* at 336.

trial with fundamental unfairness.[95] The Court later summarized the elements of a *Caldwell* violation as being met when the defendant shows that the prosecutor's "remarks to the jury improperly described the role assigned to the jury by local law."[96]

Defendants have successfully brought *Caldwell* claims in federal and state courts challenging a variety of improper arguments by prosecutors. One line of these cases discusses arguments that lead the jurors to believe that their role in the criminal sentencing system is different from what the law requires. Prosecutors cannot lead jurors to believe that their role is "advisory when it is not, or . . . that [their] decision will not have effect unless others make the same decision."[97] Further, a *Caldwell* violation exists when the prosecutor's comment is a "technically accurate statement" of the appellate process that, because few jurors have legal training, might be misinterpreted as a statement that minimizes their role.[98] These arguments violate the Eighth Amendment's reliability requirement.[99] The Eighth Amendment requires jurors to deliberate carefully,[100] and these arguments encourage quick, thoughtless decisions.[101] Prosecutors cannot use closing arguments to confuse jurors into thinking that they serve a less important role than the law requires of them.

Another line of *Caldwell* claims centers on improper comments by prosecutors that mislead jurors on the law that governs deliberations. For example, defendants have a constitutional right to presentation and consideration by the jury of any facts that may mitigate the jury's finding that

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95. *Id.* at 340 (holding that the prosecutor's comment which was uncorrected by the trial judge "might so affect the fundamental fairness of the sentencing proceeding as to violate the Eighth Amendment").

96. Romano v. Oklahoma, 512 U.S. 1, 9 (1994).

97. Sawyer v. Butler, 881 F.2d 1273, 1282 (5th Cir. 1989); *see also* Frye v. Commonwealth, 345 S.E.2d 267, 284–86 (Va. 1986) (holding that the prosecutor telling the jury that their verdict was a recommendation to the judge who "will be the person that fixes [the] sentence" is misleading, violating *Caldwell* because according to Virginia law, "it is the jury's responsibility to 'fix' the punishment").

98. *See* Riley v. Taylor, 277 F.3d 261, 298 (3d Cir. 2001) (holding that a technically accurate statement to the jury about Delaware's judicial review of their decision being automatic is misleading because jurors are unlikely to be aware of or able to fully understand the exceptionally narrow standard of appellate review).

99. *See, e.g., id.* at 298 (holding arguments that mislead jurors on their role to be Eighth Amendment violations under *Caldwell*).

100. *See, e.g., id.* at 299 (stating that the Eighth Amendment requires jurors to keep in mind the importance of their decision and their role at all times during sentencing deliberations).

101. *Cf., e.g., id.* (noting that jurors must "continue to feel the weight" of their duties, otherwise they may not treat their deliberations with the importance that the law requires).

death is the appropriate punishment.[102] A *Caldwell* violation is established if the prosecutor argues in such a manner as to "foreclose the jury's consideration of . . . mitigating evidence" because the jurors are misled on their duty to consider this evidence.[103] Additionally, prosecutors violate *Caldwell* if their arguments lead jurors to think that their decision is nothing more than an affirmation or denial of the prosecutor's carefully made decision.[104] Under these circumstances, the jurors might make a less careful or less serious decision than the law prescribes.[105] Thus, prosecutors cannot confuse jurors on the sentencing analysis that the law requires them to use.

C. The Due Process Clauses and the Prohibition on Misleading Juries

The Due Process Clauses of the Fifth and Fourteenth Amendments provide additional protection from improper comments.[106] These clauses state that no government shall deprive any person of "life, liberty, or property, without due process of law."[107] The Court has read these clauses as protecting the right of all criminal defendants to have a fair trial.[108] This fair trial

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102. *See* Lockett v. Ohio, 438 U.S. 586, 604 (1978) (concluding that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death").

103. *See* Depew v. Anderson, 311 F.3d 742, 749 (6th Cir. 2002) (quoting Buchanan v. Angelone, 522 U.S. 269, 277 (1998)) (holding that a prosecutor's argument that undercut the defendant's mitigation case so significantly, and at times inaccurately, foreclosed the jury's consideration of mitigating evidence, thereby altering the jury's view of the role assigned to it in violation of the Eighth Amendment); State v. Neal, 361 N.J. Super. 522, 535–36 (App. Div. 2003) (holding that a prosecutor's remark that the "defendant's calling of character witnesses was quite shameless" undercut the defendant's mitigation case, which the "prosecutor cannot do").

104. *See* Newlon v. Armontrout, 693 F. Supp. 799, 805–06 (W.D. Miss. 1988), *aff'd*, 885 F.2d 1328, 1337 (8th Cir. 1989) (finding misleading a series of comments that led the jury to believe that the prosecutor was the sentencing decision maker, meaning the appropriate person to balance this case against others and to balance the aggravating factors and mitigating factors, instead of the jury).

105. *Cf. Newlon*, 693 F. Supp. at 805–06 (noting that sentences rendered under these circumstances do not reflect careful, thoughtful jury deliberation).

106. *See* Darden v. Wainwright, 477 U.S. 168, 181 (1986) (stating that a prosecutor's comments may "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process").

107. U.S. CONST. amend. V, cl. 3 (applying to the federal government); U.S. CONST. amend. XIV, § 1, cl. 3 (applying to state governments).

108. *See Darden*, 477 U.S. at 181 (stating that due process requires trials free from fundamental unfairness).

protection extends to both the guilt and sentencing phases of capital trials.[109] In discussing sentencing schemes, the Court has noted that "[t]he defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence."[110] Prosecutors may not make remarks that "so infect[] the sentencing proceeding as to render [it] fundamentally unfair."[111] Should a prosecutor make such a comment, the "Due Process Clause . . . provides a mechanism for relief."[112] This Part discusses two types of arguments that violate due process fairness standards.

First, arguments that confuse jurors on their legal duties or their legal role violate the Clause. This due process violation closely resembles *Caldwell* Eighth Amendment violations; however, courts maintain separate doctrines.[113] Under this Fourteenth Amendment doctrine, prosecutors cannot misinform jurors as to the appropriate body of law they should apply—for example, biblical law instead of state law.[114] These arguments encourage jurors to impose death on the basis of outside, irrelevant factors, instead of the legal principles they promised to follow.[115] Further, prosecutors cannot urge sentencing determinations on the basis of misstatements of the law. One court found a due process violation because the prosecutor told jurors that they had no duty to consider mercy, even though state law clearly directs jurors to

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109. *See* Romano v. Oklahoma, 512 U.S. 1, 12 (1994) (quoting Clemons v. Mississippi, 494 U.S. 738, 746 (1990)) (holding that the Due Process Clause's protections are available at both guilt and sentencing phases of capital trials).

110. Gardner v. Florida, 430 U.S. 349, 358 (1977).

111. *Darden*, 477 U.S. at 181.

112. Payne v. Tennessee, 501 U.S. 808, 825 (1991) (O'Connor, J. concurring) (holding that prosecutors may not make arguments that are so "unduly prejudicial" that defendants are denied their guarantee of a fair trial).

113. This due process violation is nearly identical to the *Caldwell* Eighth Amendment violations discussed in Part III.B, *supra*. Defendants may challenge these misleading arguments under either Amendment. *See, e.g.*, Antwine v. Delo, 54 F.3d 1357, 1371 (8th Cir. 1995) (holding the prosecutor's arguments unconstitutionally misleading under both the Eighth and Fourteenth Amendments). Most likely, these coextensive yet separate doctrines evolved as a result of the particular claims raised by appellants. *See* State v. Rizzo, 833 A.2d 363, 411 n.40 (Conn. 2003) (noting that the defendant did not challenge the improper argument made under any specific state or federal constitutional clause, discussing the potential for claims under the Eighth Amendment and Due Process Clause precedent, and construing the defendant's claim as one arising under federal due process protections).

114. *See* Romine v. Head, 253 F.3d 1349, 1366–71 (11th Cir. 2001) (holding unconstitutional an argument that encouraged jurors to follow biblical law, which does not permit mercy towards individuals who kill their parents, instead of state sentencing law).

115. *See id.* (holding these arguments unconstitutional because they encourage jurors to make a sentencing decision that is not founded on state sentencing law).

consider it.[116] This misstatement of the law encouraged the jurors to deliberate in a manner that deviates from that required by law.[117] Because jurors promise to deliberate in accordance with law, fair trial protections are violated by any sentence based on principles that contradict the law.[118] Lastly, prosecutors cannot urge jurors to use facts during deliberations in a manner that is inconsistent with the law. One court deemed unconstitutional an argument that enticed jurors to penalize the defendant for prior crimes that by law could not be counted against him.[119] Arguments like these call for death on the basis of legally irrelevant factors.[120] The imposition of a death sentence should, however, reflect only those aggravating factors specified by law.[121] As these cases demonstrate, prosecutors cannot use closing arguments to confuse jurors on the type of analysis they are required to use.

There is a second type of improper argument recognized by courts that is unrelated to *Caldwell*. Arguments that inflame jurors also violate fundamental fairness standards.[122] Because of the "vital importance" of the decision to impose death, death verdicts must "appear to be based on reason."[123]

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116. *See* Presnell v. Zant, 959 F.2d 1524, 1529–31 (11th Cir. 1992) (holding as unconstitutionally misleading a prosecutor's argument that denounced mercy as a sentencing factor, because the law of the state directed jurors to specifically consider mercy); *see also* Peterkin v. Horn, 176 F. Supp. 2d 342, 372–73 (E.D. Pa. 2001) (stating that a prosecutor's comment telling jurors that they "could not apply the concept of mercy" was "excessive and . . . overstepped the boundaries into the realm of constitutional error").

117. *See, e.g.*, *Presnell*, 959 F.2d at 1531 (stating that the law requires jurors to consider mercy and the prosecutor informed them otherwise).

118. *Cf., e.g., id.* (holding that defendants are entitled to a sentence made in accordance with the law).

119. *See* Lesko v. Lehman, 925 F.2d 1527, 1545–46 (3d Cir. 1991) (holding unconstitutional an argument that urged jurors to settle the score between the defendant and victims by penalizing the defendant for crimes that state law prohibited jurors from considering); *see also* Christy v. Horn, 28 F. Supp. 2d 307, 318 (W.D. Pa. 1998) (stating that a prosecutor's argument "crossed the line from [permissible oratorical] 'flair' to foul" because the prosecutor told jurors to return a death verdict if they found one aggravating factor, and Pennsylvania law directs the jurors to "engage in a weighing process if it finds at least one aggravating and mitigating factor").

120. *Cf., e.g., Lesko*, 925 F.2d at 1545–46 (noting that factors that the law prohibits jurors from considering are irrelevant to sentencing determinations).

121. *See infra* Part IV.B.1 (discussing capital sentencing and noting that jurors must determine that the prosecutor established at least one aggravating factor beyond a reasonable doubt to impose death).

122. *See* Payne v. Tennessee, 501 U.S. 808, 831 (1991) (O'Connor, J., concurring) (stating that inflammatory arguments made by prosecutors are a grounds for Fourteenth Amendment relief).

123. Godfrey v. Georgia, 446 U.S. 420, 433 (1980) (Marshall, J., concurring in judgment) (reversing the defendant's death sentence because the sentence was not imposed "based on reason [but] rather . . . caprice or emotion").

Inflammatory arguments, however, encourage death verdicts made on the basis of a "whim, passion, prejudice, or mistake."[124] The severity and finality of death dictates that courts take "extraordinary measures" to protect defendants from sentencing by passion and prejudice.[125] Moreover, prosecutors themselves have "a heightened duty to refrain from conduct designed to inflame the sentencing jury's passions and prejudices."[126]

There are a variety of arguments that courts find inflammatory. Prosecutors may not scare the jurors into imposing a death verdict.[127] They cannot encourage jurors to vote for death instead of life because the defendant might escape prison and harm them if given a life sentence.[128] Arguments like these improperly "play on the jurors' personal fears and emotions."[129] Jurors are likely to impose death as a means of self-preservation rather than as a statement of the defendant's blameworthiness.[130] Prosecutors may not urge jurors to deny the defendant mercy in order to give the defendant the same cruel treatment that the defendant gave the victim.[131] Comments of this nature are

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124. Eddings v. Oklahoma, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring).

125. *See Payne*, 501 U.S. at 831 (O'Connor, J., concurring) (discussing the role of courts in preventing the imposition of death based on passion instead of reason).

126. Lesko v. Lehman, 925 F.2d 1527, 1541 (3d Cir. 1991).

127. *See* Viereck v. United States, 318 U.S. 236, 247–48 (1943) (prohibiting prosecutors from using scare-tactics during closing arguments because these arguments encourage a verdict made out of fear or passion, not reason).

128. *See* Miller v. Lockhart, 65 F.3d 676, 684 (8th Cir. 1995) (holding unconstitutional an argument that described the defendant as an escape artist who posed a threat to society and later that the defendant is a "Mad Dog" that should be put to death); Tucker v. Zant, 724 F.2d 882, 889 (11th Cir. 1984) (holding improper a comment by the prosecutor that he would sleep better with a death conviction because the defendant could not get back "out on the street"); Christy v. Horn, 28 F. Supp. 2d 307, 318–19 (W.D. Pa. 1998) (holding that an argument that labeled the defendant as "the Great Manipulator," to whom prison was just a "revolving door," only served to inflame the jurors).

129. *Miller*, 65 F.3d at 684 (holding that inflammatory arguments misdirect the focus of jurors away from the facts and the law to fears and emotions).

130. *See Tucker*, 724 F.2d at 889 (holding these arguments unconstitutional because they divert the focus of the jurors during sentencing from the "character of th[e] crime and th[e] criminal" to "generalized fears" and the Due Process Clause does not tolerate misleading of this kind); *cf.* Stone v. Powell, 428 U.S. 465, 490 (1976) (stating that the central question before jurors during the guilt phase of a capital trial is that of guilt or innocence and prosecutors should not cause a shift in the jurors' focus from this question).

131. *See Lesko*, 925 F.2d at 1545 (stating that "the prosecutor exceeded the bounds of permissible advocacy by imploring the jury to make its death penalty determination in the cruel and malevolent manner shown by the defendants when they tortured and drowned the [victims]"); Thomas v. State, 83 P.3d 818, 826 (Nev. 2004) (stating that a prosecutor's comment was improper because it informed jurors that the "defendant is deserving of the same sympathy and compassion and mercy that he extended to [the victims]").

fundamentally unfair because they are "calculated to incite an unreasonable and retaliatory decision," instead of a decision based on reasoning and the facts.[132] Additionally, arguments that go beyond the evidence presented and make unsubstantiated inferences that might inflame jurors are unconstitutional.[133] These arguments encourage jurors to shift their focus from the facts of the case to irrelevant and unrelated emotionally charged issues.[134] They encourage a decision based on "blood lust" rather than "reasoned deliberation."[135] Lastly, some Justices have expressed a concern that, by the very nature of victim impact evidence, any arguments made upon it risk becoming unconstitutionally inflammatory.[136] Victim impact evidence is emotionally charged evidence.[137] It is "frequently tearful testimony" that comes straight from the "hearts . . . of the survivors."[138] Jurors might sentence the defendant to death as a passionate response to the arguments and not a reasoned response to the facts of the

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132. *See, e.g.*, Lesko v. Lehman, 925 F.2d 1527, 1545 (3d Cir. 1991) (holding such arguments unconstitutional because, instead of making a reasoned moral response to the evidence presented, jurors act on the basis of vengeance and retaliation).

133. *See* Shurn v. Delo, 177 F.3d 662, 666–68 (8th Cir. 1999) (Wollman, J., concurring) (holding unconstitutional an argument that "attempted to link [the defendant] with Charles Manson" followed by direction to "kill [the defendant] now" because that argument inappropriately appealed to "blood lust and mob justice rather than . . . reasoned deliberation"); Newlon v. Armontrout, 693 F. Supp. 799, 806–08 (W.D. Mo. 1988), *aff'd* 855 F.2d 1328, 1337 (8th Cir. 1989) (holding unconstitutional an argument that "attempted to link petitioner with Richard Speck, Charles Manson, and the Son of Sam" followed by directions to "kill [the defendant] before he could harm their own children"); Mays v. State, 571 S.W.2d 429, 430 (Ark. 1978) (holding highly improper a prosecutor's closing argument that included references to the defendant being a "dope pusher" and friend of convicted felons, when neither comment is supported by evidence because prosecutors should not include in their closing arguments "anything except the evidence in the case and legitimately deductible conclusions that may be made"); Thomas v. State, 83 P.3d 818, 825–26 (Nev. 2004) (holding as inflammatory and as arguing inferences outside the evidence a remark that encouraged jurors to find death because "[t]here is no program that we know of that rehabilitates killers").

134. *See Shurn*, 177 F.3d at 668 (Wollman, J., concurring) (stating that these arguments improperly encourage jurors to shift the focus of their deliberations from the facts of the case to irrelevant emotional considerations).

135. *See id.* at 668–69 (describing the problems with this type of inflammatory argument).

136. *See* Payne v. Tennessee, 501 U.S. 808, 836 (1991) (Souter, J., concurring) (stating that the admission of victim impact evidence and arguments upon it "can of course be so inflammatory as to risk a verdict impermissibly based on passion, not deliberation"); *id.* at 856 (Stevens, J., concurring) (noting that victim impact evidence and arguments upon it "serve[] no purpose other than to encourage jurors" to render a death verdict "on the basis of their emotions rather than their reason").

137. *See* Logan, *supra* note 14, at 177–78 (discussing the highly emotional nature of victim impact evidence).

138. *See id.* (describing the testimony of survivors).

case.[139] Therefore, in addition to the other forms of improper arguments, prosecutors may not use closing arguments to encourage an undue emotional response from the jurors.

IV. Validity of Comparative Value Arguments

This Part begins by outlining the opinions that address comparative value arguments and their limited holdings. This Part suggests that several constitutional doctrines—largely unaddressed by those opinions—support a finding that comparative value arguments are an unconstitutional use of victim impact evidence.

A. Judicial Treatment of Comparative Value Arguments

Payne lifted the *Booth* Eighth Amendment per se bar to the admission of victim impact evidence.[140] Defendants are not, however, precluded from challenging the prosecutor's *specific use* of victim impact evidence in their trials.[141] Indeed, in her concurring opinion, Justice O'Connor reviewed the specific use of victim impact evidence challenged in *Payne*.[142] Noting that courts must hold prosecutors to Eighth Amendment standards, Justice O'Connor did not find that the specific use of victim impact evidence in Payne's sentencing trial violated this Amendment.[143] The Court has not

139. *See Payne*, 501 U.S. at 836 (Souter, J., concurring) (expressing concern that arguments based upon victim impact evidence will be so inflammatory as to encourage death on the basis of passion instead of reasoned deliberation); *id.* at 856 (Stevens, J., concurring) (stating that arguments on victim impact evidence will impermissibly cause a shift in the focus of jurors from reasoning to emotion).

140. *See id.* at 818–27 (holding admission of the category of evidence known as "victim impact evidence" permissible under the Eighth Amendment and overturning *Booth* which held that "the admissibility of victim impact evidence was not to be determined on a case-by-case basis, but that such evidence was per se inadmissible").

141. *See id.* at 818 (distinguishing *Payne* from *Booth* on the grounds that *Payne* permits case-by-case review of the use of victim impact evidence, whereas *Booth* bans all uses of it).

142. *See id.* at 831 (O'Connor, J., concurring) (determining that the line between permissible and impermissible uses of victim impact evidence "was not crossed [by the prosecutor] in this case").

143. *See id.* at 831–33 (O'Connor, J., concurring) (holding that defendants may seek relief if "in a particular case . . . a prosecutor's remark so infects the sentencing proceeding as to render it fundamentally unfair").

granted certiorari since *Payne* to address the validity of any of the specific uses of victim impact evidence that have developed.[144]

One controversial use of victim impact evidence is comparative value arguments. To date, seven states have addressed the merits of comparative value arguments briefly, or at least commented on them.[145] Missouri, New Jersey, South Carolina, and Wisconsin prohibit prosecutors from making at least one of the comparative value arguments.[146] North Carolina, Virginia, and Texas, however, permit both.[147] These seven courts support their holdings on a variety of grounds leaving no clear rationale.[148] Further, the constitutional issues upon which the courts rely are not always clear.[149]

In May 2004, a federal circuit addressed a challenge to the use of these arguments for the first time. In *Humphries v. Ozmint*,[150] a panel of the Fourth

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144. *See* Blume, *supra* note 29, at 266 (noting that the Court has not granted certiorari to any post-*Payne* cases that challenge the prosecutor's use of victim impact evidence).

145. *See* Humphries v. Ozmint, 397 F.3d 206, 238 (4th Cir. 2005) (Wilkinson, J., dissenting) (discussing the few state supreme courts that have addressed comparative value arguments).

146. *See* Hall v. Catoe, 601 S.E.2d 335, 341 (S.C. 2004) (holding comparative worth arguments unconstitutional); State v. Muhammad, 678 A.2d 164, 179 (N.J. 1996) (holding both types of comparative value arguments unconstitutional); State v. Storey, 901 S.W.2d 886, 902 (Mo. 1995) (holding comparative worth arguments unconstitutional); State v. Gallion, 654 N.W.2d 446, 454 (Wis. Ct. App. 2002) (expressing a concern for the use of comparative value arguments at jury sentencing proceedings as an unconstitutional use of victim impact evidence, though the death penalty is not available in this jurisdiction).

147. *See* Jackson v. Warden of Sussex I State Prison, 2005 WL 1404939, at *8 (Va. 2005) (denying in a cursory manner a state habeas petitioner's Sixth Amendment claim that the comparative worth argument made violated fundament fairness standards); State v. Haselden, 577 S.E.2d 594, 610 (N.C. 2003) (permitting prosecutors to make comparative worth arguments such as the one in this case, during which the prosecutor told the jurors "[i]f you let this murderer walk out of this courtroom with his life then you are saying that his life is worth more than [the victim's]"); Jackson v. State, 33 S.W.3d 828, 834 (Tex. Crim. App. 2000) (en banc) (permitting prosecutors to make comparisons between the worth of the victim and the defendant).

148. *See Hall*, 601 S.E.2d at 341 (holding comparative worth arguments unconstitutional because they are highly inflammatory and prejudicial and distinguishable from the permissible uses of victim impact evidence); *Haselden*, 577 S.E.2d at 610 (permitting the comparative worth argument in question as a proper use of victim impact evidence); *Storey*, 901 S.W.2d at 902 (stating that the prosecutor's comparative worth arguments misstate the law and improperly use victim impact evidence); *Jackson*, 33 S.W.3d at 834 (holding that *Payne* only prohibits victim-to-victim comparisons, not victim-to-defendant comparisons).

149. *See Muhammad*, 678 A.2d at 179 (stating summarily that comparative value arguments are unconstitutional); *Gallion*, 654 N.W.2d at 454 (stating that the court recognizes the problems that these arguments present but not specifying the problems). Furthermore, the other opinions never explicitly state the amendment(s) upon which the holdings are based.

150. *See* Humphries v. Ozmint, 366 F.3d 266 (4th Cir. 2004). In *Humphries*, the court considered the validity of a comparative life argument which "insistently and systematically

Circuit held that comparative life arguments are an unconstitutional extension of *Payne*.[151] The case was reargued en banc and the resulting decision, issued in February 2005, overturned the panel decision.[152] It is important to note that it is the procedural posture of the case that is central to the en banc reversal.[153] At the state sentencing trial Humphries did not make a timely objection to the use of comparative life arguments.[154] Instead, his challenge to the use of these arguments reached the Fourth Circuit as an appeal from denial of his petition for federal habeas corpus relief.[155] In his petition, Humphries argued that comparative life arguments so clearly violate *Payne* that his state trial attorney's failure to object amounted to ineffective assistance of counsel.[156] The standard of review for constitutional claims raised in federal habeas appeals is quite strict.[157] Petitioners must establish that the state court's ruling on the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law."[158] The Fourth Circuit rejected

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contrasted the apparently virtuous and productive life of the victim with Humphries' allegedly worthless existence." *Id.* at 270. The court described this argument as "squarely within the category of prosecutorial conduct that may be so prejudicial that it renders a trial fundamentally unfair." *Id.* at 272. The court stated that the "one thing the centerpiece of closing argument cannot invite is a sentence on the basis that one person is of more intrinsic value than someone else." *Id.* at 274. Further, the court held that these arguments do not further punishment goals because they "ask a jury to decide, not on the character of the crime, not on the consequences of the crime, not on the criminal record of the perpetrator of the crime, but on some unfettered evaluation of human worth that works improper prejudice." *Id.* This due process violation should have struck the defendant's trial attorney "like a bucket of ice water." *Id.* at 276. Thus, the court granted the defendant's habeas relief on the grounds of ineffective assistance of counsel. *Id.* at 276–78.

151. *See id.* at 269 (granting the defendant's federal habeas relief "because of the use to which the 'victim impact' evidence was put in this case").

152. *See* Humphries v. Ozmint, 397 F.3d 206, 215 (4th Cir. 2005) (vacating the prior panel decision).

153. *See id.* at 228–29 (noting that Humphries challenged comparative value arguments on collateral review and distinguishing the high burden for petitioners of collateral review from petitioners who raise issues directly).

154. *See id.* at 214 (noting that Humphries' attorney did not object to the comparative life arguments at trial, instead his attorney first objected to them at a post-trial motion hearing).

155. *See id.* (discussing the procedural history of this case).

156. *See id.* at 215 (noting that Humphries attacked his trial court attorney's failure to object to the use of comparative life arguments as a denial of the right to effective assistance of counsel on the grounds that these arguments clearly violate *Payne*).

157. *See id.* at 228 (noting the high burden that petitioners must meet in order to receive relief under the federal habeas corpus standard of review).

158. *See id.* at 215–16 (describing the standard of review for appeals from denials of habeas corpus petitions).

Humphries's ineffective assistance of counsel claim.[159] The majority held that South Carolina's Supreme Court did not unreasonably interpret *Payne* in its decision to deny Humphries's claim.[160] Permitting the use of comparative life arguments, according to the majority opinion, is not such a clear violation of *Payne* that this interpretation meets the strict standards for habeas review.[161] Thus, the failure to object to these arguments did not deprive Humphries's sentencing of fundamental fairness.[162]

Humphries does not, however, hold that comparative life arguments are constitutionally permissible uses of victim impact evidence.[163] Indeed, the majority stated that the scope of review for direct appeals is much broader than the scope of review in habeas corpus cases.[164] Addressing the full range of constitutional issues associated with comparative value arguments, will require a case in which the defendant objected at trial, lost the objection, and directly appealed that decision.[165] The limited *Humphries* holding should not be considered as indicative of how appellate courts will resolve properly raised claims. In light of the approaches taken by *Humphries* and the state supreme courts, several issues linger as to the constitutional validity of comparative value arguments. Do these arguments encourage jurors to use victim impact evidence in a manner that violates the Supreme Court's Eighth or Fourteenth Amendment jurisprudence? Is a defendant's constitutional right to the jury's consideration of mitigation evidence eviscerated by these arguments? Finally, do these arguments improperly inflame jurors? The following sections seek to bring long needed attention to these issues.

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159. *See id.* (affirming the lower court's denial of habeas relief).

160. *See id.* at 220–23 (holding that the South Carolina Supreme Court's interpretation of *Payne* is not unreasonable and that the use of these arguments did not deprive Humphries's sentencing procedure of fairness).

161. *See id.* (holding for several reasons that the South Carolina Supreme Court's interpretation is not an unreasonable interpretation of *Payne*).

162. *See id.* at 220 (holding that the prosecutor's comment "did not render Humphries's sentencing proceeding fundamentally unfair").

163. *See id.* at 225 (noting that this opinion does not address the validity of comparative value arguments).

164. *See id.* 225–26 (distinguishing the standards of review for direct versus collateral appeals and noting that this collateral appeal is limited solely to whether or not the South Carolina Supreme Court unreasonably applied *Payne*, an "unmistakably narrow" issue).

165. *Cf. id.* (distinguishing the range of issues available for collateral appeals instead of direct appeals).

B. *Comparative Value Arguments as* Caldwell *Violations*

None of the existing decisions that address comparative value arguments discuss the validity of these arguments under *Caldwell*.[166] To successfully challenge comparative value arguments under *Caldwell*, defendants must establish that (1) the law requires jurors to use a certain type of analysis in making their sentencing decision, (2) that by making a comparative value argument the prosecutor encouraged jurors to use different analysis, and (3) that this urging of jurors to misapply the law infected the trial with arbitrariness in violation of the Eighth Amendment.[167] This section argues that defendants can successfully establish comparative value arguments as violations of *Caldwell*.

1. *The Analysis Required by the Law*

The law sets out the legal framework that jurors must use while deliberating a capital sentence. This framework derives from Supreme Court precedent and state sentencing statutes. Fundamental to this framework in most jurisdictions is the delegation to jurors of the determination that death is the appropriate punishment for the defendant. The sentencing responsibility of jurors is "truly awesome,"[168] their task, a "serious one."[169] The specifics of their role vary for each jurisdiction as set out in each jurisdiction's capital sentencing statutes.[170] States may not enforce sentencing statutes that create the risk of

166. Critics might argue that the absence of this analysis is indicative of the weakening of this doctrine by the Supreme Court in *Romano*. *See* Romano v. Oklahoma, 512 U.S. 1, 9 (1994) (discussing the outer bounds of *Caldwell* challenges). The author contends, however, that the district and circuit courts are good indicators of the remaining protections available under *Caldwell*, as demonstrated by the relief granted and sustained on appeal in these courts. *See supra* notes 94–102 and accompanying text (discussing *Caldwell* relief). Moreover, a parallel doctrine exists under the Fourteenth Amendment which provides defendants protection from improper arguments. *See supra* Part III.C (discussing misleading arguments as prohibited by the Fourteenth Amendment). For the sake of brevity, the analysis of this Note regarding misleading arguments will proceed solely under Eighth Amendment jurisprudence. Part IV.B will analyze comparative value arguments under one additional due process doctrine (for which there is no corresponding Eighth Amendment doctrine)—the Court's prohibition on inflammatory arguments.

167. *See supra* Part III.B (outlining the elements of a *Caldwell* violation and discussing several successful claims brought in federal and state courts).

168. McGautha v. California, 402 U.S. 183, 208 (1971).

169. Caldwell v. Mississippi, 472 U.S. 320, 329 (1985).

170. *See* NATIONAL SURVEY OF STATE LAWS 69–97 (Richard A. Leiter, 4th ed. 2003) [hereinafter NATIONAL SURVEY] (summarizing the capital sentencing statutes in every state).

arbitrary sentencing.[171] To guard against arbitrariness, the Court has established a few standards that state sentencing procedures must incorporate.[172] First, sentencing statutes must provide jurors with standards for separating the defendants deserving of death from those who are not.[173] This requirement is met by having jurors find at least one aggravating circumstance before imposing a death sentence.[174] Aggravating factors vary for each jurisdiction and are specified in each jurisdiction's capital sentencing statutes.[175] Typical aggravating factors include the circumstances of the crime, the gravity of the crime, and the chances of rehabilitating the defendant.[176] Second, defendants have a constitutional right to presentation of mitigation evidence and individualized jury consideration of it.[177] Mitigating evidence is evidence of "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[178]

Jurors must adhere to these specific rules while deliberating. If the required analysis is simplified, it can be expressed as a balancing test.[179] On the one hand, jurors must find the existence of at least one aggravating factor beyond a reasonable doubt.[180] If they do find such a factor, then, on the other

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171. *See* Lockett v. Ohio, 438 U.S. 586, 601 (1978) (noting that post-*Furman* the Court insisted that state sentencing procedures not "create a substantial risk that the death penalty will be inflicted in an arbitrary and capricious manner").

172. *See id.* at 602 (stating that post-*Furman* the Court has required that States revise their death penalty statutes to incorporate the Court's standards).

173. *See id.* at 601 (stating that state sentencing procedures must provide a meaningful way to distinguish between "the cases in which [death] is imposed from the many cases in which it is not") (quoting Gregg v. Georgia, 428 U.S. 153, 188 (1976)).

174. Kimberly J. Winbush, Annotation, *Application of* Apprendi v. New Jersey *and* Ring v. Arizona *to State Death Penalty Proceedings*, 110 A.L.R. 5TH 1, 1 (2005) (stating that the finding of at least one aggravating factor beyond a reasonable doubt protects against arbitrary sentencing).

175. *See* NATIONAL SURVEY, *supra* note 170, at 69–97 (listing the capital sentencing statutes for each state and a description of each state's aggravating factors).

176. *See id.* (describing the statutory aggravating factors for each state).

177. *See* Lockett v. Ohio, 438 U.S. 586, 608 (1978) (holding unconstitutional any state sentencing procedures that preclude jury consideration of mitigating factors).

178. *Id.* at 604.

179. *See* Darryl K. Brown et al., *An Overview of the American Criminal Jury*, 21 ST. LOUIS U. PUB. L. REV. 99, 108 (2002) (describing the capital sentencing role of a juror as consisting of weighing "mitigating circumstances and aggravating circumstances"); 21A AM. JUR. 2D *Criminal Law* § 969 (1998) (describing, as widespread, the sentencing scheme that requires jurors to balance aggravating circumstances against mitigating circumstances).

180. *Cf.* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (holding that the Due Process Clause requires prosecutors to establish beyond a reasonable doubt all necessary elements, including aggravating factors).

hand, jurors assess the strength of the mitigation evidence.[181] If the jurors find that the mitigation evidence outweighs the aggravation evidence, they must render a life sentence.[182] If the jurors find that the aggravation evidence outweighs the mitigation evidence, they may impose a death sentence.

2. *Comparative Value Analysis*

As the decisions addressing comparative value analysis reveal, jurors use a different balancing test when they use comparative value analysis. They assign values to the victim's and defendant's lives.[183] These values represent their respective contributions to society.[184] This Note proceeds on the assumption that jurors likely add points to a defendant's or victim's value for contributions to society and likely subtract points for harm caused.[185] Jurors then balance these two values to determine the defendant's sentence.[186] Thus, this different balancing test consists of the defendant's value on the one side and the victim's value on the other.[187]

Through these arguments, prosecutors tell jurors which facts they should use in assigning value to each side. Jurors are urged to use the aggravation case and the fact that the defendant is guilty of a crime to set the defendant's value.[188] Prosecutors urge jurors to decrease the defendant's value because the

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181. *Cf.* Brown, *supra* note 179, at 108 (noting that one of factors weighed is the strength of the mitigation case).

182. *Cf. id.* (noting that under these circumstances jurors may render a death sentence).

183. *Cf.* State v. Storey, 901 S.W.2d 886, 902 (Mo. 1995) (noting that the prosecutor asked jurors to render their verdict on the basis of "[w]hose life has more value?"). Implicit within this charge to the jurors is the direction to them to assess the value of the defendant's and victim's lives. Without making findings on their respective values, jurors could not answer the question of whose life has more value.

184. *Cf.* State v. Koskovich, 776 A.2d 144, 182 (N.J. 2001) (discussing hypothetical comparative value analysis and noting that the values set are relative to the values society assigns these individuals).

185. *Cf. id.* (describing the victim's contributions to society as value adding criteria and the defendant's status as a convicted murderer as a value subtracting criterion).

186. *See id.* (describing comparative value analysis as the "weighing [of] worth," meaning the weighing of the respective values of the defendant's and victim's lives).

187. *Cf.* Hall v. Catoe, 601 S.E.2d 335, 341 (S.C. 2004) (labeling a comparative worth argument an "arbitrary formula" consisting of two balanced values: value assigned to the defendant's life and value assigned to the victim's).

188. *See* Humphries v. Ozmint, 366 F.3d 266, 282–83 (4th Cir. 2004) (providing a transcript of the comparative life argument presented by the prosecutor which urged jurors to assess the defendant's value based upon the aggravating factors of the case, and outlining the aggravating factors); *cf. Storey*, 901 S.W.2d at 901–02 (excerpting a portion of the comparative worth argument presented by the prosecutor in which the prosecutor argued that the defendant's

defendant is a psychopathic killer,[189] a rapist,[190] or a torturer.[191] It is likely that consideration of this one fact results in a near-zero value. Moreover, prosecutors urge jurors to further decrease the defendant's value for any prior crimes.[192]

Regarding the other side of the balancing test—the victim's value—prosecutors instruct jurors to use victim impact evidence alone to set the victim's value. They present victim impact evidence showing the victim's good character and contributions to society.[193] Jurors are told to assign significant weight to the victim's life because the victim was a spouse,[194] a parent,[195] a businessman,[196] a community leader,[197] an innocent individual,[198] from a loving family,[199] a high school graduate,[200] an exemplary citizen,[201] a

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value is his value as a guilty murderer); State v. Haselden, 577 S.E.2d 594, 610 (N.C. 2003) (telling jurors to find the defendant less valuable than the victim because the defendant is a murderer); *Hall*, 601 S.E. 2d at 337 (including the prosecutor's comparative worth argument during which the prosecutor urged jurors to assign the defendant his value on the basis that he committed an aggravated murder).

189. *See Hall*, 601 S.E.2d at 337 (labeling the defendant a "psychopath" and telling jurors to find him less valuable than the victim because the defendant is a convicted killer); *see also Humphries*, 366 F.3d at 282–83 (arguing at length that the defendant has no value because he is a killer); State v. Storey, 901 S.W.2d 886, 902 (Mo. 1995) (urging jurors to find the defendant less valuable than the victim because the defendant is guilty of first degree murder).

190. *See Hall*, 601 S.E.2d at 337 (urging jurors to decrease the defendant's value for raping two victims).

191. *See id.* (imploring jurors to decrease the defendant's value because the defendant "stabs and stabs and kills and rapes and kidnaps").

192. *See Humphries*, 366 F.3d at 282–83 (encouraging jurors to further decrease the defendant's value because the defendant broke the law at ages 13, 14, 15 and 17); *see also* State v. Gallion, 654 N.W.2d 446, 454 n.4 (Wis. 2002) (noting that the sentencing authority in this non-capital case further decreased the defendant's value because "as a younger man [the defendant] was involved in a lot of criminal activity").

193. For an excerpt of a comparative value arguments that uses victim impact evidence in this manner, see Humphries v. Ozmint, 397 F.3d 206, 211–13 (4th Cir. 2005).

194. *See id.* at 213 (arguing that the victim was valuable to society because the victim was a spouse).

195. *See id.* (noting that the victim had a child).

196. *See id.* (stating that the victim was a self-made businessman).

197. *See id.* (arguing that the victim is valuable because the victim involved himself with the community).

198. *See* State v. Storey, 901 S.W.2d 886, 902 (Mo. 1995) (describing the victim as the innocent party).

199. *See* State v. Gallion, 654 N.W.2d 446, 454 n.4 (Wis. 2002) (adding value to the victim because the victim came from a loving family).

200. *See id.* (noting that the victim graduated high school).

201. *See id.* (describing the victim as an outstanding citizen).

nice decent person,[202] a hard-working employee,[203] a religious individual,[204] or a law abiding citizen.[205] Further, the victim's character is rarely attacked by defendants.[206] Therefore, in the majority of cases, jurors assess the victim's social value by using unchallenged evidence of the victim's good character.

3. *Risk of Arbitrary Sentencing*

The previous sections discussed the broad differences between the analysis required by law and comparative value analysis. This section argues that there are specific differences between the two types of analysis that create the risk of arbitrary sentencing. First, jurors influenced by these arguments misuse victim impact evidence. Second, jurors use mitigation evidence in a manner that the Constitution forbids. Finally, due to changes in the analysis that jurors use, they are less likely to treat their roles seriously.

a. Jurors Might Misuse Victim Impact Evidence

Jurors influenced by comparative value arguments improperly use victim impact evidence. The Court permits jurors to use victim impact evidence to assess "the specific harm caused by the crime."[207] In other words, jurors may consider victim impact evidence in assessing the prosecutor's case for death.[208] The presentation of victim impact evidence does not, however, replace the requirement that prosecutors establish an aggravating factor.[209] Even as recognized in *Payne*, prosecutors must prove beyond a reasonable doubt at least one aggravating factor independent of the existence of victim impact

202. *See* State v. Koskovich, 776 A.2d 144, 179 (N.J. 2001) (describing the victim as a nice, decent person).

203. *See id.* at 182 (noting that the victim was a hard-working individual).

204. *See id.* (stating that the victim was religious).

205. *See id.* (encouraging jurors to increase the victim's value because the victim was law abiding).

206. *See* Payne v. Tennessee, 501 U.S. 808, 823 (1991) (summarizing the many reasons why defendants do not attack the character of the victims).

207. *See id.* at 825–27 (describing the uses to which jurors may put victim impact evidence).

208. *Cf. id.* (holding that victim impact evidence helps prosecutors to counteract the defendant's ability to present unlimited mitigation evidence).

209. *See id.* (discussing the potential uses of victim impact evidence, which do not include the ability to use victim impact evidence as an aggravating factor).

evidence.[210] If jurors find that the prosecutor established this factor, they then may consider mitigation and victim impact evidence.[211] Further, sentencing statutes do not permit victim impact evidence as a substitute for proof of aggravating factors.[212] Therefore, the death penalty cannot be imposed solely because victim impact evidence is admitted.[213]

Yet under comparative value analysis, the entire life-or-death decision turns on the admission of victim impact evidence.[214] This problem is visible when the steps of comparative value analysis are explored and probable jury resolutions considered. First, the defendant's value is set at zero, or close to it.[215] Second, jurors likely set the victim's value quite high.[216] As previously noted, prosecutors give jurors a thorough accounting of the victim's good deeds or value to society.[217] However, even in a case with minimal good character evidence presented, jurors add some points to the victim's value.[218] The victim's value may be increased because the victim did not harm the defendant and thus, the victim has some value to society beyond that of the defendant.[219] Thus, as a starting point, the victim's value is higher than the defendant's.

It is during the final step—balancing the two values to determine whose life is worth more—that the effects of comparative value analysis are most pronounced.[220] Under comparative value analysis, jurors will always sentence

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210. *See* Logan, *supra* note 14, at 180 (stating that victim impact evidence is not a substitute for aggravating factors).

211. *See id.* (describing the analysis that the law requires as first requiring jurors to find the existence of at least one aggravating factor beyond a reasonable doubt, second requiring consideration of mitigation evidence, and last, requiring consideration of any victim impact evidence that might counteract the defendant's mitigation case).

212. *See* NATIONAL SURVEY, *supra* note 170, at 69–97 (noting that aggravating factors are a requirement to be established independent of any admitted victim impact evidence).

213. *See* State v. Storey, 901 S.W.2d 886, 902 (Mo. 1995) (holding that aggravating factors must permit jurors to distinguish between different defendants and that victim impact evidence cannot serve as an aggravating factor because jurors cannot distinguish between one defendant and another on this ground).

214. *See id.* (holding that jurors using comparative worth analysis treat this evidence as an aggravating factor).

215. *See supra* Part IV.B.2 (discussing setting the defendant's value).

216. *See supra* Part IV.B.2 (discussing setting the victim's value).

217. *See supra* notes 197–210 and accompanying text (noting that prosecutors present jurors with evidence of the victim's good deeds and qualities).

218. *Cf.* State v. Koskovich, 776 A.2d 144, 182 (N.J. 2001) (stating that even if the victim impact evidence is not strong, jurors will still find more value in the victim because the victim is the victim, the defendant, the victim's murderer).

219. *See id.* (noting that victims have some value simply because they are the victim and not the murderer).

220. *See, e.g.*, Hall v. Catoe, 601 S.E.2d 335, 340–41 (S.C. 2004) (describing comparative

the defendant to death.[221] This result occurs especially in cases in which prosecutors extolled the victim's good virtues during arguments.[222] In these cases, jurors have plenty of facts to use to boost the victim's value. Moreover, this result occurs in every case in which victim impact evidence is admitted.[223] Even minimal victim impact evidence will cause a noticeable disparity between the values of the victim and the defendant. The imposition of death based on the finding of an aggravating factor is transformed into the imposition of death based on the admission of victim impact evidence.[224]

This use of victim impact evidence differs from the way that the law requires jurors to use it. When prosecutors make permissible arguments with victim impact evidence, they encourage jurors to use it to assess the impact of the crime on the victims and their families.[225] Opinions addressing comparative worth arguments found these arguments distinguishable from the permissible uses.[226] Through comparative worth arguments, prosecutors seek to corner jurors into a death verdict if jurors give any consideration of victim impact evidence.[227] This use of victim impact evidence taints the sentencing process with arbitrariness.[228]

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worth as the balancing of the relative worth of the defendant against the victim in order to determine the appropriate sentence).

221. *See Hall*, 601 S.E.2d at 341 (stating that jurors who use comparative worth balancing will never reach any result but that the death penalty is appropriate); *Koskovich*, 776 A.2d at 182 (stating that comparative value balancing usually results in a death verdict).

222. *See Koskovich*, 776 A.2d at 182 (noting that the prosecutor presented evidence of the victim's good qualities and that, especially in cases like these, jurors are inclined to impose death instead of life).

223. *See id.* (stating that when victim impact evidence is admitted, jurors using comparative value balancing tend to impose death verdicts); *see also Hall*, 601 S.E.2d at 341 (stating that the admission of victim impact evidence results in a death verdict).

224. *Cf.* State v. Storey, 901 S.W.2d 886, 902 (Mo. 1995) (holding unconstitutional the use of victim impact evidence as the aggravating factor).

225. *See Hall*, 601 S.E.2d at 341 (stating that victim impact evidence is used properly when it is used to demonstrate the impact of the crime on the victims and the victims' loved ones).

226. *See id.* (distinguishing comparative value arguments as an impermissible use of victim impact evidence); State v. Muhammad, 678 A.2d 164, 179 (1996) (distinguishing comparative value arguments from the permissible uses of victim impact evidence).

227. *See* Hall v. Catoe, 601 S.E.2d 335, 341 (S.C. 2004) (holding that jurors using victim impact evidence as directed by comparative value arguments can reach no verdict but death); *see also* State v. Koskovich, 776 A.2d 144, 182 (N.J. 2001) (stating that jurors who use comparative value analysis tend to render death verdicts, and thus victim impact evidence operates as the aggravating factor).

228. *See Hall*, 601 S.E.2d at 340–41 (holding that comparative worth arguments infect capital sentencing with arbitrariness); *see also Koskovich*, 776 A.2d at 182 (N.J. 2001) (holding that comparative value arguments increase the risk that jurors will arbitrarily impose the death

Under *Caldwell*, prosecutors cannot urge jurors to misuse evidence during deliberation.[229] The courts that prohibit comparative value arguments did not ground their holdings in *Caldwell* analysis. Their holdings do, however, establish each element of a *Caldwell* violation. Prosecutors urged jurors to use victim impact evidence in a manner[230] that conflicts with the constitutionally permissible uses of victim impact evidence.[231] Arguments of this type create the risk of an arbitrarily imposed death sentence.[232]

b. Jurors Might Misuse Mitigation Evidence

Additionally, jurors influenced by comparative value arguments improperly use mitigation evidence. The law requires jurors to give consideration to the defendant's mitigation evidence.[233] Mitigation evidence takes many forms.[234] Defendants present evidence of their good character and good deeds.[235] They present this evidence with hopes of persuading jurors to

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sentence).

229. *See supra* Part III.B (discussing *Caldwell* violations and noting that prosecutors cannot misdirect jurors on their use of evidence during jury deliberations).

230. *See* Humphries v. Ozmint, 366 F.3d 266, 270 (4th Cir. 2004) (stating that the prosecutor encouraged jurors to use comparative value analysis); *Hall*, 601 S.E.2d at 341 (stating that the prosecutor's argument encouraged the jurors to balance worth); *Koskovich*, 776 A.2d at 182 (holding that the jury instructions encouraged the jurors to render a verdict based on the comparative worth of the defendant and the victim).

231. *See Humphries*, 366 F.3d at 270 (stating that the victim impact evidence was used in a comparative life analysis, which is more than *Payne* allows); *Hall*, 601 S.E.2d at 341 (holding victim impact evidence as used during comparative worth analysis as contrary to what the law requires); *Koskovich*, 776 A.2d at 182 (holding victim impact evidence as used in comparative worth analysis an unconstitutional use of victim impact evidence).

232. *See Hall*, 601 S.E.2d at 340–41 (stating that the prosecutor mislead the jury on the uses of victim impact evidence in a manner that infected the trial with an impermissible level of arbitrariness); *Koskovich*, 776 A.2d at 182 (holding that misleading jurors impermissibly increased the risk of an arbitrary sentence).

233. *See* McKoy v. North Carolina, 494 U.S. 433, 444 (1990) (holding that state sentencing schemes cannot impose conditions that limit the jurors' consideration of mitigation evidence); Mills v. Maryland, 486 U.S. 367, 375 (1988) (stating that jurors "may not refuse to consider or be precluded from considering any relevant mitigating evidence"); Lockett v. Ohio, 438 U.S. 586, 608 (1978) (holding that defendants are entitled to the presentation and jury consideration of mitigation evidence).

234. *See Mills*, 486 U.S. at 380 (describing mitigation evidence as any "aspect of a defendant's character or record or a circumstance of the offense that the defendant proffered as a basis for a sentence less than death").

235. *See* Payne v. Tennessee, 501 U.S. 808, 826 (1991) (noting that defendants present evidence of their good qualities as part of their mitigation cases); Humphries v. Ozmint, 397 F.3d 206, 210 (4th Cir. 2005) (stating that as part of his mitigation case, the defendant presented

take mercy on them because, perhaps, they are not the worst of the worst.[236] Additionally, defendants present evidence of any diagnosed mental deficiencies,[237] untreated mental deficiencies,[238] below average intelligence,[239] lack of education,[240] poor physical health,[241] history of substance abuse,[242] and traumatic or troubled upbringings.[243] They introduce the latter category of evidence to show that there are factors other than their bad character alone that have led to the crime committed.[244] Consideration of this kind of mitigation evidence has led some juries to render life sentences instead of death.[245] Indeed, Humphries and other defendants in the comparative value cases presented evidence of their troubled lives for this purpose.[246] Thus, the law requires jurors to consider both kinds of mitigation evidence and to use both in a manner that is favorable to the defendant.

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evidence showing the jurors that he is a "trustworthy, respectful, and pleasant person").

236. *See* 21A AM. JUR. 2D *Criminal Law* § 968 (2005) (noting that defendants present mitigation evidence to persuade juries to impose a sentence less than death).

237. *See Mills*, 486 U.S. at 370 n.1 (stating that the defendant presented evidence of "minimal brain damage").

238. *See McKoy*, 494 U.S. at 437 (stating that the defendant presented evidence of several decades of mental and emotional problems that went untreated); Eddings v. Oklahoma, 455 U.S. 104, 107 (1982) (noting that the defendant presented a psychologist who told the jurors that the defendant suffered from "sociopathic or antisocial personality").

239. *See* McKoy v. North Carolina, 494 U.S. 433, 436 (1990) (reviewing evidence that the defendant presented showing his "borderline intellectual" capabilities); *Eddings*, 455 U.S. at 107 (noting that the defendant presented evidence that he had below average mental and emotional development for boys of his age).

240. *See* Mills v. Maryland, 486 U.S. 367, 370 n.1 (1988) (stating that the defendant presented evidence of his sixth grade education).

241. *See McKoy*, 494 U.S. at 437 (noting that the defendant presented evidence of poor physical health).

242. *See Mills*, 486 U.S. at 370 n.1 (noting that the defendant informed jurors that he developed drug and alcohol problems at a young age).

243. *See Eddings*, 455 U.S. at 107 (discussing the mitigation evidence presented by the defendant as including evidence of his parents' divorce, his mother's alcohol abuse and possible prostitution, and his father's infliction of severe physical punishments).

244. *See id.* at 115–16 (discussing this type of mitigation evidence and noting that jurors might find defendants less culpable upon consideration of it).

245. *See id.* (noting that jurors might take mercy upon a defendant with a "turbulent" upbringing).

246. *See* Humphries v. Ozmint, 397 F.3d 206, 210 (4th Cir. 2005) (noting that the defendant presented evidence of his "extensive history of emotional, physical, and substance abuse" problems); Hall v. Catoe, 601 S.E.2d 335, 337 (S.C. 2004) (stating that the defendant presented as part of his mitigation case, evidence of his "battle with epilepsy, diagnosed mental deficiencies, his low IQ, and that he is borderline mentally retarded"); State v. Storey, 901 S.W.2d 886, 901 (Mo. 1995) (noting that the defendant presented evidence of his abusive family as part of his mitigation case).

Under comparative value analysis, jurors use some but not all mitigation evidence as evidence that favors a life sentence. Mitigation evidence, if considered, falls on the "defendant's value" side of the equation.[247] The consideration of mitigation evidence of the defendant's good deeds, if considered, should result in the addition of points to the defendant's value.[248] Under comparative value analysis, the higher the defendant's value, the better the defendant's chance is for life.[249] Therefore, to the extent that jurors treat evidence of the defendant's good deeds as value added to society jurors use this form of mitigation evidence in the manner required by the Constitution—evidence demonstrative of why the defendant should receive a punishment less than death.

Not all mitigation evidence, however, receives the same treatment under both types of analysis. It is the latter category of evidence—evidence of the defendant's troubled life—that is misused. It is uncertain whether this type of evidence can be described as demonstrating value added to society. Does the fact that the defendant went for decades without treatment for psychological problems show that he adds value to society?[250] What about a defendant with below average intelligence who suffered for years at the hands of an abusive parent?[251] More likely than not, jurors do not consider these facts as indicative of contributions to society.

Regardless of whether these individuals are considered burdens to society, it is unlikely that they are considered contributors to society.[252] At best, jurors ignore this mitigation evidence in setting the defendant's value. Moreover, to

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247. *Cf.* State v. Koskovich, 776 A.2d 144, 182 (N.J. 2001) (discussing the probable comparative worth analysis conducted by jurors, and noting that only victim impact evidence of the victim's good qualities is used by jurors to assess the victim's value).

248. The author asserts this proposition with the assumption that jurors will treat evidence of good deeds of the defendant the same as they are urged to treat evidence of good deeds of the victim—value added to society. *Cf. id.* (discussing probable comparative value analysis and noting that evidence of the victim's good deeds and good character demonstrate value added to society).

249. *Cf. Koskovich*, 776 A.2d at 182 (describing comparative value analysis as determining the defendant's sentence by his value to society—if it is higher than the victim's, the defendant will receive a life sentence).

250. For the case upon which this question is based, see McKoy v. Maryland, 494 U.S. 433, 437 (1990) (noting that the defendant presented this evidence as part of his mitigation case).

251. For the case upon which this question is based, see Eddings v. Oklahoma, 455 U.S. 104, 107 (1982) (stating that the defendant submitted this evidence as part of his mitigation case).

252. *Cf.* Payne v. Tennessee, 501 U.S. 808, 823–24 (1991) (noting that an individual with mental defects is "not, in the eyes of most, a significant contributor to society").

the extent that contemporary society considers these individuals a burden, jurors will use this evidence to decrease the defendant's value. By treating this evidence as either irrelevant to setting the defendant's value or indicative of the defendant's lack of value, jurors are not using this evidence as the Constitution requires. They use it to increase the defendant's probability of receiving a death sentence. It is precisely this use of mitigation evidence that the Constitution forbids.[253]

Arguments that create the risk that jurors will misuse mitigation evidence violate *Caldwell*.[254] Again, courts have not explicitly addressed this danger as a ground for prohibiting these arguments. Yet, this very real danger exists so long as courts permit prosecutors to make comparative value arguments.

c. Jurors Might Treat Their Role Less Seriously

These previous sections demonstrate that comparative value analysis and the analysis required by law are not the same. This difference is not unnoticed by courts.[255] First, several opinions distinguish between the consideration of aggravating and mitigating factors and the weighing of lives as entirely different methods of analysis.[256] The analysis required by law involves evaluating the circumstances of the crime and the defendant's criminal propensity and issuing a death sentence if this evidence is not counteracted by sufficient mitigating circumstances.[257] The weighing of lives involves

253. *See, e.g.*, *Eddings*, 455 U.S. at 113–15 (holding that defendants are entitled to the jurors' consideration of evidence of their troubled lives because this consideration might lead the jurors to conclude that life, not death, is the appropriate punishment).

254. *See supra* Part III.B (discussing *Caldwell* violations and noting that prosecutors cannot misdirect jurors on their required consideration of mitigation evidence).

255. *See* Hall v. Catoe, 601 S.E.2d 335, 341 (S.C. 2004) (distinguishing comparative worth analysis as "totally unrelated" to the analysis required by law); State v. Koskovich, 776 A.2d 144, 182 (N.J. 2001) (distinguishing comparative value analysis from the analysis required by law); State v. Storey, 901 S.W.2d 886, 902 (Mo. 1995) (discussing the differences between comparative value analysis and the analysis required by law); *cf.* Humphries v. Ozmint, 397 F.3d 206, 208–14 (4th Cir. 2005) (noting the difference between the analysis that the prosecutor in *Hall* requested jurors to use and what the law requires).

256. *See Koskovich*, 776 A.2d at 180–82 (holding that jurors must apply the law while deliberating and that deliberations based on comparative worth analysis are not the same); *Storey*, 901 S.W.2d at 902 (holding that comparative value analysis is not the same as consideration of aggravating and mitigating factors).

257. *See Koskovich*, 776 A.2d at 180–81 (noting that the law requires jurors to follow certain standards during deliberations and later referencing the aggravation-mitigation framework); *Storey*, 901 S.W.2d at 902 (recognizing consideration of aggravating and mitigating factors as the analysis that jurors must use).

evaluating evidence of two biographies and issuing a verdict of death if the defendant's life is worth less.[258] A death sentence should represent punishment for "the legal wrong a citizen has committed."[259] Instead, death is a punishment for the defendant's lower social "status."[260]

One result of jurors deviating from the analysis required by law is the risk that they might treat their role in the capital sentencing system differently.[261] Through use of comparative value analysis, jurors cease serving as decision makers who follow specific legal standards.[262] Instead, they serve as judges of character and of status.[263] Operating under this new role, jurors likely treat their task as easier than it is.[264] Determining "who lived the better life" does not involve any legal analysis.[265] Instead, a decision made using this criterion simply involves placing a few facts about the defendant's life on one side of an equation, and a few facts about the victim's on the other.[266] The making of a legal decision, however, involves much more on the part of the jurors.[267] Jurors

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258. *Cf. Koskovich*, 776 A.2d at 182 (stating that comparative value analysis involves assigning value to the defendant's and victim's lives and rendering a death sentence if the defendant's life is worth less).

259. *Humphries*, 397 F.3d at 246 (Wilkinson, J., dissenting).

260. *See id.* (Wilkinson, J., dissenting) (stating that comparative value analysis results in the infliction of the death penalty on the basis of social status).

261. *Cf. supra* Part III.B (discussing *Caldwell* violations and noting that when jurors are led to use analysis that varies from that required by law, they treat their role differently).

262. *See Humphries v. Ozmint*, 397 F.3d 206, 236 (4th Cir. 2005) (holding that jurors using comparative value analysis do not consider the "circumstances of the crime, the consequences for its victims, and the defendant's criminal history," factors that the law requires them to consider); State v. Storey, 901 S.W.2d 886, 902 (Mo. 1995) (stating that jurors using comparative value analysis do not consider aggravating and mitigating factors, as required by sentencing statutes).

263. *See Humphries*, 397 F.3d at 246 (Wilkinson, J., dissenting) (describing jurors using comparative value analysis as judges of social status).

264. *See Storey*, 901 S.W. 2d at 902 (stating that comparative value arguments are prejudicial because they result in jurors thinking that their job is simpler than what the law requires).

265. *Cf. id.* (stating that comparative value analysis permits jurors to "lump" all defendants into one category for punishment purposes, making analysis of legal standards, such as aggravating factors, irrelevant to their decision making process); *see also Hall*, 601 S.E.2d at 341 (stating that jurors who use comparative value analysis "conduct an arbitrary balancing of worth" that is "totally unrelated to the circumstances of the crime," meaning the factors the law requires jurors to consider); State v. Koskovich, 776 A.2d 144, 182 (N.J. 2001) (describing comparative value analysis as character balancing, and thus, void of legal analysis).

266. *See Koskovich*, 776 A.2d at 182 (stating that the hypothetical comparative value analysis in this case involved jurors placing on the victim's side facts that the victim was "hard-working, religious, [and] law abiding," and on the defendant's side, that the defendant was a "convicted murderer").

267. *See Humphries*, 397 F.3d at 245 (detailing all of the factors that jurors must consider

must evaluate the persuasiveness of the evidence presented.[268] They must support each of their legal findings with facts.[269] They must consider the aggravating factors listed in sentencing statutes and whether the prosecutor established one beyond a reasonable doubt.[270] The distinctions between these two types of analysis as discussed by courts indicate that the courts consider comparative value analysis to be simpler and less methodical than the analysis required by law.[271] It is not a stretch to imagine that jurors minimize the importance of their role.

Under *Caldwell*, however, prosecutors are prohibited from encouraging jurors to minimize the importance of their role.[272] None of the courts that prohibit comparative value analysis grounded their holdings in this analysis. Yet the elements necessary to establish a *Caldwell* violation are found in their holdings. Prosecutors discuss one version of the role of jurors in the capital sentencing system,[273] while the law requires a different role of them.[274] This misinformation results in the imposition of an arbitrary death sentence[275] and violates the Eighth Amendment's reliability requirement.[276]

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when using the analysis required by law).

268. *Cf. Koskovich*, 776 A.2d at 182 (implying that jurors using comparative value analysis ignore the determinate facts of the case and the persuasiveness of the prosecutor's and defendant's cases).

269. *Cf. id.* (implying that jurors using comparative value analysis ignore this duty).

270. *See, e.g.*, State v. Storey, 901 S.W.2d 886, 902 (Mo. 1995) (indicating that jurors who use the analysis required by law consider statutory aggravating factors in making their decision).

271. *See* Humphries v. Ozmint, 397 F.3d 206, 249 (4th Cir. 2005)(describing the analysis required by law as more of a methodical nature, and comparative value analysis a free-for-all); *Storey*, 901 S.W.2d at 902 (stating that comparative worth arguments simplify the analysis involved in deliberating a death sentence, when the decision actually involves consideration of a "wide array" of legal factors).

272. *See supra* Part III.B (discussing *Caldwell* violations and noting that prosecutors cannot misdirect jurors on the importance of their role in the capital sentencing system).

273. *See, e.g.*, *Humphries*, 397 F.3d 206, 248–49 (4th Cir. 2005)(Wilkinson, J., dissenting) (holding that comparative value arguments encourage jurors to consider themselves status judges).

274. *See, e.g.*, *id.* at 245 (noting that the law requires jurors to punish defendants for committing crimes and comparative value arguments direct jurors to punish defendants for "leading a less valuable life than someone else").

275. *See, e.g.*, Hall v. Catoe, 601 S.E.2d 335, 341 (S.C. 2004) (stating that comparative value analysis results in the arbitrary imposition of death).

276. The author recognizes that not all courts treat comparative value arguments as having a significant effect on jurors. *See supra* note 147 and accompanying text (discussing opinions that permit comparative value arguments). However, these opinions represent the minority view. There is a growing consensus against the use of comparative value arguments because of the effect that these arguments have on jurors. *See supra* note 146 and accompanying text (indicating that the majority of capital sentencing jurisdictions that have addressed fully the

C. Comparative Value Arguments as Due Process Clause Violations

Finally, there is a due process doctrine (aside from the Court's prohibition on unconstitutionally misleading arguments) that supports a finding that comparative value arguments are unconstitutional—the Court's prohibition on inflammatory arguments. Prosecutors are prohibited from making arguments that might inflame the jurors.[277] The law requires decisions made on reason and application of the law to the facts, not passion and prejudice.[278] One of the reasons *Booth* held the presentation of victim impact evidence unconstitutional is because the admission of this evidence might lead to arguments by prosecutors that inflame the jurors.[279] *Booth* feared that introduction of victim impact evidence would lead to arguments by prosecutors that involved victim-to-victim comparisons.[280] These comparisons, held *Booth*, deprive the jurors of any "principled way" to make their sentencing decision.[281] It is inflammatory to ask jurors to render a death verdict because the particular victim of the case is a "sterling member of the community rather than someone of questionable character."[282] Because the Court believed that introducing victim impact evidence would cause sentencing by passion, it barred the use of victim impact evidence.[283]

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merits of these arguments prohibit them as highly prejudicial to defendants). Further, the only federal opinion to address these arguments appears to acknowledge their questionable constitutional nature. *See supra* notes 153–56 and accompanying text (noting that the Fourth Circuit did not hold comparative value arguments constitutional). Thus, the author, too, considers comparative value arguments highly persuasive. The analysis of this Note proceeds upon this assumption.

277. *See supra* Part III.C (discussing the Clause and its prohibition against inflammatory arguments).

278. *See id.* (noting that the law requires reasoned analysis from jurors and prohibits decisions made on emotions).

279. *See* Booth v. Maryland, 482 U.S. 496, 508 (1987) (stating that "the formal presentation of [victim impact evidence] 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").

280. *See id.* at 506 (prohibiting the admission of victim impact evidence because prosecutors might use it for impermissible purposes, such as victim-to-victim comparisons during closing arguments).

281. *See id.* (describing victim-to-victim comparisons as interjecting arbitrariness in capital sentencing deliberations because these arguments leave jurors with no "principled way" to determine which defendants should receive the death penalty).

282. *See id.* (describing this distinction as depriving jurors of principled decision making, thereby leaving them subject to decision making on a whim, or out of passion).

283. *See id.* (holding the admission of victim impact evidence unconstitutional because its admission will lead to inflammatory arguments that inject arbitrariness into sentencing deliberations).

When the Court overturned *Booth* in *Payne*, the Court did not leave *Booth*'s concern with inflammatory arguments unaddressed.[284] Instead, the Court provided a solution.[285] *Payne* expressed disapproval of any victim-to-victim comparisons.[286] The *Payne* court believed that by eliminating these inflammatory comparisons courts could permit the admission of victim impact evidence without fear of any resulting arbitrary sentencing.[287] In addressing *Booth*'s concerns, the Court reconciled *Payne* with *Booth*.[288] Thus, *Payne* did not reject the concerns expressed in *Booth* as irrelevant to the permissible uses of victim impact evidence.[289]

To the extent that *Payne*'s disapproval of victim-to-victim comparisons is premised on *Booth*'s concern for inflammatory comparisons, there is no difference between victim-to-victim comparisons and victim-to-defendant comparisons. Both comparisons ask jurors to make their decision on the basis of human worth.[290] *Booth* stated that asking jurors to make their decision on the basis of human worth is inflammatory by nature.[291] Jurors will always side with the individual who is more worthy.[292] "[O]ur system of justice, [however,] does not tolerate such distinctions."[293] Distinctions on the basis of human

284. *See* Payne v. Tennessee, 501 U.S. 808, 823 (1991) (acknowledging *Booth*'s concern with the arbitrariness that results from victim-to-victim comparisons as a use of victim impact evidence).

285. *See id.* (resolving the concerns expressed in *Booth*).

286. *See id.* (holding that "victim impact evidence is not offered to encourage" comparisons between "victims [who] were assets to their community . . . [and] victims [who] are perceived to be less worthy"). There is some debate among the courts about the meaning of this passage; however, all courts interpret this passage as prohibiting victim-to-victim comparisons. *See* Humphries v. Ozmint, 397 F.3d 206, 217–18 (4th Cir. 2005) (noting that *Payne* is understood as prohibiting victim-to-victim comparisons).

287. *See Payne*, 501 U.S. at 823 (stating that the admission of victim impact evidence does not inject sentencing decisions with arbitrariness because this evidence is not used for comparative purposes).

288. *See id.* (discouraging victim-to-victim comparisons as a use of victim impact evidence, thereby reconciling *Payne* with the constitutional concerns expressed in *Booth*).

289. *See id.* (acknowledging but not criticizing the concerns expressed in *Booth*).

290. *See* Booth v. Maryland, 482 U.S. 496, 506 n.8 (1987) (describing victim-to-victim comparisons as comparisons of perceived worth); *cf.* Hall v. Catoe, 601 S.E.2d 335, 341 (S.C. 2004) (describing comparative worth arguments as comparisons of human worth).

291. *Cf. Booth*, 482 U.S. at 506 n.8 (expressing concern for using human worth as the basis for sentencing determinations because these considerations inflame jurors, thereby violating fundamental fairness standards).

292. *Cf. id.* at 506 (expressing concern over human worth comparisons because these comparisons turn on the jurors' perception of which individual has greater worth).

293. *See id.* at 506 n.8 (describing principles fundamental to the American legal system).

worth do not result in decisions made on the basis of sound reasoning.[294] Both comparisons deprive jurors of the ability to make their decision in a principled manner.[295] Because victim-to-defendant comparisons are just as inflammatory as victim-to-victim comparisons, they, too, mislead jurors.[296] The jurors' focus shifts from consideration of the law and facts to passion and prejudice.[297] Encouraging this shift violates the Due Process Clauses.[298]

V. Conclusion

It is ironic that comparative value arguments emerged as one of the uses of victim impact evidence. The majority in *Payne* believed that the per se ban on the admission of victim impact evidence unfairly disadvantaged prosecutors at capital sentencing proceedings.[299] Defendants had the ability to present unlimited mitigation evidence of their individuality. Yet prosecutors could not counter this emotional evidence with evidence showing the victim's uniqueness.[300] The majority viewed lifting the per se ban as tipping the "unfairly weighted . . . scales" back into balance.[301] However, by providing a

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294. *See id.* at 506 (noting that arguments that encourage jurors to make human worth distinctions mislead jurors into making unprincipled decisions).

295. *See Hall*, 601 S.E.2d at 341 (holding comparative worth arguments so "emotionally inflammatory that [they become] a material part of the jury's deliberation process"); State v. Storey, 901 S.W.2d 886, 902 (Mo. 1995) (holding that comparative worth arguments encourage decisions grounded in "bias or caprice" instead of neutral and principled reasoning).

296. *See* Hall v. Catoe, 601 S.E.2d 335, 341 (S.C. 2004) (holding that comparative worth arguments mislead jurors by encouraging decisions premised on emotion rather than consideration of the circumstances of the crime); *Storey*, 901 S.W.2d at 902 (holding that comparative worth arguments mislead jurors by inflaming them).

297. *See Hall*, 601 S.E.2d at 341 (holding that comparative worth arguments mislead jurors by materially altering their decision making process from one premised in legal standards to one influenced by passion); *Storey*, 901 S.W.2d at 902 (holding that comparative worth arguments encourage jurors to make decisions based on passion and discourage jurors from making decisions based on legal principles).

298. *Cf. Hall*, 601 S.E.2d at 341 (holding that comparative worth arguments misdirect jurors, resulting in a Due Process Clause violation); *Storey*, 901 S.W.2d at 902 (holding that comparative worth arguments misdirect jurors, thereby violating the Due Process Clause).

299. *See* Payne v. Tennessee, 501 U.S. 808, 822 (1991) (stating that the per se ban on the presentation of victim impact evidence "unfairly weighted the scales in a capital trial").

300. *See id.* (discussing the defendant's ability to submit unlimited mitigation evidence and the state's inability to counter this evidence with any evidence of the victim's uniqueness).

301. *See id.* (lifting the per se ban in order to level the playing field between defendant and prosecutor).

vague limitation on its uses, *Payne* permits prosecutors to do more than just level the playing field.[302]

This Note argues that comparative value arguments are one example of prosecutors using victim impact evidence to tip the scales entirely in their favor.[303] These persuasive arguments mislead jurors in violation of the Eighth Amendment and Due Process Clauses.[304] To date, courts have paid too little attention to these arguments. Barely over a handful of state supreme courts have resolved challenges to the use of comparative value arguments.[305] Further, in *Humphries*—the only federal opinion to acknowledge their questionable validity—the circuit was constrained by the exceptionally narrow review permitted under the federal habeas statute.[306] This Note concludes that until the Supreme Court prohibits the use of comparative value arguments, the Court's goal of a level playing field will remain unrealized.

302. *See* Logan, *supra* note 14, at 191–92 (arguing that *Payne*'s vague limitation on the uses of victim impact evidence permits highly prejudicial abuses by prosecutors).

303. *See supra* Part IV (arguing that these persuasive arguments wrongly compel a death verdict).

304. *See supra* Part IV (arguing that comparative value arguments violate the Eighth Amendment and the Due Process Clauses by misleading the jurors).

305. *See supra* Part IV (noting that only seven states have addressed challenges to these arguments).

306. *See supra* Part IV (discussing the standard of review issues that deprived the defendant of full consideration of constitutional challenges to comparative value arguments).