Washington and Lee Law Review

Volume 56 | Issue 1 Article 8

Winter 1-1-1999

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Due Process on the "Uncharted Seas of Irrelevance":† Limiting the Presence of Victim Impact Evidence at Capital Sentencing After *Payne v. Tennessee*

Justin D. Flamm*

Table of Contents

† Payne v. Tennessee, 501 U.S. 808, 859 (1991) (Stevens, J., dissenting).

* The author wishes to thank Professor Penny White, Christine Daniels, and Jeff Keithline for their assistance in the development of this Note.

I. Introduction

Since the 1970s, the criminal justice system has become increasingly responsive to the needs of crime victims and their families.[1] As a result of this increased responsiveness, victim impact evidence[2] has become a prevalent feature in criminal trials, particularly in capital sentencing proceedings.[3] In 1991, the Supreme Court held in *Payne v. Tennessee*[4] that the Eighth Amendment[5] does not prohibit individual states from choosing to allow the admission of victim impact evidence at the sentencing phase of capital trials.[6] Having eliminated the previously existing constitutional bar against victim impact evidence, the Court noted in passing that the Due Process Clause of the Fourteenth Amendment[7] was the proper source for relief in cases in which the

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1. *See, e.g.*, Andrew J. Karmen, *Who's Against Victims' Rights? The Nature of the Opposition to Pro-Victim Initiatives in Criminal Justice*, 8 ST. JOHN'S J. LEGAL COMMENT. 157, 158-60 (1992) (discussing inception and evolution of victims' rights movement); Ashley Paige Dugger, Note, *Victim Impact Evidence in Capital Sentencing: A History of Incompatibility*, 23 AM. J. CRIM. L. 375, 377-81 (1996) (same); Alice Koskela, Comment, *Victim's Rights Amendments: An Irresistible Political Force Transforms the Criminal Justice System*, 34 IDAHO L. REV. 157, 158-60 (1997) (discussing evolution and current political power of "victim's rights movement").

2. *See infra* Part II (discussing nature of victim impact evidence).

3. *See* Koskela, *supra* note 1, at 167 (noting prevalence of state constitutional victim's rights amendments regarding presentation of victim impact evidence at capital sentencing).

4. 501 U.S. 808 (1991).

5. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

6. *See* Payne v. Tennessee, 501 U.S. 808, 827 (1991) (holding that "if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar"). In *Payne*, the Supreme Court reconsidered its prior position that the Eighth Amendment prohibits states from using victim impact evidence in the sentencing phase of capital trials. *Id.* at 811. A jury convicted Pervis Payne on two counts of first degree murder and sentenced him to death for each murder. *Id.* The charges stemmed from an attack that left Charisse Christopher and her two-year-old daughter Lacie dead from multiple stab wounds inflicted with a butcher knife. *Id.* at 812-13. Christopher's three-year-old son Nicholas sustained several stab wounds in the attack, but he ultimately survived. *Id.* at 812. At the sentencing phase of Payne's trial, the prosecution called Charisse Christopher's mother to the witness stand and elicited testimony from her about how the murders had affected Nicholas. *Id.* at 814-15. In addition, while arguing for the death penalty, the prosecutor made statements about the impact of the murders on Nicholas and on Charisse's parents. *Id.* at 815-16. Payne argued that the use of victim impact evidence and argument violated his rights under the Eighth Amendment. *Id.* at 816. The Court reasoned that victim impact evidence served the legitimate purpose of informing the capital sentencing jury about the specific harm caused by the defendant. *Id.* at 825. Accordingly, the Court held that the Eighth Amendment does not prohibit states from choosing to admit victim impact evidence. *Id.* at 827.

7. U.S. CONST. amend. XIV ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."). The Eighth Amendment applies to the states

victim impact evidence was unduly prejudicial.[8] The *Payne* decision, an important victory for victims' rights advocates and an unequivocal rejection of two modern Supreme Court decisions, has been the subject of extensive commentary.[9]

In the years since *Payne*, nearly all the death penalty states[10] have chosen to permit the admission of victim impact evidence.[11] In addition, the United States Congress has provided for the admission of victim impact evidence in federal capital trials.[12] No less than seventeen death penalty states have incorporated into their state constitutions a statement of victims' rights that includes a qualified or unqualified right to offer victim impact evidence before sentencing.[13] Numerous states have provided for the admission of

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through the Due Process Clause of the Fourteenth Amendment. Robinson v. California, 370 U.S. 660, 666 (1962).

8. *See Payne*, 501 U.S. at 825 (noting that Due Process Clause of Fourteenth Amendment is available to defendants when victim impact evidence encroaches upon fundamental fairness of trial).

9. *See, e.g.*, Kathryn E. Bartolo, Comment, Payne v. Tennessee: *The Future Role of Victim Statements of Opinion in Capital Sentencing Proceedings*, 77 IOWA L. REV. 1217, 1224-39 (1992) (discussing Supreme Court's decision in *Payne*); Craig Edward Gilmore, Note, Payne v. Tennessee: *Rejection of Precedent, Recognition of Victim Impact Worth*, 41 CATH. U. L. REV. 469, 502-04 (1992) (discussing stare decisis implications of *Payne*); Jonathan H. Levy, Note, *Limiting Victim Impact Evidence and Argument After* Payne v. Tennessee, 45 STAN. L. REV. 1027, 1038-50 (1993) (discussing potential limitations on use of victim impact evidence after *Payne*); Catherine Bendor, Recent Development, *Defendants' Wrongs and Victims' Rights:* Payne v. Tennessee, 27 HARV. C.R.-C.L. L. REV. 219, 231-43 (1992) (analyzing *Payne* and discussing its potential implications).

10. *See* NATIONAL SURVEY OF STATE LAWS 66-82 (Richard A. Leiter ed., 2d ed. 1997) (noting that Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming currently authorize death penalty for murder).

11. The manner by which states allow the admission of victim impact evidence – whether by constitutional provision, by statute, or by judicial decision – is not material to the analysis of the evidence itself. *See Payne*, 501 U.S. at 821 (noting that Tennessee did not, at time of trial, provide for victim impact evidence by statute, but such evidence had same "purpose and effect" as if statute had provided for it).

12. *See* 18 U.S.C. § 3593(a) (1994) (providing that victim impact is factor that may justify death penalty against defendant).

13. *See* ALA. CONST. amend. 557 (establishing rights of crime victims including right "to be heard when authorized"); ARIZ. CONST. art. II, § 2.1 (establishing rights of crime victims including right "to be heard at any proceeding involving . . . sentencing"); COLO. CONST. art. II, § 16a (establishing rights of crime victims including right "to be heard when relevant"); FLA. CONST. art. I, § 16(b) (same); IDAHO CONST. art. I, § 22 (establishing rights of crime victims including right "[t]o be heard, upon request, at . . . sentencing, . . . unless manifest injustice

victim impact evidence by statutes which provide explicitly that the sentencing authority may or even must consider victim impact evidence in making capital sentencing determinations.[14] The sentencing provisions of the remaining death penalty states allow for the admission of any evidence that is generally relevant to sentencing[15] or to the aggravating or mitigating factors at

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would result"); ILL. CONST. art. I, § 8.1 (establishing rights of crime victims including "right to make a statement to the court at sentencing"); KAN. CONST. art. 15, § 15 (establishing rights of crime victims including right "to be heard at sentencing"); MD. DECL. OF RIGHTS art. 47 (establishing rights of crime victims including right, "upon request and if practicable, . . . to be heard at a criminal justice proceeding"); MICH. CONST. art. I, § 24 (establishing rights of crime victims including "right to make a statement to the court at sentencing"); MO. CONST. art. I, § 32 (establishing right of crime victims including right to be "heard at . . . sentencings"); NEV. CONST. art. I, § 8 (establishing rights of crime victims including right to be "[h]eard at all proceedings for . . . sentencing"); N.M. CONST. art. II, § 24 (establishing rights of crime victims including "right to make a statement to the court at sentencing"); N.C. CONST. art. I, § 37 (establishing rights of crime victims including "right to be heard at sentencing of the accused in a manner prescribed by law"); OKLA. CONST. art. II, § 34 (establishing rights of crime victims including right "to be heard at any sentencing"); S.C. CONST. art. I, § 24 (establishing rights of crime victims including right to "be heard at . . . sentencing"); UTAH CONST. art. I, § 28 (establishing rights of crime victims including, upon request, right "to be heard at important criminal justice hearings"); VA. CONST. art. I, § 8-A (establishing rights of crime victims and noting that "[t]hese rights may include . . . right to address the circuit court at the time sentence is imposed").

14. *See* ARK. CODE ANN. § 5-4-602 (Michie 1997) (allowing victim impact evidence at sentencing if defendant has rebuttal opportunity); COLO. REV. STAT. ANN. § 16-11-103 (West 1998) (allowing victim impact evidence if judge deems evidence to have probative value and if defendant has opportunity to react); FLA. STAT. ANN. § 921.141 (West Supp. 1999) (allowing victim impact evidence once prosecution has presented evidence as to one or more aggravator); GA. CODE ANN. § 17-10-1.2 (1997) (allowing victim impact testimony, subject to cross-examination, at discretion of trial judge); IDAHO CODE § 19-5306 (Supp. 1998) (allowing victim impact statement and testimony, upon request, at capital sentencing hearing); LA. CODE CRIM. PROC. ANN. art. 905.2 (West 1997) (providing that capital sentencing hearing shall focus on impact of murder on victim's family members); MD. ANN. CODE art. 41, § 4-609 (Supp. 1998) (allowing sentencing body to consider victim impact statement prior to sentencing); MO. ANN. STAT. § 565.030 (West Supp. 1998) (allowing evidence "concerning the murder victim and the impact of the crime upon the family of the victims and others"); MONT. CODE ANN. § 46-18-302 (1997) (allowing admission of evidence of harm that murder caused to victim and victim's family); N.J. STAT. ANN. § 2C:11-3 (West Supp. 1998) (allowing state to present victim impact evidence if defendant presents evidence of defendant's character or prior record); OKLA. STAT. ANN. tit. 21, § 701.10 (West Supp. 1999) (allowing victim impact evidence); OR. REV. STAT. § 163.150 (1997) (same); 42 PA. CONS. STAT. ANN. § 9711 (West 1998) (same); S.D. CODIFIED LAWS § 23A-27A-2 (Michie 1998) (same); TENN. CODE ANN. § 40-38-202 (1997) (requiring sentencing judge to "solicit and consider" victim impact statement); UTAH CODE ANN. § 76-3-207 (Supp. 1998) (allowing evidence concerning murder's impact on victim's family and community); VA. CODE ANN. § 19.2-264.4 (Michie Supp. 1998) (requiring admission of victim impact evidence at sentencing); WYO. STAT. ANN. § 7-21-103 (Michie 1997) (allowing victim impact evidence).

15. *See* ALA. CODE § 13A-5-45 (1994) (allowing evidence on any matter relevant to sentence); CAL. PENAL CODE § 190.3 (West 1988) (same); CONN. GEN. STAT. ANN. § 53a-46a (West Supp. 1998) (same); DEL. CODE ANN. tit. 11, § 4209 (Supp. 1998) (same); KAN. STAT.

issue.[16] In a majority of these remaining states, the courts have ruled in favor of admitting victim impact evidence.[17]

Part II of this Note describes victim impact evidence.[18] Part III briefly discusses the Supreme Court's decision in *Payne v. Tennessee*.[19] Part IV examines the current status of victim impact evidence at the sentencing phase of capital murder trials under federal laws[20] and the laws of Texas[21] and Virginia,[22] the two leading death penalty states.[23] Against the aggravating circumstances

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ANN. § 21-4624(c) (1995) (same); MISS. CODE ANN. § 99-19-101 (1994) (same); NEB. REV. STAT. § 29-2521 (1995) (same); NEV. REV. STAT. § 175.552 (1997) (same); N.C. GEN. STAT. § 15A-2000 (Supp. 1997) (same); TEX. CODE CRIM. P. ANN. art 37.071 (West Supp. 1997) (same); VA. CODE ANN. § 19.2-264.4 (Michie 1995) (same); WASH. REV. CODE ANN. § 10.95.060 (West 1990) (same).

16. *See* ARIZ. REV. STAT. ANN. § 13-703 (West Supp. 1998) (allowing evidence relevant to aggravating or mitigating factors); IDAHO CODE § 19-2515 (Supp. 1998) (same); 720 ILL. COMP. STAT. ANN. 5/9-1 (West Supp. 1998) (same); IND. CODE ANN. § 35-50-2-9 (Michie 1998) (same); KY. REV. STAT. ANN. § 532.025 (Michie Supp. 1996) (allowing evidence relevant in extenuation, mitigation, or aggravation of sentence); N.H. REV. STAT. ANN. § 630:3 (1996) (allowing evidence relevant to aggravating or mitigating factors); N.M. STAT. ANN. § 31-20A-1 (Michie 1994) (allowing evidence relevant to aggravating or mitigating factors or to circumstances of crime); N.Y. CRIM. PROC. LAW § 400.27 (McKinney Supp. 1999) (allowing evidence relevant to aggravating or mitigating factors); OHIO REV. CODE ANN. § 2929.03 (Banks-Baldwin 1997) (same); S.C. CODE ANN. § 16-3-20 (Law Co-op. Supp. 1997) (allowing evidence relevant to extenuating, mitigating, or aggravating factors).

17. *See Ex parte* Slaton, 680 So. 2d 909, 928 (Ala. 1996) (stating that Alabama permits victim impact evidence and argument at capital sentencing), *cert. denied*, 117 S. Ct. 742 (1997); People v. Edwards, 819 P.2d 436, 465 (Cal. 1991) (allowing victim impact evidence at capital sentencing); *In re* State, 597 A.2d 1, 3 (Del. 1991) (same); Bowling v. Commonwealth, 942 S.W.2d 293, 303 (Ky.) (same), *cert. denied*, 118 S. Ct. 451 (1997); Jenkins v. State, 607 So. 2d 1171, 1183 (Miss. 1992) (same); Homick v. State, 825 P.2d 600, 606 (Nev. 1992) (same); State v. Robinson, 451 S.E.2d 196, 205 (N.C. 1994) (same); State v. Fautenberry, 650 N.E.2d 878, 882 (Ohio 1995) (same); State v. Byram, 485 S.E.2d 360, 366 (S.C. 1997) (same); State v. Payne, 791 S.W.2d 10, 18 (Tenn. 1990) (same), *aff'd*, 501 U.S. 808 (1991); State v. Gentry, 888 P.2d 1105, 1134 (Wash. 1995) (en banc) (same). *But see* Bivins v. State, 642 N.E.2d 928, 957 (Ind. 1994) (stating that victim impact evidence is admissible under Constitution of Indiana only if relevant to statutory aggravator at issue in trial, and that victim impact evidence was not relevant to aggravator of murder in commission of robbery).

The highest courts of Connecticut, Nebraska, New Hampshire, and New York, states without statutory or constitutional provisions for victim impact evidence, have not ruled on the admissibility of victim impact evidence at capital sentencing hearings.

18. *See infra* Part II (discussing nature of victim impact evidence).

19. 501 U.S. 808 (1991); *see infra* Part III (discussing Supreme Court's decision in *Payne*).

20. *See infra* Part IV.A (discussing federal death penalty law and victim impact evidence).

21. *See infra* Part IV.B (discussing Texas death penalty law and victim impact evidence).

22. *See infra* Part IV.C (discussing Virginia death penalty law and victim impact evidence).

23. *See* Death Penalty Information Center, *Number of Executions by State Since 1976*

that each of those jurisdictions recognizes as tending to warrant the death penalty, Part IV argues that victim impact evidence should be inadmissible in the three jurisdictions.[24] Specifically, under federal law, the probative value of victim impact evidence is insufficient to overcome its prejudicial effect.[25] Likewise, victim impact evidence is not relevant to the sentencing decision under the laws of Texas and Virginia.[26] Part V evaluates the due process standard that applies to victim impact evidence under the Fourteenth Amendment.[27] In light of this case-specific standard and the corresponding evidentiary problems that victim impact evidence presents, this Note concludes that legislatures and courts should reevaluate their decisions to admit victim impact evidence.[28]

II. Victim Impact Evidence

In the context of capital sentencing, the "victim impact" concept encompasses several discrete matters.[29] The term "victim impact evidence" refers to evidence having a tendency to show the personal characteristics of the murder victim and the effect that the victim's death has had on the surviving family members and friends.[30] Courts often receive victim impact evidence as testimony from the victim's survivors.[31] The evidence also may come in the form of written victim impact statements prepared by the survivors them-

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(visited Jan. 26, 1999) <http://www.essential.org/dpic/dpicreg.html> (stating that Texas is first in executions since 1976 with 166 and Virginia is second with 60).

24. *See infra* Part IV (discussing federal, Texas, and Virginia death penalty laws and victim impact evidence).

25. *See infra* Part IV.A.2 (concluding that victim impact evidence should be inadmissible at federal capital sentencing hearing).

26. *See infra* Parts IV.B and IV.C (concluding that victim impact evidence is not relevant to capital sentencing in Texas or Virginia).

27. *See infra* Part V (discussing due process standard applicable to victim impact evidence).

28. *See infra* Part VI (concluding that courts and legislatures should reevaluate their decisions to allow admission of victim impact evidence).

29. *See infra* Part II (discussing nature of victim impact evidence).

30. *See* Booth v. Maryland, 482 U.S. 496, 502 (1987) (noting that victim impact evidence at issue in case described emotional impact of murder on families of victims, as well as personal characteristics of actual victims), *overruled in part by* Payne v. Tennessee, 501 U.S. 808 (1991).

31. *See, e.g., Payne*, 501 U.S. at 814-15 (quoting testimony regarding effect that murders had on three-year-old who survived attack that killed his mother and younger sister); Rippo v. State, 946 P.2d 1017, 1031 (Nev. 1997) (noting testimony of five witnesses addressing how victims' deaths had affected witnesses' lives), *cert. denied*, 119 S. Ct. 104 (1998); Weeks v. Commonwealth, 450 S.E.2d 379, 389 (Va. 1994) (noting testimony of victim's widow regarding effect of murder on victim's family).

selves or by an officer of the court.[32] Whether oral or written, victim impact evidence often is an intensely emotional expression of the survivors' grief.[33]

Additionally, prosecutors frequently invoke victim impact in their sentencing phase argument before the jury or judge in capital cases in an attempt to secure the death penalty against convicted capital defendants.[34] In terms of its constitutional analysis, the United States Supreme Court has effectively collapsed the various forms of victim impact evidence and argument.[35] This Note likewise makes no analytical distinction between types of

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32. *See, e.g., Booth*, 482 U.S. at 509-15 (reproducing full text of victim impact statement as appendix to majority opinion); *In re* Rieber, 663 So. 2d 999, 1006 (Ala. 1995) (noting trial court's receipt of written victim impact statement in presentence investigation report); State v. Card, 825 P.2d 1081, 1087 (Idaho 1991) (noting that investigator interviewed victim's family and prepared written victim impact statement for court's consideration at sentencing).

33. *See, e.g., Payne*, 501 U.S. at 814-15 (quoting testimony from grandmother of three-year-old survivor of attack that left his mother and sister dead: "He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He . . . asks me, Grandmama, do you miss my Lacie. And I tell him yes. He says, I'm worried about my Lacie."); *Booth*, 482 U.S. at 511 (quoting victim impact statement: "The [victims' granddaughter] was to be married two days later. . . . She had been looking forward to [the wedding] eagerly, but it was a sad occasion with people crying. . . . The next day, instead of going on her honeymoon, she attended her grandparents' funerals."), *overruled in part by* Payne v. Tennessee, 501 U.S. 808 (1991); State v. Atwood, 832 P.2d 593, 673 (Ariz. 1992) (en banc) (quoting poem submitted to trial court by murder victim's sister: "Growing up with you was the best thing for me. You taught me to be myself and the best that I could be. . . . But all those days are gone now they're just a memory, of me and my little sis together faithfully."); Conover v. State, 933 P.2d 904, 919 n.6 (Okla. Crim. App. 1997) (quoting statement of murder victim's mother regarding impact on victim's sons: "We've had to answer questions like, 'why is daddy dead? Why did the mean men hurt daddy? Will daddy come back and take us on a vacation when our piggy bank is full?'"); McDuff v. State, 939 S.W.2d 607, 619-20 (Tex. Crim. App.) (en banc) (noting testimony from victim's sister that, as result of murder, sister was afraid to go out alone at night, experienced marital difficulties, and missed victim's "acceptance and love"), *cert. denied*, 118 S. Ct. 125 (1997); Ford v. State, 919 S.W.2d 107, 112-13 (Tex. Crim. App. 1996) (en banc) (noting tearful testimony of victim's mother that because of her daughter's murder, "she felt like she was embalmed and had a dead body and felt like she cried inside all the time, and knew that there is no end to her mourning for her son nor her grief").

34. *See, e.g., Payne*, 501 U.S. at 815-16 (quoting prosecutor's argument regarding effect of murders on surviving family members); Homick v. State, 825 P.2d 600, 605 (Nev. 1992) (noting prosecutor's argument regarding impact of victims' death on surviving family members); State v. Robinson, 451 S.E.2d 196, 204 (N.C. 1994) (noting prosecutor's statement that "[t]here are children in this world today that are without mothers because of [defendant]" (alterations in original)).

35. *See Payne*, 501 U.S. at 827 (holding that states may choose to permit victim impact evidence and argument). The specific victim impact evidence and argument at issue in *Payne* addressed the effect of the murders on the surviving family members. *Id.* at 814-16. In addition, *Payne* specifically allows evidence and argument regarding the personal characteristics of the victim. *Id.* at 827.

victim impact evidence or argument, although it will discuss distinctions when necessary for an accurate reflection of either the facts or the decision in a particular case.

III. The Supreme Court Removes the Bar

In holding that the Eighth Amendment does not prohibit the admission of victim impact evidence, the Court in *Payne v. Tennessee* overruled two of its decisions from the late 1980s.[36] In *Booth v. Maryland*,[37] a 1987 decision, the Court concluded that the Eighth Amendment prohibits the sentencing-phase admission of evidence regarding a murder victim's personal characteristics or the impact of the murder on the victim's family.[38] The *Booth* Court found that victim impact evidence was irrelevant to the sentencing decision and that it had the potential to influence the jury improperly.[39] Two years

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The victim impact evidence that the Supreme Court had previously barred under the Eighth Amendment included the survivors' characterizations of the murders and the survivors' opinions regarding the appropriate punishment for the crimes. *Booth*, 482 U.S. at 508-09. *Payne* did not involve victim impact evidence of this kind. *Payne*, 501 U.S. at 830 n.2. Thus, the holding of *Payne* does not overrule this aspect of *Booth*. *Id.* This Note does not address survivors' characterizations of the crime or their opinions about the appropriate sentence.

36. Payne v. Tennessee, 501 U.S. 808, 828-30 (1991) (overruling South Carolina v. Gathers, 490 U.S. 805 (1989) and Booth v. Maryland, 482 U.S. 496 (1987)). The Supreme Court's grant of certiorari in *Payne* included a specific request for briefing and argument on whether the Court should overrule the two cases. Payne v. Tennessee, 498 U.S. 1076, 1076 (mem. granting cert.), *amended by* 498 U.S. 1080 (1991). Neither Payne nor the State of Tennessee had initially argued for the overruling of *Gathers* or *Booth*. *Id.* (Stevens, J., dissenting) (stating that Court's request that parties address overruling *Gathers* and *Booth* was "a question presented neither in the petition for certiorari nor in the response").

37. 482 U.S. 496 (1987).

38. *See* Booth v. Maryland, 482 U.S. 496, 501-03 (1987) (holding that "Eighth Amendment prohibits a capital sentencing jury from considering victim impact evidence"), *overruled in part by* Payne v. Tennessee, 501 U.S. 808 (1991). A jury found the petitioner in *Booth* guilty of two counts of first-degree murder. *Id.* at 498. Pursuant to statute, the state prepared a victim impact statement (VIS) that included family members' comments about the character of the victims and the effect of the crimes on the victims' surviving family. *Id.* at 498-500. The trial court denied the petitioner's motion to suppress the VIS. *Id.* at 500-01. After considering the VIS, the jury sentenced the petitioner to death on one of the murder counts. *Id.* at 501. The Supreme Court, however, found that the information contained in the VIS was irrelevant to the jury's proper sentencing considerations. *Id.* at 507. Because the VIS also threatened the jury's "reasoned decisionmaking," the Court held that the introduction of a VIS at capital sentencing violated the Eighth Amendment. *Id.* at 508-09.

The *Booth* Court found that the Eighth Amendment barred testimony regarding the family members' "opinions and characterizations of the crimes." *Id.* at 508. The *Payne* Court explicitly did not overrule this aspect of *Booth*. *Payne*, 501 U.S. at 830 n.2.

39. *See Booth*, 482 U.S. at 502-03 (finding that victim impact evidence was irrelevant to capital sentencing decision and presented risk of improperly diverting jury's attention).

later, the Court in *South Carolina v. Gathers*[40] extended the rule of *Booth* to prohibit prosecutorial argument on a homicide victim's personal characteristics.[41]

With the *Payne* decision, however, the Court explicitly overruled both of these earlier cases.[42] In *Payne*, a Tennessee jury had convicted Pervis Tyrone Payne for the murders of a woman and her two-year-old daughter.[43] At the sentencing phase, the prosecution presented testimony and argument regarding the effect of the murders on the victims' family.[44] The jury sentenced Payne to death on both murder counts.[45] On appeal to the Supreme Court of Tennessee, Payne argued that the victim impact testimony and argument presented at sentencing violated his rights under the Eighth Amendment.[46] Although Tennessee's high court characterized the victim impact testimony as "technically irrelevant," the court rejected Payne's argument and affirmed the sentence.[47]

The United States Supreme Court granted certiorari and requested that the parties address the possible reconsideration of *Booth* and *Gathers*.[48] Neither Payne nor the State of Tennessee had sought reconsideration of the prior cases.[49] Nonetheless, the Court proceeded to affirm the Supreme Court of Tennessee and to reject the two precedents.[50] In support of its new position, the *Payne* Court stated that victim impact evidence was relevant to

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40. 490 U.S. 805 (1989).

41. *See* South Carolina v. Gathers, 490 U.S. 805, 811 (1989) (extending *Booth* rule to prosecutorial argument involving characterization of victim's personal qualities), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991). In *Gathers*, a jury convicted the defendant of murder and sentenced him to death. *Id.* at 806. At the sentencing phase, the prosecutor commented extensively on the victim's character traits and religious beliefs. *Id.* at 808-10. Finding no distinction between the descriptions of the victim's character made by the prosecutor and the statements made by the victims' families in *Booth*, the Court upheld the South Carolina Supreme Court's reversal of Gathers's death sentence. *Id.* at 810-11.

42. *See Payne*, 501 U.S. at 830 (overruling *Booth* and *Gathers* regarding victim impact evidence and argument).

43. *See id.* at 811 (noting factual and procedural background of case).

44. *See id.* at 814-16 (discussing prosecution's evidence and argument at sentencing phase).

45. *See id.* at 816 (noting sentence).

46. *See id.* (noting Payne's arguments on appeal to Supreme Court of Tennessee).

47. *See* State v. Payne, 791 S.W.2d 10, 18 (Tenn. 1990) (finding that victim impact testimony, though "technically irrelevant," was not unconstitutional), *aff'd*, 501 U.S. 808 (1991).

48. *See* Payne v. Tennessee, 498 U.S. 1076, 1076 (1991) (granting certiorari).

49. *See id.* (Stevens, J., dissenting) (noting that neither petition for certiorari nor response to petition for certiorari presented question of overruling *Booth* or *Gathers*).

50. *See Payne*, 501 U.S. at 830 (overruling *Booth* and *Gathers*).

demonstrate the full scope of the harm caused by a murder.[51] Central to this claim is the concept that the indirect effects of a murder, such as the grief of the victim's family, are included in the "specific harm" that the homicidal act causes.[52] Given this characterization, six Justices joined the Court's opinion holding that victim impact evidence served legitimate purposes at capital sentencing hearings and, therefore, its admission does not violate the Eighth Amendment.[53] However, the majority opinion also stated that, in some cases, victim impact evidence may be so prejudicial as to present a violation of the Due Process Clause of the Fourteenth Amendment.[54]

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51. *See id.* at 825 ("Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question . . . .").

52. *See id.* ("[T]he State has a legitimate interest in . . . reminding the sentencer that . . . the victim is an individual whose death represents a unique loss to society and in particular to his family." (alteration in original) (quoting Booth v. Maryland, 482 U.S. 496, 571 (1987) (White, J., dissenting), *overruled in part by* Payne v. Tennessee, 501 U.S. 808 (1991))).

53. *See id.* at 827 (holding that Eighth Amendment does not bar victim impact evidence). To embellish the Court's conclusion, Chief Justice Rehnquist's majority opinion quoted a 1934 opinion by Justice Cardozo: "[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." *Id.* (alteration in original) (quoting Snyder v. Massachusetts, 291 U.S. 97, 122 (1934)). Although this passage would appear to add a certain luster to the Court's holding, the quote takes Justice Cardozo's words out of context. *See* Markus Dirk Dubber, *Regulating the Tender Heart When the Axe Is Ready to Strike*, 41 BUFF. L. REV. 85, 130 n.181 (1993) (discussing *Payne*'s distortion of Justice Cardozo's language in *Snyder*). *Snyder* was a murder case in which the prosecution successfully moved for a jury view of the gas station where the crime had occurred. *Snyder*, 291 U.S. at 103. Snyder's counsel was present at the view and directed the jury's attention to several specific areas of the gas station, as did the prosecutor. *Id.* at 103-04. On appeal from his conviction, the defendant claimed that the trial court's denial of his motion to be personally present at the view was a due process violation. *Id.* at 104-05. Because the view presented only "gossamer possibilities of prejudice" to the defendant, the Court found that no due process violation occurred. *Id.* at 122. Victim impact evidence, however, is quite different than a jury view, and victim impact evidence presents possibilities of unfair prejudice that easily rise beyond the level of the "gossamer." *See supra* note 33 (providing examples of victim impact evidence).

It is also interesting to note another context in which a member of the Supreme Court invoked Justice Cardozo's words from *Snyder*. Protesting the majority's decision in *Miranda v. Arizona* – requiring police officers to warn suspects of their constitutional rights before questioning – Justice Harlan lamented that "confessions . . . are to be sacrificed to the Court's own finespun conception of fairness." Miranda v. Arizona, 384 U.S. 436, 519 (1966) (Harlan, J., dissenting). Justice Harlan then dropped the following footnote: "[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." *Id.* at 519 n.16 (Harlan, J., dissenting) (alteration in original) (quoting *Snyder*, 291 U.S. at 122).

54. *See Payne*, 501 U.S. at 825 ("In the event that [victim impact] 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.").

In a sharp dissent, Justice John Paul Stevens criticized the majority for abandoning long-held requirements of relevance in favor of a politically popular course: "Today . . . the Court abandons rules of relevance that are older than the Nation itself and ventures into uncharted seas of irrelevance."[55] By presenting information about a murder victim's character and about the impact of the murder on the victim's family, Justice Stevens argued, a risk exists that the jury will consider facts that were unforeseeable to the defendant at the time of the crime.[56] Additionally, Justice Stevens noted that no defined point exists at which the fact of victim impact transforms a murder from one meriting a life sentence to one meriting execution.[57] The majority's unfounded embrace of victim impact evidence and the resulting effects on capital sentencing led Justice Stevens to characterize the occasion of the *Payne* decision as "a sad day for a great institution."[58]

IV. The Aftermath of Payne

The language of the Court's holding in *Payne* was permissive in nature.[59] Far from mandating the admission of victim impact evidence, the *Payne* Court expressly left to the states the decision of whether to allow victim impact evidence and argument.[60] Almost without exception, the death penalty states have capitalized on the Court's open invitation to make victim impact evidence a factor at capital sentencing hearings.[61] Additionally, Congress has enacted a law that allows juries to consider victim impact evidence at the sentencing phase of capital trials in the federal system.[62] Nonetheless, an examination of victim impact evidence under the federal provisions and the

55. *Id.* at 858-59 (Stevens, J., dissenting).

56. *See id.* at 863 (Stevens, J., dissenting) (stating that Court's holding "permits a jury to sentence a defendant to death because of harm to the victim and his family that the defendant could not foresee [and] which was not even identified until after the crime had been committed").

57. *See id.* at 861 (Stevens, J., dissenting) ("[T]he quantity and quality of victim impact evidence sufficient to turn a verdict of life in prison into a verdict of death is not defined until after the crime has been committed and therefore cannot possibly be applied consistently in different cases.").

58. *Id.* at 867 (Stevens, J., dissenting).

59. *See id.* at 827 ("We thus hold that if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar.").

60. *See id.* (stating that states "*may* legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed" (emphasis added)).

61. *See supra* notes 13-17 and accompanying text (discussing measures that individual states have taken to allow victim impact evidence at capital sentencing hearings).

62. *See* 18 U.S.C. § 3593(a) (1994) (providing that victim impact is factor that government may use to justify death penalty).

laws of Texas and Virginia demonstrates that the admission of such evidence raises significant concerns.

A. Federal Law

Since the early days of the nation, federal law has authorized capital punishment as a sentence for murder and other offenses.[63] With the passage of the Federal Death Penalty Act of 1994 (Act),[64] Congress significantly expanded the scope of federal capital crimes.[65] Although the number of federal offenses punishable by death has increased dramatically, very few individuals actually have received death sentences under the new provisions.[66] However, the Oklahoma City bombing trials, most notably that of Timothy McVeigh, brought considerable national attention to the federal death penalty laws.[67] Popular attention notwithstanding, the Supreme Court has yet to consider a case involving the constitutionality of the Act.[68]

1. Statutory Provisions

The federal statutory definition of murder, now codified at 18 U.S.C. § 1111, has remained virtually unchanged since 1909.[69] Jurisdiction for

63. *See* MICHAEL KRONENWETTER, CAPITAL PUNISHMENT: A REFERENCE HANDBOOK 13 (1993) (noting that Congress of United States, in its first session, passed laws providing capital punishment for rape and murder).

64. Federal Death Penalty Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, 1959 (codified in scattered sections of 18 U.S.C.).

65. *See* Charles Kenneth Eldred, Recent Development, *The New Federal Death Penalties*, 22 AM. J. CRIM. L. 293, 296-98 (1994) (listing approximately 60 federal capital offenses under 1994 provisions).

66. *See* Margaret A. Jacobs, *McVeigh Jury Now Weighs Execution, A Seldom-Used Penalty in Federal Cases*, WALL ST. J., June 4, 1997, at B1 (noting that, at time of article's writing, only 13 individuals had received death sentences in federal court since adoption of new death penalty laws, while several hundred individuals had received death sentences in state courts).

67. *See, e.g.*, Jacobs, *supra* note 66 (discussing current federal death penalty provisions); Steven K. Paulson, *The McVeigh Verdict: Execution Far from Certain*, CIN. ENQUIRER, June 4, 1997, at A1 (noting that Supreme Court has not ruled on constitutionality of new federal death penalty provisions); Richard A. Serrano, *McVeigh Gets Death Sentence*, L.A. TIMES, June 15, 1997, at A1 (discussing federal capital sentencing procedures).

The eleven capital counts in McVeigh's indictment included eight counts of first degree murder in violation of 18 U.S.C. § 1111. United States v. McVeigh, 940 F. Supp. 1571, 1583 (D. Colo. 1996). Federal jurisdiction existed because the eight victims were federal employees in the performance of their official duties. *Id.* The jury's recommendation of the death sentence applied collectively to all eleven counts. United States v. McVeigh, No. 96-CR-68, 1997 WL 318019, at *1 (D. Colo. June 13, 1997) (official trial transcript of special findings and recommendation).

68. *See* Paulson, *supra* note 67 (noting that Supreme Court has not evaluated new federal death penalty laws).

69. *See* 18 U.S.C. § 1111(a) (1994) (defining murder and distinguishing between first and second degree murder); Act of March 4, 1909, ch. 321, sec. 273, 35 Stat. 1088, 1143 (same).

murder lies with the federal courts only when the murder occurs on federal property or when other circumstances exist to make the offense a federal one.[70] The United States Code recognizes murder in the first and second degrees.[71] Of the two, only first degree murder carries a possible death sentence.[72] After convicting a defendant for first degree murder, a federal jury or court makes special findings as to which of the offered aggravating or mitigating factors exist.[73] The sentencing body then weighs the applicable aggravating factor or factors against any mitigating factors to determine whether the defendant should receive a death sentence.[74] If the sentencing body recommends a sentence of death, the court must sentence the defendant in accordance with that recommendation.[75]

Any defendant who receives a sentence of death in federal court has a right to have the court of appeals review the sentence.[76] The reviewing court must consider the entire record from the trial and the sentencing hearing, the

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70. *See* Hackathorn v. Decker, 243 F. Supp. 22, 24 (N.D. Tex. 1965) (noting that state courts have jurisdiction over murder trials unless offense occurs on federal property or unless other circumstances invoke federal jurisdiction), *aff'd*, 369 F.2d 150 (5th Cir. 1966).

71. *See* 18 U.S.C. § 1111(a) (defining murder as "the unlawful killing of a human being with malice aforethought"). The distinction between first degree and second degree murder is as follows:

> Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree. Any other murder is murder in the second degree.

Id.

72. *See id.* § 1111(b) (establishing sentence for first degree murder as death or life imprisonment).

73. *See id.* § 3593(d) (providing for return of special findings on aggravating and mitigating factors). For a list of the aggravating factors, see *infra* note 82. The mitigating factors are as follows: the defendant had impaired capacity; the defendant was under duress; the defendant, though punishable as a principal, had only minor participation in a homicide committed by another; other defendants in the case are equally culpable, but they will not receive a death sentence; the defendant had no prior criminal record; the defendant was under severe mental or emotional disturbance at the time of the homicide; the victim consented to the conduct that caused the victim's death; and other, unenumerated factors that operate in mitigation. *Id.* § 3592(a)(1)-(8).

74. *See id.* § 3591(a) (providing for death sentence "if, after consideration of the factors set forth in section 3592 in the course of a hearing held pursuant to section 3593, it is determined that imposition of a sentence of death is justified").

75. *See id.* § 3594 ("Upon a recommendation under section 3593(e) that the defendant should be sentenced to death or life imprisonment without possibility of release, the court shall sentence the defendant accordingly.").

76. *See id.* § 3595 (providing automatic review, at defendant's option, of death sentence).

procedures by which the district court conducted the sentencing hearing, and the sentencing body's special findings.[77] If the court of appeals finds that the sentencing body imposed the death penalty under the influence of passion or prejudice, the court must remand for reconsideration of the sentence unless the improper influence was harmless beyond a reasonable doubt.[78] The government bears the burden of demonstrating the harmlessness of any error or impermissible influence.[79]

The Act includes a provision that allows the admission of victim impact evidence[80] at the sentencing phase.[81] The statutory aggravating factors for murder, however, do not include victim impact.[82] Nonetheless, 18 U.S.C.

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77. *See id.* (dictating scope of review in any case in which court imposes death sentence).

78. *See id.* (mandating remand of sentence if "the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor," unless error is harmless beyond reasonable doubt).

79. *See id.* (noting that government bears burden of demonstrating harmlessness beyond reasonable doubt).

80. *See id.* § 3593(c) (noting that "[i]nformation is admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials"). Because the Federal Rules of Evidence do not apply to capital sentencings under the federal death penalty regime, § 3593 speaks in terms of "information" rather than in terms of "evidence." *Id.* For purposes of consistency and clarity, this Note will refer to victim impact information in federal capital sentencings as "victim impact evidence," although the term "evidence" in this context is not strictly accurate.

81. *See id.* § 3593(a) (establishing procedures for capital sentencing proceedings). If the attorney for the government wishes to seek the death sentence in an eligible case, § 3593 requires that:

> [T]he attorney shall, a reasonable time before the trial or before acceptance by the court of a plea of guilty, sign and file with the court, and serve on the defendant, a notice – (1) stating that the government believes that the circumstances of the offense are such that, if the defendant is convicted, a sentence of death is justified under this chapter and that the government will seek the sentence of death; and (2) setting forth the aggravating factor or factors that the government, if the defendant is convicted, proposes to prove as justifying a sentence of death. *The factors for which notice is provided under this subsection may include factors concerning the effect of the offense on the victim and the victim's family, and may include oral testimony, a victim impact statement that identifies the victim of the offense and the extent and scope of the injury and loss suffered by the victim and the victim's family, and any other relevant information.*

Id. (emphasis added).

82. *See* 18 U.S.C. § 3592(c) (1994 & Supp. 1996) (providing aggravating factors for homicide). The federal statutory aggravators are:

> (1) Death during commission of another crime. . . .
> (2) Previous conviction of violent felony involving firearm. . . .
> (3) Previous conviction of offense for which a sentence of death or life imprisonment was authorized. . . .
> (4) Previous conviction of other serious offenses. . . .

§ 3593, which governs the procedures at capital sentencing hearings, explicitly establishes victim impact as a factor on which the attorney for the government may rely in seeking the death penalty.[83] If the government intends to rely upon the victim impact factor, § 3593 requires that the government notify the court and the defendant of this intention.[84]

At the sentencing hearing, the sentencing body may consider the victim impact factor if the government has given the appropriate notice under § 3592.[85] The status of the victim impact factor, however, is not equivalent to that of the sixteen aggravators that § 3592 explicitly sets forth.[86] In contrast to the mandatory consideration afforded to the enumerated aggravators of § 3592, consideration of victim impact is entirely permissive.[87] Furthermore, a finding that the government has proven the existence of victim impact is insufficient to support a death sentence unless the sentencing body also finds the existence

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(5) Grave risk of death to additional persons. – The defendant, in the commission of the offense, or in escaping apprehension for the violation of the offense, knowingly created a grave risk of death to 1 or more persons in addition to the victim of the offense.

(6) Heinous, cruel, or depraved manner of committing offense. – The defendant committed the offense in an especially heinous, cruel, or depraved manner in that it involved torture or serious physical abuse to the victim.

(7) Procurement of offense by payment. . . .

(8) Pecuniary gain. . . .

(9) Substantial planning and premeditation. . . .

(10) Conviction for two felony drug offenses. . . .

(11) Vulnerability of victim. – The victim was particularly vulnerable due to old age, youth, or infirmity.

(12) Conviction for serious Federal drug offenses. . . .

(13) Continuing criminal enterprise involving drug sales to minors. . . .

(14) High public officials. . . .

(15) Prior conviction of sexual assault or child molestation. . . .

(16) Multiple killings or attempted killings. . . .

Id. Additionally, the sentencing body "may consider whether any other aggravating factor for which notice has been given exists." *Id.*

83. *See* 18 U.S.C. § 3593(a) (1994) (providing for inclusion of victim impact as basis for government to seek death penalty).

84. *See id.* (requiring government attorney to give notice to court and defendant of government's intention to seek death sentence and of aggravating factors by which government seeks to justify death sentence).

85. *See id.* § 3592(c) (providing that sentencing body may consider any aggravating factor for which government has given notice).

86. *See id.* (enumerating 16 aggravating factors for homicide).

87. *Compare id.* ("[T]he jury, or if there is no jury, the court, *shall* consider each of the following [enumerated] aggravating factors for which notice has been given and determine which, if any, exist. . . ." (emphasis added)) *with id.* ("The jury, or if there is no jury, the court, *may* consider whether any other aggravating factor for which notice has been given exists." (emphasis added)).

of at least one enumerated aggravator.[88] Because of this arrangement within the United States Code, victim impact is a nonstatutory aggravating factor.[89]

Section 3593 specifies that the nonstatutory victim impact factor may include oral testimony or a victim impact statement.[90] Additionally, the government may present any other relevant information to prove the victim impact factor.[91] The statutory language itself places no limits on what the court may receive in this regard.[92] As a result, application of the victim impact factor at a capital sentencing hearing is a potentially difficult proposition.[93] Congress's failure to provide more specific guidance regarding the admission of victim impact evidence leaves much discretion to the district court.[94] In the exercise of this discretion, the court must ensure that the sentencing body makes its sentencing determination without passion or undue prejudice.[95]

2. *Victim Impact Evidence Lacks Sufficient Probative Value*

At the sentencing hearing under § 3593, the Federal Rules of Evidence do not govern the admissibility of information.[96] Section 3593, however, includes two specific provisions that are analogous to the Federal Rules of Evidence.[97] The first states that information relevant to aggravating and

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88. *See id.* § 3593(d) ("If no aggravating factor set forth in section 3592 is found to exist, the court shall impose a sentence other than death authorized by law.").

89. *See* United States v. Davis, 912 F. Supp. 938, 947 (E.D. La. 1996) (noting that victim impact is nonstatutory aggravator in federal capital sentencing).

90. *See* 18 U.S.C. § 3593(a) (1994) (providing that government's victim impact factor for justifying death sentence may include victim impact statement or oral testimony).

91. *See id.* (stating that government's victim impact factor for justifying death sentence may include "any other relevant information").

92. *See id.* (providing that "factors . . . may include oral testimony, a victim impact statement that identifies the victim of the offense and the extent and scope of the injury and loss suffered by the victim and the victim's family, and any other relevant information"); United States v. McVeigh, 944 F. Supp. 1478, 1491 (D. Colo. 1996) (stating that Congress did not limit scope of victim impact evidence under § 3593).

93. *See McVeigh*, 944 F. Supp. at 1491 (noting that victim impact factor in § 3593(a) is "most problematical of all of the aggravating factors and may present the greatest difficulty in determining the nature and scope of the 'information' to be considered").

94. *See id.* (noting that limitation on victim impact evidence under § 3593 is matter for district court's discretion); *Davis*, 912 F. Supp. at 941 (noting that § 3593 imposes "substantial responsibility and considerable discretion" on district court).

95. *See McVeigh*, 944 F. Supp. at 1491 (noting that admission of information regarding victim impact "must be determined with consideration for the constitutional limitation that the jury must not be influenced by passion or prejudice").

96. *See* 18 U.S.C. § 3593(c) (1994) ("Information is admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials . . . .").

97. *See infra* notes 98-102 and accompanying text (discussing analogous provisions of 18 U.S.C. § 3593 and Federal Rules of Evidence).

mitigating factors is admissible.[98] Because the Act expressly permits the introduction of victim impact information as a nonstatutory factor, it follows that victim impact evidence will satisfy § 3593's relevance requirement whenever the government gives the appropriate notice.[99]

The second provision allows the court to exclude information if the resulting risk of unfair prejudice outweighs the probative value of the information.[100] Although clearly analogous to Federal Rule of Evidence 403, the language of § 3593 suggests that a lower threshold for exclusion applies at a capital sentencing hearing.[101] The nearly identical text of Federal Rule of Evidence 403 provides that courts may exclude relevant evidence if the risk of unfair prejudice *substantially* outweighs the probative value.[102] Because of this distinction, § 3593 appears to require the district courts to apply a particularly demanding standard to victim impact evidence at capital sentencing hearings.[103]

Against this standard for exclusion, the statutory authorization for the death sentence, 18 U.S.C. § 3591, becomes extremely significant.[104] Section 3591 provides for imposition of the death sentence only after a determination that the sentence is justified.[105] Although § 3593 governs the procedures at the hearing held to make this determination, § 3593 does not displace § 3591 as the substantive law regarding the death penalty.[106] In turn, § 3591 unequiv-

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98. *See* 18 U.S.C. § 3593(c) ("[I]nformation may be presented as to any matter relevant to the sentence, including any mitigating or aggravating factor permitted or required to be considered under section 3592."); *cf.* FED. R. EVID. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

99. *See* 18 U.S.C. § 3593(a) (requiring government to give notice of aggravating factor relating to victim impact); *id.* § 3593(c) (allowing government to present evidence relevant to any aggravating factor for which government has given notice under § 3593(a)).

100. *See id.* ("[I]nformation may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury.").

101. *Compare id.* ("[I]nformation may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury.") *with* FED. R. EVID. 403 ("[E]vidence may be excluded if its probative value is *substantially* outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." (emphasis added)).

102. *See* FED. R. EVID. 403 ("[E]vidence may be excluded if its probative value is *substantially* outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." (emphasis added)).

103. *See supra* notes 100-02 and accompanying text (discussing distinction between exclusion provisions of § 3593 and Federal Rule of Evidence 403).

104. *See* 18 U.S.C. § 3591(a) (1994) (authorizing sentence of death upon satisfaction of several preconditions).

105. *See id.* (providing for imposition of death sentence in eligible cases if "it is determined that imposition of a sentence of death is justified").

106. *See id.* (noting that § 3593 governs sentencing hearing).

ocally establishes that the justification of the death sentence is dependent only upon "consideration of the factors set forth in section 3592."[107] As a nonstatutory aggravating factor, victim impact is not "set forth" in § 3592.[108] To the contrary, § 3592 does not mention any factor involving victim impact.[109] Rather, § 3593 contains the Act's only provision for the victim impact factor, which only the government may set forth.[110] Thus, the ultimate sentencing determination that § 3591 requires does not include victim impact.[111]

Because the sentencing provision of § 3591 refers only to statutory aggravating factors, evidence relating to the nonstatutory factor of victim impact has little or no probative value in the sentencing determination.[112] The considerable danger of unfair prejudice that typically accompanies the admission of victim impact evidence will therefore outweigh the low probative value attributable to the evidence in all but the most aberrant cases.[113] For this reason, federal district courts should refuse to admit victim impact evidence in capital sentencing proceedings unless such evidence has a tendency to prove a statutorily enumerated aggravator.[114]

B. Texas

Texas's statutory capital sentencing scheme does not explicitly provide for the admission of victim impact testimony prior to sentencing.[115] However, Texas does have a unique statutory provision known as postsentence victim allocution.[116] Article 42.03 of the Texas Code of Criminal Procedure ex

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107. *Id.*

108. *Cf. id.* § 3593(d) (distinguishing between "any aggravating factor or factors set forth in section 3592 . . . and any other aggravating factor for which notice has been provided under" § 3593(a)).

109. *See* 18 U.S.C. § 3592 (1994 & Supp. 1996) (enumerating aggravating factors, which do not include reference to victim impact).

110. *See id.* § 3593(a) (allowing government to rely upon victim impact evidence if it gives notice of intent).

111. *See* 18 U.S.C. § 3591(a) (1994) (authorizing sentence of death upon "consideration of the factors set forth in section 3592"); *id.* § 3592(c) (setting forth aggravating factors, none of which include victim impact).

112. *See id.* § 3591(a) (authorizing sentence of death upon "consideration of the factors set forth in section 3592").

113. *See id.* § 3593(c) (providing for exclusion of evidence if danger of unfair prejudice outweighs probative value).

114. *See id.* (providing for exclusion of evidence if danger of unfair prejudice outweighs probative value).

115. *See* TEX. CODE CRIM. P. ANN. art. 37.071 (West Supp. 1999) (establishing procedure for sentencing phase of capital cases).

116. *See* Keith D. Nicholson, Comment, *Would You Like More Salt with That Wound?*

pressly allows a family member of the victim to appear personally and to address the court and the defendant regarding the impact of the murder.[117] Any such appearance, however, must occur after the imposition of sentence.[118] Because the court will have already fixed and announced the sentence, article 42.03 represents an attempt to provide an emotional release for the victim's family members without affecting the defendant's punishment.[119] Notwithstanding the codified provision for postsentence victim input, the Texas Court of Criminal Appeals[120] has chosen to allow victim impact evidence prior to sentencing.[121] In light of this choice, it is necessary to examine the applicable statutory provisions to determine the propriety of victim impact evidence at capital sentencing hearings in Texas.[122]

1. Statutory Provisions

The Texas Penal Code distinguishes between murder in the first and second degrees.[123] Eight statutory predicates – based on the status of the

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Post-Sentence Victim Allocution in Texas, 26 ST. MARY'S L.J. 1103, 1105 (1995) (describing Texas's procedure as "post-sentence victim allocution").

117. *See* TEX. CODE CRIM. P. ANN. art. 42.03(1)(b) (allowing family member of victim to make postsentence statement to court and defendant). Article 42.03 provides:

> The court shall permit a . . . close relative of a deceased victim . . . to appear in person to present to the court and to the defendant a statement of the person's views about the offense, the defendant, and the effect of the offense on the victim. The . . . relative . . . may not direct questions to the defendant while making the statement. The court reporter may not transcribe the statement. The statement must be made . . . after sentence is pronounced.

Id.

118. *See id.* (allowing family member of victim to make postsentence statement to court and defendant).

119. *See* Nicholson, *supra* note 116, at 1117 (noting that article 42.03 is of benefit to family members of victim rather than of detriment to defendant).

120. *See* PAMELA R. TEPPER & PEGGY N. KERLEY, TEXAS LEGAL RESEARCH 44 (2d ed. 1997) (stating that Texas Court of Criminal Appeals is court of last resort for criminal matters in Texas).

121. *See infra* Part IV.B.2 (discussing rulings of Texas Court of Criminal Appeals on victim impact evidence).

122. *See infra* Part IV.B.1 (discussing Texas's statutory provisions for capital murder and sentencing).

123. *See* TEX. PENAL CODE ANN. § 19.02(b)-(d) (West 1994) (defining murder). Texas defines murder as follows:

> A person commits [murder] if he:
> (1) intentionally or knowingly causes the death of an individual;
> (2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or

victim, the circumstances of the crime, or the tender age of the victim – elevate the offense to capital murder.[124] Upon a defendant's conviction for capital murder, the trial court conducts a sentencing proceeding pursuant to Texas Code of Criminal Procedure article 37.071.[125] At the sentencing hearing, the court may admit any evidence that it deems relevant to the sentence.[126]

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(3) commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

Id. § 19.02(b). Although all murders are presumptively first degree, *id.* § 19.02(d), the defendant may raise and prove the issue of "immediate influence of sudden passion arising from an adequate cause," which reduces the offense to second degree murder. *Id.* § 19.02(d).

124. *See id.* § 19.03 (defining capital murder). Texas law defines capital murder as any murder in which:

(1) the person murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman;
(2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault, arson, or obstruction or retaliation;
(3) the person commits the murder for remuneration or the promise of remuneration or employs another to commit the murder for remuneration or the promise of remuneration;
(4) the person commits the murder while escaping or attempting to escape from a penal institution;
(5) the person, while incarcerated in a penal institution, murders another:
  (A) who is employed in the operation of the penal institution; or
  (B) with the intent to establish, maintain, or participate in a combination or in the profits of a combination;
(6) the person:
  (A) while incarcerated for an offense under this section or Section 19.02, murders another; or
  (B) while serving a sentence of life imprisonment or a term of 99 years . . . murders another;
(7) the person murders more than one person:
  (A) during the same criminal transaction; or
  (B) during different criminal transactions but the murders are committed pursuant to the same scheme or course of conduct; or
(8) the person murders an individual under six years of age.

Id.

125. *See* TEX. CODE CRIM. P. ANN. art. 37.071 (West Supp. 1999) (mandating procedures for sentencing phase of capital trials).

126. *See id.* art. 37.071(2)(a) (stating that prosecution and defense may present evidence on "any matter that the court deems relevant to sentence"); *see also* Briddle v. State, 742 S.W.2d 379, 391 (Tex. Crim. App. 1987) (en banc) (noting that trial court has "wide discretion in admitting or excluding evidence" at sentencing phase of capital trial (quoting Smith v. State, 676 S.W.2d 379, 390 (Tex. Crim. App. 1984) (en banc))).

After the parties present evidence and argument, the court presents two threshold issues to the jury.[127] The first issue requires the jury to determine whether the defendant presents a risk of future dangerousness.[128] The second issue, which applies only to cases that involve capital murder by complicity, requires a determination of whether the defendant actually did the killing or whether the defendant intended or anticipated that a killing would take place.[129] If the jury unanimously finds that the prosecution has proved both issues beyond a reasonable doubt, the court then presents a third issue.[130] Under this final issue, the jury must determine whether sufficient mitigating circumstances exist to compel a sentence of life imprisonment rather than a sentence of death.[131] In making this determination, the jury must consider all the evidence relating to the murder, including the circumstances of the murder, the defendant's personal characteristics, and the defendant's moral culpability.[132] To impose a death sentence, the jury must unanimously agree that the mitigating circumstances do not support leniency for the defendant.[133]

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127. *See* TEX. CODE CRIM. P. ANN. art. 37.071(2)(b) (requiring that court submit two sentencing issues to jury).

128. *See id.* art. 37.071(2)(b)(1) (requiring jury to consider "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society").

129. *See id.* art. 37.071(2)(b)(2) (requiring jury to consider "whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken" when jury finds defendant guilty of capital murder under complicity theory).

130. *See id.* art. 37.071(2)(e) (requiring submission of third issue upon sentencing body's affirmative findings on first two issues).

131. *See id.* (noting scope of jury's consideration for capital sentencing issue). The third issue for the jury states:

> Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.

Id. Subsection (2)(e) of article 37.071 represents a statutory codification of Penry v. Lynaugh, 492 U.S. 302 (1989), in which the Supreme Court required Texas juries to consider all the defendant's relevant mitigating evidence at capital sentencing. Shannon v. State, 942 S.W.2d 591, 598 (Tex. Crim. App. 1996) (en banc) (citing *Penry*, 492 U.S. at 326-28). Because of this origin, the Court of Criminal Appeals has referred to subsection (2)(e) as the "*Penry* issue." Smith v. State, 919 S.W.2d 96, 102 (Tex. Crim. App. 1996) (en banc) (plurality opinion).

132. *See* TEX. CODE CRIM. P. ANN. art. 37.071(2)(e) (West Supp. 1999) (requiring jury to consider all evidence, including circumstances of offense, defendant's character and background, and personal moral culpability of defendant).

133. *See id.* art. 37.071(2)(f) (requiring jury to agree unanimously before returning negative finding on mitigation issue).

Upon a jury's unanimous negative finding on the mitigation issue, the court must sentence the defendant to death.[134] In all other cases, the court must impose a sentence of life imprisonment.[135]

The Texas Code of Criminal Procedure requires that the Court of Criminal Appeals automatically review any case in which the defendant receives the death sentence.[136] In turn, the Texas Rules of Appellate Procedure establish the standard of review that the Court of Criminal Appeals must apply.[137] If the court finds a constitutional error in the sentencing phase, reversal of the sentence is mandatory unless the court finds beyond a reasonable doubt that the error did not contribute to the sentencing decision.[138]

2. *Victim Impact Evidence and the Texas Court of Criminal Appeals*

In 1996, the Texas Court of Criminal Appeals first addressed the admissibility of victim impact evidence at capital sentencing hearings.[139] The first case, *Ford v. State*,[140] involved an attack on a family that left one person dead and two others seriously injured.[141] On appeal from his conviction and sentence of death, Ford argued that the trial court erred in allowing members

134. *See id.* art. 37.071(2)(g) (requiring court to sentence defendant to death upon jury's unanimous negative finding on mitigation issue).

135. *See id.* (requiring court to impose sentence of life imprisonment in all cases in which jury does not return unanimous negative finding on mitigation issue or in which jury does not make affirmative finding on subsection (b) issues).

136. *See id.* art. 37.071(h) (providing automatic review of judgment of conviction and sentence of death).

137. *See* TEX. R. APP. P. 44.2 (West 1998) (establishing standard of review).

138. *See id.* ("If the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, the court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment.").

139. *Cf.* Goff v. State, 931 S.W.2d 537, 554-56 (Tex. Crim. App. 1996) (en banc) (plurality opinion) (rejecting Goff's argument that trial court erred by refusing to admit evidence of victim's homosexuality), *cert. denied*, 117 S. Ct. 1438 (1997); Alvarado v. State, 912 S.W.2d 199, 218 n.17 (Tex. Crim. App. 1995) (en banc) (stating that *Payne* does not allow defendants to present evidence relating to victim's bad character).

140. 919 S.W.2d 107 (Tex. Crim. App. 1996).

141. *See* Ford v. State, 919 S.W.2d 107, 109-10 (Tex. Crim. App. 1996) (en banc) (describing evidence presented at trial). In *Ford*, the defendant entered the home of Myra Concepcion Murillo and shot Murillo's son Armando in the back of the head. *Id.* A jury convicted Ford of capital murder. *Id.* at 109. At sentencing, the jury heard testimony from the three survivors of the shooting and from Armando's father regarding the effects of Armando's death on the family. *Id.* at 112-13. The trial court sentenced Ford to death. *Id.* at 109. The Court of Criminal Appeals did not determine whether the victim impact testimony was relevant to the defendant's sentence, but it reviewed the trial court's admission of the testimony under an abuse of discretion standard. *Id.* at 115. The court upheld the admission of the family members' testimony as being "at least within the zone of reasonable disagreement." *Id.* at 115-16.

of the victim's family, including the injured survivors, to testify at the sentencing phase as to how the crime had impacted their lives.[142] The Court of Criminal Appeals, after discussing *Payne* and the relevance of victim impact evidence under Texas law, concluded that the trial court did not abuse its discretion in admitting the testimony.[143] Although *Ford* suggests the acceptance of victim impact evidence, the Court of Criminal Appeals failed to determine whether such evidence was relevant to capital sentencing in Texas as a matter of law.[144]

In *Smith v. State*,[145] decided the same day as *Ford*, the defendant argued that the trial court erred in allowing testimony from two prosecution witnesses regarding the positive characteristics of the murder victim, who was a female teacher.[146] A plurality of the Court of Criminal Appeals found that victim impact evidence regarding a victim's character was not relevant to the statutory sentencing issue of future dangerousness.[147] As to the remaining sentencing issue, that of whether a defendant merits life imprisonment rather than death, the plurality found that the legislature did not intend victim impact evidence to be included in the class of evidence relevant to the sentence because the Eighth Amendment prohibited victim impact evidence at the time Texas codified the mitigation issue.[148] As a result, the plurality decided that evidence pertaining to the victim's character was admissible only if it

142. *See id.* at 114 (noting defendant's appellate claims regarding testimony of victim's family members).

143. *See id.* at 115-16 (finding that trial court's decision to admit victim impact testimony was "at least within the zone of reasonable disagreement").

144. *See id.* (concluding that, on facts of case, trial court's decision to admit victim impact testimony was not abuse of discretion).

145. 919 S.W.2d 96 (Tex. Crim. App. 1996).

146. *See* Smith v. State, 919 S.W.2d 96, 97 (Tex. Crim. App. 1996) (en banc) (plurality opinion) (noting defendant's argument that trial court erred in allowing testimony regarding victim's good character). In *Smith*, a jury convicted the defendant of the capital murder of a female teacher. *Id.* at 97. At sentencing, the state presented testimony from a coworker of the victim regarding the victim's dedication to teaching. *Id.* The state also elicited testimony from the victim's sister regarding the positive personal characteristics and accomplishments of the victim. *Id.* The plurality discussed *Payne* and its application in Oregon and Utah cases wherein the courts of those states concluded that victim impact evidence was inadmissible at capital sentencing. *Id.* at 100-01. After noting that the Eighth Amendment prohibited victim impact evidence when Texas adopted its statutory sentencing scheme, the plurality held that evidence of the victim's good character was inadmissible unless it was directly related to the circumstances of the offense or was offered in rebuttal. *Id.* at 102. However, the plurality found the trial court's admission of victim impact evidence harmless because of its relatively minor role in Smith's sentencing hearing. *Id.* at 103.

147. *See id.* at 102 (determining that evidence of personal characteristics of victim is irrelevant to determination of defendant's future dangerousness).

148. *See id.* (explaining that Eighth Amendment prohibited admission of victim impact evidence when legislature enacted article 37.071(2)(e)).

related to the circumstances of the offense or if the government presented it in rebuttal.[149]

The Court of Criminal Appeals next addressed victim impact evidence in *Janecka v. State*.[150] Janecka received a sentence of death after being convicted of the for-hire murder of an infant.[151] At the sentencing phase, the government presented testimony from a former assistant district attorney who had been involved in an earlier stage of the case.[152] This witness testified about the profound personal impact that resulted from his involvement in the case and stated that he still kept a picture of the murdered infant in his office.[153] The court found that the trial judge erred in admitting this victim impact testimony because it was not relevant to any issues in the case.[154] Nonetheless, the court concluded that the error did not contribute to the jury's sentencing decision and was harmless beyond a reasonable doubt.[155]

In 1997, the Court of Criminal Appeals again considered the admissibility of victim impact evidence at capital sentencing hearings.[156] The plurality

149. *See id.* ("[W]e hold art. 37.071 does not permit the admission of victim impact evidence and such is inadmissible as a matter of law to the extent it is not directly related to the circumstances of the offense or necessary for rebuttal.").

150. 937 S.W.2d 456 (Tex. Crim. App. 1996).

151. *See* Janecka v. State, 937 S.W.2d 456, 460 (Tex. Crim. App. 1996) (en banc), *cert. denied*, 118 S. Ct. 86 (1997). In *Janecka*, the defendant received a death sentence after his conviction for capital murder, namely the murder of an infant for remuneration. *Id.* Several years earlier, Janecka had received the same sentence for the same crime, but the Court of Criminal Appeals had reversed his conviction and had ordered a retrial. *Id.* at 460 n.1. At the sentencing hearing that followed the defendant's second conviction for the murder, the jury heard testimony from Ted Poe, a sitting state judge who, as assistant district attorney, had prosecuted Janecka's first trial. *Id.* at 473. Poe testified about the significant personal impact that resulted from his involvement in the case, and he told the jury that he still kept a picture of the murdered infant in his office. *Id.* Reviewing Janecka's conviction and sentence upon retrial, the Court of Criminal Appeals found that the trial court erred in admitting Poe's testimony because the testimony had no relevance to any issues at trial. *Id.* Nonetheless, the Court of Criminal Appeals found that the testimony did not contribute to the jury's sentencing decision and was therefore harmless. *Id.*

152. *See id.* (noting that prosecution presented testimony of Ted Poe, sitting state judge who was prosecutor in Janecka's original trial for same murder).

153. *See id.* (quoting witness's testimony regarding impact of murder of infant).

154. *See id.* (finding that admission of victim impact testimony was erroneous because testimony had no relevance to any issue).

155. *See id.* (finding that erroneous admission of victim impact testimony was harmless beyond reasonable doubt).

156. *See* Johnson v. State, No. 72,046, 1997 WL 209527, at *1 (Tex. Crim. App. Apr. 30, 1997) (plurality opinion) (noting appellant's argument against admission of victim impact testimony from victims' family members), *reh'g granted and opinion withdrawn*, No. 72,046 (Tex. Crim. App. Dec. 16, 1998) (unpublished decision on file with the *Washington and Lee Law Review*).

in *Johnson v. State*,[157] an opinion that the court subsequently withdrew, rejected Johnson's argument that the trial court erred in admitting victim impact testimony from the mothers of the two murder victims.[158] Responding to Johnson's contention that the precedents regarding victim impact evidence were ambiguous, however, the plurality summarized the case law governing the admission of victim impact evidence in Texas.[159] In this summary, the plurality identified seven specific constraints on the admission of victim

157. No. 72,046, 1997 WL 209527 (Tex. Crim. App. Apr. 30, 1997).

158. *See* Johnson v. State, No. 72,046, 1997 WL 209527, at *8 (Tex. Crim. App. Apr. 30, 1997) (plurality opinion) (noting that Johnson made general objection to victim impact testimony at trial and thus trial court did not abuse discretion in admitting evidence), *reh'g granted and opinion withdrawn*, No. 72,046 (Tex. Crim. App. Dec. 16, 1998) (unpublished decision on file with the *Washington and Lee Law Review*). In *Johnson*, the jury convicted appellant of capital murder and the trial court sentenced him to death. *Id.* at *1. On appeal, Johnson argued that the penalty phase testimony from the victims' mothers was unduly prejudicial. *Id.* Noting Johnson's contention that Texas law regarding victim impact evidence was ambiguous, the plurality discussed *Ford*, *Smith*, *Goff*, and *Janecka*. *Id.* at *2-4. The plurality then proceeded to summarize the current state of Texas law on victim impact evidence under the court's decisions. *Id.* at *4. Ultimately, the plurality found that the trial court's admission of the victim impact evidence at the sentencing hearing did not constitute an abuse of discretion. *Id.* at *8.

On rehearing, the court again found that the admission of the victim impact testimony was not erroneous. The court's per curiam opinion merely quoted a lengthy passage from *Mosley v. State*, No. 72,281, 1998 WL 349513 (Tex. Crim. App. July 1, 1998), and "reaffirm[ed]" that case, which the court decided 14 months after the original opinion in *Johnson*. *See Johnson*, No. 72,046, at 6-7 (Tex. Crim. App. Dec. 16, 1998) (unpublished decision on file with the *Washington and Lee Law Review*); *see also infra* notes 175-77 and accompanying text (discussing *Mosley*).

159. *See id.* at *4 (summarizing Texas law on victim impact evidence). The plurality summarized Texas law regarding victim impact evidence as follows:

> [W]e recognize the admissibility of victim impact evidence if it meets the following criteria: (1) the evidence must be relevant to a special issue during punishment or offered to rebut a defensive punishment theory, *Ford, supra*; (2) the probative value cannot be outweighed by the danger of undue prejudice, *Goff, supra*; (3) the testimony must come from either a surviving victim of the crime itself, or from a family member or legal guardian of a victim of the crime, *Ford, Smith*, and *Janecka, supra*; (4) the testimony must regard the impact the crime has had on that individual's life, *Ford, supra*; (5) that testimony cannot create a comparative judgment situation, i.e., it must show the uniqueness of the loss of the victim as an individual only as it pertains to the immediate family, guardian or surviving victim, *Payne*, and *Smith, supra*; and (6) the evidence may not pertain to the character of the victim unless it is introduced in rebuttal of a defensive theory offered during punishment. See *Goff*, and *Janecka, supra*. Furthermore, (7) the testimony may not discuss the value of the individual to the community, as such testimony could create a comparative judgment situation which the Supreme Court in *Payne* expressly discouraged.

Id. (footnote omitted).

impact evidence.[160] First, the evidence must be relevant to the sentencing issues that Texas Code of Criminal Procedure article 37.071 sets forth, or the prosecution must have offered the evidence in rebuttal to the defendant's argument at sentencing.[161] Second, the probative value of the victim impact evidence must outweigh any danger of undue prejudice.[162] Third, only family members of a victim, legal guardians of a victim, or individuals who are surviving victims of the crime in question may furnish victim impact evidence.[163] Fourth, the testimony must address the impact of the crime on the witness's life.[164] Fifth, the testimony must not effect a comparison between the value of the victim's life and the value of the defendant's life.[165] Sixth, the victim impact evidence may address the victim's character only in rebuttal to the defendant's argument.[166] Finally, the prosecution may not present evidence that characterizes the victim's death as a loss to the community.[167]

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160. *See id.* (summarizing Texas law on victim impact evidence).

161. *See id.* (stating that victim impact "evidence must be relevant to a special issue during punishment or offered to rebut a defensive punishment theory").

162. *See id.* (stating that probative value of victim impact evidence "cannot be outweighed by the danger of undue prejudice").

163. *See id.* (stating that "testimony must come from either a surviving victim of the crime itself, or from a family member or legal guardian of a victim of the crime").

164. *See id.* (stating that "testimony must regard the impact the crime has had on that individual's life").

165. *See id.* (stating that "testimony cannot create a comparative judgment situation, i.e., it must show the uniqueness of the loss of the victim as an individual only as it pertains to the immediate family, guardian or surviving victim").

166. *See id.* (stating that "evidence may not pertain to the character of the victim unless it is introduced in rebuttal of a defensive theory offered during punishment"). The plurality noted that this constraint on victim impact evidence was consistent with the court's holding in *Armstrong v. State*, which represents the Court of Criminal Appeals's traditional view on evidence offered by the prosecution to demonstrate the victim's nonviolent nature. *Id.* at *4 n.6 (plurality opinion). The Court of Criminal Appeals in *Armstrong* announced the rule as follows:

> It is never competent for the State in the first instance to prove that the person slain was peaceable and inoffensive. Such evidence becomes admissible in rebuttal when the opposite has been testified to in behalf of the defense, or when the defendant seeks to justify the homicide on the ground of threats made by the deceased.

Armstrong v. State, 718 S.W.2d 686, 695 (Tex. Crim. App. 1985) (en banc) (quoting Arthur v. State, 339 S.W.2d 538, 539 (Tex. Crim. App. 1960)).

167. *See* Johnson v. State, No. 72,046, 1997 WL 209527, at *4 (Tex. Crim. App. Apr. 30, 1997) (plurality opinion) (stating that "testimony may not discuss the value of the individual to the community, as such testimony could create a comparative judgment situation which the Supreme Court in *Payne* expressly discouraged"), *reh'g granted and opinion withdrawn*, No. 72,046 (Tex. Crim. App. Dec. 16, 1998) (unpublished decision on file with the *Washington and Lee Law Review*).

In a concurring opinion, Judge McCormick likewise sought to clarify Texas law regarding victim impact evidence.[168] Based on the various opinions in *Ford* and *Smith*, Judge McCormick determined that a majority of the Court of Criminal Appeals had ruled that evidence concerning the effects of the murder on the victim's family is admissible.[169] Additionally, he interpreted the *Ford* and *Smith* decisions as barring the prosecution from presenting evidence regarding the character and background of the murder victim.[170]

One year after the original decision in *Johnson*, the Texas Court of Criminal Appeals in *Mosley v. State*[171] acknowledged the uncertainty created by the court's fractured decisions regarding victim character and victim impact evidence.[172] In affirming Mosley's conviction for murder in the course of a robbery, a five-member majority of the court announced that victim character and victim impact evidence are admissible at capital sentencing hearings.[173] The majority cited the article 37.071(2)(e) special sentencing issue – the mitigation issue – as the proper context for victim character and victim impact evidence.[174] Under the court's conception of mitigation, the prosecution may present victim character and victim impact evidence to demonstrate the "uniqueness" of the murder victim and the harm caused by the defendant, as well as to rebut the defendant's mitigating evidence.[175]

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168. *See id.* at *15 n.1 (McCormick, J., concurring) (discussing opinions in *Ford* and *Smith* and utilizing United States Supreme Court's method for determining holding of fragmented court).

169. *See id.* (McCormick, J., concurring) ("A majority of this Court apparently has decided that 'victim impact' evidence relating to the effects of the crime on the victim's family is admissible.").

170. *See id.* (McCormick, J., concurring) ("[A] majority of this Court apparently has decided that 'victim impact' evidence relating to the victim's character and background is not admissible.").

171. No. 72,281, 1998 WL 349513 (Tex. Crim. App. July 1, 1998).

172. *See* Mosley v. State, No. 72,281, 1998 WL 349513, at *13-14 (Tex. Crim. App. July 1, 1998) (en banc) (discussing opinions in *Ford*, *Smith*, and *Johnson*), *petition for cert. filed*, No. 98-7262 (U.S. Dec. 15, 1998). In *Mosley*, a jury convicted DaRoyce Mosley of capital murder in connection with the robbery of a bar. *Id.* at *1. In accordance with the jury's findings on the article 37.071 capital sentencing issues, the trial judge sentenced Mosley to death. *Id.* On appeal, Mosley argued that the trial court should not have allowed the prosecution to present evidence of the victim's character during the sentencing phase. *Id.* at *12. The Court of Criminal Appeals affirmed and established a rule stating that victim impact and victim character evidence are admissible at capital sentencing. *Id.* at *14.

173. *See id.* ("Both victim impact and victim character evidence are admissible, in the context of the mitigation special issue, to show the uniqueness of the victim, the harm caused by the defendant, and as rebuttal to the defendant's mitigating evidence.").

174. *Id.*

175. *See id.* (finding that "victim impact and victim character evidence [are] admissible in the context of the mitigation special issue, to show the uniqueness of the victim, the harm caused by the defendant, and as rebuttal to the defendant's mitigating evidence").

The *Mosley* court did, however, indicate two limitations on victim character and victim impact evidence.[176] First, evidence relating to the victim is inadmissible if it tends to compare the value of the murder victim's life to the lives of other individuals.[177] Second, the court stated without explanation that the mitigating evidence presented by the defendant should be a factor in the trial court's decision to admit victim impact or victim character evidence at all.[178] Notwithstanding these limitations, *Mosley* and the above cases clearly indicate that the Texas Court of Criminal Appeals has determined to admit victim character and victim impact evidence at capital sentencing.[179]

3. *Victim Impact Evidence Is Not Relevant*

Each of Texas's statutory predicates to capital murder is dependent upon one or two specified facts relating to the victim's employment, the circumstances of the murder, or the victim's youth.[180] Victim impact evidence, however, has no tendency to make the existence of any of these facts more or less

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176. *See id.* (noting limits on admission of victim character and victim impact evidence).

177. *See id.* (noting that evidence tending to "measur[e] the worth of the victim compared to other members of society" is inadmissible).

178. *Id.* ("[M]itigating evidence introduced by the defendant may also be considered in evaluating whether the State may subsequently offer victim-related testimony.").

179. *But cf.* Cantu v. State, 939 S.W.2d 627, 637 (Tex. Crim. App.) (en banc) (holding victim impact evidence as to victim not named in defendant's indictment irrelevant under article 37.071), *cert. denied*, 118 S. Ct. 557 (1997). A jury convicted Cantu of the capital murder of Jennifer Ertman. *Id.* at 630. After the jury answered the article 37.071 special issues, the trial judge sentenced Cantu to death. *Id.* at 631. Ertman's murder was part of a transaction in which Cantu and several companions had robbed, sexually assaulted, and murdered Ertman and Elizabeth Pena. *Id.* Cantu's indictment, however, charged only the capital murder of Ertman, and it did not name Pena. *Id.* at 630. At the sentencing phase, Elizabeth Pena's mother testified about Elizabeth's good character, the search for Elizabeth's body, and the impact of Elizabeth's death on the family members. *Id.* at 636. A majority of the Court of Criminal Appeals noted that Elizabeth Pena was not the victim for whose death the jury was sentencing Cantu. *Id.* at 637. Accordingly, the court held that the testimony of Pena's mother was irrelevant to the sentencing phase special issues mandated by article 37.071. *Id.* Under *Payne*, the court found such "[e]xtraneous victim impact evidence" to serve "no purpose other than to inflame the jury." *Id.* Nonetheless, the court ruled that the testimony did not contribute to the sentencing decision and was harmless beyond a reasonable doubt. *Id.* at 637-38.

The Court of Criminal Appeals decided *Cantu* on January 29, 1997, approximately three months before the original decision in *Johnson*.

180. *See supra* note 124 and accompanying text (discussing elements of capital murder as codified in Texas). Texas's statutory scheme does not elevate murder to capital murder based on the mere brutality of the killing. *Cf.* TENN. CODE ANN. § 39-13-204 (Supp. 1998) (establishing aggravator for murders that are "especially heinous, atrocious, or cruel"); VA. CODE ANN. § 19.2-264.2 (Michie 1995) (establishing aggravator for murders that are "outrageously or wantonly vile, horrible or inhuman").

probable.[181] As to the first sentencing issue, victim impact evidence is not probative of the factors that Texas generally recognizes as indicative of a defendant's future dangerousness.[182] The future dangerousness factors are of two types; either they relate to the circumstances of the actual killing, or they are specific to the personal characteristics of the defendant.[183] Evidence relating to the character of the victim or to the indirect effects of the murder simply has no tendency to prove any of the factors that Texas recognizes as indicative of future dangerousness. Likewise, victim impact evidence has no relevance to the second sentencing issue, which applies only in complicity cases and addresses whether or not the defendant caused or anticipated the killing.[184]

Perhaps mindful of this relevance problem, the Court of Criminal Appeals has relied upon the "personal moral culpability" component of the third statutory sentencing issue as a justification for the admission of victim impact evidence.[185] By its own terms, however, the third sentencing issue addresses the appropriateness of *mitigation*, and only mitigation, of the defendant's sentence.[186] Because this issue establishes a safeguard for the defendant rather than a further opportunity for the government to secure a sentence of death, any victim impact evidence that tends to support imposition of the death penalty is irrelevant to moral culpability under the third sentencing issue.[187]

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181. *Cf.* TEX. R. EVID. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

182. *See* Smith v. State, 919 S.W.2d 96, 102 (Tex. Crim. App. 1996) (en banc) (plurality opinion) (noting that victim impact evidence was not relevant to future dangerousness); *see also* Keeton v. State, 724 S.W.2d 58, 61 (Tex. Crim. App. 1987) (en banc) (listing factors relating to future dangerousness).

183. *See Keeton*, 724 S.W.2d at 61 (explaining that factors relating to future dangerousness include circumstances of murder, calculated nature of defendant's acts, defendant's forethought and deliberateness in executing crime, existence and severity of prior crimes, defendant's age and personal circumstances, presence or lack of duress affecting defendant, defendant's psychiatric state, and defendant's character).

184. *See* TEX. CODE CRIM. P. ANN. art. 37.071(2)(b)(2) (West Supp. 1999) (requiring jury to consider "whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken" when jury finds defendant guilty of capital murder under complicity theory).

185. *See* McDuff v. State, 939 S.W.2d 607, 620 (Tex. Crim. App.) (en banc) (noting that murder's impact on sister of victim "would . . . appear to be a legitimate factor in assessing one's moral culpability"), *cert. denied*, 118 S. Ct. 125 (1997); Ford v. State, 919 S.W.2d 107, 115 (Tex. Crim. App. 1996) (en banc) (noting that mitigation issue directs jury's attention to defendant's "personal moral culpability").

186. *See supra* note 131 and accompanying text (noting that third sentencing issue relates to mitigation of sentence).

187. *See supra* note 131 and accompanying text (noting that third sentencing issue relates to mitigation of sentence).

Because victim impact evidence is not relevant to the sentencing issues and because of the inflammatory nature of such evidence, the Court of Criminal Appeals should hold victim impact evidence inadmissible as a matter of law.[188] Family members of murder victims will retain their statutory right to address the court after the imposition of sentence, thereby obviating any concern that the impact of a murder will go unnoticed.[189] Even without a bright-line rule from the Court of Criminal Appeals, however, trial courts should exclude victim impact evidence at capital sentencing hearings because the evidence is irrelevant to the sentencing determination.[190]

C. Virginia

In 1998, Virginia enacted its first statutory provision for the presentation of victim impact testimony to a capital sentencing jury.[191] Prior to this enactment, the sole Virginia statute concerning victim impact evidence in capital cases only required the judge to receive a written victim impact statement before imposing sentence when the jury recommended a death sentence.[192]

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188. *Cf.* Cantu v. State, 939 S.W.2d 627, 637 (Tex. Crim. App.) (en banc) (holding that victim impact evidence pertaining to "extraneous" victim is inadmissible at capital sentencing because of irrelevance and danger of unfair prejudice to defendant), *cert. denied*, 118 S. Ct. 557 (1997); *supra* note 179 (discussing *Cantu*).

189. *See supra* notes 118-19 and accompanying text (discussing Texas's statutory provision for postsentence victim allocution).

190. *See* TEX. R. EVID. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); TEX. R. EVID. 402 ("Evidence which is not relevant is inadmissible.").

191. *See* VA. CODE ANN. § 19.2-264.4 (Michie Supp. 1998) ("In any [capital sentencing] proceeding . . . , the court shall permit the victim . . . to testify in the presence of the accused regarding the impact of the offense upon the victim.").

192. *See* VA. CODE ANN. § 19.2-264.5 (Michie 1996) (mandating inclusion of victim impact statement in postsentence report for court's consideration). The Virginia Crime Victim and Witness Rights Act's internal definition of victim includes "a spouse, parent or legal guardian" of a homicide victim, unless such person committed the homicide. *See* VA. CODE ANN. § 19.2-11.01 (Michie Supp. 1998). If the victim personally prepares the victim impact statement, the statement must be in writing and may consist of the victim's own words. *See id.* § 19.2-299.1. If someone other than the victim prepares the victim impact statement, the statement shall:

> (i) [I]dentify the victim, (ii) itemize any economic loss suffered by the victim as a result of the offense, (iii) identify the nature and extent of any physical or psychological injury suffered by the victim as a result of the offense, (iv) detail any change in the victim's personal welfare, lifestyle or familial relationships as a result of the offense, (v) identify any request for psychological or medical services initiated by the victim or the victim's family as a result of the offense, and (vi) provide such other information as the court may require related to the impact of the offense upon the victim.

Id.

Even before the enactment of the statutory authorization for victim impact evidence at capital sentencing, however, the Virginia Supreme Court in two decisions had judicially expanded the sentencing provisions to allow the introduction of victim impact evidence.[193] In light of these decisions and the 1998 statutory amendment, it is necessary to examine the law governing capital murder in Virginia.[194]

1. Statutory Provisions

The Code of Virginia divides murder into three classes: capital,[195] first degree, and second degree.[196] As the names suggest, only capital murder carries a possible penalty of death.[197] Capital murder requires the combination of willful, deliberate, and premeditated killing and one of several other factors, which depend upon characteristics of the defendant, characteristics of the victim, or the circumstances surrounding the homicide.[198]

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193. *See* Weeks v. Commonwealth, 450 S.E.2d 379, 389 (Va. 1994) (holding that victim impact testimony was relevant to punishment in capital murder prosecution); *see also* Beck v. Commonwealth, 484 S.E.2d 898, 903-04 (Va.) (extending *Weeks* holding to include victim impact testimony from individuals beyond victim's family), *cert. denied*, 118 S. Ct. 608 (1997).

194. *See infra* Part IV.C.1 (discussing Virginia's statutory provisions for capital murder and sentencing).

195. *See* VA. CODE ANN. § 18.2-31 (Michie Supp. 1998) (defining capital murder and identifying it as Class 1 felony).

196. *See id.* § 18.2-32 (defining first degree murder and identifying it as Class 2 felony, and defining all murder other than capital and first degree murder as second degree murder).

197. *See* VA. CODE ANN. § 18.2-10 (Michie 1996) (authorizing punishment of death for Class 1 felonies); *id.* § 18.2-31 (establishing capital murder as Class 1 felony).

198. *See id.* § 18.2-31 (defining capital murder). Virginia's statutory definition of capital murder is as follows:

> 1. The willful, deliberate, and premeditated killing of any person in the commission of abduction, as defined in § 18.2-48, when such abduction was committed with the intent to extort money or a pecuniary benefit or with the intent to defile the victim of such abduction;
> 2. The willful, deliberate, and premeditated killing of any person by another for hire;
> 3. The willful, deliberate, and premeditated killing of any person by a prisoner confined in a state or local correctional facility . . . or while in the custody of an employee thereof;
> 4. The willful, deliberate, and premeditated killing of any person in the commission of robbery or attempted robbery;
> 5. The willful, deliberate, and premeditated killing of any person in the commission of, or subsequent to, rape or attempted rape, forcible sodomy or attempted forcible sodomy or object sexual penetration;
> 6. The willful, deliberate, and premeditated killing of a law-enforcement officer . . . when such killing is for the purpose of interfering with the performance of his official duties;

Upon conviction for capital murder, a defendant is not eligible to receive a sentence of death unless the prosecution proves the existence of one or both of Virginia's statutory aggravators beyond a reasonable doubt.[199] The two aggravators are the future dangerousness of the defendant and the vileness of the murder itself.[200] In addition to finding at least one aggravating factor, the jury must also recommend a sentence of death before the court may consider imposing the death penalty.[201]

> 7. The willful, deliberate, and premeditated killing of more than one person as a part of the same act or transaction;
> 8. The willful, deliberate, and premeditated killing of more than one person within a three-year period;
> 9. The willful, deliberate, and premeditated killing of any person in the commission of or attempted commission of [a drug offense,] when such killing is for the purpose of furthering the commission or attempted commission of such violation;
> 10. The willful, deliberate, and premeditated killing of any person by another pursuant to the direction or order of one who is engaged in a continuing criminal enterprise . . . ;
> 11. The willful, deliberate, and premeditated killing of a pregnant woman by one who knows that the woman is pregnant and has the intent to cause the involuntary termination of the woman's pregnancy without a live birth; and
> 12. The willful, deliberate, and premeditated killing of a person under the age of fourteen by a person age twenty-one or older.

Id.

199. *See id.* § 19.2-264.4 (noting that defendant cannot receive death sentence unless government proves either future dangerousness of defendant or vileness of offense, and sentencing body proceeds to recommend death sentence); Smith v. Commonwealth, 248 S.E.2d 135, 150 (Va. 1978) (stating that courts may not impose death sentence unless prosecution proves either or both aggravators beyond reasonable doubt).

200. *See* VA. CODE ANN. § 19.2-264.2 (Michie 1995) (establishing conditions for imposition of death penalty). Section 19.2-264.2 states:

> [A] sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed.

Id.

201. *See id.* (noting that defendant cannot receive death sentence unless court or jury finds either future dangerousness of defendant or vileness of offense and proceeds to recommend death sentence). If the jury does not unanimously recommend the death sentence, the defendant will receive life imprisonment. *Id.* § 19.2-264.4. If the jury does unanimously recommend the death sentence, the court must consider a postsentence report from the probation office that advises the court whether the death sentence is appropriate and just in the particular case. *Id.* § 19.2-264.5. The postsentence report must contain a victim impact statement. *Id.* After considering the report, the court may, upon a showing of good cause, set aside the jury's sentence of death and impose life imprisonment. *Id.*

After a jury recommends a death sentence, the trial judge decides whether the defendant should actually receive the sentence.[202] In making this decision, the judge must consider a written victim impact statement that details the effects of the murder.[203] Upon a showing of good cause, the judge may reject the jury's recommendation of a death sentence and impose a sentence of life imprisonment.[204] If the defendant does not show good cause and if the judge determines that the jury's recommendation of capital punishment is appropriate, the court then imposes a sentence of death.[205]

2. *Victim Impact Evidence and the Virginia Supreme Court*

As a matter of first impression, the Virginia Supreme Court in *Weeks v. Commonwealth*[206] addressed sentencing phase testimony regarding the impact of a murder on the victim's survivors.[207] Although the Virginia Supreme Court did not discuss the issue, the trial court presumably admitted the victim impact testimony pursuant to the statutory provision that allows the admission of evidence relating to any matter the court deems relevant to the sentence.[208] With virtually no discussion, the *Weeks* court held as a general proposition

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202. *See id.* § 19.2-264.5 (directing court to have probation officer investigate relevant facts and history of defendant to determine if death sentence is "appropriate and just"). "[U]pon good cause shown," the judge may disregard the jury's recommendation of the death penalty and impose a sentence of life imprisonment. *Id.*

203. *See id.* (requiring judge to consider victim impact statement before imposing sentence). Section 19.2-264.5 mandates the contents of the victim impact statement by reference to § 19.2-299.1, which does not apply to capital punishment cases. VA. CODE ANN. § 19.2-299.1 (Michie Supp. 1998).

204. *See id.* § 19.2-264.5 (noting that judge may, upon good cause shown, set aside jury's recommendation of death sentence and impose term of life imprisonment).

205. *See id.* (noting that judge may, upon good cause shown, set aside jury's recommendation of death sentence and impose term of life imprisonment).

206. 450 S.E.2d 379 (Va. 1994).

207. Weeks v. Commonwealth, 450 S.E.2d 379, 389-90 (Va. 1994) (addressing defendant's argument that victim impact evidence was not relevant to capital sentencing in Virginia). In *Weeks*, a jury convicted the petitioner of capital murder for the killing of a law enforcement officer who was performing an official duty. *Id.* at 382. At sentencing, the trial court admitted testimony from the victim's widow and the victim's coworkers regarding the effect of the murder on the victim's family and coworkers. *Id.* at 389. The jury recommended a sentence of death based on Virginia's "vileness" aggravator. *Id.* at 382. On appeal, petitioner argued that victim impact evidence was not relevant to the jury's sentencing decision. *Id.* at 389. As an example of relevance, the court stated that victim impact testimony was probative of the "depravity of mind" element of the vileness aggravator, on which the jury had based its sentence. *Id.* at 390. Citing *Payne v. Tennessee*, the court held as a general proposition that victim impact testimony was relevant to sentencing capital murder prosecutions. *Id.* at 389.

208. *See* VA. CODE ANN. § 19.2-264.4 (Michie 1996) (governing capital sentencing proceedings) (current version at VA. CODE ANN. § 19.2-264.4 (Michie Supp. 1998)).

that victim impact evidence is relevant to capital sentencing in Virginia.[209] As the rationale for this holding, the court merely cited *Payne* and quoted the United States Supreme Court's statement that individual states are permitted to conclude that victim impact evidence is relevant to capital sentencing.[210] The *Weeks* court also offered one possibility for its attribution of probative value to victim impact evidence – the evidence has a tendency to show depravity of mind, a component of the vileness aggravator.[211] Similar to the court's holding, however, this example was merely a conclusory statement followed by a quotation from *Payne*.[212]

In the 1997 case of *Beck v. Commonwealth*,[213] the Virginia Supreme Court simultaneously extended and limited the holding of *Weeks*.[214] Beck

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209. *See Weeks*, 450 S.E.2d at 389 (holding victim impact evidence relevant at capital sentencing in Virginia). The full extent of the court's discussion of this holding is as follows:

> [W]e hold that victim impact testimony is relevant to punishment in a capital murder prosecution in Virginia, and that the trial court did not err in admitting the testimony in this case. In [*Payne*], the Supreme Court authorized the use of such testimony. The Court said: "A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed."

Id. (citation omitted) (quoting Payne v. Tennessee, 501 U.S. 808, 827 (1991)).

210. *See id.* ("A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." (quoting *Payne*, 501 U.S. at 827)).

211. *See id.* at 390 (providing example that victim impact evidence was probative of depravity of mind component of vileness aggravator).

212. *See id.* (providing example that victim impact evidence was probative of depravity of mind component of vileness aggravator). The full extent of the court's discussion regarding this example is as follows:

> [U]nder Virginia's modern, bifurcated capital procedure, victim impact evidence is probative, for example, of the depravity of mind component of the vileness predicate, which the jury in this case found as a basis for imposing the death penalty. As the Supreme Court said in *Payne*, "for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant."

Id. (quoting *Payne*, 501 U.S. at 825); *see also infra* notes 245-57 (discussing depravity of mind component of vileness aggravator).

213. 484 S.E.2d 898 (Va. 1997).

214. Beck v. Commonwealth, 484 S.E.2d 898, 903-04 (Va.) (extending *Weeks* rule to statements from those who are well-acquainted with victim and limiting admissibility of victim impact evidence to that which is relevant to show impact of defendant's actions), *cert. denied*, 118 S. Ct. 608 (1997). In *Beck*, the petitioner pleaded guilty to three capital murders. *Id.* at 900. The trial court, sitting without a jury at sentencing, had received numerous letters from friends and coworkers of the victims, as well as from members of the victims' families. *Id.* at 903. In response to Beck's argument, the court reasoned that the language of *Payne* contained neither an express nor an implied requirement that victim impact evidence come only from

pleaded guilty to three capital murders and received three death sentences from the court, which sat without a jury because of the guilty pleas.[215] Invoking an argument that the *Weeks* court had refused to consider on procedural grounds,[216] Beck contended that evidence about the murder's effect on the survivors of the victim could come only from family members, and not from friends and coworkers.[217] The Virginia Supreme Court ruled that *Payne* does not limit the scope of relevant victim impact to the effect that the victim's death had on members of the victim's family.[218] The court held that relevance was the only limit on the admission of victim impact evidence.[219]

As in *Weeks*, the *Beck* court responded to the defendant's argument with a holding that, by its terms, applies to all capital sentencings in Virginia.[220] Its generalizations about victim impact evidence notwithstanding, the *Beck* court emphasized that a judge, not a jury, had sentenced Beck.[221] Furthermore, the trial judge had explicitly stated that he would base his sentencing decision solely on evidence received from individuals of sufficiently close relation to the victim.[222] The Virginia Supreme Court affirmed Beck's death sentences without even attempting to determine the specific victim impact evidence upon which the trial court had actually relied.[223] Thus, the admission

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family members. *Id.* The court held that the admissibility of victim impact evidence is limited only by its relevance in demonstrating "the impact of the defendant's actions." *Id.* at 904.

215. *See id.* at 900 (noting that Beck pleaded guilty to three capital murders and received three death sentences from court, which sat without jury).

216. *See* Weeks v. Commonwealth, 450 S.E.2d 379, 389 (Va. 1994) (refusing to address Weeks's claim that court should limit victim impact evidence to effect of murder on family members because Weeks made no distinction between sources of victim impact evidence at trial).

217. *See Beck*, 484 S.E.2d at 903 (addressing Beck's argument that documents submitted to court from friends and coworkers of victims were beyond scope of *Payne* holding).

218. *See id.* (rejecting Beck's contention that *Payne* limited victim impact evidence to effect of murder on family members).

219. *See id.* at 904 (holding that relevance to impact of defendant's actions was sole limitation on admission of victim impact evidence). Citing *Payne*, however, the court did note that a constitutional problem could arise if the prejudice resulting from victim impact evidence becomes too great: "So long as its prejudicial effect does not outweigh its probative value, [victim impact] evidence is beneficial to the determination of an individualized sentence as is required by the Eighth Amendment." *Id.* (citing Payne v. Tennessee, 501 U.S. 808, 825 (1991)).

220. *See id.* ("We hold that the admissibility of victim impact evidence during the sentencing phase of a capital murder trial is limited only by the relevance of such evidence to show the impact of the defendant's actions.").

221. *See id.* at 905 (emphasizing that Beck received death sentences from judge, not from jury).

222. *See id.* (noting trial judge's statement that he would give consideration only to appropriate victim impact evidence in sentencing Beck on capital murder charges).

223. *See id.* at 906 (refusing to find abuse of discretion on part of trial judge without attempting to determine extent to which trial judge relied upon victim impact evidence).

of nonfamily victim impact evidence in sentencings before a jury may present a closer question outside of the bench trial context.[224]

To some extent, *Beck* extends the potential sources of victim impact evidence.[225] However, the language of the *Beck* holding tempers the unconditional relevance that the *Weeks* court had afforded to such evidence.[226] Additionally, *Beck* suggests that Virginia applies a more stringent standard for admitting victim impact evidence than contemplated by the United States Supreme Court in *Payne*.[227] Purporting to follow *Payne*, the *Beck* court defined the outer limit of admissibility as the point at which the prejudice resulting from victim impact evidence outweighs the probative value of the evidence.[228] However, the *Payne* Court looked only to the Fourteenth Amendment's Due Process Clause as the proper remedy in cases in which the prejudice resulting from the introduction of victim impact evidence rendered the trial fundamentally unfair.[229] Thus, the Virginia Supreme Court's threshold for excluding victim impact evidence is the point at which the prejudicial effect eclipses the probative value; in contrast, the corresponding *Payne* threshold is the point at which the victim impact evidence renders the trial fundamentally unfair.[230]

Weeks and *Beck* clearly indicate that the Virginia Supreme Court deemed victim impact evidence relevant to capital sentencing even before the 1998 statutory amendment mandated the admission of victim impact evidence.[231]

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224. *See* Mary K. Martin, Case Note, Beck v. Commonwealth, 10 CAP. DEF. J. 27, 30 (1997) (noting possibility that *Beck*'s broad relevance standard may not apply to jury sentencings).

225. *See* Beck v. Commonwealth, 484 S.E.2d 898, 903 (Va.) (stating that *Payne* does not limit source of victim impact evidence to family members), *cert. denied*, 118 S. Ct. 608 (1997).

226. *Compare id.* at 904 ("We hold that the admissibility of victim impact evidence during the sentencing phase of a capital murder trial is limited only by the relevance of such evidence to show the impact of the defendant's actions.") *with* Weeks v. Commonwealth, 450 S.E.2d 379, 389 (Va. 1994) ("[W]e hold that victim impact testimony is relevant to punishment in a capital murder prosecution in Virginia . . . .").

227. *See infra* notes 228-30 and accompanying text (discussing distinction between language in *Payne* and *Beck*).

228. *See Beck*, 484 S.E.2d at 904 (stating that Eighth Amendment requires probative value of victim impact evidence to outweigh its prejudicial effect (citing Payne v. Tennessee, 501 U.S. 808, 825 (1991))).

229. *See Payne*, 501 U.S. at 825 (noting that Due Process Clause of Fourteenth Amendment provides relief when admission of victim impact evidence results in fundamentally unfair trial).

230. *Compare Beck*, 484 S.E.2d at 904 ("So long as its prejudicial effect does not outweigh its probative value, [victim impact evidence] is beneficial to the determination of an individualized sentence as is required by the Eighth Amendment.") *with Payne*, 501 U.S. at 825 ("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.").

231. *See* VA. CODE ANN. § 19.2-264.4 (Michie Supp. 1998) (mandating admission of

However, the full extent to which the court would have allowed victim impact evidence is far less clear because *Weeks* and *Beck* failed to discuss fully the limitations, if any, on the admission of such evidence.[232] The 1998 statutory amendment, however, effectively renders this uncertainty moot because of the amendment's broad language.[233] Notwithstanding the statutory provision and the judicial decisions regarding victim impact evidence, victim impact evidence is irrelevant to the capital sentencing decision in Virginia and should not be admissible.[234]

3. Victim Impact Evidence Is Not Relevant

The future dangerousness aggravator requires the government to prove beyond a reasonable doubt that the defendant would be likely to commit additional violent acts and thereby present a threat to society.[235] When considering this aggravator, the sentencing body may evaluate both the defendant's prior history and the particular circumstances of the murder at issue.[236] Evidence of a defendant's prior violent conduct demonstrates a disposition for violence, and, according to the Virginia Supreme Court, such a disposition clearly increases the probability that a defendant would engage in acts of violence at some point in the future.[237] Likewise, the circumstances of the murder may indicate that a defendant simply does not value human life and thus would likely kill others in the future.[238]

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victim impact evidence at capital sentencing).

232. *See* Weeks v. Commonwealth, 450 S.E.2d 379, 389 (Va. 1994) (holding that victim impact testimony was relevant to capital murder prosecution); *see also* Beck v. Commonwealth, 484 S.E.2d 898, 903-04 (Va.) (extending *Weeks* holding to include victim impact testimony from individuals beyond victim's family), *cert. denied*, 118 S. Ct. 608 (1997).

233. *See* VA. CODE ANN. § 19.2-264.4 (mandating admission of victim impact evidence at capital sentencing). Section 19.2-264.4 states that "[t]he court shall limit the victim's testimony to the factors set forth in clauses (i) through (vi) of subsection A of § 19.2-299.1." *Id.* However, these factors – which include "any . . . psychological injury," "any change in . . . personal welfare, lifestyle or familial relationships," and "such other information as the court may require" – are so broad as to constitute virtually no limit whatsoever. *See id.* § 19.2-299.1.

234. *See infra* Part IV.C.3 (arguing that victim impact evidence is irrelevant to capital sentencing in Virginia).

235. *See* VA. CODE ANN. § 19.2-264.4 (requiring government to prove that defendant would "commit criminal acts of violence that would constitute a continuing serious threat to society" for future dangerousness aggravator).

236. *See id.* (predicating future dangerousness finding on consideration of defendant's prior criminal record or circumstances of murder at issue).

237. *See* Bassett v. Commonwealth, 284 S.E.2d 844, 849 (Va. 1981) (finding that defendant's prior violent criminal conduct demonstrates propensity for violence).

238. *See* Goins v. Commonwealth, 470 S.E.2d 114, 131 (Va. 1996) (upholding finding of future dangerousness because murder of two adults and three children indicated that defendant placed no value on human life).

These types of evidence, valued for their predictive qualities, stand in contrast to victim impact evidence.[239] The Virginia Supreme Court chose to permit the admission of victim impact evidence not to portray the probability of any future acts of the defendant, but rather to demonstrate the individual's culpability for a past act – the particular murder at issue.[240] Because the acknowledged purpose of victim impact evidence is to demonstrate an aspect of the defendant's moral guilt, and not to demonstrate the defendant's propensity for violence, victim impact evidence is not relevant to the future dangerousness aggravator.[241] Consequently, attention must turn to the remaining aggravator – vileness.[242]

The vileness aggravator applies when a defendant's conduct in committing murder was outrageously vile, horrible, or inhuman.[243] By statute, the vileness aggravator consists of three possible components – torture, depravity of mind, and aggravated battery.[244] To reach an affirmative decision on vileness, the jury need find only one of the three components.[245] Both aggravated battery, which means a battery involving more force or effort than is minimally necessary to effect a murder, and torture clearly relate to the physical conduct of the defendant in relation to the victim.[246] Thus, a finding

239. *See* VA. CODE ANN. § 19.2-264.4 (Michie Supp. 1998) (predicating finding of future dangerousness on consideration of defendant's prior criminal record or circumstances of murder at issue).

240. *See* Weeks v. Commonwealth, 450 S.E.2d 379, 390 (Va. 1994) (stating that victim impact evidence is relevant to "specific harm" that defendant caused (quoting Payne v. Tennessee, 501 U.S. 808, 825 (1991))).

241. *See* VA. CODE ANN. § 19.2-264.4 (requiring government to prove that defendant would "commit criminal acts of violence that would constitute a continuing serious threat to society" for future dangerousness aggravator).

242. *See* VA. CODE ANN. § 19.2-264.2 (Michie 1995) (providing that defendant cannot receive death sentence unless court or jury finds either future dangerousness or vileness of offense and proceeds to recommend death sentence).

243. *See id.* (establishing aggravator for conduct that is "outrageously or wantonly vile, horrible or inhuman").

244. *See id.* (establishing aggravator for conduct that was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim").

245. *See id.* (describing vileness as involving "torture, depravity of mind *or* an aggravated battery to the victim" (emphasis added)); Mueller v. Commonwealth, 422 S.E.2d 380, 395 (Va. 1992) (stating that proof of any one of three vileness components is sufficient for finding of vileness).

246. *See* Smith v. Commonwealth, 248 S.E.2d 135, 149 (Va. 1978) (construing "aggravated battery" to mean "battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder"). Because the Virginia Supreme Court has not explicitly construed "torture" as used in the Virginia Code, this component of vileness would seem to carry its generally accepted meaning into the statute. *See* WEBSTER'S THIRD

of vileness predicated on either torture or aggravated battery depends upon the specific physical acts that the defendant committed in the course of the murder.[247]

Conversely, victim impact evidence relates not to the nature of the direct physical act that was the murder, but to the necessarily indirect impact that a person's death has upon survivors.[248] The "impact" of a murder, meaning the effect of the victim's death on survivors, is conceptually one step removed from the defendant's actual act of murdering the victim. This degree of separation strips victim impact evidence of any potential relevance to the vileness aggravator's components of aggravated battery and torture, both of which concern only the direct actions of the defendant in relation to the victim.[249] As a result, the depravity of mind component of the vileness aggravator remains as the sole possible justification for the admission of victim impact evidence.[250]

In the context of capital sentencing, the Virginia Supreme Court has interpreted the term depravity of mind to mean an unusually high degree of moral turpitude and "psychical debasement."[251] Although a defendant's actions often support the sentencing body's finding of depravity, such actions are merely evidence of the substantive mental condition that the term describes.[252] The scope of the depravity component therefore extends beyond

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NEW INTERNATIONAL DICTIONARY 2414 (3d ed. 1993) (defining torture, alternatively, as "the infliction of intense pain . . . to give sadistic pleasure to the torturer " and "anguish of body or mind"). The conclusion that "torture" in Code of Virginia Annotated §19.2-264.2 contemplates only physical acts, and not nonphysical acts tending to induce anguish of mind, finds support in *Poyner v. Commonwealth*, in which the Virginia Supreme Court held that *psychological* torture "falls squarely within" *Smith*'s definition of the *depravity of mind* component of vileness. Poyner v. Commonwealth, 329 S.E.2d 815, 832 (Va. 1985).

247. *See Smith*, 248 S.E.2d at 149 (construing "aggravated battery" to mean "battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder").

248. *See* Payne v. Tennessee, 501 U.S. 808, 825 (1991) (noting that victim impact evidence demonstrates the "specific harm *caused by the crime*" (emphasis added)).

249. *See supra* note 246 and accompanying text (discussing physical character of aggravated battery and torture components of vileness predicate).

250. *See* VA. CODE ANN. § 19.2-264.2 (Michie 1995) (describing components of vileness predicate as "torture, depravity of mind or an aggravated battery to the victim").

251. *See Smith*, 248 S.E.2d at 149 (explaining depravity of mind component as "degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation").

252. *See, e.g.*, Sheppard v. Commonwealth, 464 S.E.2d 131, 139 (Va. 1995) (noting that murdering two individuals in their home, stripping their dead bodies of jewelry, and stealing two automobiles and various personal property from victims demonstrated depravity of mind); Mueller v. Commonwealth, 422 S.E.2d 380, 396 (Va. 1992) (finding that mutilation of murder victim's breasts demonstrated depravity of mind); Poyner v. Commonwealth, 329

the physical acts that the other two vileness components contemplate.[253] For this reason, the position that victim impact evidence relates to depravity of mind is perhaps more tenable than either of the other components of the vileness aggravator.[254]

The *Weeks* court suggested that victim impact evidence might tend to prove depravity of mind.[255] The court, however, provided no reasoning to support this assertion.[256] Nonetheless, the heavy reliance that the *Weeks* court placed on the language and reasoning of *Payne* suggests that the derivation of the court's position lies in the Tennessee statute brought to bear upon Pervis Payne.[257]

At Payne's sentencing hearing, the prosecution presented testimony from a family member of the two murder victims that described the impact that the murders had on the family.[258] The prosecutor later argued to the jury that this impact made Payne's offenses "especially cruel, heinous, and atrocious."[259] The language of the prosecutor's phrase tracks a Tennessee statutory aggravator on which the state relied to obtain the death penalty against Payne.[260] Regarding this aggravator, the Tennessee Code provides that a murder is especially heinous, atrocious, or cruel if it involves torture or a degree of physical harm exceeding that which was necessary to cause the death of the

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S.E.2d 815, 832 (Va. 1985) (noting that shooting "defenseless" woman in back of head after she had complied with defendant's demands and begged for her life demonstrated depravity of mind).

253. *See* Bunch v. Commonwealth, 304 S.E.2d 271, 282-83 (Va. 1983) (noting that defendant's planning and lack of remorse demonstrated depravity of mind).

254. *See* VA. CODE ANN. § 19.2-264.2 (describing components of vileness predicate as "torture, depravity of mind or an aggravated battery to the victim").

255. *See* Weeks v. Commonwealth, 450 S.E.2d 379, 390 (Va. 1994) (stating as example that victim impact evidence had relevance to depravity of mind component of vileness aggravator).

256. *See id.* (stating without explanation that victim impact evidence was "probative, for example, of the depravity of mind component of the vileness predicate").

257. *See id.* (quoting *Payne* as rationale to support decision).

258. *See* Payne v. Tennessee, 501 U.S. 808, 814-15 (1991) (quoting sentencing phase testimony of woman who was mother and grandmother, respectively, of the two individuals whom Payne murdered).

259. *Id.* at 816. At the sentencing phase, the prosecutor's rebuttal argument emphasized the impact of the murders on Nicholas Christopher, the young child who survived the attack that killed his mother Charisse and sister Lacie. *Id.* at 815-16. The prosecutor further argued in rebuttal that Payne's attorney did not want the jury to consider the plight of Nicholas, who mourned and wanted to know where "his best little playmate" Lacie had gone. *Id.* at 816. After noting that Nicholas no longer had "anybody to watch cartoons with him," the prosecutor told the jury that "[t]hese are the things that go into why it is especially cruel, heinous, and atrocious." *Id.*

260. *See* State v. Payne, 791 S.W.2d 10, 19-20 (Tenn. 1990) (noting that state sought to prove murders were heinous, atrocious, or cruel), *aff'd*, 501 U.S. 808 (1991).

victim.[261] Thus, the Tennessee aggravator underlying Payne's death sentence is similar to Virginia's vileness aggravator.[262]

Against the statutory language of Tennessee's aggravator, the *Payne* prosecutor's argument is a non sequitur because the "heinous, atrocious, or cruel" aggravator contemplates only the physical conduct of the defendant in relation to the murder victim.[263] Without specifically addressing the connection between victim impact and the "heinous, atrocious, or cruel" aggravator, the Supreme Court of Tennessee found the prosecutor's argument relevant to Payne's responsibility and "blameworthiness."[264] The United States Supreme Court, likewise failing to establish a link between the victim impact argument and the "heinous, atrocious, or cruel" aggravator, affirmed the Tennessee court's decision to allow the argument.[265]

Thus, the prosecutorial argument that the Supreme Court approved in *Payne* provides the foundation for the *Weeks* court's sole example of the relevance attributable to victim impact evidence in Virginia.[266] The derivation of the depravity of mind example suggests its conceptual basis.[267] A defendant's decision to commit murder could evince depravity of mind because that defendant either knows or should know that the victim inevitably has survivors whom the murder will adversely affect.[268] Even defendants who lack such specific

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261. *See* TENN. CODE ANN. § 39-13-204(i)(5) (Supp. 1998) (stating that heinous, atrocious, or cruel aggravator refers to murders involving "torture or serious physical abuse beyond that necessary to produce death").

262. *Compare id.* (establishing aggravator that "murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death") *with* VA. CODE ANN. § 19.2-264.2 (Michie 1995) (establishing aggravator that defendant's conduct in committing murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim").

263. *See supra* note 261 and accompanying text (discussing Tennessee's heinous, atrocious, or cruel aggravator).

264. *See Payne*, 791 S.W.2d at 19 (finding that prosecutor's victim impact argument was relevant to Payne's "personal responsibility and moral guilt"). Interestingly, the Tennessee Supreme Court described the similarly themed victim impact *testimony* that preceded the prosecutor's argument as "technically irrelevant." *Id.* at 18. The court applied harmless error analysis to this testimony and found no error. *Id.* As to the prosecutorial argument pertaining to victim impact, however, the court found the argument acceptable and applied harmless error analysis to the argument only as an alternative basis for decision. *Id.* at 19.

265. *See* Payne v. Tennessee, 501 U.S. 808, 827 (1991) (rejecting Supreme Court's previous view that prosecutor may not present argument concerning victim impact).

266. *See supra* note 262 and accompanying text (comparing language of Tennessee's heinous, atrocious, or cruel aggravator with language of Virginia's vileness aggravator).

267. *See supra* note 262 and accompanying text (comparing language of Tennessee's heinous, atrocious, or cruel aggravator with language of Virginia's vileness aggravator).

268. *See Payne*, 501 U.S. at 838 (Souter, J., concurring) (discussing connection between victim impact and defendant's blameworthiness). In his concurring opinion in *Payne*, Justice

knowledge or actual foresight may nonetheless incur a measure of moral guilt because of a particular murder's impact on survivors of the victim.[269]

Assuming arguendo that defendants incur moral guilt because of their specific knowledge or actual foresight regarding the effect of the murder on the victim's survivors, the conclusion that victim impact evidence is relevant to depravity of mind does not follow.[270] The Virginia Supreme Court's extensive reliance on the United States Supreme Court's reasoning in *Payne* suggests that the two courts share the same view on victim impact evidence.[271] The *Payne* Court's justification for the admission of victim impact evidence, however, was the tendency of that type of evidence to demonstrate both the specific harm that the defendant caused and the moral guilt that purportedly attached to the defendant as a result.[272] Although the Supreme Court unequivocally decided that this specific harm was relevant to a determination of the appropriate punishment, *Payne* does not suggest that the impact of a murder is relevant to any character trait or attribute of the defendant personally.[273] Conversely, the depravity of mind component of Virginia's vileness aggravator conditions the appropriate punishment upon a personal attribute of the defendant.[274] Because of this distinction, victim impact evidence is not probative of depravity of mind and thus is not relevant to capital sentencing in Virginia.[275]

Souter argued:

> Every defendant knows, if endowed with the mental competence for criminal responsibility, that the life he will take by his homicidal behavior is that of a unique person, like himself, and that the person to be killed *probably* has close associates, "survivors," who will suffer harms and deprivations from the victim's death.

Id. (emphasis added).

269. *See id.* at 837-38 (Souter, J., concurring) ("While a defendant's anticipation of specific consequences to the victims of his intended act is relevant to sentencing, such detailed foreknowledge does not exhaust the category of morally relevant fact.").

270. *See infra* notes 271-75 and accompanying text (arguing that victim impact evidence is not relevant to depravity of mind component of vileness aggravator).

271. *See* Weeks v. Commonwealth, 450 S.E.2d 379, 389-90 (Va. 1994) (quoting *Payne* as rationale to support decision).

272. *See* Payne v. Tennessee, 501 U.S. 808, 825 (1991) ("We are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant.").

273. *See id.* (noting that victim impact evidence demonstrates specific harm that actual crime caused).

274. *See* Smith v. Commonwealth, 248 S.E.2d 135, 149 (Va. 1978) (construing depravity of mind component as "degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation").

275. *See Payne*, 501 U.S. at 825 (stating that victim impact evidence demonstrates harm

The lack of relevance attributable to victim impact evidence at capital sentencing in Virginia necessarily leads to the conclusion that the 1998 statutory amendment that requires courts to permit victim impact evidence at capital sentencing hearings[276] is seriously misguided. By removing all discretion from trial courts and mandating admission of victim impact evidence upon a motion by the prosecution,[277] the amendment makes no allowance for cases in which victim impact evidence is so unduly prejudicial that it clearly should not be admitted.[278] Thus, the amendment will result in the introduction of evidence that offers nothing more than the likelihood of unfair prejudice to defendants who are facing the possibility of death at the hands of the government. In light of the substantive Virginia law governing capital murder, and given the nature of victim impact evidence, trial courts in capital murder cases should not admit victim impact evidence.

V. Due Process and Victim Impact Evidence

The United States Supreme Court in *Payne* stated that the Due Process Clause of the Fourteenth Amendment could limit the admission of victim impact evidence at capital sentencing.[279] Although this proposition consists of only a single sentence in the majority's opinion, the Court made clear that admission of victim impact evidence violates due process if the unduly prejudicial effect of such evidence results in fundamental unfairness to the defendant.[280] Accordingly, it is worthwhile to consider the due process standards that govern victim impact evidence at capital sentencing hearings.[281]

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that actual crime caused); *Smith*, 248 S.E.2d at 149 (construing depravity of mind component as descriptive of defendant's "psychical debasement").

276. *See* VA. CODE ANN. § 19.2-264.4 (Michie Supp. 1998) ("In any [capital sentencing] proceeding . . . , the court shall permit the victim . . . to testify in the presence of the accused regarding the impact of the offense upon the victim.").

277. *See id.* ("In any [capital sentencing] proceeding . . . , the court shall permit the victim . . . , upon the motion of the attorney for the Commonwealth, and with the consent of the victim, to testify in the presence of the accused regarding the impact of the offense upon the victim.").

278. *Cf.* Payne v. Tennessee, 501 U.S. 808, 825 (1991) (acknowledging that victim impact evidence may be so unduly prejudicial as to render trial fundamentally unfair).

279. *See id.* (noting due process restriction on victim impact evidence).

280. *See id.* ("In the event that [victim impact] 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.").

281. *See infra* notes 283-307 and accompanying text (discussing due process standards).

Without discussion, the *Payne* Court offered only one case, *Darden v. Wainwright*,[282] to define the specific contours of the protection that the Due Process Clause of the Fourteenth Amendment provides against victim impact evidence.[283] In *Darden*, the Supreme Court addressed prosecutorial misconduct at the guilt phase of a capital murder trial.[284] In addressing Darden's argument that his trial and resulting conviction were fundamentally unfair because of the prosecution's improper argument,[285] the Court characterized the inquiry as whether the improper comments were so unfair as to make the conviction a denial of due process.[286] Because this circular standard offers little in the way of specific guidance, it is necessary to consider *Darden* in conjunction with related Supreme Court decisions.[287]

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282. 477 U.S. 168 (1986).

283. *See Payne*, 501 U.S. at 825 (citing Darden v. Wainwright, 477 U.S. 168, 179-83 (1986)); *Darden*, 477 U.S. at 179-83 ("The relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974))). In *Darden*, the petitioner had received a sentence of death in a Florida court for murder. *Id.* at 170. Darden unsuccessfully sought a writ of habeas corpus in federal district court. *Id.* at 171. The Supreme Court granted certiorari and addressed Darden's claim that the prosecution's closing argument at the guilt phase of the trial made the conviction fundamentally unfair. *Id.* at 178-79. Emphasizing the importance of the context in which the prosecution made the argument, the Court noted several features of the argument that Darden's counsel made prior to the prosecution's argument. *Id.* at 179. The Court stated that the prosecution's "argument deserves the condemnation it has received from every court to review it." *Id.* Impropriety notwithstanding, the Court characterized the issue as a question of whether the argument "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* at 181 (quoting *DeChristoforo*, 416 U.S. at 643). Applying this standard, the Court found that the prosecution's argument did not deprive Darden of his right to a fair trial. *Id.* The argument did not "manipulate or misstate the evidence" and it did not implicate any of Darden's specific constitutional rights. *Id.* at 181-82. The Court observed that some of the prosecution's improper comments came in response to improper defense argument. *Id.* at 182. Finally, the Court stated that the weight of the evidence against Darden was sufficiently heavy to negate any possibility that the prosecution's inflammatory remarks influenced the jury. *Id.*

284. *See Darden*, 477 U.S. at 178 (addressing Darden's contention that prosecution's closing argument at guilt-innocence phase resulted in fundamentally unfair conviction).

285. In his closing argument, the prosecutor referred to the defendant as follows: "He shouldn't be out of his cell unless he has a leash on him and a prison guard at the other end of that leash.... I wish that I could see him sitting here with no face, blown away by a shotgun." *Id.* at 180 n.12.

286. *See id.* at 181 (stating that standard for reviewing petitioner's claim of fundamental unfairness was "whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process'" (quoting *DeChristoforo*, 416 U.S. at 643)).

287. *See id.* (stating that standard for reviewing petitioner's claim of fundamental unfairness was "whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process'" (quoting *DeChristoforo*, 416 U.S. at 643)).

The *Darden* Court based its due process standard on *Donnelly v. DeChristoforo*,[288] another prosecutorial misconduct case.[289] In considering DeChristoforo's claim that his first degree murder conviction violated his due process rights, the Court stated that the due process analysis properly addresses more than just the questionable prosecutorial conduct itself.[290] Instead, a court making a due process inquiry must consider the challenged conduct in relation to the proceeding as a whole.[291] The analysis of a due process claim founded on unfair prosecutorial conduct may thus depend upon numerous factors, which include the severity of the prosecutorial misconduct,[292] the relative dimension of the improper conduct,[293] the issuance of curative instructions from the court,[294] any defense conduct inviting improper prosecutorial response,[295] and

288. 416 U.S. 637 (1974).

289. *See* Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974) (addressing respondent's claim that prosecutor's argument made conviction so unfair as to deny due process). In *DeChristoforo*, a Massachusetts jury convicted DeChristoforo of first degree murder and the court sentenced him to life imprisonment. *Id.* at 638. DeChristoforo unsuccessfully sought habeas corpus relief in federal court, and the Supreme Court granted certiorari to determine whether the prosecutor's improper remark resulted in a denial of due process. *Id.* at 638-39. The Court considered the prosecutor's remark in the context of the entire proceeding against DeChristoforo. *Id.* at 643. Reasoning that the improper remark was but a brief portion of the prosecutor's argument, that the comment was ambiguous, and that the trial court instructed the jury to disregard the comment, the Court found that the prosecutor's conduct did not amount to a denial of due process. *Id.* at 645.

Although a first degree murder case, *DeChristoforo* involved the imposition of life imprisonment for a death-eligible conviction. *Id.* at 638. Nonetheless, the due process framework that the Court established in *DeChristoforo* is applicable to direct review of capital sentencing proceedings. *See* Romano v. Oklahoma, 512 U.S. 1, 12 (1994) (noting that *DeChristoforo* provided "proper analytical framework" for due process claim regarding admission of specified evidence at capital sentencing hearing).

290. *See DeChristoforo*, 416 U.S. at 639 (stating that Court granted certiorari to consider improper prosecutorial remarks "in the context of the entire trial").

291. *See id.* (stating that Court granted certiorari to consider improper prosecutorial remarks "in the context of the entire trial"); *id.* at 643 (finding that "examination of the entire proceedings in this case" did not support claim of due process violation).

292. *See* Darden v. Wainwright, 477 U.S. 168, 181-82 (1986) (stating that comments, though objectionable, neither manipulated nor misstated evidence); *DeChristoforo*, 416 U.S. at 647-48 (noting distinction between "ordinary trial error of a prosecutor" and "egregious misconduct" in due process analysis).

293. *See DeChristoforo*, 416 U.S. at 645 (emphasizing that questionable remark was brief portion of long trial).

294. *See Darden*, 477 U.S. at 182 (noting that trial court repeatedly issued cautionary instructions to jury regarding distinction between evidence and argument); *DeChristoforo*, 416 U.S. at 645 (noting that court issued corrective instruction regarding questionable remark by prosecutor).

295. *See Darden*, 477 U.S. at 182 (stating that improper prosecutorial comments were responsive to questionable defense argument).

the weight of the evidence.[296]

Because *Darden* and *DeChristoforo* both involved due process claims founded on prosecutorial misconduct, their due process framework undoubtedly applies to cases in which the prosecution's argument at the sentencing phase invokes a murder's impact on the victim's family.[297] Likewise, the *Payne* Court's invocation of *Darden* indicates that the same due process analysis applies to the introduction of victim impact evidence.[298] Thus, the *Payne* Court perceived the limitation on the admission of victim impact evidence at capital sentencing to be the basic due process concept of fundamental fairness.[299]

Although the idea of fundamental fairness is central to constitutional law, this aspect of due process does not readily submit to definition.[300] The due process inquiry in any particular case largely depends on the specific circumstances surrounding that case.[301] It is not enough for courts to consider merely the nature and the extent of the victim impact evidence alone.[302] Rather, courts making the fundamental fairness inquiry must scrutinize the challenged victim impact evidence in the context of the entire sentencing proceeding.[303] This holistic approach indicates that the factors discussed in *Darden* and *DeChristoforo*, as well as any pertinent additional circumstances, comprise the necessary elements of a due process analysis in a particular case.[304] For

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296. *See id.* (noting that heavy weight of evidence against petitioner reduced influence of improper prosecutorial argument).

297. *See id.* at 178-83 (addressing claim that prosecutorial argument violated due process); Donnelly v. DeChristoforo, 416 U.S. 637, 642-45 (1974) (same).

298. *See* Payne v. Tennessee, 501 U.S. 808, 825 (1991) (citing *Darden* for proposition that Fourteenth Amendment's Due Process Clause provides relief from unduly prejudicial victim impact evidence); *see also* Romano v. Oklahoma, 512 U.S. 1, 12 (1994) (noting that *DeChristoforo* standard, which *Darden* Court incorporated, applied to direct review of due process claim regarding admission of evidence at sentencing).

299. *See Payne*, 501 U.S. at 825 (noting that Fourteenth Amendment's Due Process Clause provides relief when introduction of victim impact evidence makes trial "fundamentally unfair").

300. *See* Lassiter v. Department of Soc. Servs., 452 U.S. 18, 24 (1981) (stating that fundamental fairness is "a requirement whose meaning can be as opaque as its importance is lofty").

301. *See supra* notes 292-96 and accompanying text (noting relevant factors in addressing claim of fundamental unfairness).

302. *See supra* note 291 and accompanying text (explaining that due process inquiry must address challenged remark in context of entire proceeding).

303. *See Romano*, 512 U.S. at 12 (stating that relevant inquiry for determining whether introduction of specified evidence at capital sentencing violated due process was whether evidence "so infected *the sentencing proceeding* with unfairness as to render the jury's imposition of the death penalty a denial of due process" (emphasis added)).

304. *See supra* notes 292-96 and accompanying text (providing relevant factors in addressing claim of fundamental unfairness).

example, in some cases the jury may already know certain facts about the individual murder victim from evidence adduced at the guilt phase of the trial.[305] Under these circumstances, the sentencing jury's familiarity with the facts about the victim may significantly diminish the due process threat presented by victim impact evidence on the same general topic.[306] In all cases, however, the due process analysis is a highly fact-sensitive process that scrutinizes the particularized circumstances involved.[307]

VI. Conclusion

Since the *Payne* Court removed the outright constitutional bar in 1991, victim impact evidence has become a prevalent and significant feature at capital sentencing hearings.[308] Legislatures and courts in both the federal and the state systems have exhibited strong support for allowing murder victims and their survivors to have a role in the sentencing process.[309] Political power notwithstanding, the victims' rights movement should not compel legislative or judicial decisions that effectively nullify a jurisdiction's fundamental requirements for the admission of evidence.[310] By admitting victim impact evidence, courts disregard both laws and established procedures.[311] As a result, sentencing bodies become prejudiced against defendants, and this prejudice violates a right – the right to due process of law – that the Constitution guarantees to all criminal defendants.[312]

Should a convicted murderer die for taking the life of another? This essential question underlies every capital sentencing hearing. Subject to numerous constitutional mandates announced by the United States Supreme

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305. *See* Payne v. Tennessee, 501 U.S. 808, 823 (1991) (noting that sentencing jury may have already heard evidence relating to victim from guilt phase of trial).

306. *See id.* at 832 (O'Connor, J., concurring) (noting that victim impact testimony at sentencing does not constitute due process violation when it merely amplifies certain facts that jury already knows from guilt-innocence phase).

307. *See supra* notes 292-96 and accompanying text (providing relevant factors in addressing claim of fundamental unfairness).

308. *See* Koskela, *supra* note 1, at 167 (noting prevalence of state constitutional victim's rights amendments regarding presentation of victim impact evidence at capital sentencing).

309. *See supra* notes 13-17 and accompanying text (discussing measures that individual states have taken to allow victim impact evidence at capital sentencing proceedings).

310. *See supra* Part IV (discussing victim impact evidence and statutory structures of federal, Texas, and Virginia law).

311. *See supra* Part IV (arguing that admission of victim impact evidence contradicts sentencing provisions of federal, Texas, and Virginia law).

312. *See* Payne v. Tennessee, 501 U.S. 808, 825 (1991) (noting that Due Process Clause of Fourteenth Amendment may provide relief to defendants if victim impact evidence is so prejudicial as to encroach upon fundamental fairness of trial).

Court, each death penalty jurisdiction has enacted specific provisions for making this determination.[313] However, the impact of the victims' rights movement has obscured not only these specific provisions, but also the basic proposition that the appropriate punishment for murder depends upon the particular offense and the particular offender.[314] Victim impact evidence demonstrates neither of these factors and serves only to provoke an emotional response, untempered by reason.[315] Accordingly, legislatures and courts should reevaluate the decisions that have allowed victim impact evidence to become a common feature at capital sentencing hearings.

313. *See supra* Part IV (arguing that admission of victim impact evidence is contrary to statutory provisions of federal, Texas, and Virginia law).

314. *See Payne*, 501 U.S. at 856 (Stevens, J., dissenting) ("Until today our capital punishment jurisprudence has required that any decision to impose the death penalty be based solely on evidence that tends to inform the jury about the character of the offense and the character of the defendant."). Observing that the *Payne* decision was an unsupported rejection of longstanding capital sentencing jurisprudence, Justice Stevens stated: "Today . . . the Court abandons rules of relevance that are older than the Nation itself and ventures into uncharted seas of irrelevance." *Id.* at 858-59 (Stevens, J., dissenting).

315. *See id.* at 856 (Stevens, J., dissenting) (stating that victim impact evidence "serves no purpose other than to encourage jurors to decide in favor of death rather than life on the basis of their emotions rather than their reason").