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WHEN BALANCE AND FAIRNESS COLLIDE: AN ARGUMENT FOR EXECUTION IMPACT EVIDENCE IN CAPITAL TRIALS

Wayne A. Logan*

A central precept of death penalty jurisprudence is that only the “death worthy” should be condemned, based on a “reasoned moral response” by the sentencing authority. Over the past decade, however, the Supreme Court has distanced itself from its painstaking efforts in the 1970s to calibrate death decision making in the name of fairness. Compelling proof of this shift is manifest in the Court’s decisions to permit victim impact evidence in capital trials, and to allow jurors to be instructed that sympathy for capital defendants is not to influence capital decisions. This Article examines a novel strategy now being employed by capital defendants in response: the proffer of “execution impact evidence,” intended to inform the sentencer of the manifold consequences of the defendant’s possible execution. Professor Logan advances several arguments in favor of its admission, based most prominently on a defendant’s constitutional right to have consideration given to mitigating evidence, and the need for such evidence to restore a semblance of the even-handedness historically sought in capital trials.

“When a man is hung, there is an end of our relations with him. His execution is a way of saying, ‘You are not fit for this world, take your chance elsewhere.’”¹

INTRODUCTION

The Supreme Court’s capital punishment jurisprudence is not only complex but also beset with manifold contradictions. Central among these are the conflicting constitutional mandates that death decisions be “individualized” on the basis of the “character and record of the individual offender,”² yet not so individualized as to

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1. *Furman v. Georgia*, 408 U.S. 238, 290 (1972) (Brennan, J., concurring) (citations omitted).

2. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976); *see also Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (emphasizing “[t]he need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual”).

be “wantonly” and “freakishly imposed.”³ To complicate matters further, the Court has expanded its notion of individualization. No longer is individualization oriented principally toward capital defendants, intended to provide capital jurors an informed basis to exercise mercy.⁴ Increasingly, individualization is invoked by the State to more readily convince jurors of the “deathworthiness” of those found guilty of capital murder.⁵

This shift has been most apparent in the opinions of the Rehnquist Court, which has forcefully embraced the notion that individualization cuts both ways. The foremost example of the Chief Justice’s imprint is his majority opinion in *Payne v. Tennessee*,⁶ the Court’s controversial 1991 decision to allow “victim impact” testimony in capital trials. Embracing the premise that the sentencing phase was “unfairly weighted” in favor of capital defendants, by virtue of their unfettered right to proffer relevant mitigating evidence,⁷ Chief Justice Rehnquist asserted that the State must be free to establish (1) the “uniqueness” of the victim and (2) the harm caused to surviving loved ones by the murder, as indicated by testimony from those left behind.⁸ This evidence, the Chief Justice stated, is needed to “‘keep the balance true’” between the con-

3. *Furman*, 408 U.S. at 310 (Stewart, J., concurring); see also *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) (stating that the death penalty must be imposed “fairly, and with reasonable consistency, or not at all”).

4. See, e.g., *Eddings*, 455 U.S. at 112; *Lockett*, 438 U.S. at 604–05; *Woodson*, 428 U.S. at 304.

5. See, e.g., *Romano v. Oklahoma*, 512 U.S. 1, 10 (1994) (upholding admission of evidence of death judgment from previous murder trial in later, unrelated murder trial of defendant); *Barefoot v. Estelle*, 463 U.S. 880, 904–06 (1983) (upholding admission of speculative psychiatric testimony regarding “future dangerousness,” likening it to “other relevant evidence against any defendant in a criminal case”); *Zant v. Stephens*, 462 U.S. 862, 878–80 (1983) (permitting jurors’ consideration of non-statutory aggravating evidence). As the *Zant* Court noted:

[T]he Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that class, those defendants who will actually be sentenced to death. What is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime.

Id. at 878–79 (citations and footnote omitted).

6. 501 U.S. 808 (1991).

7. See *id.* at 822.

8. See *id.* at 823, 826–27; see also *id.* at 833 (Scalia, J., concurring) (stating that “[t]he Court correctly observes the injustice of requiring the exclusion of relevant aggravating evidence during capital sentencing, while requiring the admission of all relevant mitigating evidence”).

demned capital defendant and the State,⁹ and to ensure that the State can avail itself of the “full moral force of its evidence.”¹⁰

While the *Payne* Court’s presumption that “balance” between the accused and the State is constitutionally required is itself subject to serious question,¹¹ the Court’s approval of victim impact evidence is entirely consistent with its hastening of what one commentator has accurately described as the “disappearing capital defendant.”¹² At the same time, the Court has placed limits on how jurors can respond to the positive, constitutionally-required mitigation evidence presented by the defense. Indeed, on the basis of the Court’s decisions in *California v. Brown*¹³ and *Saffle v. Parks*,¹⁴ jurors can be instructed that “sympathy” for convicted defendants is not to drive their death decisions.

The upshot of this evolution, in which the politically empowered victims’ rights movement has played a crucial role,¹⁵ is a system

9. *Id.* at 827 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934)).

10. *Id.* at 825.

11. See *Wardius v. Oregon*, 412 U.S. 470, 480 (1973) (Douglas, J., concurring) (noting that “[m]uch of the Bill of Rights is designed to redress the advantage that inheres in a government prosecution”); *Williams v. Florida*, 399 U.S. 78, 111–12 (1970) (Black, J., concurring and dissenting) (noting that “[t]he Framers were well aware of the awesome investigative and prosecutorial powers of government and it was in order to limit those powers that they spelled out in detail in the Constitution the procedure to be followed in criminal trials”). As Justice Stevens correctly noted in his *Payne* dissent, “[t]he premise that a criminal prosecution requires an even-handed balance between the State and the defendant is . . . incorrect. The Constitution grants certain rights to the criminal defendant and imposes special limitations on the State designed to protect the individual from overreaching by the disproportionately powerful State.” *Payne*, 501 U.S. at 860 (Stevens, J., dissenting); see also Susan Bandes, *Taking Some Rights Too Seriously: The State’s Right to a Fair Trial*, 60 S. CAL. L. REV. 1019, 1022–23 (1987) (noting that “[t]he Constitution makes no mention of the State’s right to a fair or impartial trial”). See generally DAVID J. BODENHAMER, *FAIR TRIAL: RIGHTS OF THE ACCUSED IN AMERICAN HISTORY* (1992) (describing constitutional deference to criminal defendants).

12. Joan W. Howarth, *Deciding to Kill: Revealing the Gender in the Task Handed to Capital Jurors*, 1994 WIS. L. REV. 1345, 1382.

13. 479 U.S. 538, 542 (1987).

14. 494 U.S. 484, 490 (1990).

15. See *Payne*, 501 U.S. at 834 (Scalia, J., concurring) (asserting that the pre-existing prohibition of victim impact evidence “conflict[ed] with a public sense of justice keen enough that it has found voice in a nationwide ‘victims’ rights’ movement”). See generally Peggy M. Tobolowsky, *Victim Participation in the Criminal Justice Process: Fifteen Years After the President’s Task Force on Victims of Crime*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 21 (1999) (surveying widespread increases in victim participation in all aspects of prosecutions, including sentencing).

The explicit idea that “balance” is called for between victims (as opposed to the State) and criminal defendants permeates the nationwide proliferation of victims’ rights provisions. See, e.g., OHIO CONST. art I, § 10(a) (1994 Editor’s Comment) (noting that proponents of the Ohio victims’ rights constitutional amendment argued that the amendment was a “question of balance” because there was no “corresponding” victim-oriented provision in the Ohio Constitution); S.C. CONST. art. I, § 24(A) (identifying originating purpose of “Victims’

increasingly shorn of procedural barriers designed to insulate capital jurors from the arbitrary influences that produced the "wanton" and "capricious" outcomes condemned by the Supreme Court in 1972 in *Furman v. Georgia*.¹⁶ As one commentator recently observed, the Supreme Court "has transformed the capital sentencing hearing into a rematch between the offender and her victim. . . . [T]he jury now chooses between two contestants: the defendant and the victim, locked once again in mortal combat."¹⁷ In condoning this pitched battle, the Court has created a seriously imbalanced playing field, at once permitting de-individualization of capital defendants¹⁸ and the hyper-individualization of their victims.¹⁹ In this new environment, capital defendants have

Bill of Rights" as the need to "preserve and protect victims' rights to justice and due process").

This perceived "imbalance" is also a central concern of advocates of the proposed federal victims' rights constitutional amendment, who contend that the victims' rights provisions in place nationwide, and in the constitutions of at least 29 states, are inadequate because the rights they embody are "subservient" to the defendants' established federal constitutional rights. See, e.g., *Proposal for a Constitutional Amendment to Provide Rights for Victims of Crime: Hearings on H.J. Res. 173 and H.J. Res. 174 Before the House Comm. on the Judiciary*, 104th Cong. 169 (1996) (statement of John R. Schmidt, Associate Attorney General, Department of Justice) (stating that the Clinton administration's support for amendment was not premised on view "that a victim's rights be given more weight than the rights of an accused . . . [but] to make sure they are given *equal weight*"); Richard Barajas & Scott Alexander Nelson, *The Proposed Crime Victims' Federal Constitutional Amendment: Working Toward a Proper Balance*, 49 BAYLOR L. REV. 1, 14 (1997) (identifying the "need for balance between the rights of the victim and the rights of the accused"). Critics of the proposed amendment express alarm over precisely this perceived need to rectify the Constitution. See, e.g., Robert P. Mosteller, Essay, *Victims' Rights and the United States Constitution: An Effort to Recast the Battle in Criminal Litigation*, 85 GEO. L.J. 1691, 1692 (1998) (arguing that "the Amendment will help change the outcomes of criminal litigation in favor of the victim in a 'zero sum game' against the accused").

16. 408 U.S. 238 (1972).

17. Markus Dirk Dubber, *Regulating the Tender Heart When the Axe Is Ready to Strike*, 41 BUFF. L. REV. 85, 86-87 (1993) [hereinafter Dubber, *Tender Heart*]; see also Angela P. Harris, *The Jurisprudence of Victimhood*, 1991 SUP. CT. REV. 77, 78 (describing the Court's view of capital cases as being a contest between defendant and victim).

Nor is the battle always concluded at the moment of sentencing. In Texas, for instance, crime victims and survivors are permitted—after formal sentence has been pronounced—to provide yet another public account of the effect of the crime on their lives. See generally Keith D. Nicholson, Comment, *Would You Like More Salt with That Wound? Post-Sentence Victim Allocation in Texas*, 26 ST. MARY'S L.J. 1103 (1995) (discussing TEX. CRIM. P. CODE ANN. art. 42.03, § 1(b) (West 1995)). Texas, along with several other states, also permits victims' families to attend and bear witness to the actual execution of the condemned murderer. See Michael Lawrence Goodwin, Note, *An Eyeful for an Eye: An Argument Against Allowing the Families of Murder Victims to View Executions*, 36 BRANDEIS J. FAM. L. 585 (1998) (discussing "right-to-view" statutes, policies, and procedures nationwide).

18. See Dubber, *Tender Heart*, *supra* note 17, at 87 (arguing that *Payne*, *Parks*, and *Brown* "deindividualized the capital defendant and individualized her victim").

19. See *infra* notes 93-160 and accompanying text (discussing widespread admission of highly prejudicial victim impact evidence without procedural controls or limits on its use).

struggled to restore some of the even-handedness and fairness that our constitutional traditions demand. One defense strategy in particular will be examined here: the use of “execution impact evidence,” which informs capital jurors of the effect that a defendant’s execution will have on his or her surviving loved ones.

The Article begins with an overview of the historic mission of capital juries: to render a “reasoned moral response,” based on the defendant’s character, background, and crime. Part II discusses the Court’s decisions in *Payne*, *Brown*, and *Parks*, and surveys the widespread use of victim impact evidence in capital trials. Courts nationwide now regularly permit far more than a mere “‘glimpse of the life’” that a defendant “extinguish[ed],”²⁰ as envisioned by *Payne*, and provide jurors scant guidance in how to employ the emotional, virtually un rebuttable evidence in death decisions. Part III examines the largely unsuccessful efforts of defendants to get execution impact evidence before capital juries, and the rationales offered by appellate courts to justify barring its admission. Finally, in Part IV, the Article advances several arguments in favor of the admission of execution impact evidence, based most prominently on the constitutional right of capital defendants to proffer and have sentencing consideration given to relevant mitigating evidence, and the recognition that execution impact evidence, in the midst of the emotional tug-of-war created by *Payne*, is needed to restore a semblance of the procedural even-handedness historically sought in capital proceedings.

I. THE DEATH PENALTY: A “REASONED MORAL RESPONSE”

For over twenty-five years, starting with the landmark *Furman v. Georgia*, the Supreme Court has wrestled with virtually every aspect of the capital sanction and how it is imposed. Although the case law has proven notoriously complex, one unifying theme has emerged: the death penalty, which differs in harshness from all other sanctions, should be reserved for only the most blameworthy.²¹ In order to facilitate this sorting, the Court has mandated

20. *Payne*, 501 U.S. at 822 (citing *Mills v. Maryland*, 486 U.S. 397, 397 (1988) (Rehnquist, C.J., dissenting)). See, e.g., *State v. Knese*, 985 S.W.2d 759, 771 (Mo. 1999) (asserting that “to suggest . . . that *Payne* stands for the proposition that only a brief glimpse of the victim’s life is constitutionally permissible is to misread that case.”), *cert. denied*, 526 U.S. 1136 (1999).

21. See *Spaziano v. Florida*, 468 U.S. 447, 468 (1984) (Stevens, J., dissenting and concurring in part) (“[T]he death penalty is qualitatively different from any other punishment,

that death penalty jurisdictions employ a bifurcated proceeding. After first determining that a particular defendant committed a capital crime, the sentencing authority (typically the jury) must decide whether the defendant merits the ultimate sanction, death, on the basis of facts and factors that are largely independent of those considered at the guilt phase.²² In so doing, the jury renders a "reasoned moral response"²³ to the crime and the defendant, in effect culling from the living those unfit to live.²⁴ As Third Circuit Court of Appeals Judge Richard Nygaard put it even more bluntly:

and hence must be accompanied by unique safeguards to ensure that it is a justified response to a given offense."); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) ("The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases."); see also Phyllis L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 66 *FORDHAM L. REV.* 21, 22 (1997) ("The punishment of death is supposed to be reserved for those defendants who commit the most grievous murders and deserve the most extreme punishment.").

22. See Crocker, *supra* note 21, at 26 (recognizing that "[t]he punishment-phase determination is not a recapitulation of the guilt-phase decision, but both a reconceptualization of the defendant's guilt-phase culpability and the consideration of new factors relevant only to punishment"). Professor Crocker adds:

[T]he question of what punishment should be imposed on the defendant . . . is more than a statement about his culpability for committing the crime; it is a judgment about his character, his record, his background, the circumstances and character of the murder, and the harm caused, not only to the victim, but to the victim's family. None of these features are relevant to the guilt-phase determination of culpability; they are all essential to the punishment decision about the defendant's deathworthiness.

Id. at 82–83; see also *Simmons v. South Carolina*, 512 U.S. 154, 163 (1994) (noting that matters that are irrelevant at the guilt stage "step into the foreground and require consideration at the sentencing phase"); *California v. Ramos*, 463 U.S. 992, 1007 (1983) (stating that there is a "fundamental difference between the nature of the guilt/innocence determination . . . and the nature of the life/death choice at the penalty phase"); *Bullington v. Missouri*, 451 U.S. 430, 450 (1981) (Powell, J., dissenting) ("Underlying the question of guilt or innocence is an objective truth: the defendant, in fact, did or did not commit the acts constituting the crime charged. . . . The sentencer's function is not to discover a fact, but to mete out just deserts as he sees them."); GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 491 (1978) ("[G]uilt, culpability and blameworthiness . . . do not raise questions of the actor's general moral worth or even of his moral wickedness. . . . They pinpoint the specific inquiry into whether it is fair to hold the actor accountable for an act of legal wrongdoing.").

23. *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987)) (O'Connor, J., concurring) (emphasis omitted).

24. See, e.g., *Caldwell v. Mississippi*, 472 U.S. 320, 340 n.7 (1985) (Rehnquist, J., concurring) (explaining that the jury is called upon to make a "highly subjective, 'unique, individualized judgment regarding the punishment that a particular person deserves'" (quoting *Zant v. Stephens*, 462 U.S. 862, 900 (1983)); *Spaziano*, 468 U.S. at 469 (Stevens, J., concurring and dissenting in part) (stating that the decision to impose death is an "expression of the community's outrage—its sense that an individual has lost his moral entitlement to live").

"to kill, the state must be prepared to evaluate a human life, place it at zero, and take it."²⁵

Since *Woodson v. North Carolina*,²⁶ which struck down the groundswell of mandatory death penalty schemes arising in the wake of *Furman*, the Supreme Court has made clear that this process of identification must be based on an "individualized" sentencing determination. According to the *Woodson* Court, such individualization is compelled by "evolving standards of decency" and the ideal of human dignity, both inhering in the Eighth Amendment.²⁷ Two years later, in *Lockett v. Ohio*,²⁸ the Court solidified the constitutional status of this requirement: the sentencing authority cannot "be precluded from considering, as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."²⁹ According to *Lockett*, "[w]hen the choice is between life and death, that risk [that death will be imposed despite evidence calling for a less severe penalty] is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments."³⁰

Although *Lockett's* individualization mandate has come under fire for its apparent tension with *Furman's* concern over "unfettered" decision making,³¹ the constitutional preference in

25. Richard Lowell Nygaard, *Crime, Pain, and Punishment: A Skeptic's View*, 102 DICK. L. REV. 355, 370 (1998).

26. 428 U.S. 280 (1976).

27. See *id.* at 304 ("[T]he fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender . . .") (citation omitted). *Woodson's* focus on individualization had its origins in the Court's prior decisions of similar emphasis. See, e.g., *Williams v. New York*, 337 U.S. 241, 247 (1949); *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55 (1937). These cases themselves emanate from the early twentieth century effort to humanize and make more effective the criminal justice process. See, e.g., Sheldon Glueck, *Principles of a Rational Penal Code*, 41 HARV. L. REV. 453, 481 (1928) (advocating a "scientific individualization of peno-correctional diagnosis and treatment"); Sam B. Warner & Henry B. Cabot, *Changes in the Administration of Criminal Justice During the Past Fifty Years*, 50 HARV. L. REV. 583, 600–01 (1937) (referencing the "scientific" effort to categorize and process offenders).

28. 438 U.S. 586 (1978).

29. *Id.* at 604 (plurality opinion).

30. *Id.* at 605.

31. Justice Antonin Scalia has been individualization's harshest critic. See *Buchanan v. Angelone*, 522 U.S. 269, 279 (1998) (Scalia, J., concurring) ("I continue to adhere to my view that the Eighth Amendment does not . . . require that sentencing juries be given discretion to consider mitigating evidence . . ."); *Walton v. Arizona*, 497 U.S. 639, 664 (1990) (Scalia, J., concurring) ("To acknowledge that 'there perhaps is an inherent tension' between [the *Lockett* line of cases] and the line stemming from *Furman* . . . is rather like saying that there was perhaps an inherent tension between the Allies and the Axis Powers in World War II."). For a sample of the many convincing rebuttals of Justice Scalia's position see, e.g.,

favor of providing jurors the broadest possible access to potentially mitigating evidence in their "deathworthiness" decisions is beyond dispute.³² In its 1998 Term, Chief Justice Rehnquist stated for the Court that in the capital selection phase:

[W]e have emphasized the need for a broad inquiry into all relevant mitigating evidence to allow an individualized determination. . . . [O]ur cases have established that the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence. . . . Our consistent concern has been that restrictions on the jury's sentencing determination not preclude the jury from being able to give effect to mitigating evidence.³³

Indeed, the Court has reasoned that the focus on "deserts" implicit in the individualization mandate is integral to the predominant, retributive-based justification of the death penalty itself.³⁴ As noted by one commentator, "[t]he individualization mandate finds justification, if at all, in the need to avoid retributive excess in the use of the death penalty. The mandate must serve as assurance that only those who actually deserve the death penalty receive it."³⁵ In short, the death penalty derives whatever moral and

Dubber, *Tender Heart*, *supra* note 17, at 103; Stephen P. Garvey, "As the Gentle Rain from Heaven": *Mercy in Capital Sentencing*, 81 CORNELL L. REV. 989, 1002-05 (1996).

32. This was perhaps best expressed by Justice Lewis Powell, who observed that "a consistency produced by ignoring individual differences is a false consistency." *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982); *see also* *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (stating that the capital defendant must be treated as a "unique individual human being"); *Zant v. Stephens*, 462 U.S. 862, 869 (1982) (stating that imposition of the death penalty must turn on a "individualized determination . . . [based on] the character of the individual and the circumstances of the crime").

33. *Buchanan*, 522 U.S. at 276.

34. *See, e.g., McKoy v. North Carolina*, 494 U.S. 433, 443 (1990) ("[I]t is precisely because the punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense."). *See generally* Dubber, *Tender Heart*, *supra* note 17, at 132 ("Over the course of capital jurisprudence since *Furman*, the Court has settled on a generally retributive approach to capital sentencing."); Scott W. Howe, *Reassessing the Individualization Mandate in Capital Sentencing: Darrow's Defense of Leopold and Loeb*, 79 IOWA L. REV. 989, 1069 (1994) ("[T]he Eighth Amendment function of the sentencing inquiry could only be to provide for desert assessments to help avoid imposition of the death penalty when it would constitute retributive excess—when it would be undeserved."); Margaret J. Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1159 (1980) ("The substantive judgment to be made is a moral judgment: Does this person deserve death as punishment?").

35. Howe, *supra* note 34, at 1051-52; *see also* *Eddmonds v. Peters*, 93 F.3d 1307, 1312 (7th Cir. 1996) (noting the purpose of mitigating evidence is to show that defendant is "not as 'bad'" as the guilty verdict indicates).

constitutional authority it enjoys³⁶ from the self-limiting influence of the individualization mandate.³⁷

In keeping with *Lockett's* demand for individualization, the Court has repeatedly insisted that states permit unconstrained consideration of "all relevant mitigating evidence" proffered by the defense.³⁸ Perhaps because it has desired to remain morally neutral on the matter of when a sentence of less than death is deserved, the Court itself has not seen fit to define in any meaningful way the proper scope of mitigating evidence.³⁹ Instead, it has stuck by its broadly inclusive definition, first enunciated in *Lockett*, that encompasses evidence relating to "any aspect of a defendant's character or record and any of the circumstances of the offense,"⁴⁰ and developed its jurisprudence on a pragmatic, case-by-case basis.⁴¹

36. Professors Carol and Jordan Steiker point out that the individualization mandate is also grounded in the Eighth Amendment requirement that "like cases must be treated alike in order to enhance the 'reliability' of the imposition of the death penalty." Carol S. Steiker & Jordan M. Steiker, *Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing*, 102 YALE L.J. 835, 870 n.50 (1992) [hereinafter Steiker & Steiker, *Let God Sort Them Out?*]; see also *id.* at 843 ("[T]he individualization requirement makes constitutionally relevant any and all traits or experiences that distinguish one individual from another."). They also offer an alternate Eighth Amendment justification, namely, "the right of both the defendant and the sentencer to have the humanity of the defendant squarely confronted in the capital sentencing process." *Id.* at 845 n.50. Such information permits the sentencer

to appreciate the humanity of the defendant and to recognize thereby the gravity of the decision to impose the death penalty in a particular case. Confronted with details about an individual defendant a sentencer may be moved—in an inarticulable and nonstandardized way—to impose a sentence less than death.

Id.; see also *Boyd v. California*, 494 U.S. 370, 387 (1990) (Marshall, J., dissenting) ("The insistence in our law that the sentencer know and consider the defendant as a human being before deciding whether to impose the ultimate sanction operates as a shield against arbitrary execution . . .").

37. Perhaps the best support for this argument is found in the pre-*Woodson* era of mandatory death sentences, when juries frequently nullified capital law when faced with defendants deemed unworthy of death. See *Woodson*, 428 U.S. at 290–91 (discussing same).

38. See, e.g., *Buchanan*, 522 U.S. at 276 ("Our consistent concern has been that restrictions on the jury's sentencing determination not preclude the jury from being able to give effect to mitigating evidence.").

39. See, e.g., James R. Acker & Charles S. Lanier, *In Fairness and Mercy: Statutory Mitigating Factors in Capital Punishment Laws*, 30 CRIM. L. BULL. 299, 303 (1994) (stating that the Court's definition of "the boundaries of mitigating evidence in the context of capital sentencing is conspicuous for its lack of substance"); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 389 (1995) [hereinafter Steiker & Steiker, *Sober Second Thoughts*] (stating that the Court's opinions "did not specify what kinds of evidence could be regarded as 'mitigating'").

40. *Lockett*, 438 U.S. at 604.

41. See Steiker & Steiker, *Sober Second Thoughts*, *supra* note 39, at 398 (characterizing the Court's death penalty jurisprudence as less "a systematic effort to regulate the death penalty

This inclusiveness notwithstanding, mitigation evidence comes in three basic categories. The first category, pertaining to offender culpability and responsibility, encompasses information concerning defendant's background, history, and role in the predicate crime.⁴² Evidence relating to an offender's youth,⁴³ history of emotional or physical abuse,⁴⁴ or relative lack of involvement in the predicate murder⁴⁵ falls into this category. The second category involves considerations of future dangerousness. Although not mitigating in a strict sense, an offender's capacity to be rehabilitated, or otherwise act peacefully in prison, merits admission pursuant to *Lockett's* requirement that evidence possibly warranting a "sentence less than death" be available to the sentencing authority.⁴⁶

The third category of mitigation evidence, that of most interest here, concerns the offender's "character" or general "deserts."⁴⁷ Although the Court has yet to define "character" in mitigation,⁴⁸ it plays a crucial role insofar as it provides insight into the defendant's essential social or "moral worth," the lynchpin of the capital sentencing decision.⁴⁹ Indeed, the Court has signaled its

process so much as a series of responses to particular circumstances in which the Court deemed a state rule or practice manifestly unreliable or unfair"). It is also possible that the Court's pragmatic, hands-off approach to mitigation derives from Justice Harlan's recognition in *McGautha v. California*, 402 U.S. 183, 204 (1971), that advance identification of factors that should sway the capital decision appears to be a task "beyond present human ability."

42. See Acker & Lanier, *supra* note 39, at 304.

43. See, e.g., *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (sixteen-year-old defendant).

44. See, e.g., *Penry v. Lynaugh*, 492 U.S. 302 (1989) (childhood beatings suffered by mentally retarded defendant).

45. See, e.g., *Lockett*, 438 U.S. at 586 (defendant's lack of intent to kill and relatively minor participation in robbery-murder).

46. See *id.* at 604. See generally Acker & Lanier, *supra* note 39, at 305 (describing rationale of "future dangerousness" mitigation evidence).

47. See Acker & Lanier, *supra* note 39, at 305-06. The role of "character" in sentencing has deep roots in the common law and Western philosophy. Eighteenth century philosopher David Hume wrote:

[A]ctions are, by their very nature, temporary and perishing; and where they proceed not from some cause in the character and disposition of the person who performed them, they can neither redound to his honor, if good, nor infamy, if evil For as actions are objects of our moral sentiment so far only as they are indications of the internal character, passions, and affections

DAVID HUME, AN INQUIRY CONCERNING HUMAN UNDERSTANDING 107-08 (Henry Regnery ed., 1955); see also FLETCHER, *supra* note 22, at 800 (1978) ("[A] judgment about character is essential to the just distribution of punishment.").

48. See *Franklin v. Lynaugh*, 487 U.S. 164, 178 (1988).

49. As Justice Kennedy has remarked, during the penalty phase "the sentencer must attempt to know the heart and mind of the offender and judge his character. . . .

receptiveness to mitigating evidence relating to the defendant's proclivity for "voluntary service, kindness to others, or of religious devotion,"⁵⁰ record of good behavior while in jail pending trial,⁵¹ and even ability to dance.⁵² Of most significance to the discussion here, the Court held in *Hitchcock v. Dugger*⁵³ that the lower court's failure to permit consideration of evidence that the defendant was a "fond and affectionate uncle" was constitutional error. State courts have repeatedly recognized this worth as well and accorded mitigating weight to evidence of *defendant's* love for or devotion to family and friends,⁵⁴ and, conversely, *family and friends'* love for or

[A]ssessments of character and remorse may carry great weight and, perhaps, be determinative of whether the offender lives or dies." *Riggins v. Nevada*, 504 U.S. 127, 144 (1992) (Kennedy, J., concurring).

"Character evidence" gets before the jury in any of several ways. Most typically, although the capital laws of many states expressly prescribe that a defendant's "character" be "considered," see Acker & Lanier, *supra* note 39, at 311, such evidence gets before the jury as a non-statutory mitigator. See *Hitchcock v. Dugger*, 481 U.S. 393, 398–99 (1987) (holding that non-statutory mitigating circumstances may not be precluded from sentencing decision). Alternatively, the jury can receive character evidence by means of the so-called "catch-all" statutory mitigator. See Acker & Lanier, *supra* note 39, at 338–39.

50. *Franklin*, 487 U.S. at 186 (O'Connor, J., concurring).

51. See *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986).

52. See *Boyd v. California*, 494 U.S. 370, 382 n.5 (1990). Although certainly an expansive category, the extent of relevant character evidence is not without limit. See, e.g., *Skipper*, 476 U.S. at 7 n.2 ("[W]e have no quarrel with the statement of the Supreme Court of South Carolina that 'how often [the defendant] will take a shower' is irrelevant to the sentencing determination.").

53. 481 U.S. 393, 397 (1987); see also *Payne v. Tennessee*, 501 U.S. 808, 814 (1991) (acknowledging consideration of mitigating evidence that defendant was good with children and had worked with his father as a painter).

54. See, e.g., *Myers v. State*, 699 So. 2d 1281, 1284 (Ala. Crim. App. 1996); *State v. Mann*, 934 P.2d 784, 792 (Ariz. 1997); *State v. Ramirez*, 871 P.2d 237, 243 (Ariz. 1994) (en banc); *Sheridan v. State*, 852 S.W.2d 772, 779 (Ark. 1993); *Banks v. State*, 700 So. 2d 363, 365 (Fla. 1997); *Washington v. State*, 653 So. 2d 362, 366 (Fla. 1994); *State v. Row*, 955 P.2d 1082, 1088 (Idaho 1998); *People v. Steidl*, 685 N.E.2d 1335, 1344 (Ill. 1997); *State v. Loftin*, 680 A.2d 677, 713 (N.J. 1996); *Rouse v. State*, 451 S.E.2d 543, 556 (N.C. 1994); *State v. Fox*, 631 N.E.2d 124, 133 (Ohio 1994); *State v. Lawrence*, 541 N.E.2d 451, 460 (Ohio 1989).

Although the nature of such mitigation evidence bears basic similarities in cross-gender terms, one commentator recently observed that societal expectations and traditional stereotypes regarding women can have perverse effects on sentencing. "For women, these character traits necessarily include gender traits such as the woman's exceptional mothering skills, her nurturing traits, or her devotion to her husband." Jenny E. Carroll, Note, *Images of Women and Capital Sentencing Among Female Offenders: Exploring the Outer Limits of the Eighth Amendment and Articulated Theories of Justice*, 75 Tex. L. Rev. 1413, 1445–46 (1997). Carroll asserts that women, unlike men, are therefore held to a higher standard of domestic behavior, risking juror assessments of "unworth" when evidence of satisfaction of such standards is lacking. See *id.* at 1447. This situation "increases the risk that the sentence will be applied arbitrarily based on the sentencer's preconceived notions of womanhood which may be inherently exclusive of some capital defendants." *Id.*; see also *id.* at 1446 (noting that "in the case of Karla Faye Tucker, in order to offset an impressive list of aggravators, Tucker's defense team presented evidence of her loving care for her dying mother and her virtual adoption of an abandoned child").

devotion to the defendant.⁵⁵ "Mutual love" as between the defendant and his family and friends is also frequently given mitigating weight.⁵⁶ Failure to mount such potentially mitigating evidence is sufficient basis for a finding of ineffective assistance of counsel,⁵⁷ and the Seventh Circuit recently indicated that the *sole* purpose of mitigation is to permit consideration of positive

55. See, e.g., *Coral v. State*, 628 So. 2d 988, 1002 (Ala. Crim. App. 1992); *State v. King*, 883 P.2d 1024, 1028-29 (Ariz. 1994) (en banc); *People v. Hines*, 938 P.2d 388, 406 (Cal. 1997); *People v. Stanley*, 897 P.2d 481, 519 (Cal. 1995) (en banc); *People v. Crittenden*, 885 P.2d 887, 932 (Cal. 1994) (en banc); *Banks v. State*, 700 So. 2d 363, 365 (Fla. 1997); *Thompson v. State*, 648 So. 2d 692, 697 (Fla. 1994); *Barnes v. State*, 496 S.E.2d 674, 689 (Ga. 1998); *State v. Loftin*, 680 A.2d 677, 713 (N.J. 1996); *State v. Williams*, 679 N.E.2d 646, 662 (Ohio 1997); *State v. Smith*, 684 N.E.2d 668, 696 (Ohio 1997); *State v. Dunlap*, 652 N.E.2d 988, 998 (Ohio 1995); *Romano v. State*, 909 P.2d 92, 123 n.21 (Okla. Crim. App. 1996); *Plantz v. State*, 876 P.2d 268, 282 (Okla. Crim. App. 1994); *State v. Cauthern*, 967 S.W.2d 726, 738-39 (Tenn. 1998); *State v. Lord*, 822 P.2d 177, 220 (Wash. 1991) (en banc); see also Joseph P. Fried, *Mother's Love, Despite "Terrible Crime,"* N.Y. TIMES, June 2, 1998, at B3 (describing emotional testimony of mother of defendant in first capital proceeding in New York since the death penalty was reinstated in 1995).

56. See, e.g., *People v. Stanley*, 897 P.2d 481, 519 (Cal. 1995) (en banc); *People v. Kelly*, 800 P.2d 516, 540 n.12 (Cal. 1990) (en banc); *State v. Manley*, Nos. 95-11007022, 95-11006992, 1997 WL 27094, at *13 (Del. Super. Ct. Jan. 10, 1997); *Foster v. State*, 614 So. 2d 455, 461 (Fla. 1992); *Carruthers v. State*, 465 So. 2d 496, 498 (Fla. 1985); *State v. Loftin*, 680 A.2d 677, 706 (N.J. 1996).

Courts on occasion have even gone so far as to scrutinize the quality and extent of such affection. The Arizona Supreme Court, for instance, while holding that "[l]ove for and of family may be a mitigating circumstance," recounted that defendant joined the military to "get away from his father"; went "months without contacting" his mother; "admitted to having differences with one of his brothers and a sister"; "ha[d] not seen his daughter for 10 years"; and was "twice divorced." *State v. Spears*, 908 P.2d 1062, 1079 (Ariz. 1996) (en banc). The court concluded: "Although defendant may have proven that his mother loves him, we conclude that in this case the support of third parties does not translate into a mitigating circumstance for defendant." *Id.*; cf. *State v. Bishop*, 472 S.E.2d 842, 859 (N.C. 1996) (affirming lower court's refusal to submit to jury the non-statutory mitigator that the "defendant's family loves and cares about the defendant," concluding that the "circumstance relates only to defendant's family relationships in his childhood, not at the time of the crime or of trial").

It is also apparent that a defendant's use of such evidence can backfire, with the prosecution arguing that even if defendant loved and/or was loved by others such love failed to deter the (irredeemable) defendant from committing the murderous act. See *State v. Williams*, 904 P.2d 437, 454 (Ariz. 1995) (en banc); *State v. King*, 883 P.2d 1024, 1044-45 (Ariz. 1994) (en banc); *State v. Carriger*, 692 P.2d 991, 1011 (Ariz. 1984) (en banc); *State v. Simmons*, 944 S.W.2d 165, 188 (Mo. 1997) (en banc); *State v. Hicks*, 538 N.E.2d 1030, 1039 (Ohio 1989).

In other instances, the fact that defendant has inspired the affection of others has been conceived as a betrayal and in effect served as a *de facto* aggravating circumstance. See, e.g., *State v. Ceja*, 612 P.2d 491, 495 (Ariz. 1990) (en banc). Such a turnabout strategy would appear to violate the Supreme Court's position that ostensibly mitigating evidence cannot constitutionally be transformed into aggravating evidence. See *Zant v. Stevens*, 462 U.S. 862, 885 (1983).

57. See, e.g., *Collier v. Turpin*, 177 F.3d 1184, 1202-04 (11th Cir. 1999); *Mak v. Blodgett*, 970 F.2d 614, 622 (9th Cir. 1992); *Tyler v. Kemp*, 755 F.2d 741, 745 (11th Cir. 1985); *People v. Steidl*, 685 N.E.2d 1335, 1343-44 (Ill. 1997).

character evidence, not to investigate “causality” (for example, the influence of childhood abuse on defendant).⁵⁸

In short, character evidence in capital trials, especially that relating to defendants’ love for and by family and friends, plays a critically important yet intangible role.⁵⁹ Carol and Jordan Steiker observe that admission of such evidence is justified on two fundamental bases. The first is utilitarian, “forward-looking and consequentialist. Evidence of a defendant’s special talents or close family ties may suggest the defendant’s capacity to make continuing

58. See *Eddmonds v. Peters*, 93 F.3d 1307, 1321–22 (7th Cir. 1996); *Stewart v. Gramley*, 74 F.3d 132, 136–37 (7th Cir. 1996); see also Marc D. Hauser, Comment, *Capital Mitigation Evidence in the Seventh Circuit*, 92 Nw. U. L. Rev. 1129 (1998) (condemning Circuit’s failure to recognize omission of available “causality evidence” as violative of *Strickland*).

59. The idea that by examining the emotional investment of third parties we gain understanding into the first person is of a long and distinguished philosophical tradition. See, e.g., IMMANUEL KANT, *IMMANUEL KANT’S CRITIQUE OF PURE REASON* 131–40 (Norman Kemp Smith trans., The Macmillan Press Ltd. 1973) (1787). But precisely why the love of another should have mitigating value presents a complex philosophical question, perhaps explaining why, although courts invariably admit such evidence in the name of mitigation, they rarely articulate why they do so.

One explanation is that such love permits an inference that the defendant possesses some human value or quality, as seen through the eyes of another, i.e., that affection presumes virtue, and that the sentencer should be privy to this appreciation. See, e.g., *People v. Ochoa*, 966 P.2d 442, 506 (Cal. 1998) (noting that jury can take into account testimony from defendant’s mother that she “loves her son if it believes that he must possess redeeming qualities to have earned his mother’s love”); *People v. Arias*, 913 P.2d 980, 1035 (Cal. 1996) (acknowledging defense counsel’s argument that “the love [the witness] had expressed for defendant was a reflection that he had some good qualities”); *People v. Crittenden*, 885 P.2d 887, 932 (Cal. 1994) (en banc) (“The evidence presented by the defense in mitigation, emphasizing primarily the love and respect defendant had engendered in his family and peers, was not insubstantial.”); see also JONATHAN LEAR, *LOVE AND ITS PLACE IN NATURE: A PHILOSOPHICAL INTERPRETATION OF FREUDIAN ANALYSIS* 186 (1990) (noting that from a Freudian perspective, “man is not just a donor of love, he is also a recipient. It is in this give-and-take that the human soul comes to be.”); IRVING SINGER, *THE NATURE OF LOVE: 3 THE MODERN WORLD* 13 (1987) (characterizing Platonic love as “a longing for the very idea of perfection, which may or may not prevail against the material order in things”).

Another explanation might stem from the idea that love is arguably finite in nature, and of necessity is therefore distributed only in a discriminatory way. As noted by one commentator, “[s]ince we cannot be all things to all people, our ability to love, let alone to love well, is limited.” Drucilla Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 U. PA. L. REV. 291, 341 (1985). The recognition of “blind love,” most often familial-based, would appear to cut against this conceptualization. Indeed, courts have been known to bar, or belittle, expressions of such family-based love that defendants have proffered in the name of mitigation. See, e.g., *Barnes v. State*, 496 S.E.2d 674, 687 (Ga. 1998) (noting trial court’s dismissive statement to the effect that “everybody loves their wife”). The reality is, however, that not all capital defendants can, in fact, muster witnesses to evoke such loving sentiments, and the absence of such favorable testimony can negatively influence jurors’ perceptions of defendants’ worth. See Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109, 1151–52 (1997) (describing surprise expressed by capital jurors in response to defendants’ failure to mount “family love” evidence, or otherwise commenting on its paltry nature or extent). This phenomenon is examined at greater length *infra* at notes 250–58 and accompanying text.

contributions to society.”⁶⁰ The second is “retrospective and nonutilitarian. Evidence of positive character traits and past good works may reveal a defendant’s ‘general desert’ and contribute to a moral assessment of the defendant’s entire life”⁶¹ In this latter sense, character evidence humanizes a defendant, in stark contrast to the State’s typical strategy of dehumanizing or abstracting the defendant from the human community, a strategy designed to make it easier for the sentencer to render a sentence of death.⁶²

II. THE COURT CREATES A SERIOUSLY IMBALANCED CAPITAL JURISPRUDENCE

Traditionally, the primary objective in capital trials has been to arrive at a “reasoned moral response” to the murderous act of the defendant, tempered by his or her “deathworthiness.” In theory, this outcome is achieved by providing guidance in the consideration of aggravating circumstances relating to the defendant and the murder, and by permitting the sentencer virtually unlimited consideration of mitigating evidence that might possibly favor a sentence less than death. In recent years, however, the Rehnquist Court has recalibrated in fundamental ways the already emotional, high-stakes death penalty process, distancing itself from *Lockett*’s predominant focus on the defendant and his act, and making an already death-prone system considerably much more so.

A. *Brown, Parks, and Payne*

Although this recalibration has stemmed from several of the Court’s decisions, the interplay of three in particular, each having to do with the nature of evidence put before capital juries, and how they make use of it, will be addressed here. In *California v. Brown*, decided in 1987, the Court addressed whether a capital jury can be instructed that its deliberation “‘must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling.’”⁶³ Writing for the five-member majority,

60. Steiker & Steiker, *Let God Sort Them Out?*, *supra* note 36, at 847.

61. *Id.*

62. This point, and the related role of emotion and narrative in death penalty proceedings, is addressed at length at *infra* notes 237–65 and accompanying text.

63. 479 U.S. 538, 540 (1987).

Chief Justice Rehnquist approved of the instruction insofar as it prohibited “mere sympathy,” divorced from the aggravating and mitigating evidence.⁶⁴ Dissenting, Justice Brennan argued that “[i]n forbidding the sentencer to take sympathy into account, this language on its face precludes precisely the response that a defendant’s evidence of character and background is designed to elicit, thus effectively negating the intended effect of the Court’s requirement that all mitigating evidence be considered.”⁶⁵

In *Saffle v. Parks*, decided in 1990, the Court addressed a near-identical instruction that the jury should “‘avoid any influence of sympathy, sentiment, passion, prejudice, or other arbitrary factor when imposing sentence.’”⁶⁶ The Court upheld the instruction, noting that while the State cannot prevent defendants from proffering relevant mitigating evidence, it can instruct jurors in the way they are to conceive of such evidence by admonishing that they cannot defer to sympathy—even if evoked by the mitigating evidence.⁶⁷

Parks and *Brown* combined thus present a paradox: while capital jurors must receive and consider defendants’ mitigating evidence—evidence proffered “as a basis for a sentence less than death”⁶⁸—they can be instructed to refrain from investing any emotional meaning in it, at least not in the form of sympathy for the defendant’s human situation.⁶⁹

In 1991 came the third and most significant case in the triumvirate, *Payne v. Tennessee*,⁷⁰ where the Court granted certiorari to reconsider its very recent holdings in *Booth v. Maryland*⁷¹ and *South Carolina v. Gathers*⁷² barring “victim impact evidence” in capital trials, testimony relating to the “personal characteristics of the victim

64. See *id.* at 542.

65. *Id.* at 548 (Brennan, J., dissenting). Concurring in the result, Justice O’Connor acknowledged that “one difficulty with attempts to remove emotion from capital sentencing through instructions . . . is that juries may be misled into believing that mitigating evidence about a defendant’s background or character also must be ignored.” *Id.* at 545–46 (O’Connor, J., concurring). Justice O’Connor’s fears were allayed because the jury in *Brown* was reminded of its constitutional responsibility to consider the defendant’s mitigating evidence. See *id.* at 546.

66. 494 U.S. 484, 487 (1990).

67. See *id.* at 490.

68. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

69. In 1993, the Court as a whole articulated the position even more forcefully: capital juries need not be permitted to “dispense mercy on the basis of a sympathetic response to the defendant.” *Johnson v. Texas*, 509 U.S. 350, 371 (1993).

70. 501 U.S. 808, 817 (1991).

71. 482 U.S. 496 (1987).

72. 490 U.S. 805 (1989).

and the emotional impact of the crimes on the victim's family."⁷³ In *Booth*, the majority characterized such evidence as "irrelevant," and flatly rejected the State of Maryland's assertion that it was needed to permit jurors to assess the "gravity" of the offense.⁷⁴ Writing for the *Booth* Court, Justice Powell condemned victim impact evidence because it refocused the sentencing decision from the defendant and his crime to "the character and reputation of the victim and the effect on his family," despite the fact that the defendant may have been wholly unaware of the personal qualities and worth of the victim.⁷⁵ In so doing, Justice Powell asserted, the State created "a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner" in violation of the Eighth Amendment.⁷⁶

Bespeaking the compelling allure of victim impact evidence, the State of Tennessee, in the face of *Booth*'s unequivocal holding, employed victim evidence in its 1988 trial of Pervis Payne for the stabbing deaths of Charisse Christopher and her two-year-old daughter (witnessed by her three-year-old son, himself brutally but non-fatally stabbed).⁷⁷ Upon winning convictions on all counts, at sentencing the State presented the testimony of Ms. Christopher's mother, who testified how her grandson had been affected by the murders of his mother and sister:

He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He

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

74. *See Booth*, 482 U.S. at 504.

75. *See id.*

76. *See id.* at 503. *Booth* also barred on Eighth Amendment grounds testimony concerning survivors' personal opinions of the defendant, their impressions of the crime, and their views with respect to appropriate sentence. According to Justice Powell

this information by the State can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant. . . . The admission of these emotionally-charged opinions as to what conclusions the jury should draw from the evidence clearly is inconsistent with the reasoned decisionmaking we require in capital cases.

Id. at 508–09 (citing to survivor testimony that likened defendants to "animals," that the elderly decedents had been "butchered," and that defendant could never be rehabilitated).

In *South Carolina v. Gathers*, decided two years after *Booth*, the Court addressed the propriety of an emotional closing statement by a prosecutor that praised, *inter alia*, the religiosity and civic-mindedness of the decedent, a self-styled "Reverend Minister." *See South Carolina v. Gathers*, 490 U.S. 805, 808–10 (1989). Although not testimony from survivors, as in *Booth*, the Court considered the statements "indistinguishable" in their effect and hence impermissible. *See id.* at 811.

77. *See State v. Payne*, 791 S.W.2d 10, 18–19 (Tenn. 1990).

comes to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I tell him yes. He says, I'm worried about my Lacie.⁷⁸

The prosecutor elaborated on the boy's condition during the State's closing argument:

Nicholas was alive. . . . [H]is eyes were open. . . . [H]e was able to hold his intestines in as he was carried to the ambulance. So he knew what happened to his mother and baby sister.

There is nothing you can do to ease the pain of any of the families involved in this case. . . . But there is something you can do for Nicholas.

Somewhere down the road Nicholas is going to grow up, hopefully. . . . He is going to want to know what type of justice was done. He is going to want to know what happened. With your verdict, you will provide the answer.⁷⁹

In his rebuttal the prosecutor argued:

No one will ever know about Lacie Jo because she never had the chance to grow up. . . . And there won't be anybody there—there won't be her mother there or Nicholas' mother there to kiss him at night. His mother will never kiss him good night or pat him as he goes off to bed, or hold him and sing him a lullaby.

[Petitioner's attorney] wants you to think about . . . people who love the defendant and things about him. He doesn't want you to think about the people who love Charisse Christopher, her mother and daddy who loved her. The people who loved little Lacie Jo, the grandparents who are still here. The brother who mourns for her every single day and wants to know where his best little playmate is. He doesn't have anybody to watch cartoons with him, a little one. These are the things that . . . that child will carry forever.⁸⁰

78. *Payne*, 501 U.S. at 814–15.

79. *Id.* at 815.

80. *Id.* at 816.

The jury sentenced Payne to death on both murder counts and the Supreme Court of Tennessee affirmed.⁸¹

Over the vigorous dissents of Justices Stevens and Marshall, with Justice Marshall describing the majority's opinion as the triumph of "[p]ower, not reason,"⁸² a six-member majority of the Court overruled *Booth* and *Gathers* and affirmed Payne's death sentences. Writing for the majority, Chief Justice Rehnquist first disputed the premise of *Booth* and *Gathers* that "evidence relating to a particular victim or to the harm that a capital defendant causes a victim's family" is immaterial.⁸³ Although "this particular kind of evidence—designed to portray for the sentencing authority the actual harm caused by a particular crime—is of recent origin," the Chief Justice reasoned, "this fact hardly renders it unconstitutional."⁸⁴ "Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities."⁸⁵

The second, more practical reason for admitting victim impact evidence was to rectify what the *Payne* majority perceived as an accumulated gross evidentiary imbalance in the capital decision-making process. Because *Lockett* and *Woodson* granted capital defendants the unfettered right to proffer relevant mitigating evidence, in the name of showing their "uniqueness" and lessened personal culpability, fairness compelled that evidence relating to the "uniqueness" of the life taken by the defendant also be considered in death decisions.⁸⁶ Citing Justice White's dissent in

81. See *Payne*, 791 S.W.2d at 19-21 (holding that the admission of the victim impact evidence and related argument by the prosecution was harmless error).

82. *Payne*, 501 U.S. at 844 (Marshall, J., dissenting). Justice Blackmun joined in Justice Marshall's dissent. See *id.* Justice Stevens dissented separately, with Justice Blackmun joining in his dissent as well. See *id.* at 856 (Stevens, J., dissenting). In the intervening years between *Booth* and *Payne*, Justice Anthony Kennedy replaced *Booth*'s author, Lewis Powell, and Justice David Souter took the seat of Justice William Brennan. With Justice White, who had grudgingly sided with the majority in *Gathers* on stare decisis grounds, the 6-3 *Payne* majority took form.

The uncertain precedential status of *Booth* and *Gathers* was in fact signaled in the Court's prior term, in 1990, when the Court agreed to reexamine the decisions with its grant of certiorari in *Ohio v. Huertas*, 498 U.S. 807 (1990). The Court, however, dismissed the writ as improvidently granted one week after oral arguments. See *Ohio v. Huertas*, 498 U.S. 336 (1991).

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

84. *Id.* at 821.

85. *Id.* at 825.

86. See *id.* at 826 ("[T]here is nothing unfair about allowing the jury to bear in mind that harm at the same time as it considers the mitigating evidence introduced by the defendant.").

Booth, Chief Justice Rehnquist lauded the leveling effect that such emotional evidence can have:

“[T]he state has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family.”⁸⁷

To the *Payne* majority, *Booth* “unfairly weighted the scales in a capital trial,”⁸⁸ insofar as precluding victim impact evidence “deprives the State of the full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder.”⁸⁹ Quoting the venerable Justice Benjamin Cardozo, Chief Justice Rehnquist summarized the majority’s position: “[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.”⁹⁰ Victim impact evidence, the Chief Justice added, would run afoul of the Constitution only when it is “so unduly prejudicial that it renders the trial fundamentally unfair” for Fourteenth Amendment due process purposes.⁹¹

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

88. *Id.* at 809. This same sentiment was echoed in the concurrences of Justices O'Connor and Souter. *See id.* at 832 (O'Connor, J., concurring) (“[Murder takes] away all that is special and unique about the person. The Constitution does not preclude a state from deciding to give some of that back.”); *id.* at 839 (Souter, J., concurring) (“[G]iven a defendant’s option to introduce relevant evidence in mitigation . . . sentencing without such evidence of victim impact may be seen as a significantly imbalanced process.”).

89. *Id.* at 825. For identical reasons, the majority reversed *Gathers*, thereby permitting prosecutors’ jury arguments centering on victim impact. *See id.* at 827.

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

91. *Id.* at 825. In addition to stemming from a basic shift in the Court’s membership and ideological orientation, as George Fletcher has observed, *Payne*’s jurisprudential about-face evidenced an emerging confidence with respect to the constitutional availability of the death penalty itself:

The role of the victim in capital sentencing was, in the past, subject to careful scrutiny and tight discipline because the Supreme Court was anxious about the constitutionality of the death penalty. Yet by 1991, with the appointment of a more staunchly conservative Court, capital punishment seemed relatively safe from constitutional attack and the Court undertook to re-examine precedents, such as those related to the role of the victim, designed to minimize the risk of “arbitrary” sentencing.

Taken together, *Brown*, *Parks*, and *Payne* evince a notable shift in emphasis in the Court's capital sentencing jurisprudence. By at once allowing jurors to be precluded from acting on any feelings of sympathy for defendants, negligible though such sentiments may be, and allowing highly emotional victim impact evidence oriented toward inducing empathic concern for the victim, the Court has "allow[ed] a jury's emotions to be driven toward a death determination."⁹² As discussed next, the effects of *Payne* in particular are being felt in capital trials.

B. *Payne's Influence*

Although *Payne* merely lifted the "per se" Eighth Amendment bar against victim impact evidence (VIE), and did not require its admission,⁹³ VIE has become a staple in the State's prosecutorial arsenal.⁹⁴ At least thirty-two of the thirty-eight death penalty states,⁹⁵ and the federal government,⁹⁶ now permit VIE in a broad diversity

idea that "death is different," insofar as victim impact evidence is now allowed in capital and non-capital trials alike. Support for this is found in the majority opinion in *Booth* itself, which was at pains to emphasize that the decision did not affect the use of victim impact evidence in non-capital trials, guided as it was by "the fact death is a 'punishment different from all other sanctions.'" *Booth v. Maryland*, 482 U.S. 496, 509 n.12 (1987) (citation omitted).

92. Susan Raeker-Jordan, *A Pro-Death, Self-Fulfilling Constitutional Construct: The Supreme Court's Evolving Standard of Decency for the Death Penalty*, 23 HASTINGS CONST. L.Q. 455, 514 (1996); see also Dubber, *Tender Heart*, *supra* note 17, at 129 ("*Payne* illustrates the awesome combined impact of an antisympathy instruction . . . and a barrage of victim impact evidence that opens the floodgates of compassion for victims and their famil[ies]."). Chief Justice Rehnquist appeared to recognize this outcome in *Brown*, observing that jurors' reliance on "emotional factors would be far more likely to turn the jury against a capital defendant than for him." *Brown*, 479 U.S. at 543.

93. See *Payne*, 501 U.S. 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."); *id.* at 831 (O'Connor, J., concurring) ("We do not hold today that victim impact evidence must be admitted, or even that it should be admitted.").

94. A recent capital proceeding in Florida underscores this dominant role. In a pre-trial motion, the defense successfully argued that, in the event of conviction, victim impact evidence should be excluded due to its inherently prejudicial nature. The Florida Court of Appeals reversed. Citing Florida's victims' rights constitutional amendment and victim impact evidence statute, the court condemned the "blanket" preclusion, and held that the State was legally entitled to proffer such evidence, subject to judicial scrutiny for undue prejudice in its particularity. See *State v. Johnston*, 743 So. 2d 22, 23-24 (Fla. Dist. Ct. App. 1999).

95. See Amy K. Phillips, Comment, *Thou Shall Not Kill Any Nice People: The Problem of Victim Impact Statements in Capital Sentencing*, 35 AM. CRIM. L. REV. 93, 99-100 (1998).

96. See 18 U.S.C. § 3593(a) (1994). Once again emphasizing the great allure of victim impact evidence, the U.S. Congress itself intervened in the death penalty proceeding against Oklahoma City bombing defendant Timothy McVeigh to ensure a prominent role for survivors. Judge Richard Matsch, unable to derive clear guidance from *Payne* as to where the line

of forms. Furthermore, consistent with *Payne*'s notable reticence as to the permissible bounds of VIE,⁹⁷ jurisdictions have imposed remarkably few procedural or substantive limits on its use.⁹⁸ Indeed, at times there is no requirement that defendants be notified in advance that VIE will be introduced,⁹⁹ and the vast majority place no limits on how the emotionally powerful evidence is presented to jurors, permitting videotapes, poems, diary entries, and a litany of other methods.¹⁰⁰ Nor are limits imposed on the number or scope of persons allowed to testify, permitting friends, neighbors, co-workers,¹⁰¹ and "community" representatives¹⁰² to provide gripping

between appropriate victim impact testimony and an appeal to passion begins, excluded from the proceedings survivors who would testify at the penalty phase. In the immediate wake of Judge Matsch's ruling, under intense pressure from victims' family members, Congress quickly undid the ruling. See 18 U.S.C. § 3510 (Supp. 1998); John Gibeaut, *The Last Word: Jury Is Still Out on Effects of Victim Impact Testimony*, A.B.A. J., Sept. 1997, at 42–43; see also Jeffrey Toobin, *Victim Power*, THE NEW YORKER, Mar. 24, 1997, at 40–43 (describing influence of Oklahoma City bombing victims in *McVeigh* trial and that of the victim lobby more generally in Congress).

97. See *Payne*, 501 U.S. at 825 (stating, without elaboration, that evidence cannot be so "unduly prejudicial that it renders the trial fundamentally unfair" for due process purposes).

98. See, e.g., *United States v. Glover*, 43 F. Supp. 2d 1217, 1235 (D. Kan. 1999) ("noting that '[a]lthough Congress expressly provided for the jury's consideration of victim impact evidence [in the Federal Death Penalty Act], it did not put any limits on what can be considered"). Any limits on the reach and nature of impact evidence are solely "a matter for the court's discretion and must be determined with consideration for the constitutional limitation that the jury must not be influenced by passion or prejudice." *United States v. McVeigh*, 944 F. Supp. 1478, 1491 (D. Colo. 1996).

99. See, e.g., *Bowling v. Commonwealth*, 942 S.W.2d 293, 302 (Ky. 1997); *State v. Humphries*, 479 S.E.2d 52, 55 (S.C. 1996).

100. See, e.g., *Noel v. State*, 960 S.W.2d 439, 446 (Ark. 1998) (permitting mother of the decedent to read a poem she wrote entitled "Wishes from the Heart," which in her words she "used as a tool to suppress the hurt and pain because sometimes it is so overwhelming"); *Hicks v. State*, 940 S.W.2d 855, 857 (Ark. 1997) (permitting 14-minute videotape narrated by victim's brother spanning victim's life, containing 160 photographs); *State v. Roberts*, 948 S.W.2d 577, 604 (Mo. 1997) (en banc) (permitting items "hand-crafted" by the victim), *cert. denied*, 522 U.S. 1056 (1998); *State v. Basile*, 942 S.W.2d 342, 358 (Mo. 1997) (en banc) (permitting letters, stories, diary entries, and poem), *cert. denied*, 522 U.S. 833 (1998).

101. See, e.g., *Nooner v. State*, 907 S.W.2d 677, 688–89 (Ark. 1995) (noting that those qualified to testify "may range from the victim's family to those close to that person who were profoundly impacted by his death"); *Mosley v. State*, 983 S.W.2d 249, 262 (Tex. Crim. App. 1998) (en banc) (stating that "[m]ore distantly related family members, close friends, or co-workers may, in a given case, provide legitimate testimony"); *Beck v. Commonwealth*, 484 S.E.2d 898, 904–06 (Va. 1997) (noting that an impact witness must only not be "so far removed from the victims as to have nothing of value to impart to the court about the impact of these crimes").

102. See, e.g., FLA. STAT. ch. 921.141(7) (1998) (noting that impact evidence is "designed to demonstrate the victim's uniqueness . . . and the resultant loss to the community's members by the victim's death"); 42 PA. CONS. STAT. ANN. § 9721(b) (West 1998) (permitting evidence of the "gravity of the offense as it relates to the impact on the life of the victim and on the community"); *McClain v. State*, 477 S.E.2d 814, 824 (Ga. 1996) (allowing evidence of "community" impact based on response to radio call-in show). This expansive approach is in sharp contrast to the facts of *Payne* itself, which involved the

testimony on how the death has affected their lives. For instance, in the federal trials of Timothy McVeigh and Terry Nichols, convicted of the bombing of the Murrah Federal Building in Oklahoma City in which 168 people died, jurors heard from thirty-eight impact witnesses in *McVeigh*¹⁰³ and fifty-five in *Nichols*.¹⁰⁴ Included in this group were numerous professional rescue workers who extricated innocents from the mass of rubble.¹⁰⁵ On appeal, the Tenth Circuit in *McVeigh* commended the government for its "self-restraint" in the number of impact witnesses called, and offered that "[t]he sheer number of actual victims and the horrific things done to them necessarily allows for the introduction of a greater amount of victim impact testimony in order for the government to show the 'harm' caused by the crime."¹⁰⁶

Even more troubling, the parameters of "impact" betray any semblance of realistic limit. With only a few exceptions,¹⁰⁷ jurisdictions fail to provide any guidance whatsoever on the permissible breadth or substantive content of VIE. In *McVeigh*, for instance, the Tenth Circuit upheld the torrent of impact evidence submitted, which included "last contacts" with the victim evidence; "efforts to discover the fate of the victims" evidence; and "pure love and innocence of children" evidence.¹⁰⁸ The latter

emotional and psychological impact on a three-year-old boy as briefly testified to by his grandmother. See *Payne*, 501 U.S. at 814-16.

103. United States v. *McVeigh*, 153 F.3d 1166, 1216 (10th Cir. 1998), cert. denied, 119 S. Ct. 1148 (1999).

104. See Jo Thomas, *Emotion Fills Courtroom as Judge Calls for None*, N.Y. TIMES, Jan. 1, 1998, at A10.

105. See Scott Robinson, Editorial, *Stacking the Deck: Heart-Wrenching "Victim Impact" Statements Make It Virtually Impossible for Jurors to Set Emotions Aside*, ROCKY MOUNTAIN NEWS, June 8, 1997, at 1B (discussing testimony from rescue and medical workers in *McVeigh*); Thomas, *supra* note 104, at A10 (discussing same regarding *Nichols*).

106. *McVeigh*, 153 F.3d at 1221.

107. Several jurisdictions do limit impact evidence, but the criteria themselves are notable for their indefinite quality. See, e.g., MISS. CODE ANN. § 99-19-155(b) (1994) (limiting to "the financial, emotional, and physical effects of the crime on the victim and the victim's family"); PA. STAT. ANN. tit. 71, § 180-9.3(5) (West 1997) (limiting to the "physical or psychological harm or financial loss suffered by the victim"); *Cargle v. State*, 909 P.2d 806, 828 (Okla. Crim. App. 1995) (limiting to "those unique characteristics which define the individual who has died, the contemporaneous and prospective circumstances surrounding that death, and how those circumstances have financially, emotionally, psychologically, and physically impacted on members of the victim's immediate family"); *State v. Nesbit*, 978 S.W.2d 872, 891 (Tenn. 1998) (limiting to the "contemporaneous and prospective circumstances surrounding the individual's death, and how those circumstances financially, emotionally, psychologically or physically impacted upon members of the victim's immediate family"). Compare 18 U.S.C. § 3593(a) (1994) (permitting evidence revealing "the extent and scope of the injury and loss suffered by the victim and the victim's family, and any other relevant information").

108. *McVeigh*, 153 F.3d at 1219-20.

category contained such heartrending stories as that of a little girl who had been outside the Murrah Building when the bomb exploded, and later approached a police officer and his dog, hugged the dog, and asked, "Mr. Police Dog, will you find my friends?"¹⁰⁹ Stretching "impact" further still, the Eleventh Circuit recently approved of testimony from three prison guards relating to the effects the killing of a fellow guard had on inmate behavior and daily prison life.¹¹⁰ Other courts have even permitted evidence of emotional harm stemming from unrelated killings allegedly committed by the defendant, a practice that hardly evidences the "uniqueness" of the defendant's instant victim.¹¹¹

"Impact" can often assume a decidedly more macabre form as well. In a recent South Carolina case, for instance, the State successfully introduced photos of a stillborn child dressed in clothes the victim-mother "intended for him to wear home from the hospital" in the name of "portray[ing] the individuality of the unborn

109. *Id.* at 1220.

110. *See* United States v. Battle, 173 F.3d 1343, 1348 (11th Cir. 1999). According to the court:

the guards' testimony told the jury that the harm caused . . . was not simply to take a life, but also to embolden other prisoners to increase the harassment of guards by prisoners, and to increase the stresses on the prison staff (making them feel less safe) in the peculiar environment of a prison

Id. at 1348 n.6; *see also* Hyde v. State, No. CR-95-2036, 1998 WL 32605, at *10 (Ala. Crim. App. Jan. 30, 1998) (allowing impact evidence regarding the effect the killing had on the "law enforcement community"); Lambert v. State, 643 N.E.2d 349, 354–56 (Ind. 1994) (allowing testimony from state trooper that, after a fellow trooper was killed, their chief no longer functioned well and certain troopers began to deal with the public in improper ways).

111. *See* People v. Dunlap, 975 P.2d 723, 745–46 (Colo. 1999) (en banc) (finding harmless error); People v. Hope, 702 N.E.2d 1282, 1288–89 (Ill. 1998) (same); Sherman v. State, 965 P.2d 903, 914 (Nev. 1998) (same); Gilbert v. State, 951 P.2d 98, 117 (Okla. Crim. App. 1997) (same). The North Carolina Supreme Court has squarely approved of impact evidence relating to the emotional suffering of the children of another woman killed by the defendant years before on the reasoning that such evidence "readily applie[d] to the motherless child resulting" from the instant murders. *See* State v. Robinson, 451 S.E.2d 196, 205 (N.C. 1994); *cf.* Romano v. Oklahoma, 512 U.S. 1, 11–14 (1994) (denying Eighth Amendment and due process challenges to death sentence based in part on jurors' consideration of prior death judgment imposed on defendant).

The courts have also been receptive to VIE relating to contemporaneous non-capital crimes committed by capital defendants. The Supreme Court of Ohio, for instance, has held that "*Payne* clearly allows such testimony when the crimes are so interrelated that victims are affected by more than just the capital death." *State v. White*, 709 N.E.2d 140, 155 (Ohio 1999). This liberality is consistent with the more general judicial tendency to admit "other crimes" evidence in capital sentencings, even those of an unadjudicated nature. *See* Steven Paul Smith, Note, *Unreliable and Prejudicial: The Use of Extraneous Unadjudicated Offenses in the Penalty Phases of Capital Trials*, 93 COLUM. L. REV. 1249 (1993) (surveying the law of 16 states that permit admission of unadjudicated offenses at sentencing).

child. Since the child was murdered before he was born, there was no other way to vividly present his uniqueness to the jury."¹¹² The North Carolina Supreme Court has invoked *Payne* to uphold the admission of photos of the victims' decomposed bodies because they "were unique individuals whose death represents a unique loss to their families."¹¹³ Similarly, in the penalty phase of *Nichols*, professional rescue workers testified at length of nightmares resulting from having seen "children who had been torn apart and watched blood and remains run down the walls of the ruined building."¹¹⁴

The foregoing examples may be said to constitute expected consequences of killings. However, VIE also commonly relates to far less foreseeable outcomes, raising the obvious risk, identified by Justice Powell in *Booth*, that jurors will "impos[e] the death sentence because of factors about which the defendant was unaware, and that were irrelevant to the decision to kill."¹¹⁵ The Texas Court of Criminal Appeals, for instance, has deemed "tenuous" but admissible the fact that the victim's sister experienced a divorce in the wake of the killing,¹¹⁶ while the Missouri Supreme Court has permitted testimony that the victim's family had previously endured the loss of another child as a result of cerebral palsy.¹¹⁷ Along these same lines, courts regularly condone admission of VIE going to untoward medical events experienced by loved ones subsequent to the crime.¹¹⁸

"Victim characteristic" evidence, which the *Payne* majority stated is "designed to show . . . each victim's uniqueness as an individual hu-

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

113. *State v. Conaway*, 453 S.E.2d 824, 849 (N.C. 1995). Similarly, the Illinois Supreme Court has upheld admission of emotional testimony to the effect that the child-victims were buried in the same caskets as their mothers. *See People v. Kitchen*, 636 N.E.2d 433, 447-48 (Ill. 1994).

114. *Thomas*, *supra* note 104, at A10.

115. *Maryland v. Booth*, 482 U.S. 496, 505 (1987); *see also* Alan C. Michaels, *Constitutional Innocence*, 112 HARV. L. REV. 828, 893 n.339 (1999) (stating that under such circumstances in effect the jury "choose[s] between life and death . . . on the basis of 'strict liability' with regard to the impact of the homicide").

At present, Tennessee appears to be the sole jurisdiction to attach special probative weight to the fact that the defendant had prior "specific knowledge about the victim's [immediate] family." *State v. Nesbit*, 978 S.W.2d 872, 892 (Tenn. 1998). Tennessee courts use such advance knowledge, to the extent it can be surmised, to assess whether the probative value of the evidence is substantially outweighed by its admittedly prejudicial effect. *See id.* at 891. In the words of the Tennessee Supreme Court, "probative value is particularly great, where the proof shows . . . that a defendant had specific knowledge about the victim's family when the crime was committed." *Id.* at 893.

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

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

118. *See, e.g., Young v. State*, 992 P.2d 332, 342 (Okla. Crim. App. 1998) (permitting evidence of fatal heart attack suffered by victim's aunt upon receiving news of the killing); *Griffith v. State*, 983 S.W.2d 282, 289 (Tex. Crim. App. 1998) (en banc) (permitting evidence relating that father of victim "quit fighting" cancer after victim's killing).

man being,"¹¹⁹ also regularly comes before capital juries in highly prejudicial form. For instance, testimony that the decedent was a "martyr" (while defendant was "evil");¹²⁰ a nationally recognized piano player;¹²¹ a "smart person" with a "higher I.Q." than others in her family;¹²² a "minister who read and carried a Bible everyday";¹²³ a "good man";¹²⁴ and a person without a "hateful bone in her body,"¹²⁵ has all been held admissible. This occurs despite *Payne's* repudiation of "comparative judgments" as between the decedent and the condemned murderer,¹²⁶ and the mounting body of empirical evidence

119. *Payne v. Tennessee*, 501 U.S. 808, 823 (1991).

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

121. See *Whittlesey v. State*, 655 A.2d 223, 250 (Md. 1994).

122. *State v. Frost*, 727 So. 2d 417, 431 (La. 1998).

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

The unfettered admission of evidence relating to victims' religiosity, compared against the very irreligious behavior of convicted murderers, raises significant risk of undue prejudice. This risk is especially present among religiously devout jurors. See Brian C. Duffey, Note, *Barring Foul Blows: An Argument for a Per Se Reversible-Error Rule for Prosecutors' Use of Religious Arguments in the Sentencing Phase of Capital Cases*, 50 VAND. L. REV. 1335, 1356–60 (1997) (discussing prejudicial effects of religion-based arguments by the state in capital trials).

124. *Moore v. State*, 701 So. 2d 545, 550 (Fla. 1997); *Le v. State*, 947 P.2d 535, 551 (Okla. Crim. App. 1997); see also *State v. Simpson*, 479 S.E.2d 57, 60 (S.C. 1997) (admitting testimony extolling positive qualities of the victim, who was a husband and father); *State v. Hurley*, 876 S.W.2d 57, 67 (Tenn. 1993) (admitting testimony of mother of five children that her father was a "retired Sergeant Major who had served 26 years in special forces as a Green Beret").

125. *State v. Gray*, 887 S.W.2d 369, 389 (Mo. 1994) (en banc).

126. See *Payne v. Tennessee*, 501 U.S. 808, 823 (1991) (stating that "[a]s a general matter . . . victim impact evidence is not offered to encourage comparative judgments of this kind. . . . It is designed to show instead *each* victim's uniqueness as an individual human being.").

That victim "uniqueness" evidence is necessary, as a fundamental matter, was forcefully challenged by Justice Stevens who, in his *Payne* dissent, observed that "[t]he fact that each of us is unique is a proposition so obvious that it surely requires no evidentiary support." *Id.* at 866 (Stevens, J., dissenting); see also *Davenport v. State*, 689 N.E.2d 1226, 1232–33 (Ind. 1997) ("The murder of a person carries with it an expected impact upon the family members and other acquaintances of the victim. This impact is accounted for in the presumptive sentence for murder."); *Cargle v. State*, 909 P.2d 806, 830 (Okla. Crim. App. 1995) ("The realities are, virtually everyone who is murdered is going to be missed by someone. . . . The more a jury is exposed to the emotional aspects [the less likely due process will be satisfied]."). In the end, a cynic might observe, like Blackstone, that "the execution of a needy

indicating that victim status plays a significant, prejudicial role in death decisions.¹²⁷

Another concern stems from the proliferation of witness "opinion" testimony. Although *Payne* seemingly left intact the *Booth* proscription against survivors' (1) personal opinions of the defendant and the crime, and (2) opinions as to proper sentence,¹²⁸ the case law is rife with deviations. The Oklahoma Court of Criminal Appeals, for instance, has upheld a husband's testimony that a "cur" or a "stray dog" did not deserve the death suffered by his wife, and a daughter's reference to defendant as a "piece of trash."¹²⁹ The Mississippi Supreme Court has squarely concluded that the purpose of VIE is to "describe the victim's personal characteristics, the emotional effect of the crimes on the victim's family, and the family's opinions of the crimes and the defendant."¹³⁰ In Louisiana, the State Supreme Court (in a novel twist on the "anti-sympathy" instruction issue) has allowed

decrepit assassin is a poor satisfaction for the murder of a nobleman in the bloom of his youth and full enjoyment of his friends, his honours, and his fortune." H.L.A. Hart, *Punishment and the Elimination of Responsibility*, PUNISHMENT AND RESPONSIBILITY 161 (1968).

127. See David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1671 (1998) (finding that defendants whose victims possess more than a "minimal" socio-economic status "face, on average, a distinctly higher risk of receiving a death sentence than similarly situated defendants with victims of low" status); James C. Beck & Robert Shumsky, *A Comparison of Retained and Appointed Counsel in Cases of Capital Murder*, 21 LAW & HUM. BEHAV. 525, 536 (1997) (analyzing Baldus data and also finding increased likelihood of death imposition "when victim's social status was higher [rather] than lower").

Not surprisingly, the data also support the corollary phenomenon: that victims with lower socio-economic status are "devalued." See Baldus, *supra*, at 1715 (finding that a victim's low status "has the substantial and statistically significant effect of reducing a defendant's likelihood of receiving a death sentence"); Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1557 (1998) (finding that over 17% of capital jurors polled in South Carolina would treat as a mitigating factor evidence that the victim "was a known troublemaker," and almost 11% would treat as mitigating the fact that the victim "had a criminal record").

The influence of victim traits in sentencing decisions is evident in the context of non-capital crimes as well. See LESLIE SEBBA, *THIRD PARTIES: VICTIMS AND THE CRIMINAL JUSTICE SYSTEM* 42 (1996) (citing studies); Donald J. Hall, *Victims' Voices in Criminal Court: The Need for Restraint*, 28 AM. CRIM. L. REV. 233, 246 (1991) (same).

128. See *Payne*, 501 U.S. at 830 n.2; *id.* at 833 (O'Connor, J., concurring); *id.* at 835 n.1 (Souter, J., concurring).

129. See *Willingham v. State*, 947 P.2d 1074, 1085-86 (Okla. Crim. App. 1997), *cert. denied sub nom. Thanh Le v. Oklahoma*, 524 U.S. 930 (1998), *overruled by Shrum v. State*, 991 P.2d 1032 (Okla. Crim. App. 1999). For an incisive discussion of the various purposes and effects of such derogatory terms in relation to defendants, see Martha Grace Duncan, *In Slime and Darkness: The Metaphor of Filth in Criminal Justice*, 68 TUL. L. REV. 725 (1994).

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

prosecutors to expressly ask whether survivors “have any sympathy” for the killer of their loved one.¹³¹

A similar laxness pervades the ostensible limit placed on survivors’ sentence recommendations. Oklahoma, for instance, expressly allows such testimony, as long as it is “limited to a simple statement of the recommended sentence without amplification.”¹³² The Nevada Supreme Court recently condoned a wife’s plea that the jury “show no mercy,” unanimously concluding that this was not an “opinion” as to proper sentence but rather only a request that the jury return the most severe verdict it felt appropriate.¹³³

Not surprisingly, VIE has a palpable emotional effect on jurors¹³⁴ and even supposedly impartial trial judges. For instance, in *McVeigh*, the famously stoic Judge Richard Matsch openly wept over the course of the two days of gripping VIE presented.¹³⁵ At the state level, the Supreme Court of Delaware approved of a trial judge’s summary that the victim was a “generous, humble, and gracious man who will be missed,”¹³⁶ while the Illinois Supreme Court was not troubled by a trial judge’s comment that he had “never heard victim impact statements that were so moving or so eloquent.”¹³⁷

At the same time, defense efforts to rebut such positive testimony with “bad” victim evidence have been uniformly rebuffed by the courts,¹³⁸ despite the existence of the express right in many

131. See *State v. Wessinger*, 736 So. 2d 162, 183 (La. 1999); *State v. Taylor*, 669 So. 2d 364, 370–71 (La. 1996).

132. *Conover v. State*, 933 P.2d 904, 921 (Okla. Crim. App. 1997). According to the *Conover* court, *Payne* “implicitly” overruled *Booth*’s limit on sentence recommendations. See *id.* at 920.

133. See *Witter v. State*, 921 P.2d 886, 896 (Nev. 1996).

134. See, e.g., *State v. Deck*, 994 S.W.2d 527, 538 (Mo. 1999) (en banc) (denying claim of undue prejudice despite the fact that the VIE admitted reduced three jurors, and the victim’s family, to tears in the courtroom).

135. See Gibeaut, *supra* note 96, at 43.

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

137. *People v. Ratzke*, 625 N.E.2d 1004, 1017 (Ill. App. Ct. 1993); see also *State v. Baston*, No. L-95-087, 1997 WL 570896, at *3, (Ohio Ct. App. Sept. 12, 1997) (condemning lower court’s remark that, while denying undue influence of improper impact evidence, “it is a matter of special poignancy that . . . [defendant’s] cold act of gratuitous violence ended the life of a man of uncommon accomplishment, courage, enterprise, and decency. It is important for reasons having nothing to do with legal analysis to note the panel’s recognition of that.”), *aff’d*, 709 N.E.2d 128 (Ohio 1999).

138. See generally *United States v. Beckford*, 962 F. Supp. 804, 822 (E.D. Va. 1997) (“*Payne* cannot be read to sanction a defense argument that a defendant is undeserving of the death penalty simply because his victim was a drug dealer.”); *State v. Southerland*, 447 S.E.2d 862, 867 (S.C. 1994) (affirming preclusion of evidence relating to victim’s involvement in drugs and prostitution); *State v. Hurley*, 876 S.W.2d 57, 67 (Tenn. 1993) (upholding denial of defendant’s request to introduce evidence regarding decedent’s solicitation of prostitute); *Goff v. State*, 931 S.W.2d 537, 556 (Tex. Ct. App. 1996) (upholding

states to cross-examine impact witnesses.¹³⁹ Moreover, as the *Payne* majority itself noted, given the high risk of offending jurors, counsel are naturally loath to object to or challenge on cross-examination such testimony.¹⁴⁰ This reluctance is understandably heightened with respect to witnesses' characterizations of the emotional harms they have suffered, presuming such emotional sentiments are capable of measure and, therefore, challenge.¹⁴¹ As a result, as noted by one commentator, a defendant's right to cross-examine impact witnesses is "more apparent than real."¹⁴²

denial of defendant's request to introduce "reciprocal" character evidence, in this instance that the victim was a "fag").

139. Georgia, for example, permits defendants to "cross-examine and rebut the evidence presented of the victim's personal characteristics and the emotional impact of the crime" GA. CODE ANN. § 17-10-1.2(c) (1998). Georgia's courts, however, appear to be less than favorably disposed to recognizing the right. *See Barnes v. State*, 496 S.E.2d 674, 689 (Ga. 1998) (barring admission of victim's "bad character" at sentencing); *Hill v. State*, 427 S.E.2d 770, 777 (Ga. 1993) (stating that the "general rule is that the character of the victim is not relevant" at sentencing). Louisiana is another jurisdiction that expressly permits cross-examination. *See LA. CODE CRIM. PROC. ANN.* art. 905.2 (West 1997). However, capital defendants there cannot proffer victim "lack of worth" evidence unless the State first puts on evidence of the "victim's worth." *State v. Cooks*, 720 So. 2d 637, 645 n.6 (La. 1998).

It remains unclear whether capital defendants enjoy the constitutional right to cross-examine in sentencing proceedings. *Compare* *United States v. Hall*, 152 F.3d 381, 406 (5th Cir. 1998) (assuming without deciding that such a right exists), *with* *Bassette v. Thompson*, 915 F.2d 932, 939 (4th Cir. 1990) (concluding that no such right exists). The Supreme Court has never directly addressed the question but has on occasion addressed closely related matters, with mixed results. *See Simmons v. South Carolina*, 512 U.S. 154, 161-62 (1994) (holding that due process requires that defendants be permitted to deny or challenge evidentiary bases for capital sentence); *Williams v. New York*, 337 U.S. 241, 245-46 (1949) (rejecting the argument that due process precludes judicial use of unchallenged material contained in presentence report).

140. *See Payne v. Tennessee*, 501 U.S. 808, 823 (1991) (noting that for "tactical reasons it might not be prudent for the defense to rebut victim impact evidence makes the case no different than others in which a party is faced with this sort of dilemma"); *see also* Patrick M. Fahey, Note, *Payne v. Tennessee: An Eye for an Eye and Then Some*, 25 CONN. L. REV. 205, 255 (1992) ("At capital sentencing, the jury has already convicted the offender of murdering the victim. By attempting to impeach the testimony relating to the victim or impugn the victim's character, the offender will only incense the jury."). This reticence, however, is usually not reciprocated by the State, which typically predicates its penalty phase evidence on the "deathworthiness" of the defendant. *See, e.g., State v. Richardson*, 923 S.W.2d 301, 320 (Mo. 1996) (en banc) ("The defendant's [bad] character is highly relevant to penalty phase deliberations.").

The situation is exacerbated by judicial reluctance to permit the use of continuing objections, which can otherwise serve to lessen the volume and intrusiveness of defense objections. *See United States v. McVeigh*, 153 F.3d 1166, 1200 (10th Cir. 1998) (expressing disfavor of continuing objections when evidentiary ruling depends on alleged prejudice); *People v. Dunlop*, 975 P.2d 723, 745 (Colo. 1999) (same).

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

142. Randall Coyne, *Inflicting Payne on Oklahoma: The Use of Victim Impact Evidence During the Sentencing Phase of Capital Cases*, 45 OKLA. L. REV. 589, 599 (1992).

Finally, critical questions remain over both the fundamental purpose and role of VIE,¹⁴³ a situation at palpable odds with the Supreme Court's mandate that capital decisions be closely guided,¹⁴⁴ and that capital jurors be instructed in more than "bare terms" of how they are to evaluate the evidence.¹⁴⁵ The Supreme Court of Missouri, for example, has advised unhelpfully that it "is sufficient that . . . [impact evidence] is relevant to inform the jury as to the effect of the crime . . . even if no instruction is given regarding the evidence."¹⁴⁶ Moreover, while all jurisdictions agree that impact evidence is "relevant" and "shall" or "may" be "considered,"¹⁴⁷ and most reject that impact evidence should serve as an aggravating circumstance¹⁴⁸ or even a "superaggravator,"¹⁴⁹ in some jurisdictions impact evidence enjoys the status of a "non-statutory" aggravating circumstance.¹⁵⁰ In Florida, impact evidence "is neither aggravating nor mitigating evidence. Rather, it is *other* evidence, which is not required to be weighed against, or offset, by statutory factors."¹⁵¹ Other jurisdictions permit juror consideration of impact evidence in support of already enumerated statutory aggravators.¹⁵² To complicate matters further still, claims that juror

143. Consistent with the Court's hands-off approach to capital sentencing matters more generally, the *Payne* majority specified only that impact evidence is "relevant to the jury's decision as to whether or not the death penalty should be imposed." *Payne*, 501 U.S. at 827.

144. See *Gregg v. Georgia*, 428 U.S. 153, 189 (1976).

145. See *Walton v. Arizona*, 497 U.S. 639, 653 (1990).

146. *State v. Basile*, 942 S.W.2d 342, 359 (Mo. 1997) (en banc).

147. See, e.g., 42 PA. STAT. ANN. tit. 9711(c)(2) (West 1997) (stating that the jury "shall consider" impact evidence); *State v. Humphries*, 479 S.E.2d 52, 56 (S.C. 1996) (stating that "jury may consider" impact evidence).

148. See, e.g., *State v. Gulbrandson*, 906 P.2d 579, 599 (Ariz. 1995) (en banc); *Noel v. State*, 960 S.W.2d 439, 445–46 (Ark. 1998); *Windom v. State*, 656 So. 2d 432, 438 (Fla. 1995); *State v. Basile*, 942 S.W.2d 342, 359 (Mo. 1997); *State v. Byram*, 485 S.E.2d 360, 365 (S.C. 1997); *Weeks v. Commonwealth*, 450 S.E.2d 379, 389 (Va. 1994). The Tennessee Supreme Court, faced with a prosecutor's invocation of impact evidence to "remind the jury to consider the aggravating circumstances," instructed that this strategy was to be used "advisedly." *State v. Shepherd*, 902 S.W.2d 895, 908 (Tenn. 1995).

149. See *Douglas v. State*, 951 P.2d 651, 675 (Okla. Crim. App. 1997).

150. See 18 U.S.C. § 3593(a) (1994); *United States v. Thomas*, 43 M.J. 550, 599 (C.A.A.F. 1995); *Gattis v. State*, 637 A.2d 808, 820 (Del. 1994); *State v. Bucklew*, 973 S.W.2d 83, 96 (Mo. 1998) (en banc).

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

152. See, e.g., *Pitsonbarger v. Gramley*, 141 F.3d 728, 735 (7th Cir. 1998) (construing Illinois law); *People v. Stanley*, 897 P.2d 481, 523 (Cal. 1995); *Lambert v. State*, 675 N.E.2d 1060, 1064 (Ind. 1996); *State v. Fisher*, 445 S.E.2d 866, 874–75 (N.C. 1994).

consideration of VIE amounts to "double-counting" of closely related aggravators have been rebuffed,¹⁵³ as have challenges based on vagueness and overbreadth.¹⁵⁴

Nor has the impact of *Payne* been limited to the sentencing phase, the only place that it would have plausible relevance under *Payne*.¹⁵⁵ The case law contains numerous instances of VIE being introduced at the guilt phase, and the apparent receptivity of the appellate courts has not discouraged the practice.¹⁵⁶ For instance, in *Bennett v. Angelone*,¹⁵⁷ the Fourth Circuit approved of the following guilt-phase closing argument by a prosecutor:

Now, that's the Defendant sitting right over there. This is the victim Anne Keller Vaden, attractive, intelligent, successful, and dead. Who was she? Well, in 1975 she graduated from Clover Hill High School as class valedictorian. Two years later

153. See *United States v. Jones*, 119 S. Ct. 2090, 2106-07 (1999) (denying claim that non-statutory aggravators relating to victim impact evidence and victim "personal characteristics" were impermissibly duplicative); *United States v. Webster*, 162 F.3d 308, 324 (5th Cir. 1998) (denying claim that non-statutory victim impact evidence and statutory aggravator that murder was "especially heinous, cruel, and depraved" were impermissibly duplicative), *cert. denied*, 120 S. Ct. 83 (1999).

154. See *Jones*, 119 S. Ct. at 2107-10.

155. See *Payne v. Tennessee*, 501 U.S. 808, 811 (1991) ("In this case we reconsider our holdings in [*Booth* and *Gathers*], that the Eighth Amendment bars the admission of victim impact evidence during the penalty phase of a capital trial."); see also *State v. Keene*, 693 N.E.2d 246, 260 (Ohio 1998) (stating that impact evidence is inadmissible in the sentencing phase of capital proceeding); *Powell v. State*, 906 P.2d 765, 777 (Okla. Crim. App. 1995) (same); *Armstrong v. State*, 826 P.2d 1106, 1116 (Wyo. 1992) (same).

156. See *State v. Fautenberry*, 650 N.E.2d 878, 882 (Ohio 1995) (stating that "evidence which depicts both the circumstances surrounding the commission of the murder and also the impact of the murder on the victim's family may be admissible during both the guilt and sentencing phases"); see also, e.g., *George v. Angelone*, 100 F.3d 353, 359-60 (4th Cir. 1996) (upholding prosecutor's guilt-phase argument relating to impact of murder on victim's mother and father because it pertained to non-capital crimes charged); *People v. Frye*, 959 P.2d 183, 226 (Cal. 1998) (stating that "the challenged statements were made at the guilt phase of trial, a stage of the proceedings that does not implicate the same considerations regarding the deliberative role of the capital sentencing jury underlying the Court's decision in *Payne*"); *Burns v. State*, 609 So. 2d 600, 605-06 (Fla. 1992) (upholding impact testimony at guilt phase by boss of victim regarding victim's character and background as a police officer); *Crawford v. State*, 716 So. 2d 1028, 1046 (Miss. 1998) (holding that "evidence about the characteristics of the victim is relevant to the crime charged"); *Jenkins v. State*, 607 So. 2d 1171, 1183 (Miss. 1992) (upholding admission of guilt stage evidence that the victim was a mother, married for four years, and was reluctant to wear skirts because she was shy, concluding that such evidence was "proper and necessary to a development of the case and true characteristics of the victim").

The Fifth Circuit also recently signaled its uncertainty over limiting impact evidence to sentencing. See *Castillo v. Johnson*, 141 F.3d 218, 224 (5th Cir.) (stating that *Payne* "authorized states to allow victim impact evidence as a measure of harm to be admitted in the guilt phase of a capital case"), *cert. denied*, 524 U.S. 979 (1998).

157. 92 F.3d 1336 (4th Cir. 1996), *aff'd*, 522 U.S. 269 (1998).

she married; she married Joey Vaden. In 1979, she went to college, William and Mary, and had a 3.8 grade point average—an intelligent girl. She was also a guest minister at Tomahawk Church in Chesterfield—a guest minister.

I said she was successful. She had a type of real estate venture. She was voted outstanding businesswoman of the year. She finished second in the national oratory contest; that was Anne Vaden.¹⁵⁸

Characterizing the passage quoted above as “limited victim background evidence,” the Fourth Circuit concluded that it was “not clear” that the prosecutor’s remarks were improper.¹⁵⁹ The rationale for this judicial receptiveness was perhaps best expressed by the Supreme Court of Alabama which, when discounting the introduction of impact testimony at the guilt phase of one capital trial, commented that “[i]t is presumed that jurors do not leave their common sense at the court house door. It would elevate form over substance . . . [to reverse] simply because the jurors were told what they probably already had suspected—that the victim was not a ‘human island,’ but a unique individual.”¹⁶⁰

III. THE EMERGENCE OF EXECUTION IMPACT EVIDENCE

As the preceding section makes clear, the past several years have witnessed a dramatic shift in emphasis in capital jurisprudence. With *Parks*, *Brown*, and *Payne*, the Supreme Court has at once limited jurors’ capacity to respond in an empathic way to already-convicted capital defendants,¹⁶¹ and withdrawn all meaningful limits on emotion and pathos with respect to their victims.¹⁶² Augmenting this shift, death penalty jurisdictions themselves have

158. *Id.* at 1348.

159. *See id.*

160. *Ex parte Reiber*, 663 So. 2d 999, 1006 (Ala. 1995). Otherwise, if not expressly approved of by the reviewing courts, the admission of guilt-phase impact evidence is commonly regarded as non-prejudicial error. *See, e.g.,* *Pierson v. O’Leary*, 959 F.2d 1385, 1391 (7th Cir. 1992) (finding harmless error and noting that “[e]very criminal case involving a victim will create some sympathy”); *Odle v. Calderon*, 884 F. Supp. 1404, 1430 (N.D. Cal. 1995) (finding harmless error because evidence introduced “early in the guilt phase”); *Powell v. State*, 906 P.2d 765, 776–77 (Okla. Crim. App. 1995) (finding harmless error with extensive guilt-phase impact evidence including reference to victim as a “good kid” and defendants as “bad kids”).

161. *See supra* notes 63–69 and accompanying text.

162. *See supra* notes 93–160 and accompanying text.

greatly expanded the breadth of statutory aggravating factors capital jurors are to consider, lending further advantage to the State.¹⁶³ In this changed landscape, capital defendants have struggled to remain "individualized" before the jury. This section addresses one such strategy: the proffer of "execution impact" evidence (EIE), information presented to the sentencing authority from the friends and loved ones of defendants that goes to the manifold consequences attending the threatened execution.

At present, the admissibility of EIE is the subject of significant disagreement among appellate courts, with most courts concluding that defendants are not constitutionally entitled to have capital juries consider EIE. According to the narrow view adopted by these courts, EIE is not "relevant" to the defendant's character, record or the circumstances of the offense because it relates to a "third party," that is, someone other than the defendant.¹⁶⁴ Courts have also rebuffed defense arguments that admission of VIE requires reciprocal consideration of EIE, concluding that EIE is "not comparably relevant" to mitigate the specific harm of the murder or defendant's blameworthiness in relation to it.¹⁶⁵ Otherwise, these courts summarily uphold preclusion of EIE on the rationale that it is tantamount to an express recommendation of sentence,¹⁶⁶ a form

163. As recently noted by one commentator, the proliferation of statutory and non-statutory aggravators, including victim impact evidence, and the increasingly lessened emphasis on mitigators, marks an evolution toward a "mandatory death penalty." See Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme*, 6 WM. & MARY BILL RTS. J. 345, 348 (1998). The author adds: "[s]tates that permit the use of a broad range of non-statutory aggravating circumstances and victim impact evidence . . . thus increase the number of cases in which the sentencer is likely to impose the death penalty." *Id.* at 396. For an incisive discussion of the powerful legal-political interplay driving the proliferation of newly identified aggravators, see Jonathan Simon & Christina Spaulding, *Tokens of Our Esteem: Aggravating Factors in the Era of Deregulated Death Penalties*, in *THE KILLING STATE: CAPITAL PUNISHMENT IN LAW, POLITICS AND CULTURE* 81-113 (Austin Sarat ed., 1999). According to the authors, "new aggravating circumstances have been added to capital statutes, like Christmas tree ornaments. These new factors reveal a process self-consciously freed from the dictates of substantive Supreme Court review." *Id.* at 82.

164. See, e.g., *People v. Armstrong*, 700 N.E.2d 960, 971 (Ill. 1998); *Simon v. State*, 688 So. 2d 791, 811 (Miss. 1997); *Turner v. State*, 573 So. 2d 657, 667 (Miss. 1990); *State v. Loftin*, 680 A.2d 677, 712-13 (N.J. 1996); *State v. DiFrisco*, 645 A.2d 734, 770 (N.J. 1994). In *Turner*, defendant unsuccessfully sought to call (1) members of his family to testify to execution impact and (2) the family members of another, unrelated already-executed capital defendant to testify about the impact the execution had on their lives. See *Turner*, 573 So. 2d at 667.

165. See, e.g., *Burns v. State*, 699 So. 2d 646, 654 (Fla. 1997) ("We do not find merit in this kind of quid pro quo assertion. . . . [EIE] is not similarly relevant or authorized."), *cert. denied*, 118 S. Ct. 1063 (1998).

166. See, e.g., *Burns*, 699 So. 2d at 654; *State v. Stenson*, 940 P.2d 1239, 1281-82 (Wash. 1997), *cert. denied*, 118 S. Ct. 1193 (1998); cf. *State v. Watson*, Nos. CRA. IN 91-09-0018 to

of testimony that theoretically remains prohibited under *Payne*,¹⁶⁷ or, if admissible, deem its preclusion harmless because the trial court permitted defendant to introduce other positive family-oriented evidence thereby supposedly rendering EIE “cumulative.”¹⁶⁸

However, numerous courts have acknowledged without qualm the admission of EIE,¹⁶⁹ tacitly signaled its admissibility,¹⁷⁰ or specifically given mitigating weight to it.¹⁷¹ More importantly, the Supreme Courts of California and Oregon have both expressly approved of its consideration by capital juries. In the Oregon case, *State v. Stevens*,¹⁷² the defendant was convicted of three counts of aggravated murder, and defense counsel sought to cross-examine defendant’s wife as to the effects of the defendant’s possible execution on the couple’s nine-year-old daughter.¹⁷³ Defense counsel made separate offers of proof to establish the relevance of

CRA. IN 91-09-0025, 1993 WL 603341, at *5 & n.4 (Del. Super. Ct. Mar. 19, 1993) (giving mitigating weight to EIE but disregarding “opinion” evidence).

167. See *Payne*, 501 U.S. at 830 n.2 (O’Connor, J., concurring); *id.* at 835 n.1 (Souter, J., concurring).

168. See, e.g., *People v. Bacigalupo*, 820 P.2d 559, 581 (Cal. 1991) (en banc); *Loflin*, 680 A.2d at 713; *Stenson*, 940 P.2d at 1282.

169. See *State v. Noel*, 960 S.W.2d 439, 446 (Ark. 1998) (noting that defendant’s mother testified and identified three childhood photos of defendant “which were offered into evidence and which were clearly an effort to emphasize the loss that would be associated with his execution”); *State v. Simmons*, 944 S.W.2d 165, 187 (Mo. 1997) (en banc) (noting use of mitigating evidence designed to show that defendant’s “death at the hands of the state would injure his family,” and closing argument to this effect); *State v. Rhines*, 548 N.W.2d 415, 446–47 (S.D. 1996) (noting that VIE was proper, on a reciprocal basis, given that defendant’s sisters had previously testified of “their love for him, and the negative effect his death would have on their family”); *State v. Benn*, 845 P.2d 289, 316 (Wash. 1993) (en banc) (noting evidence relating to “the affection of family members, and the loss to his loved ones if he were sentenced to death”).

170. See *State v. Wessinger*, 736 So. 2d 162, 192 (La. 1999) (rejecting claim that instruction failed to afford jurors “room” to consider the impact that the execution would have on the defendant’s family and friends).

171. See *Richmond v. Ricketts*, 640 F. Supp. 767, 792 (D. Ariz. 1986) (noting trial court’s consideration of testimony relating to “the impact of the execution” on family members), *rev’d on other grounds sub nom.* *Richmond v. Lewis*, 506 U.S. 40, 52 (1992); *State v. Mann*, 934 P.2d 784, 795 (Ariz. 1997) (en banc) (noting mitigating evidence of defendant’s “relationship with his children and the effect on them if he were executed”); *Lawrie v. State*, 643 A.2d 1336, 1339 (Del. 1993) (noting that defendant’s “execution would have ‘a substantially adverse impact’ on his seven-year-old son . . . and on [defendant’s] mother”); *State v. Manley*, Nos. 9511007022, 9511006992, 1997 WL 27094, at *13 (Del. Super. Ct. Jan. 10, 1997) (noting that the “death sentence would have a devastating impact upon [defendant’s] family”); *Watson*, 1993 WL 603341, at *5 (noting that “the defendant is a member of the victim’s family and his execution would further traumatize that family”); *Barnes v. State*, 496 S.E.2d 674, 687–89 (Ga. 1998) (reversing death sentence because inter alia the trial court refused to admit photos of defendant’s daughter and nephew intended to “show the jury that a death sentence would impact the children in his life”).

172. 879 P.2d 162 (Or. 1994).

173. See *id.* at 163. On direct examination by the State, defendant’s wife testified that defendant had abused both her and her daughter. See *id.*

the evidence, eliciting that (1) the execution would be “destructive to her” in an “emotional” sense in that she “would feel responsible somehow”; (2) it “would not be good for her . . . I mean, she knows he’s going to be in there the rest of his life, and that’s you know, that’s a better story than they killed him”; (3) “it’s just not going to be good for her at all . . . [s]he’ll never hug him”; and (4) “[h]e is her father.”¹⁷⁴ The trial court sustained the State’s objection, concluding that the testimony was “irrelevant” to the “defendant’s background and character.”¹⁷⁵

Citing the *Lockett* mandate for unfettered consideration of potentially mitigating circumstances, the Oregon Supreme Court reversed.¹⁷⁶ According to the *Stevens* court, just as “testimony by loved ones . . . says something about the character of the [murder] victim” under *Payne*, “testimony by the relatives of a capital defendant may be informative about certain aspects of the defendant’s character.”¹⁷⁷ Although not constituting “direct evidence about defendant’s character or background,” EIE can constitute valuable “circumstantial evidence”:

A rational juror could infer from the witness’s testimony that she believed that her daughter would be affected adversely by defendant’s execution because of something positive about his relationship with his daughter and because of something positive about defendant’s character or background. Put differently, a rational juror could infer that there are positive aspects about defendant’s relationship with his daughter that demonstrate that defendant has the capacity to be of emotional value to others. In that inference, a juror could find an aspect of defendant’s character or background that could justify a sentence less than death.¹⁷⁸

Even more recently, in *People v. Ochoa*,¹⁷⁹ the California Supreme Court expressly approved of EIE. The narrow question before the Court in *Ochoa* was whether a capital defendant’s due process rights were violated when the jury was instructed that it was permissible to have feelings of sympathy for the defendant with respect to the possibly impending execution, yet not his family. The *Ochoa* court squarely rejected the assertion that sympathy for defendant’s

174. *Id.* at 163–64.

175. *See id.* at 165.

176. *Id.* at 168.

177. *Id.* at 167.

178. *Id.* at 168.

179. 966 P.2d 442 (Cal. 1998).

family was an appropriate consideration, but in a highly nuanced analysis was at pains to articulate its approval of EIE.¹⁸⁰ According to the court, “[a] defendant may offer evidence that he or she is loved by family members or others, and that these individuals want him or her to live. [This] evidence is relevant because it constitutes indirect evidence of the defendant’s character.”¹⁸¹ The court proceeded to state that “sympathy for a defendant’s family is not a matter that a capital jury can consider in mitigation, but . . . family members may offer testimony of the impact of an execution on them if by so doing they illuminate some positive quality of the defendant’s background or character.”¹⁸²

In sum, the case law evinces a marked ambivalence relative to EIE.¹⁸³ This judicial reluctance is curious for several reasons. Most fundamentally, exclusion is inconsistent with the basic recognition that EIE, as noted by the Oregon and California Supreme Courts, powerfully conveys the quality, depth, and range of emotional attachments enjoyed by capital defendants, mitigating evidence universally deemed highly relevant to death decisions,¹⁸⁴ and otherwise embraced by the same courts that reject EIE.¹⁸⁵ The exclusion is also curious because EIE is largely indistinguishable

180. See *id.* at 505–06. The court noted that several years before it had “surmised that ‘defendant may have a constitutional right to present evidence of the effect of a death verdict on his family’” *Id.* at 505 (quoting *People v. Cooper*, 53 Cal. 3d 771, 844 (1991)).

In fact, the *Ochoa* court’s assessment is an understatement of the court’s previous ambivalence on the issue. See *People v. Jones*, 931 P.2d 960, 1003–04 (Cal.) (“Neither the [U.S. Supreme Court] nor this court yet has decided whether the jury may consider evidence of the impact a judgment of death would have upon the defendant’s family.”), *cert. denied*, 522 U.S. 955 (1997); *People v. Fierro*, 821 P.2d 1302, 1336 (Cal. 1991) (en banc) (“assuming without deciding that defendant has a right to introduce evidence of the effect of a death sentence on his family,” but stating that right not violated because EIE admitted); *People v. Bacigalupo*, 820 P.2d 559, 581 (Cal. 1991) (“Assuming that testimony of a death judgment’s impact on the defendant’s family is relevant mitigating evidence,” but finding that error would be cumulative because defendant’s mother “begged the jury to spare defendant’s life.”).

181. *Ochoa*, 966 P.2d at 505–06.

182. *Id.* at 506. The court added by way of example that “a jury may take into account testimony from the defendant’s mother that she loves her son if it believes that he must possess [some] redeeming qualities to have earned his mother’s love.” *Id.*

183. Like California until *Ochoa*, Washington case law highlights some confusion. In *State v. Benn*, 845 P.2d 289, 316 (Wash. 1993) (en banc), the Washington Supreme Court expressly considered, but found insufficient, mitigating evidence of “the affection of family members, and the loss to [defendant’s] loved ones if he were sentenced to death.” More recently, however, in *State v. Stenson*, 940 P.2d 1239, 1282 (Wash. 1997) (en banc), the court upheld a trial court’s exclusion of EIE, reasoning that it amounted to “nothing more than [family members’] opinions as to the sentence for the Defendant that they thought might be best for the Stenson children.”

184. See *supra* notes 172–82 and accompanying text.

185. See, e.g., *Burns v. State*, 699 So. 2d 646, 654 (Fla. 1997); *State v. Lofun*, 680 A.2d 677, 712–13 (N.J. 1996); *Stenson*, 940 P.2d at 1282.

from defense witnesses' "pleas for mercy" that are commonly permitted in capital sentencings,¹⁸⁶ and the common law right of allocution recognized in many jurisdictions whereby defendants themselves request that their lives be spared.¹⁸⁷ Reading the opinions of courts barring EIE, one is compelled to ask, as one dissenting New Jersey Supreme Court Justice did, "[w]hy is the Court afraid of giving the defendant the opportunity to establish whether or not such mitigating evidence exists?"¹⁸⁸ The obvious an-

186. See, e.g., *People v. Hines*, 938 P.2d 388, 406 (Cal. 1997) (noting that aunt "expressed her love for defendant, and asked the jury not to sentence him to death"); *Barnes v. State*, 496 S.E.2d 674, 688 (Ga. 1998) (finding it "reversible error to prevent a friend or relative of the defendant from taking the stand and pleading with the jury for mercy"); *Cofield v. State*, 274 S.E.2d 530, 542 (Ga. 1981) (stating that it is "unwilling to foreclose a defendant seeking to avoid the imposition of the death penalty from appealing to the mercy of the jury by having his parents testify briefly to their love for him. The state frequently uses members of the victim's family for no different purpose."); *State v. Simmons*, 944 S.W.2d 165, 189 (Mo. 1997) (en banc) (noting mother's plea for mercy as mitigation strategy); *State v. DiFrisco*, 645 A.2d 734, 772 (N.J. 1994) (noting trial court's decision to permit mother of defendant, but not his siblings, to plead for mercy and adding that it "may not agree" with preclusion of the siblings' testimony); *State v. Woodard*, 623 N.E.2d 75, 82 (Ohio 1993) (noting that defendant's mother and sister testified that "they love appellant, and both requested that [he] be spared the death penalty," but assigning testimony "little or no weight in mitigation"); *State v. Torrence*, 406 S.E.2d 315, 318 (S.C. 1991) (noting a "defendant may present witnesses who know and care for him and are willing on that basis to ask for mercy on his behalf . . ."); see also *Acker & Lanier*, *supra* note 39, at 308-09 (noting that "even the most unforgiving statutes inevitably are tempered by mercy in application. . . . Even if it were possible to exclude mercy from capital sentencing hearings statutorily, it would be imprudent to do so.").

187. See, e.g., *Homick v. State*, 825 P.2d 600, 604 (Nev. 1992) (holding that "capital defendants in the State of Nevada enjoy the common law right of allocution [before the jury]"); *DiFrisco*, 645 A.2d at 757 ("[T]he purpose of allocution is two-fold. First, it reflects our commonly-held belief that our civilization should afford every defendant an opportunity to ask for mercy. Second, it permits a defendant to impress a jury with his or her feelings of remorse."); *State v. Lord*, 822 P.2d 177, 216 (Wash. 1991) (upholding right of defendant to make unsworn plea for mercy to jury); see also J. Thomas Sullivan, *The Capital Defendant's Right to Make a Personal Plea for Mercy: Common Law Allocution and Constitutional Mitigation*, 15 N.M. L. REV. 41 (1985); Caren Myers, Note, *Encouraging Allocution at Capital Sentencing: A Proposal for Use Immunity*, 97 COLUM. L. REV. 787 (1997).

At least three federal circuits have held that violation of the federal statutory right to allocute, embodied in Federal Rule of Criminal Procedure 32, is not subject to "harmless error" review. See *United States v. Myers*, 150 F.3d 459, 464 (5th Cir. 1998); *United States v. Patterson*, 128 F.3d 1259, 1261 (8th Cir. 1997); *United States v. De Alba Pagan*, 33 F.3d 125, 129 (1st Cir. 1994).

Interestingly, in New Jersey, a study group assembled to re-examine death penalty procedures recently recommended that the unsworn allocution statements of capital defendants must be presented in the same highly structured, unemotional manner required of the State when presenting VIE. See GOVERNOR'S STUDY COMMISSION ON THE IMPLEMENTATION OF THE DEATH PENALTY-FINAL REPORT 25 (Aug. 6, 1998) (on file with the *University of Michigan Journal of Law Reform*) [hereinafter *Governor's Study*].

188. *State v. Marshall*, 690 A.2d 1, 121 (N.J. 1997) (Handler, J., dissenting) (condemning majority's rejection of EIE based on concern for "'clear risk of an adverse jury reaction'").

swer lies in the powerful emotional quality of EIE and the important information it conveys.

IV. WHY EIE SHOULD BE PERMITTED IN CAPITAL TRIALS

The present climate in which capital defendants are required to litigate makes judicial refusal to permit EIE not only paradoxical but also fundamentally unfair and contrary to the Eighth and Fourteenth Amendments. This section advances two fundamental arguments in support of the admission of EIE, one constitutional and the other based on concerns sounding in fundamental fairness.

A. Capital Defendants' Unfettered Constitutional Right to Proffer Relevant Mitigating Evidence

Since the death penalty was reinstituted in 1976 with the Court's decision in *Gregg v. Georgia*,¹⁸⁹ the predominant goal of capital sentencing has been to facilitate jurors' identification of who is "deathworthy," based on a "reasoned moral response" to the defendant's background, character, and crime.¹⁹⁰ Notwithstanding the Court's recent move toward broadening the individualization mandate,¹⁹¹ this goal has been not just the distinctive but also the redeeming constitutional characteristic of death penalty procedural law.¹⁹² The Constitution requires that "the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of

189. 428 U.S. 153 (1976).

190. See *supra* notes 21–41 and accompanying text.

191. See *supra* notes 6–14 and accompanying text.

192. See *Buchanan v. Angelone*, 522 U.S. 269, 275 (1998) (noting that the Court has "emphasized the need for a broad inquiry into all relevant mitigating evidence to allow an individualized determination"); *Walton v. Arizona*, 497 U.S. 639, 649 (1990) (noting that "the Court has refused to countenance state-imposed restrictions on what mitigating circumstances may be considered in deciding whether to impose the death penalty"); *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (characterizing "individualized sentencing determinations" as a "constitutionally indispensable part" of any capital sentencing scheme); *Jurek v. Texas*, 428 U.S. 262, 271 (1976) (stating that "in order to meet the requirement of the Eighth and Fourteenth Amendments, a capital-sentencing system must allow the sentencing authority to consider mitigating circumstances"); *Gregg*, 428 U.S. at 189–90 n.38 (stating that it is "constitutionally required that the sentencing authority have information sufficient to enable it to consider the character and individual circumstances of a defendant prior to imposition of a death sentence").

a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death.'"¹⁹³

Judicial preclusion of EIE, however, contravenes this constitutional mandate. It at once places beyond jurors' reach possibly mitigating evidence that they can put to use in their "reasoned moral response," in defiance of the precept that "a State may not cut off in an absolute manner the presentation of mitigating evidence. . . ." ¹⁹⁴ As accurately noted by both the Oregon and California Supreme Courts,¹⁹⁵ EIE is relevant because it can demonstrate in an emotionally compelling fashion the character traits and essential human worth of defendants. EIE shows, as the Oregon Supreme Court stated, "that defendant has the capacity to be of emotional value to others. In that inference, a juror could find an aspect of defendant's character or background that could justify a sentence of less than death."¹⁹⁶ EIE, as observed by New Jersey Supreme Court Justice Alan Handler, "evinces the strength of the bond between the victim and his or her family. The contribution and connection the victim or defendant makes to his or her family is thus indicative of his or her character and relevant in mitiga-

193. *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)); accord *Hitchcock v. Dugger*, 481 U.S. 393, 398-99 (1987); *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986).

This goal is advanced by the virtual suspension at the penalty phase of otherwise applicable restrictive evidentiary rules. See *Green v. Georgia*, 442 U.S. 95, 97 (1979) (per curiam) (noting state evidentiary rules cannot be used to limit admission of reliable mitigating evidence); *United States v. Frank*, 8 F. Supp. 2d 253, 269 (S.D.N.Y. 1998) ("That the federal rules of evidence are suspended during a capital sentencing hearing is particularly appropriate given the difference of death from all other penalties."); *Romine v. State*, 305 S.E.2d 93, 101 (Ga. 1983) ("This court . . . has consistently refused to place unnecessary restrictions on the evidence that can be offered in mitigation at the sentencing phase of a death penalty case."). See generally Robert A. Kelly, *Applicability of the Rules of Evidence to the Capital Sentencing Proceeding: Theoretical and Practical Support for Open Admissibility of Mitigating Information*, 60 UMKC L. REV. 411 (1992) (discussing prevalent relaxation of evidentiary rules in capital sentencing).

194. *Johnson v. Texas*, 509 U.S. 350, 361 (1993) (citation omitted). Ironically, the *Payne* Court echoed this same sentiment: "States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot challenge the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant." *Payne v. Tennessee*, 501 U.S. 808, 824 (1991) (quoting *McCleskey v. Kemp*, 481 U.S. 279, 305-06 (1987)); see also *Hitchcock v. Dugger*, 481 U.S. 393, 398-99 (1987) (stating that the inclusiveness mandate applies to statutory and non-statutory mitigating evidence alike).

195. See *supra* notes 172-82 and accompanying text.

196. *State v. Stevens*, 879 P.2d 162, 168 (Or. 1994). The *Stevens* Court also noted that to the extent EIE indicates to the sentencer that "defendant can be of emotional value to others," it also serves to highlight the continued human value he might have for others, even in a prison setting. See *id.* at 167-68 (citing *Skipper v. South Carolina*, 476 U.S. 1, 5-7 (1986) (holding that "defendant's disposition to make a well-behaved and peaceful adjustment to life in prison" is mitigating)).

tion.”¹⁹⁷ Dissenting from his colleagues’ preclusion of EIE, Justice Handler added:

The effect that defendant had on his children, as evidenced by the impact of his execution, is relevant because . . . it demonstrates defendant’s ability to have an emotional impact on others and positively to engage and influence another human life. It demonstrates defendant’s human worth at the moment that the jury is to decide life or death. . . . [EIE] is clearly as relevant to defendant’s character as the fact that he attended Bucks County Community College.¹⁹⁸

In short, it is constitutionally unacceptable to preclude EIE because it is “irrelevant”¹⁹⁹ or, paradoxically, “cumulative.”²⁰⁰ Capital defendants must be permitted to proffer evidence relating to, and ask that full mitigating consideration be accorded, the impact their possible execution would have.²⁰¹ This constitutional imperative is augmented by what we know about the pitfalls of capital jury decision making. A solid body of research now shows that capital juries frequently misunderstand or ignore instructions on mitigating evidence,²⁰² tend to regard the “default” sentence to be

197. *State v. Loftin*, 680 A.2d 677, 745 (N.J. 1996) (Handler, J., dissenting).

198. *Id.* at 746.

199. *See supra* note 164 and accompanying text.

200. *See supra* note 168 and accompanying text. The use of cumulativeness as a basis for exclusion in death penalty cases, in particular, has been expressly questioned by the Supreme Court. In *Skipper v. South Carolina*, 476 U.S. 1 (1986), the Court dismissed the State’s argument that proffered evidence of defendant’s good behavior in jail was “merely cumulative” because “it appear[ed] reasonably likely that the exclusion . . . may have affected the jury’s decision to impose the death sentence [and] [t]hus, under any standard, the exclusion of the evidence was sufficiently prejudicial to constitute reversible error.” *Id.* at 7–8. According to the *Skipper* Court, “[t]he exclusion by the state trial court of relevant mitigating evidence impeded the sentencing jury’s ability to carry out its task of considering all relevant facets of the character and record of the individual offender.” *Id.*

201. *Cf. Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (“[I]t is not enough simply to allow the defendant to present mitigating evidence to the sentencer.”).

202. *See* Shari S. Diamond & Judith N. Levi, *Improving Decisions on Death by Revising and Testing Jury Instructions*, 79 JUDICATURE 224, 231 (1996) (finding that jurors were 18% less likely to impose death if provided clarified instructions); Craig Haney, *Taking Capital Jurors Seriously*, 70 IND. L.J. 1223, 1229 (1995) (reporting that less than 50% of interview subjects “could provide even a partially correct definition for the term ‘mitigation’”); James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1161, 1165–67 (1995) (finding that roughly half of jurors interviewed mistakenly believed that they could rely on any aggravator and that mitigators could be relied upon only if jurors unanimously agreed beyond a reasonable doubt). *See generally* WELSH S. WHITE, *THE DEATH PENALTY IN THE EIGHTIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT* 69 (1987) (observing that jurors are “torn between rendering a moral decision and applying a legal formula they don’t quite understand”); Howarth, *supra* note 12, at 1376 (reporting that “juror after juror [stated] that the judge’s instructions required them to

death,²⁰³ and frequently have predetermined the appropriate punishment before the penalty phase even begins, manifesting a marked "death tilt."²⁰⁴ Combined with the systemic tendency to undervalue not just mitigating evidence, but non-statutory mitigating evidence (such as defendant "character" evidence) in particular,²⁰⁵ and the practical impossibility of assessing legal prejudice when such information is excluded,²⁰⁶ these realities make admission of EIE all the more constitutionally necessary.

impose death"); cf. *Deck v. Missouri*, 994 S.W. 527, 541-42 (Mo.) (upholding trial court's refusal to elucidate meaning of "mitigation," despite two requests by jury in death deliberation), cert. denied, 120 S. Ct. 508 (1999).

203. See William J. Bowers & Benjamin D. Steiner, *Death By Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEX. L. REV. 605, 630 (1999) (finding that lack of instructions on alternatives to death leads jurors to "vote for death by default"); id. at 716 (noting "a kind of hegemonic myth of early release that infects the capital sentencing decision with excessiveness"); Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 12 (1993) (finding that "indecision tends to be resolved in favor of death", and that "[t]he default sentence in a capital case is death").

204. See, e.g., William J. Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-trial Experience, and Premature Decision Making*, 83 CORNELL L. REV. 1476, 1488-90 (1998) (noting that 48% of 864 capital jurors prematurely reached a penalty decision at the guilt stage, with 28.6% selecting death); Luginbuhl & Howe, *supra* note 202, at 1177 (noting that "even before hearing the instructions, the jury is predisposed toward a verdict of death."); Marla Sandys, *Cross-Overs—Capital Jurors Who Change Their Minds About Punishment: A Litmus Test for Sentencing Guidelines*, 70 IND. L.J. 1183, 1220 (1995) (stating that "[t]he data reveal quite dramatically that . . . the majority of jurors reach their decisions about guilt and punishment at the same time").

205. See, e.g., *State v. Wacaser*, 794 S.W.2d 190, 195 (Mo. 1990) (upholding lower court's refusal to specify non-statutory mitigating circumstances in jury instructions); *State v. Bishop*, 472 S.E.2d 842, 859 (N.C. 1996) (upholding rejection of requested non-statutory mitigator that "defendant's family loves and cares about the defendant," reasoning that trial court had instructed on "catchall circumstance" that no juror found to exist). See generally Acker & Lanier, *supra* note 39, at 337-39 (noting that only four states specify in their "catchall" factors evidence identified in *Lockett* as mitigating: character, record, and offense characteristics).

Unfortunately, the Court's recent holdings in the area of mitigation do not promise to remedy this undervaluation. In *Walton*, for example, the Court upheld a statutory regime that limited juror consideration of mitigating evidence to that meeting a preponderance of the evidence standard, a burden borne by the defendant. See *Walton v. Arizona*, 497 U.S. 639, 649-51 (1990). In *Buchanan v. Angelone*, 522 U.S. 269 (1998), the Court held that capital jurors need not be instructed on the concept of mitigation, or particular statutorily specified mitigating factors.

206. See Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 606 (1994-95) (discussing inherent difficulties in "[e]stimating the effect that mitigating evidence would have had on a reasonable juror"). Because exclusion of potentially mitigating evidence undermines the reliability of sentencing determinations, it should be deemed an error of constitutional magnitude as to which the State must establish harmlessness beyond a reasonable doubt. See *Satterwhite v. Texas*, 486 U.S. 249, 258 (1988).

B. Considerations of Fundamental Fairness

Even assuming that the *Lockett* individualization mandate does not require admission of EIE for core constitutional reasons, basic fairness compels that EIE be admitted. The changes wrought by the Court's recent capital decisions, most especially *Payne*, *Parks*, and *Brown*, and the strategic realities and high-pitched emotional dynamic of modern capital trials, make juror consideration of EIE imperative.

1. *Redressing the Emotional Imbalance Created by Payne, Parks, and Brown*—To the *Payne* majority, the combination of *Lockett*'s mandate allowing virtually unfettered mitigating evidence in favor of defendants, coupled with *Booth*'s prohibition of VIE, "unfairly weighted the scales in a capital trial."²⁰⁷ The victim's "voice," otherwise silenced by the defendant's murderous act,²⁰⁸ was needed to "keep the balance true."²⁰⁹

While the existence of this need itself is questionable in both constitutional²¹⁰ and emotional²¹¹ terms, the reality is that *Payne* did more than merely "true" the perceived imbalance between offenders and their victims.²¹² This is because VIE is not, as the

207. *Payne v. Tennessee*, 501 U.S. 808, 822 (1991).

208. See *Payne*, 501 U.S. at 825 (quoting *Booth v. Maryland*, 482 U.S. 496, 517 (1987) (White, J., dissenting) (stating that VIE "remind[s] the sentencer that just as the murderer should be considered as an individual, so too the victim . . . represents a unique loss to society and in particular to his family'").

209. *Id.* at 827 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934) (Cardozo, J.)). "True" is defined as "[t]o position (something) so as to make it balanced, level, or square." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1919 (3d ed. 1992).

210. See sources cited *supra* note 11 (expressing doubt that the constitutional framework is designed to ensure that the State be able to present its case in a manner "level" to that of the accused).

211. Justice Stevens, in his *Payne* dissent, cast a jaundiced eye toward this purported emotional imbalance, making several observations. First, the defendant has just been convicted of murder (hardly an enviable strategic position); second, the State is always empowered to rebut any mitigating evidence offered by the defense; and third, the State is also always free to "designate any relevant conduct to be an aggravating factor" consistent with the law. See *Payne*, 501 U.S. at 860 (Stevens, J., dissenting).

Moreover, given the typically gruesome facts of the killing, images of the victim naturally are foremost in jurors' minds, further lessening the emotional need for VIE. See generally Markus Dirk Dubber, *The Right to Be Punished: Autonomy and Its Demise in Modern Penal Thought*, 16 LAW & HIST. REV. 113, 144 (1998) ("Today, the gap between judge and judged, between the subject and the object of criminal punishment, runs deep and wide. . . . Empathic identification is limited to victims and considered beyond the pale for violent offenders.").

212. *Payne*'s lament of imbalance has enduring origins in conservative thought. See Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1151 (1960) (surveying views of those condemning the existence of a "serious imbalance," including Judge Learned Hand in the 1920s). What is new about *Payne*,

Payne majority blithely reassured, "simply another form or method" of imparting information to the sentencer.²¹³ Rather, it is the singularly most compelling type of evidence available to the State: invariably positive, highly emotional testimony, coming directly from the hearts and mouths of those left behind,²¹⁴ and imbued with the imprimatur of the State.²¹⁵ The power of VIE derives from its capacity to at once encourage "empathetic concern for the victim and the victim's survivors,"²¹⁶ and distract jurors from their "empathy obligation," specifically, to "find the good in the offender's character."²¹⁷ On a deeper yet still more psychological level, as Susan Bandes has written, VIE evokes "a complex set of emotions directed toward the defendant, including hatred, fear, racial animus, vindictiveness, undifferentiated vengeance, and the desire to purge collective anger."²¹⁸ And the potent evidence comes when the emotional dynamic in a capital trial is at its most delicate, the actual death decision, with very little if any guidance provided

however, is its clear concern for the "voice" of the victim—as opposed to the generic interests of the State—in criminal prosecutions. Indeed, *Payne* represents a cornerstone of a potent national movement which, although originally dedicated to ensuring victim "participation" in criminal trials (mainly through the right to be present, informed, and heard at critical junctures), now aggressively seeks to advantage the prosecution. See Robert P. Mosteller, *Victims' Rights and the Constitution: Moving from Guaranteeing Participatory Rights to Benefiting the Prosecution*, 29 ST. MARY'S L.J. 1053 (1998).

Also it bears mention, as one commentator has noted, that the *Payne* majority's use of Justice Cardozo's "balance true" statement was not altogether consistent with its original meaning and intent. See Dubber, *Tender Heart*, *supra* note 17, at 156 n.181 (stating that "[a] closer look at the quoted passage reveals that Justice Cardozo did not even speak of a balance of defendants' rights and victims' rights").

213. See *Payne*, 501 U.S. at 825; *id.* at 827 ("There is no reason to treat [impact] evidence differently than other relevant evidence is treated.").

214. See *supra* notes 93–127 and accompanying text. Writing shortly after *Payne* was handed down, one commentator observed that

[t]he Court now apparently believes that the ability of a defendant to avoid death should be equated with the ability of the prosecutor to prove the value of the deceased's life. . . . The worth of the deceased will invariably be shown to be more valuable than the life of the killer. This inflammatory proof unfairly increases the likelihood of execution.

Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 423 (1992).

215. See Paul Gewirtz, *Victims and Voyeurs at the Criminal Trial*, 90 NW. U. L. REV. 863, 880 (1996) (noting that "[VIE] has the imprimatur of the 'state' as author and therefore arguably gains narrative authority").

216. *Id.* at 873.

217. Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655, 694 (1989).

218. Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 395 (1996).

on how jurors are to weigh such powerful testimony in their visceral "reasoned moral response."²¹⁹

The proliferation of VIE, and the numbing emotional effect of *Parks* and *Brown*, demand reciprocal use of an emotional counterweight in the form of EIE.²²⁰ Even before *Payne*, *Parks*, and *Brown*, it was widely recognized that prosecutors enjoy a notable persuasive edge in convincing jurors to vote in favor of death.²²¹ In their wake, the State's already prodigious advantage has increased immeasurably, a position that only promises to be enhanced with the proliferation of aggressive victims' rights initiatives.²²² Depriving capital defendants of EIE robs them of an essential emotional tool as they endeavor to humanize themselves in the eyes of (the already "death-qualified") jurors,²²³ an enormously difficult quest given the recognized "death-tilt" of capital jurors,²²⁴ and the natural revulsion they have for the individual they have just convicted of capital murder.²²⁵ EIE has a unique capacity to counter the

219. See *supra* notes 143–54 and accompanying text.

220. This reciprocity between VIE and EIE was recently acknowledged by the South Dakota Supreme Court which, when faced with the question of whether particular VIE was admissible, ultimately justified its inclusion on the basis that defendant's sisters had previously testified of "their love for him, and the negative effect his death would have on their family." *State v. Rhines*, 548 N.W.2d 415, 446 (S.D. 1996); cf. *Governor's Study*, *supra* note 187 (describing recommendation of New Jersey death penalty commission that capital defendants' allocution statements be required to assume identical, highly structured form as required of VIE).

221. See Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1590 (1987) ("While the defense will seek to have the jury empathize with the defendant, the defense narrative . . . is a difficult one to convey, and the [State's] legalistic formula can provide sanctuary from moral anxiety."); Pillsbury, *supra* note 217, at 697 ("[T]he prosecution [has] a significant advantage at the punishment stage. The law's sanction of retribution, and the fact of criminal conviction, give weight and legitimacy to the prosecution's angry appeal."); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 59 (1991) ("[T]he prosecutor benefits from unique prestige and symbolic power. Because she represents the community, she commonly carries more influence with juries. . . . The prosecutor can rely on jurors' natural instincts to be protected against crime.").

222. See Mosteller, *supra* note 212, at 1055–57, 1062–64 (describing existing and proposed constitutional enactments at the state and federal level "aggressively" geared toward ensuring increased victim involvement).

223. A considerable body of empirical research establishes that such jurors are more prone to vote for death. See Ronald C. Dillehay & Marla R. Sandys, *Life Under Wainwright v. Witt: Juror Dispositions and Death Qualification*, 20 LAW & HUM. BEHAV. 147, 156–64 (1996); Jane Goodman-Delahunty et al., *Construing Motive in Videotaped Killings: The Role of Jurors' Attitudes Toward the Death Penalty*, 22 LAW & HUM. BEHAV. 257, 269 (1998); James Luginbuhl & Kathi Middendorf, *Death Penalty Beliefs and Jurors Responses to Aggravating and Mitigating Circumstances in Capital Trials*, 12 LAW & HUM. BEHAV. 263, 275 (1988).

224. See *supra* notes 202–04.

225. See Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 STAN. L. REV. 1447, 1469 (1997) (observing that "most capital juries will be terribly frightened of defendants, and provoked to punitive and

"otherness" of capital defendants,²²⁶ whose social and economic backgrounds (and violent criminality) can make them profoundly "different" to most jurors.²²⁷ Love for and appreciation of the defendant's human qualities, which EIE can powerfully convey, not only qualifies as "familiar" but in all likelihood also has great moral resonance with most jurors.²²⁸

In sum, despite the Supreme Court's ambivalent stance on the role of "emotion" in capital trials,²²⁹ the inescapable reality is that

vengeful feelings, long before they are exposed to any other information about them"); Steven J. Sherman, *The Capital Jury Project: The Role of Responsibility and How Psychology Can Inform the Law*, 70 IND. L.J. 1241, 1244 (1995) ("To the extent that the prosecution can point to the evilness of the defendant, jurors can diminish their own sense of responsibility, and blame the murderer for his own execution."); cf. Dan M. Kahan, *The Anatomy of Disgust in Criminal Law*, 96 MICH. L. REV. 1621, 1646 (1998) (noting that "constraining disgust is the role that we assign to mercy in capital sentencing").

226. See Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 335 (1983) (characterizing the effort to "portray the defendant as a human being" as the primary goal of the defense at sentencing); Robert Weisberg, *De-regulating Death*, 1983 SUP. CT. REV. 305, 361 ("The overall goal of the defense is to present a human narrative . . . so the jury will be less inclined to cast [the defendant] out of the human circle."); see also Christopher J. Meade, Note, *Reading Death Sentences: The Narrative Construction of Capital Punishment*, 71 N.Y.U. L. REV. 732, 758 (1996) ("If the defendant is portrayed as a full human being, with a personality that does not fit within the 'murderer' stereotype. . . . even if [the juror] believes that murderers in general should be executed, she may very well feel that this particular defendant should be spared.").

227. See 1 JAMES F. STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 478 (1883) (analogizing the execution of detested criminals to the extermination of dangerous animals); Alan M. Dershowitz, *The Last Resort, in A PUNISHMENT IN SEARCH OF A CRIME* 329, 331 (Ian Gray & Moira Stanley eds., 1989) ("Legal rules do not determine who gets executed . . . We value the life most of those who we are most alike."); Haney, *supra* note 225, at 1451-55 (describing the capital process as a "mechanism of moral disengagement," a system that "dehumanizes" capital defendants, and serves to perpetuate stereotypes and distance capital jurors from the fundamentally moral decision they must make).

228. See *Witherspoon v. Illinois*, 391 U.S. 510, 520 n.17 (1968) (citation omitted) (suggesting that those who categorically oppose the death penalty reflect "the shuddering recognition of a kinship" with the accused).

229. See Gewirtz, *supra* note 215, at 877-78 (recounting how both liberal and conservative members of the Court have equivocated on the issue). Indeed, Justice O'Connor's position is especially instructive. In *Payne*, she readily acknowledged that jurors were likely "moved," but condoned the emotional response because the victim impact evidence "did not inflame their passions more than did the facts of the crime." *Payne v. Tennessee*, 501 U.S. 808, 832 (1991) (O'Connor, J., concurring). This assessment, however, markedly differs from Justice O'Connor's unequivocal view in *Brown* that capital decisions must be a "reasoned moral response" not an "emotional response." *California v. Brown*, 479 U.S. 539, 545 (1987); cf. *Winston v. United States*, 172 U.S. 303, 313 (1899) (holding that "[h]ow far considerations of . . . sympathy . . . should be allowed weight . . . is committed . . . to the sound discretion of the jury, and of the jury alone").

The appropriateness of the role of emotion in sentencing has become the focus of burgeoning scholarly interest. See, e.g., Bandes, *supra* note 218, at 368 ("Emotion and cognition, to the extent they are separable, act in concert to shape our perceptions and reactions. . . . [E]motion leads to truer perception and, ultimately, to better (more accurate, more moral, more just) decisions."); Paul Gewirtz, *On "I Know It When I See It,"* 105 YALE L.J. 1023, 1029 (1996) (condemning an "overly narrow concept of reason and contrasting reason and emo-

Payne has placed emotion front and center in capital trials, embroiling jurors in an emotional tug-of-war between the State and the capital defendant.²³⁰ In this struggle, as Joan Howarth has noted, "emotion is everywhere," and deeply felt by the juror-participants.²³¹ Just as *Payne* deems it insufficient to simply presume that a victim's loved ones suffer hardships in the wake of a murder,²³² it should no longer be presumed, as some courts have opined in barring EIE, that jurors know of the emotional impact an execution will have.²³³ In short, EIE represents a crucial emotional counterweight.²³⁴

This is not to say, as a fundamental matter, that VIE itself is relevant or should be admitted. As Justice Stevens noted in his *Payne* dissent, evidence pertaining to the emotional impact on victims' families is "a classic non sequitur: The victim is not on trial; her character, whether good or bad, cannot therefore constitute either an aggravating or a mitigating circumstance."²³⁵ Rather, as Mississippi Supreme Court Justice Michael Sullivan stated in his recent dissent in *Wilcher v. State*, where the majority approved the admission of VIE at the same time it barred EIE, "[n]ow that victim impact statements are admissible, any similar mitigating evidence

tion in an overly simplified manner"); Pillsbury, *supra* note 217, at 655 (arguing that emotion, in the form of anger and sympathy, is a natural and indispensable component of justice). *But see* Dubber, *Tender Heart*, *supra* note 17, at 111–12 (arguing that "[e]motional responses should be excluded from capital sentencing not on account of their lack of foundation in the evidence, but on account of their irrelevance to the sentencer's 'reasoned moral response' independent of the evidence").

230. According to Susan Bandes, "the problem with victim impact statements is not that they evoke emotion rather than reason. Rather, it is that they evoke unreasoned, unreflective emotion that cannot be placed in any usable perspective. . . . They overwhelm the jury with feelings of outrage toward the defendant and identification with the victim." Bandes, *supra* note 218, at 401.

231. *See* Howarth, *supra* note 12, at 1404 ("Pretending emotion is absent does not make it so; acknowledging that emotion is already deeply at work . . . can lead to seeing its value in capital sentencing."); *id.* at 1403 ("[C]apital doctrine pretends to rest on reason, not emotion, while in fact emotions are holding forth on all sides."); *see also* NORMAN J. FINKEL, COMMONSENSE JUSTICE: JURORS' NOTIONS OF THE LAW 190 (1995) ("In the morality play that is beginning, one that will be highly emotional, jurors may engage in a task of matching, trying to decide if the defendant fits the prototype they have conceived. Then come the arguments and emotional pulls.").

232. *See supra* notes 82–91 and accompanying text.

233. *See, e.g.,* *People v. Sanders*, 905 P.2d 420, 458–59 (Cal. 1996); *Burns v. State*, 699 So. 2d 646, 654 (Fla. 1997), *cert. denied*, 522 U.S. 1121 (1998); *State v. Loftin*, 680 A.2d 677, 712 (N.J. 1996); *State v. Stenson*, 940 P.2d 1239, 1282 (Wash. 1997) (en banc).

234. This situation is exacerbated in those jurisdictions where defendants lack the right to allocution and hence cannot directly ask jurors for "mercy." *See, e.g.,* *People v. Brown*, 705 N.E.2d 809, 823 (Ill. 1998); *State v. Guevara*, 506 S.E.2d 711, 721 (N.C. 1998); *see also* Myers, *supra* note 187, at 788 (discussing widespread reluctance of defendants to allocute, in large part for fear that allocution testimony could be used in any subsequent retrial).

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

should be deemed relevant on the basis of fairness and equal parity. . . . [A]s the old proverb reads, what is good for the goose is good for the gander²³⁶

2. *Permitting the Creation of a Narrative Whole*—A second reason supporting admission of EIE stems from the reality that, when all is said and done, a capital proceeding constitutes a story or narrative,²³⁷ a highly familiar interpretative model that jurors intuitively use to make sense of the conflicting, graphic evidence put before them.²³⁸ The critical role of narrative is highlighted in interviews conducted with capital jurors as part of the Capital Jury Project, a nationwide empirical study designed to assess juror decision making and attitudes. As one juror explained:

[I began developing a story] as soon as they started presenting the case. I used the evidence as it was being presented, as well as later discussion during jury deliberations to create a story. I had my own version of the story when the jury started deliberating, but after discussion with the jury, the members, I was able to kind of maybe adjust my conclusions of some certain facts.²³⁹

236. *Wilcher v. State*, 697 So. 2d 1087, 1117–18 (Miss. 1997) (Sullivan, J., dissenting). Justice Sullivan added: “[Because the] criminal law requires more than an equal playing field. . . . [T]here should be no doubt that a defendant’s family may testify as to the impact of the defendant’s death just as the victim’s family has done.” *Id.* at 1117.

237. See Bandes, *supra* note 218, at 391 (“[C]apital punishment is thick with narrative content.”); Haney, *supra* note 206, at 605 (“It is the nexus between legal storytelling (in the form of a defendant’s social history) and the empathy that such storytelling is capable of generating among jurors that offers the promise of individualized justice in the capital sentencing process.”). See generally Austin Sarat, *Narrative Strategy and Death Penalty Advocacy*, 31 HARV. C.R.-C.L. L. REV. 353 (1996) (describing from the perspective of capital defense counsel the critical role narrative plays in death penalty proceedings).

238. See FINKEL, *supra* note 231, at 70 (“[S]tories are relevant to the drama [jurors] are witnessing, and to the moral decision they must make regarding the defendant’s blameworthiness.”); Nancy Pennington & Reid Hastie, *The Story Model for Juror Decision Making*, in *INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING* 192–221 (Reid Hastie ed., 1993) (describing the “story model”); Benjamine Reid, *The Trial Lawyer as Storyteller: Reviving an Ancient Art*, LITIG., Spring 1998, at 8, 8 (“Storytelling is as old as human communication. People are accustomed to listening to stories.”); Neil J. Vidmar & Regina A. Schuller, *Juries and Expert Evidence: Social Framework Testimony*, LAW & CONTEMP. PROBS., Autumn 1989, at 133, 146 (characterizing storytelling model as “most widely accepted model” of juror decisionmaking).

239. Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109, 1177 n.138 (1997); see also Craig Haney, *Commonsense, Justice and Capital Punishment*, 3 PSYCHOL. PUB. POL’Y & L., 303, 329 (1997) (noting that polled jurors “embraced a narrative version of the defendant’s life, put themselves in his shoes . . . and came to an empathetic understanding of his social history from a largely subjective perspective”).

Quite understandably, in the penalty phase, the denouement of the entire gruesome capital proceeding, jurors resort to narrative to make sense of the "chaos."²⁴⁰ Testimony by loved ones of the emotional impact of a defendant's execution, and what it might say about the quality and depth of relation between survivor and executed, thus represents a critical piece of the narrative puzzle, just as the toll imposed on the victims by the murder in the form of VIE has now become. As one commentator recently observed, to ensure reliability of death decisions "the full story, including both the reasons for separating an individual from society and the reasons for the continued affiliation of the individual and society, must be fully presented and argued before a jury."²⁴¹ In this sense, EIE permits the defendant's story to be fully told, allowing jurors a fuller understanding of the human they are to adjudge.²⁴²

This narrative power is not lost on the current Supreme Court. Writing for the Court in its 1997 decision in *Old Chief v. United States*, Justice Souter stated that the component evidentiary parts of a trial create a narrative, which "gains momentum, with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences . . . necessary to reach an honest verdict."²⁴³ Evidence "can accomplish what no set of abstract statements ever could, not just to prove a fact but to establish its human significance, and so to implicate the law's moral underpinnings and a juror's obligation to sit in judgment."²⁴⁴

Furthermore, as Richard Sherwin has written, "legal storytelling must also keep current with changing culture. The stories that lawyers tell, and the frames within which they tell them, must reflect the changing narrative conventions and meaningmaking structures that resonate with one's audience."²⁴⁵ Because the victim's "voice" now dominates sentencing,²⁴⁶ precluding EIE from

240. See Richard K. Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case*, 47 STAN. L. REV. 39, 71 (1994) (noting that "[c]haos is disorienting and unpleasant, especially in matters of life and death"); Meade, *supra* note 226, at 742–44 (discussing symbolic import of the death decision amid "chaos" of the murder).

241. Jeffrey J. Pokorak, *Dead Man Talking: Competing Narratives and Effective Representation in Capital Cases*, 30 ST. MARY'S L.J. 421, 433 (1999).

242. See Howarth, *supra* note 12, at 1382–83 (asserting that the Supreme Court's recent capital decisions have hastened a "disappearing defendant," and arguing that "[t]he best way to draw the decisionmakers closer . . . is to tell them his story").

243. *Old Chief v. United States*, 519 U.S. 172, 187 (1997).

244. *Id.* at 187–88; see also *id.* at 183, 187 (recognizing the "offering party's need for evidentiary richness," which "tells a 'colorful story with descriptive richness').

245. Sherwin, *supra* note 240, at 78.

246. This dominance has notable irony given the progressive orientation of the progenitors of what has come to be known as "narrative scholarship." See, e.g., Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991); Richard Delgado, *Storytelling*

the trial "narrative" acts as a special impediment in our emotion-laden, crime-obsessed age—a time when the Oprah Winfrey Show garners top ratings, and the O.J. Simpson murder trial transfixed the nation for months.²⁴⁷ On "Oprah," of course, the viewing public (in effect the jury) "feels itself entitled to pass judgment. 'I feel, therefore I may judge.'"²⁴⁸ Placed in a jury box, and assigned the awesome, likely one-time power to decide the capital question,²⁴⁹ these same laypersons absorb the State's parade of negatives (and relatively precious few positives) about the human they must judge. When EIE is not permitted, however, they do not benefit from the full range of emotional facets customarily brought to bear in drawing inferences about others. As a result, they rightfully might feel that something is missing, namely, the narrative counterweight to VIE that at once educates jurors about the quality and breadth of defendants' human ties and tellingly portrays their depth.

Once again, results from the Capital Jury Project underscore this point. Polling capital jurors in California, Scott Sundby discovered that testimony from family and friends stood out among the very most influential forms of evidence received. Finding that lay witnesses have more persuasive value than "experts,"²⁵⁰ a recognition itself important to the discussion here, Sundby discovered that this

for *Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099 (1989); Kim L. Scheppele, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073 (1989).

Perhaps recognizing that the conservative Rehnquist Court has taken such scholarship at its word, Susan Bandes recently offered the caveat that "we must proceed carefully in making claims about *which* stories belong in the legal arena. . . . Whether a particular narrative should be heard in any given legal context will depend on particulars—the type of proceeding, the type of narrative, and ultimately, the intended and actual effects of the narrative." Bandes, *supra* note 218, at 383. Unfortunately, such concerns appear to have been voiced too late. See Gewirtz, *supra* note 215, at 873–74 (arguing in favor of VIE and noting that "in the most literal sense, victim impact evidence consists of stories of victimized and silenced people, who are the usual concern of many in the storytelling movement").

247. As Robert Weisberg has written, "[t]he criminal trial is a 'miracle play' of government in which we can carry out our inarticulate beliefs about crime and criminals within the reassuring formal structure of disinterested due process." Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 385. The phenomenon is a modern example of "performing the laws," the use of popular trials to enunciate and deliberate matters of public concern. See Robert Hariman, *Performing the Laws: Popular Trials and Social Knowledge*, in *POPULAR TRIALS: RHETORIC, MASS MEDIA, AND THE LAW* (Robert Hariman ed. 1990).

248. See Gewirtz, *supra* note 215, at 886–87.

249. See Leigh B. Bienen, *Helping Jurors Out: Post-Verdict Debriefing for Jurors in Emotionally Disturbing Trials*, 68 IND. L.J. 1333 *passim* (1993) (describing common psychological and emotional trauma experienced by jurors in homicide trials); Joseph L. Hoffman, *Where's the Buck? Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 IND. L.J. 1137, 1155 (1995) (describing traumatic, long-term psychological effects of capital trials on jurors).

250. See Sundby, *supra* note 239, at 1115.

effectiveness “reveals both an emotional and a factual component,” effects not diminished by the predictably positive nature of the testimony.²⁵¹ “At the most basic level, from an emotional viewpoint, the testimony shows that someone cares about the defendant and believes that he has some redeeming value.”²⁵² Sundby reports that to a significant extent the emotional impact stems from jurors’ ability to “relate to the parent or the sibling in a way that they simply cannot to the defendant who has committed this horrible crime.”²⁵³ This connection, in turn, “brings other individuals into the picture who will be affected by the decision of whether to execute the defendant.”²⁵⁴ Sundby discusses several jurors for whom such factors were dispositive in their decision to vote for life.²⁵⁵

Of equal if not greater importance, Sundby found *the absence* of such testimony was unfavorably noted by jurors. This void was expressed in a post-verdict interview of one capital juror who, when asked if any defense witnesses “backfired,” stated: “I’d say the mother’s testimony She said stuff like he was a good boy. People, I guess, were expecting her like to plead for his life She didn’t really get into doing any of that”²⁵⁶ Such sentiments tellingly illustrate the primary ill-effect of precluding EIE: it denies narrative “coverage,” which jury researchers Nancy Pennington and Reid Hastie view as critical in jurors’ decisions of which narrative is to “be viewed as more acceptable.”²⁵⁷ Coverage, they write, “refers to the extent to which the story accounts for evidence presented [T]he greater the story’s coverage, the more acceptable is the story”²⁵⁸ In *Old Chief v. United States* the Supreme Court recognized the “fact that juries have expectations

251. See *id.* at 1152.

252. *Id.*; see also *id.* at 1153 (“[L]istening to a parent or sibling talk about the defendant—how he added to their lives, how they feel responsible for the way he turned out, how they will feel . . . if he is sentenced to death—almost always has an emotional impact on the jury.”).

253. *Id.* at 1154.

254. *Id.*

255. See *id.* at 1154–55. Notably, Sundby acknowledges that “many” of the jurors interviewed participated in death cases before *Payne* was handed down. Commenting on one juror in particular, who ultimately voted for death, and who characterized as “dramatic” a “battle between the . . . mothers,” Sundby states that “[t]he juror’s statements suggest that the emotional impact of the testimony of the defendant’s family in mitigation may be dampened through the prosecution’s use of victim impact statements.” *Id.* at 1155 n.102.

256. *Id.* at 1161.

257. See Nancy Pennington & Reid Hastie, *Explaining the Evidence: Tests of the Story Model for Juror Decision Making*, 63 J. OF PERSONALITY & SOC. PSYCHOL. 189, 190 (1992).

258. Pennington & Hastie, *supra* note 257, at 190; see also Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decisionmaking: The Story Model*, 13 CARDOZO L. REV. 519, 528 (1991) (“A story is plausible to the extent that it corresponds to the decisionmaker’s knowledge about what typically happens in the world and does not contradict that knowledge.”).

as to what evidence ought to be presented by a party, and may well hold the absence of that evidence against the party"²⁵⁹ As noted by Justice Souter, "a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it,"²⁶⁰ a recognition at plain odds with the view that EIE is somehow "cumulative" of testimony from defense witnesses of their fondness for the defendant.²⁶¹

In short, a criminal trial is "a struggle about what stories may be told at trial, how stories must be told,"²⁶² in which the trial judge serves as the "editor of the narrative."²⁶³ Judicial editing (indeed, exclusion) of EIE, while permitting the emotionally potent, personalizing influence of VIE, imposes an intolerable limit on the capacity of capital defendants to provide a counter narrative—to tell the sentencer their "whole story." "In the end," as Craig Haney has written,

[i]t is the defendant as a complete person . . . who will suffer the ultimate penalty. The fundamental purpose of the capital sentencing hearing is to force the sentencer to view the defendant as a person, no matter how hard some prosecutors might try to describe the defendant as an animal or an inanimate object.²⁶⁴

It is no longer enough that descriptive testimony from family and friends of defendants' positive traits can get before the jury. EIE must be admitted to fill the demonstrable narrative void that

259. *Old Chief v. United States*, 519 U.S. 172, 188 n.9n (1997); *see also id.* at 188 (noting that "beyond the power of conventional evidence to support allegations and give life to the moral underpinnings of law's claims, there lies the need for evidence in all its particularity to satisfy the jurors' expectations about what proper proof should be").

260. *Id.* at 189. Although *Old Chief* addressed the issue of perceived evidentiary completeness at the guilt stage, in that case relating to the nature of a stipulation for a prior conviction, the same—if not greater—argument obtains in the capital sentencing realm, with its relaxed evidentiary standards and heightened need for the jury to have a full understanding of the "deathworthiness" of the convicted murderer they must evaluate.

261. *See supra* note 168 and accompanying text.

262. Gewirtz, *supra* note 215, at 863.

263. *See* Alan M. Dershowitz, *Life Is Not a Dramatic Narrative*, in *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 99, 103 (1996).

264. Haney, *supra* note 206, at 608; *see also* *Boyd v. California*, 494 U.S. 370, 387 (1990) (Marshall, J., dissenting) ("The insistence in our law that the sentencer know and consider the defendant as a human being before deciding to impose the ultimate sanction operates as a shield against arbitrary execution . . .").

otherwise exists for capital jurors when such emotionally powerful information is barred.²⁶⁵

3. *Permitting Jurors to Obtain an Informed Understanding of Harm*—Finally, EIE should be admitted because juror consideration of it is consistent with the tenets of modern sentencing philosophy, and the basic rationales of *Payne* itself.

As for the former, American courts routinely find highly relevant, and often dispositive, any prospective “impact” on third parties when meting out punishments for non-capital crimes.²⁶⁶ Traditionally, this has been especially so with respect to white-collar offenses.²⁶⁷ Indeed, in finding that “harm” should play a role in assessing the appropriateness of capital punishment, the *Payne* Court relied on a well-known book relating to the sentencing of white-collar criminals.²⁶⁸ That EIE should be barred from capital trials when identical information is considered in non-capital sentencing decisions, where the stakes are so much lower, and far stricter evidentiary limits are usually tolerated,²⁶⁹ represents an ironic inconsistency that demands remedy.

Second, EIE should be allowed because its admission is consistent with *Payne*’s conception of the “harm” jurors must assess when meting out punishment.²⁷⁰ The *Payne* majority itself characterized “the assessment of harm caused by the defendant” as an “important concern of the criminal law,” albeit of “recent origin.”²⁷¹ According to the *Payne* court, “[a] State may legitimately conclude that evidence about the victim and about the impact of

265. See, e.g., Sundby, *supra* note 239, at 1178 (asserting that “[i]n developing the story that they will use in arriving at a verdict, jurors rely heavily upon their own life experiences”).

266. See, e.g., *People v. Meyer*, 680 N.E.2d 315, 317 (Ill. 1997) (imposition of probationary term in lieu of incarceration in part because of adverse collateral effects on defendant’s family that would come with imprisonment); *Edgecomb v. State*, 673 N.E.2d 1185, 1199 (Ind. 1996) (giving mitigating weight to fact that “imprisonment would result in undue hardship on [defendant’s] children,” construing IND. CODE ANN. § 35-38-1-7.1(c)(10) (West 1997)); *State v. Mirakaj*, 632 A.2d 850, 851 (N.J. Super Ct. App. Div. 1993) (reversing non-capital sentence because lower court failed to consider impact on defendant’s children).

267. See STANTON WHEELER ET AL., SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS 152–56 (1988) (discussing widespread judicial consideration of adverse impact on families and others when sentencing white-collar criminals). But see U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 (1999) (stating “[f]amily ties and responsibilities . . . are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range”).

268. See *Payne*, 501 U.S. at 820 (citing WHEELER ET AL., *supra* note 267).

269. See *supra* note 193 and accompanying text.

270. See *Payne*, 501 U.S. at 824–25.

271. *Id.* at 819, 821.

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.²⁷²

This conception of harm highlights another of the manifold qualities of EIE: it powerfully conveys to the jurors that their death verdict will affect other members of their community. EIE permits jurors to recognize in a visceral way that their capital decision does not occur in a vacuum—that the life they may decide to take perhaps has had, and perhaps will continue to have, some positive effect on others.²⁷³ Jurors must be permitted to assess the aggregate harm that will ensue with their decision to impose death;²⁷⁴ the murder victim is not the only casualty of the capital punishment process.²⁷⁵ Post-trial polling responses from capital jurors,

272. *Id.* at 827. It bears mention that the Court's assessment of VIE as being of "recent origin" is itself subject to question. See Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497, 1602 (1974) (suggesting that focus on harm in adjudging moral blameworthiness is "largely a holdover from the days of retaliatory justice").

273. See *State v. Mann*, 934 P.2d 784, 795 (Ariz. 1997) (en banc) (noting mitigating evidence of defendant's "relationship with his children and the effect on them if he were executed"); *Lawrie v. State*, 643 A.2d 1336, 1339 (Del. 1994) (noting that defendant's "execution would have 'a substantially adverse impact' on his seven-year-old son . . . and on [defendant's] mother"); *State v. Manley*, Nos. 95-11007022, 95-11006992, 1997 WL 27094, at *13, (Del. Super. Ct. Jan. 10, 1997) (noting that the "death sentence would have a devastating impact upon [defendant's] family"); *State v. Watson*, C.R.A. Nos. IN91-09-0020 to C.R.A. IN91-09-0025, 1993 WL 603341, at *5, (Del. Super. Ct. Mar. 19, 1993) (noting that "the defendant is a member of the victim's family and his execution would further traumatize that family"); *Barnes v. State*, 496 S.E.2d 674, 687-89 (Ga. 1998) (reversing death sentence because inter alia trial court refused to admit photos of defendant's daughter and nephew intended to "show the jury that a death sentence would impact the children in his life"); *State v. Benn*, 845 P.2d 289, 316 (Wash. 1993) (en banc) (noting "the affection of family members, and the loss to his loved ones if he were sentenced to death").

274. To date, little research has been conducted on the adverse effects of execution on the lives of the families of persons condemned to death. As Margaret Vandiver recently noted, "[i]f there is one unchanging aspect of capital punishment, it must be the pain that homicides and executions cause the families involved." Margaret Vandiver, *The Impact of the Death Penalty on the Families of Homicide Victims and of Condemned Prisoners, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT* 477, 477 (James R. Acker et al. eds., 1998). Vandiver adds that "[w]hatever effect executions may have on victims' families, it is certain that they are devastating for the families of defendants." *Id.* at 486. Further, "[i]t seems reasonable to assume that a parent's death sentence and eventual execution would have even more traumatic effects on children." *Id.* at 488 n.11.

275. Needless to say, this argument would find favor among those advocates of the view that capital punishment is nothing more than state-sanctioned murder. See, e.g., Albert Camus, *Reflexions sur la Guillotine*, in *REFLEXIONS SUR LA PEINE CAPITALE* 123, 126 (Arthur Koestler & Albert Camus eds., 1957); ROBERT JOHNSON, *DEATH WORK: A STUDY OF THE MODERN EXECUTION PROCESS* 218-24 (2d ed. 1998).

In ultimate terms, the conflicting demands of a capital trial—on the one side conventional aggravating evidence and VIE, and the other mitigating evidence designed to convince jurors that the offender should be spared—can be viewed as competing demands for victimhood. This in itself has significance insofar as "victim" status today enjoys transcendent appeal among most Americans. See JOSEPH A. AMATO, *VICTIMS AND VALUES: A*

interviewed as part of the Capital Jury Project, highlight the role such information can play. For instance, one California capital juror who had been a hold-out in favor of death, but ultimately decided in favor of life, stated: “‘I think that . . . the most mitigating thing that would lead us away from the death penalty [was] just how it was devastating to [the defendant’s family]. That basically, having him put to death is just going to create more victims”²⁷⁶

In recognizing this significance it is important to observe that such evidence is related to, but fundamentally differs from, the realm of grisly evidence relating to the physical impact on the defendant of the execution itself, which courts as a rule prohibit.²⁷⁷ Although one certainly can argue (as others have)²⁷⁸ that such grim information should be provided jurors in the name of fairness to counterbalance the predictably heinous presentations of the crime and offender offered by the State, this is not the argument made here. Rather, the purpose of EIE is to provide jurors with information critical to their “reasoned moral response.” As Craig Haney has written, “[p]eople are more likely to act on the impulse to punish when the consequences or personal costs of such actions are made to seem small, insignificant or distant. Thus, people can act

HISTORY AND THEORY OF SUFFERING, at xix (1990) (noting that “claims of suffering have invaded and, in measure, overwhelmed contemporary conscience and political rhetoric”); ROBERT ELIAS, *THE POLITICS OF VICTIMIZATION: VICTIMS, VICTIMOLOGY AND HUMAN RIGHTS* *passim* (1986) (canvassing manifold ways in which victimhood has come to enjoy social and political prominence). But with the appeal of victimhood have come conflicting demands, resulting in a competition between and among members of society: “The claims of suffering confuse and divide us.” See Amato, *supra*, at xvii; see also *id.* at 177 (“While there is no doubt . . . that we presume victims to be those who wrongly suffer harm and injury, the question still remains of whether they can be classified into hierarchies of serious suffering and deserved attention.”).

276. Sundby, *supra* note 239, at 1155; see also Pam Belluck, *In Nebraska, Amendment for Equal Rights Keeps Condemned Killer Alive*, N.Y. TIMES, Feb. 20, 1999, at A9 (quoting husband of one of two murder victims as believing that “‘three lives had been lost that night,’ the lives of the two women and [the defendant]”).

277. Courts typically justify exclusion on the basis that such information is irrelevant to mitigation insofar as the evidence does not relate to the defendant’s character or record or the circumstances of the crime. See, e.g., *McGahee v. State*, 632 So. 2d 976, 978 (Ala. Crim. App. 1993); *People v. Fudge*, 875 P.2d 36, 60 (Cal. 1994); *Wilcher v. State*, 697 So. 2d 1087, 1104 (Miss. 1997).

278. See, e.g., KENT S. MILLER & MICHAEL L. RADELET, *EXECUTING THE MENTALLY ILL: THE CRIMINAL JUSTICE SYSTEM AND THE CASE OF ALVIN FORD* 46 (1993); Howarth, *supra* note 12, at 1390–92; Earl Martin, *Towards an Evolving Debate on the Decency of Capital Punishment*, 66 GEO. WASH. L. REV. 84, 121–22 (1997).

punitively if they feel that they, or others they care about, have nothing to lose by the punitive actions they take."²⁷⁹

Precisely because jurors are kept in the dark relative to the grisly physical realities of the death penalty, they should be privy to knowledge of the basic human consequences of their decisions. Access to such information should go a long way toward lessening the widespread, well-documented tendency among capital jurors to either misperceive or discount their responsibility in death decisions,²⁸⁰ and otherwise delude themselves into thinking that their affirmative death decision are of little moral moment because they will not likely be carried out.²⁸¹

279. Haney, *supra* note 225, at 1474. Professors Jordan and Carol Steiker have offered a similar argument with respect to defendant character evidence more generally. Such evidence allows jurors

to appreciate the humanity of the defendant and to recognize thereby the gravity of the decision to impose the death penalty in a particular case. Confronted with details about an individual defendant a sentencer may be moved—in an inarticulable and nonstandardized way—to impose a sentence less than death.

Steiker & Steiker, *Let God Sort Them Out?* *supra* note 36, at 845 n.50; *see also* Howarth, *supra* note 12, at 1382 (noting that imposing death “becomes more difficult when it is connected to a real person”).

Once again, the unavailability of the common law right to allocute in many jurisdictions, or the widespread reluctance of capital defendants to speak directly to the jury when such a right exists, further exacerbates this problem of “dehumanization.” *See* sources cited *supra* note 234. As a result, defendants risk being sentenced to death “by a jury which never heard the sound of [their] voice.” *McGautha v. California*, 402 U.S. 183, 220 (1971).

280. *See, e.g.*, William J. Bowers, *The Capital Jury: Is It Tilted Toward Death?*, 79 JUDICATURE 220, 223 (1996); Theodore Eisenberg et al., *Jury Responsibility in Capital Sentencing*, 44 BUFF. L. REV. 339, 353 tbl.1 (1996); Hoffman, *supra* note 249, at 1138; *see also* Albert Bandura, *Mechanisms of Moral Disengagement*, in ORIGINS OF TERRORISM: PSYCHOLOGIES, IDEOLOGIES, THEOLOGIES, STATES OF MIND 161, 173 (Walter Reich ed., 1990) (noting that “[p]eople behave in injurious ways they normally repudiate if a legitimate authority accepts responsibility for the consequences of their conduct”); Paul Whitlock Cobb, Jr., *Reviving Mercy in the Structure of Capital Punishment*, 99 YALE L.J. 389, 395 (1989) (stating that providing a “judicial imprimatur serves to absolve other governmental actors from responsibility for independently evaluating death decisions”).

Stephen Garvey surmises that victim impact evidence itself has the potential for promoting, indeed exacerbating, juror abdication of sentencing responsibility. Describing his results from interviews conducted with South Carolina jurors serving on capital trials before *Payne*, Garvey states that as a result of being exposed to impact evidence “jurors may come to think of themselves almost as the victim’s agent, thus potentially eroding any prevailing norms of jury independence or individual juror responsibility.” Stephen P. Garvey, *supra* note 127, at 1554.

281. *See* Haney, *supra* note 225, at 1447 (summarizing research to this effect); Howarth, *supra* note 12, at 1416–17 (same).

CONCLUSION

In its most benign sense, *Payne v. Tennessee* can be said to rest on the Supreme Court's guiding principle that capital jurors should be privy to the maximum amount of information possible when making the "individualized" decision of which defendants merit death.²⁸² *Payne*, however, represents a perverse subversion of this noble doctrine, geared as it is toward "individualizing" the victim, as opposed to the defendant, when the jury is asked only to make a decision about the latter's fate. As a consequence of *Payne*, capital jurors throughout the country now regularly hear lengthy, highly prejudicial accounts of the unvarnished positive personal characteristics of decedents and the incalculably broad "impact" their deaths have had.²⁸³ Worse yet, precious little, if any, guidance is given to jurors in how to weigh and employ such emotionally explosive testimony in their capital decisions.²⁸⁴ Taken together, *Payne* has opened the emotional floodgates in favor of the State, at the same time *Parks* and *Brown* have squelched any vestigial impulse to find "sympathy" for capital defendants.

To a significant extent, the current majority rule permitting the State to monopolize "impact evidence" inspires comparison to the early common law, a time when felony defendants (who by definition faced the death penalty) stood mute before the jury unable to call witnesses and were themselves not permitted to testify under oath.²⁸⁵ Although perhaps extreme, such a view is not far off the

282. See *Lockett v. Ohio*, 438 U.S. 586, 603 (1978) (citation omitted) ("[P]ossession of the fullest information possible concerning the defendant's life and characteristics' [is] '[h]ighly relevant—if not essential—[to the] selection of an appropriate sentence'"); *Gregg v. Georgia*, 428 U.S. 153, 204 (1976) (the capital jury should "have as much information before it as possible when it makes the sentencing decision"); see also *United States v. Pitera*, 795 F. Supp. 546, 551–53 (E.D.N.Y. 1992) (asserting that *Payne* facilitates the individualization of capital decisions); Haney, *supra* note 225, at 1476 (admitting victim impact evidence "is arguably justified in the interest of maximizing the amount of information available to juror called on to make a death-sentencing decision").

283. See *supra* notes 93–127 and accompanying text (discussing widespread use of highly prejudicial VIE and lack of controls); see also Gewirtz, *supra* note 215, at 882 ("[F]or survivors to be asked to tell about the victim's particular characteristics in this context invites a predictable selectively in detail. Typically . . . people have complex and conflicting feelings about family members. But how frequently does victim impact evidence after a family member's murder dwell on these complexities?").

284. See *supra* notes 93–127 and accompanying text.

285. See George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575, 597–604 (1997). Fisher notes that it was not until 1702 that felony defendants could call sworn witnesses, and not until 1864 in America, and 1898 in England, that they themselves were permitted to testify under oath in their defense. See *id.* at 597, 662; cf. *Booth v. Maryland*, 482 U.S. 496, 520 (1987) (Scalia, J., dissenting) (asserting that decision to bar victim impact evidence "is

mark given the onslaught of VIE in capital trials. To those concerned that reciprocal admission of the EIE and VIE risks the distracting specter of “mini-trials,”²⁸⁶ one must ask: “distracted from what?”²⁸⁷ Capital trials have become little more than a “rematch” between the defendant and his victim. The Constitution—and fundamental fairness—demand that EIE be permitted to ensure procedural fairness between capital defendants and the State, and to provide capital juries access to the fundamentally important information it conveys.

in effect to prescribe a debate on the appropriateness of the death penalty with one side muted.”).

For a comprehensive treatment of the gradual erosion of this practice, culminating in the adoption of the Compulsory Process Clause in the Sixth Amendment, and the goal of evidentiary even-handedness animating origin the Clause, see Richard A. Nagareda, *Reconceiving the Right to Present Witnesses*, 97 MICH. L. REV. 1063 (1999).

286. Such an outcome, with respect to victim-related information alone, was ominously predicted by the majority in *Booth*. See *Booth*, 482 U.S. at 507.

287. This same observation has been made by Professor Paul Gewirtz, but in support of his argument in favor of admitting VIE. See Gewirtz, *supra* note 215, at 876 n.35 (“Telling a story often prompts others to tell a story. . . . But the argument about distraction really begs the question here, which is whether victim evidence is indeed a distraction from relevant matters or is itself one of the relevant matters.”).