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VICTIM IMPACT EVIDENCE: HARD TO FIND THE REAL RULES

Robert P. Mosteller†

INTRODUCTION

This Comment has two major parts. Part I reviews some of the developments in the law relating to victim impact evidence over the last decade in light of my earlier predictions and hopes in this area. Part II examines victim catharsis and its growing importance as a justification for the receipt of victim impact evidence.

I

SEARCHING (PREDICTING, AND HOPING) IN VAIN FOR THE GOOD NEWS IN VICTIM IMPACT EVIDENCE

On some occasions, one has confidence in how future developments will unfold, makes predictions, and waits for later events to validate (or refute) the predictions. On other occasions, one has a sense of foreboding about how future events may unfold, but gives voice to an alternative, more positive future, hoping to be proved a poor prognosticator. Almost a decade ago, I wrote a short article for *Criminal Justice* about the effect of victim impact evidence on the defense.¹ If I was simply making predictions, I was rather consistently wrong; if I was giving expression to my hopes, few of those have been realized.

I made several points in the article. One was to emphasize that *Payne v. Tennessee*² simply removed the per se Eighth Amendment bar to receipt of victim impact evidence that *Booth v. Maryland*³ and *South Carolina v. Gathers*⁴ previously imposed.⁵ *Payne* did not hold that victim impact evidence was admissible, but rather made the question of admissibility one of state law.⁶ I noted that in some states, such evidence was inadmissible as a matter of state law either through a judicial rule or the death penalty statute, which contained an exclusive

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¹ Robert P. Mosteller, *The Effect of Victim-Impact Evidence on the Defense*, CRIM. JUST., Spring 1993, at 24.

² 501 U.S. 808 (1991).

³ 482 U.S. 496 (1987), *overruled by Payne*, 501 U.S. at 830.

⁴ 490 U.S. 805 (1989), *overruled by Payne*, 501 U.S. at 830.

⁵ Mosteller, *supra* note 1, at 24.

⁶ *See Payne*, 501 U.S. at 824–25; Mosteller, *supra* note 1, at 25.

designation of aggravating factors, of which victim impact evidence was not one.⁷ My analysis was accurate, but, as discussed below, state law prohibitions have largely disappeared or have not been considered full bars to admission.

My example of judicial exclusion came from Georgia, which excluded victim impact evidence because the Georgia Supreme Court held that it caused “confusion and prejudicial digression in sentencing.”⁸ In short order, the state legislature undid the judicial exclusion by making victim impact evidence admissible.⁹

As to a designated system of aggravating factors that appeared exclusive, I cited North Carolina and Arizona.¹⁰ North Carolina enacted no relevant legislation after *Payne*. Rather, it simply overlooked the distinction I noted between *Payne*'s removal of a federal constitutional prohibition and explicit state law authorization to use victim impact evidence. Without explaining the use of the evidence within the state statutory structure, the North Carolina Supreme Court used *Payne*'s language, which provided the standard of the inadmissibility of victim impact evidence under the Due Process Clause, to justify its admissibility otherwise: “Victim-impact evidence is admissible in a capital sentencing proceeding unless the evidence ‘is so unduly prejudicial that it renders the trial fundamentally unfair.’”¹¹ Similarly, Arizona did not change its law with respect to victim impact evidence after *Payne*. However, the Arizona Supreme Court ruled that although such evidence may not be used as an aggravating factor, it is admissible to rebut mitigating evidence.¹²

Not surprisingly, most states have taken the opportunity afforded them by *Payne* to admit victim impact evidence. The count is roughly as follows: of the thirty-seven jurisdictions that allow the death penalty, thirty-one statutorily permit victim impact evidence.¹³ Four states—Connecticut, Montana, New Hampshire, and New York—have not de-

⁷ See Mosteller, *supra* note 1, at 25.

⁸ *Sermons v. State*, 417 S.E.2d 144, 146 (Ga. 1992); see Mosteller, *supra* note 1, at 25.

⁹ See Ga. Code Ann. § 17-10-1.2 (1997). Georgia enacted the statutory change in 1993, one year after *Sermons* was decided. See Act of April 27, 1993, No. 570, § 2, 1993 Ga. Laws 1660, 1662. The Georgia Supreme Court ruled the statute constitutional in *Livingston v. State*, 444 S.E.2d 748, 751 (Ga. 1994). *Livingston* requires the state to give notice to the defense of evidence that it intends to offer and to make a pretrial ruling on admissibility. *Id.* at 752. Later, in *Turner v. State*, 486 S.E.2d 839 (Ga. 1997), it further amplified the procedural requirements on the presentation of the evidence (requiring, for example, preparation of written victim impact statements) and developed a jury instruction forbidding the use of the evidence to prove an aggravating factor. *Id.* at 842–43.

¹⁰ See Mosteller, *supra* note 1, at 25.

¹¹ *State v. Hooks*, 548 S.E.2d 501, 510 (N.C. 2001) (quoting *Payne*, 501 U.S. at 825), *cert. denied*, 122 S. Ct. 1126 (2002).

¹² See *State v. Bocharski*, 22 P.3d 43, 55 (Ariz. 2001).

¹³ *Commonwealth v. Means*, 773 A.2d 143, 154 (Pa. 2001).

cided the issue.¹⁴ Mississippi limits its use to situations in which it is necessary to establish relevant aggravating factors or to develop the case.¹⁵ Finally, one state, Indiana, excludes victim impact evidence under an interpretation of its death penalty statute that limits admissible evidence to other specially defined factors.¹⁶ Notably, most of the states that impose and carry out the death penalty with the greatest frequency authorize use of victim impact evidence.¹⁷

In my earlier mispredictions, I also noted that victim impact evidence was used less frequently at that time, a couple years after the *Payne* decision, than one might have expected given the apparent eagerness of jurisdictions to embrace harsh death penalty practices.¹⁸ I speculated that perhaps prosecutors were hesitant to use the evidence because of its potential to induce overly emotional reactions and to produce reversals of death penalties on appeal because of a violation of due process or evidentiary principles.¹⁹

I have no comprehensive statistics on the use of victim impact evidence, but based on reported cases mentioning its use, admission of victim impact evidence appears quite common in death penalty cases. My suggestion that reversals might result from inflammatory and emotional uses of such evidence has not proved true. For example, in *Cargle v. State*, the Oklahoma Court of Criminal Appeals held that the victim impact evidence was beyond the statutory framework, that it was overly emotional, and that its prejudicial impact clearly exceeded its probative value.²⁰ Nonetheless, it found admission of the evidence harmless because abundant evidence existed to support four aggravating factors.²¹

The willingness of this particular court to excuse even outrageous victim impact evidence was demonstrated in a second case, *Willingham v. State*.²² There, one of the murder victim's daughters stated:

"I think the only fair punishment for him is he should be confined in a small area, someone three or four times his size should come into that confined area and beat him, cause him pain. I think he should have to beg for his life. I think he should have to choke

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *See id.* (listing California, Texas, and Florida as states that permit victim impact evidence); DEBORAH FINS, NAACP LEGAL DEF. & EDUC. FUND, DEATH ROW U.S.A. 28-29 (2002) (showing California, Texas, and Florida as the leading states in the number of prisoners on their death rows).

¹⁸ Mosteller, *supra* note 1, at 25.

¹⁹ *Id.*

²⁰ 909 P.2d 806, 829-30 (Okla. Crim. App. 1995).

²¹ *Id.* at 834-35.

²² 947 P.2d 1074 (Okla. Crim. App. 1997), *overruled on other grounds by* Shrum v. State, 991 P.2d 1032 (Okla. Crim. App. 1999).

on his own blood. I think he should have to crawl, try to get away from his attacker.

I think he should suffer, suffer, suffer, but you know, even if he's put to death, he won't suffer, you know he will have a painless death. We can't do anything to him that will cause him the kind of pain that has been caused to our mother and to us

Mom has raised us to be kind and forgiving, but we can't forgive this and we want him killed."²³

Despite this extraordinary statement, the court found that the victim impact evidence had no effect and affirmed the death sentence.²⁴

I also spent a major portion of my earlier article discussing various potential offsetting benefits to the defense from admission of victim impact evidence, which is typically very damaging.²⁵ One such benefit might be the expansion of ordinary discovery and "Brady requirements"²⁶ on the prosecution to provide evidence impugning the victim's character.²⁷ However, from examining the reported cases, little if anything seems to have materialized in this area. I also suggested that admitting positive evidence about the victim could open the door to the incredibly distasteful possibility of rebuttal by the defense with negative information.²⁸ I have seen none of these rebuttals, which are obviously very difficult to contemplate and would be even more diffi-

²³ *Id.* at 1085 (alteration in original). The applicable Oklahoma statute defines permissible victim impact evidence to include "the victims' opinion of a recommended sentence." OKLA. STAT. ANN. tit. 22, § 984 (Supp. 2001). The Oklahoma courts have found this apparent violation of *Booth's* prohibition against admitting evidence of the survivor's opinion as to sentence, which was not explicitly altered by *Payne*, see Mosteller, *supra* note 1, at 25, constitutional. See *Ledbetter v. State*, 933 P.2d 880, 890-91 (Okla. Crim. App. 1997). The court in *Ledbetter* reasoned that, although *Payne* did not reach the issue directly, a fair reading of that opinion demonstrates that the Eighth Amendment does not bar "characterizations and opinions about the crime, the defendant and the appropriate punishment." *Id.* at 890.

²⁴ See *Willingham*, 947 P.2d at 1088-89. Because the defense attorney did not object at trial, the error was directly reviewed under a plain error standard, but the court also reviewed the statements under its mandatory sentencing review to "determine whether the statements caused Appellant to be sentenced to death for improper reasons." *Id.* at 1086. The court affirmed because, remarkably, it concluded that "even absent the improper victim impact evidence, the result would have been the same." *Id.* at 1088-89. Despite apparently strong reluctance to reverse based on misuse of victim impact evidence, reversals do occur in extraordinarily outrageous cases. See, e.g., *Ledbetter*, 933 P.2d at 891-93 (reversing in part because the witness copied portions of the victim impact statement from *Booth* into the statement which he read to the jury as his own).

²⁵ See Mosteller, *supra* note 1, at 28-29, 63. Even theoretically, these "benefits" were usually no more than ways to diminish the harm rather than true benefits.

²⁶ This reference refers to *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, which require the prosecution to provide to the defense evidence in its possession material to guilt or to sentencing. See generally Lisa M. Kurcias, Note, *Prosecutor's Duty to Disclose Exculpatory Evidence*, 69 FORDHAM L. REV. 1205, 1214-20 (2000) (discussing the scope of *Brady* disclosure requirements).

²⁷ Mosteller, *supra* note 1, at 29.

²⁸ *Id.* at 63.

cult to actually present. The mere possibility of such rebuttals certainly has not diminished the appetite for victim impact evidence. The most likely explanation is that rebuttal rarely occurs because prosecutors do not offer victim impact evidence when it would realistically allow the defense to introduce negative character evidence not already known by the jury.

I suggested that admitting evidence about the impact of the homicide on survivors might open the door to new types of mitigating evidence for the defense.²⁹ Because *Payne* did not challenge the impropriety of survivors' opinions that death was the appropriate sentence, I argued, the Court's change in the law should not provide a new basis to admit opinions of family members against the death penalty.³⁰ However, I suggested that by analogy, the defense might be able to introduce evidence about the impact of the anticipated execution of the defendant on the defendant's family as a mitigating circumstance.³¹ Predictably, such evidence has only gained the most narrow of theoretical and actual footholds in death penalty law.³²

Probably, the most significant recommendation for the defense in the article was that the admission of victim impact evidence should focus the defense on the victims and survivors of the crime.³³ As difficult as the contact may be, the greater general focus on the victim resulting directly and indirectly from concern about the impact of the crime on the victims and survivors should affect the defense as well. Perhaps there are opportunities for healing; perhaps accommodations are possible.³⁴ Both in service of the client's interests, and be-

²⁹ *Id.*

³⁰ *Id.* at 28. Given that Oklahoma permits opinions by victims that death is the appropriate sentence, *see supra* note 23, it would logically follow that opinions in opposition to death should also be admissible. However, elsewhere this general prohibition should remain unchanged.

³¹ *See* Mosteller, *supra* note 1, at 63.

³² *See* Wayne A. Logan, *When Balance and Fairness Collide: An Argument for Execution Impact Evidence in Capital Trials*, 33 U. MICH. J.L. REFORM 1, 32-35 (1999) (arguing for admission but recognizing that most, but not all, courts have rejected the constitutional argument for admitting such evidence). *State v. Stevens*, 879 P.2d 162, 167-68 (Or. 1994) and *People v. Ochoa*, 966 P.2d 442, 505-06 (Cal. 1998) provide limited support for admissibility in that they recognized that such evidence may be a reflection of the defendant's character. Assuming admission of such evidence, one would expect it to have a less powerful effect on juries in the typical case than would victim impact evidence. The arguably just (and arguably humanely achieved) termination of life would logically have a lesser impact on the jury than evidence regarding the impact of an unjust and more sudden killing of the victim.

³³ *See* Mosteller, *supra* note 1, at 63.

³⁴ *Id.* at 29. Finality through a plea and, as part of that process, acknowledgment of the wrong that was done, are two possibilities for common ground for survivors and defendants. *Id.*

cause it is the humane thing to do, I suggested the defense attempt to make contact and develop relationships with victims and survivors.³⁵

One finds anecdotal evidence that such contacts take place. They are almost always difficult, sometimes unsuccessful and even damaging, but frequently helpful to ameliorate the degree of anger and pain, if not to reach lasting reconciliation. Experienced death penalty lawyers doubtless see that developing such contact helps to humanize the stark adversarial battle of a death penalty trial.³⁶

Having looked back at some of the developments in victim impact evidence, I want to now engage a new subject that may help shape the future of victim impact evidence—the growing use of the concept of victim catharsis to justify victim impact evidence.

II

SURVIVOR CATHARSIS AS AN EXPANDING BASIS FOR VICTIM IMPACT EVIDENCE

In a recent criminal case in North Carolina, the prosecutor asked the judge to permit the surviving daughter to speak at the completion of a sentencing hearing at which life sentences were imposed.³⁷ Facing the defendant, she said, “I hope you live every day to regret everything you’ve done. It was something you took away that was precious to us. Maybe one day God can forgive you, but I know I couldn’t.”³⁸

While this is not the type of statement that *Payne* would allow as victim impact evidence,³⁹ it illustrates one aspect of victim statements as they appear in noncapital sentences, in ad hoc accommodations in the absence of the jury in capital cases,⁴⁰ and occasionally directly in death penalty cases.⁴¹ I suspect victim catharsis is an implicit motiva-

³⁵ *Id.*

³⁶ My limited direct experience in death penalty litigation demonstrates that even the contact between the victims’ and defendants’ families that can occur casually over the course of protracted court hearings can ameliorate an image of the defendant as evil incarnate, an image which almost naturally flows from the criminal act and the defendant’s position as the accused. Families of defendants are human in a way that defendants do not obviously appear to be. Maintaining an image of the wholly evil defendant is more difficult when his or her family becomes known to victims and survivors.

³⁷ See Resentencing Hr’g Tr. at 7–8, *State v. Moore*, No. 78 CRS 25577 (N.C. Super. Ct. 2001).

³⁸ *Id.* at 8.

³⁹ See *Payne v. Tennessee*, 501 U.S. 808, 824–27 (1991); Mosteller, *supra* note 1, at 25.

⁴⁰ Mike Lee & Josh Shaffer, *Rivas Given Death Penalty*, FT. WORTH STAR-TELEGRAM, Aug. 30, 2001, at 1A (describing how the widow of a slain officer demanded defendant look at her and stated, “The day that you die’ . . . ‘I’m going to be there to watch you die just like you watched Aubrey [her husband] die’” at proceeding where judge imposed death sentence earlier determined by the jury).

⁴¹ See *Willingham v. State*, 947 P.2d 1074, 1085 (Okla. Crim. App. 1997) (quoting statement of murder victim’s daughter to the jury: “Mom has raised us to be kind and

tion behind the giving, and perhaps the receipt, of many victim impact statements. What appears to be happening is an effort by the survivor or victim to bring “closure” to an event; to have catharsis. I want to address this victims’ rights aspect of victim impact statements in current practice and explain how some of those who support victims’ rights hope to use the victims’ desire to achieve catharsis to affect the use of victim impact statements in the future.⁴²

In *Payne*, the Supreme Court reasoned that through prosecutorial arguments and victim impact evidence “[a] State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim’s family is relevant to . . . whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated.”⁴³

Chief Justice Rehnquist, writing for the majority, thus justified admission as a matter of straightforward relevance. Elsewhere the Court

forgiving, but we can’t forgive this and we want him killed,” which was held to be error but did not require reversal), *overruled on other grounds by* *Shrum v. State*, 991 P.2d 1032 (Okla. Crim. App. 1999); *supra* note 23 and accompanying text.

⁴² In this limited Comment, I do not attempt to develop why I believe victim catharsis is not an appropriate part of victim impact statements in death penalty cases. At one level, the answer is that the Court in *Payne* gave no authorization for this use of such statements. Fundamentally, I believe attempting to achieve catharsis through victim impact statements is inherently incompatible with the reasonable arguments that can be developed to justify receiving victim impact evidence in the process of determining whether to impose the death penalty. It is incompatible with due process protections and analysis. Further, recognizing catharsis as a justification would make it virtually impossible to limit the improperly prejudicial effect of victim impact statements.

I also do not undertake a detailed analysis of the benefit to victims from victim impact statements. While I question whether the inherent constraints on such statements make them congenial to achieving catharsis, I fully accept that a cathartic benefit can be gained from a statement directed at a defendant and from other types of victim impact statements, such as those which honor the lost loved one. I also recognize that (1) many victims want to make such statements, (2) they sincerely believe that making the statement will provide healing, and (3) some degree of healing does occur. Fundamentally, however, I question whether victim impact statements directed at the defendant, or in other forms, very often have a dramatic and lasting healing effect. I am persuaded that healing after a traumatic loss of the magnitude of the homicide of a loved one is a long (indeed, for many, unending) process in which no one event, be it an effective victim impact statement or even the execution of the defendant, provides anything approaching “closure.” *See generally* JUDITH LEWIS HERMAN, *TRAUMA AND RECOVERY* (1997) (discussing disorders related to and the stages of recovery following traumatic events). Although all these questions are beyond the scope of this Comment, and may indeed be beyond our current analytical and scientific capacities, my general view is that if we had the chance to lift the due process bar on the receipt of victim impact statements made in a death penalty case solely for the cathartic benefit of a survivor, the anticipated benefit of catharsis would clearly be insufficient to justify the change. *See* Susan Bandes, *When Victims Seek Closure: Forgiveness, Vengeance and the Role of Government*, 27 *FORDHAM URB. L.J.* 1599, 1605–06 (2000) (discussing the differences between needs of victims and what the legal system can and should provide); *infra* notes 52–61 and accompanying text (discussing a proposed victims’ rights amendment to the U.S. Constitution).

⁴³ 501 U.S. at 827.

made similar arguments: “[A] State may properly conclude that for the jury to assess meaningfully the defendant’s moral culpability and blameworthiness, it should have . . . evidence of the specific harm caused by the defendant.”⁴⁴ Such evidence may be part of the “information necessary to determine the proper punishment for a first-degree murder.”⁴⁵ The majority opinion also defended admission of such evidence on the grounds of adversarial fairness in death penalty litigation: First, the Court noted that the state has a legitimate interest in counteracting the defense’s mitigating evidence, which individualizes the defendant, by showing that “so too the victim is an individual whose death represents a unique loss to society and in particular to his family.”⁴⁶ Second, “turning the victim into a ‘faceless stranger’ . . . deprives the State of the full moral force of its evidence.”⁴⁷ The Court made general arguments of relevance and effectiveness of proof, but did not suggest the motivation to help heal and restore the survivors.

Justice O’Connor, in her concurring opinion, provided a glimpse into a broader victims’ rights justification for victim impact evidence. She stated, “‘Murder is the ultimate act of depersonalization.’ It transforms a living person with hopes, dreams, and fears into a corpse, thereby taking away all that is special and unique about the person. *The Constitution does not preclude a State from deciding to give some of that back.*”⁴⁸ The argument is styled in terms of returning something to the murder victims themselves, but obviously that action is symbolic. Its impact is for the benefit of the victims’ families and friends, but even in Justice O’Connor’s concurring opinion, the justification is not stated or justified as one of catharsis for the survivors and victims.

As everyone is no doubt aware, a powerful victims’ rights movement has developed over the last two decades. The influence and impact of the national movement was clearly felt in the *Payne* decision.⁴⁹ One of the major results of the movement has been the enactment of

⁴⁴ *Id.* at 825.

⁴⁵ *Id.*

⁴⁶ *Id.* (quoting *Booth v. Maryland*, 482 U.S. 496, 517 (1987) (White, J., dissenting) (citation omitted)).

⁴⁷ *Id.* (quoting *South Carolina v. Gathers*, 490 U.S. 805, 821 (1989) (O’Connor, J., dissenting)).

⁴⁸ *Id.* at 832 (O’Connor, J., concurring) (quoting the Brief For Justice For All Political Committee, a victims’ rights group (citation omitted) (emphasis added)).

⁴⁹ *Id.* at 834 (Scalia, J., concurring) (“*Booth’s* stunning *ipse dixit*, that a crime’s unanticipated consequences must be deemed ‘irrelevant’ to the sentence, conflicts with a public sense of justice keen enough that it has found voice in a nationwide ‘victims’ rights’ movement.” (citation omitted)). See generally Vivian Berger, *Payne and Suffering—A Personal Reflection and a Victim-Centered Critique*, 20 FLA. ST. U. L. REV. 21, 44–60 (1992) (arguing that *Payne* represents a step back for victims’ rights groups because it invites defense attorneys to prove that the victim was of dubious moral character).

victims' rights amendments to the constitutions of over thirty states.⁵⁰ Such enactments have affected the admissibility of victim impact evidence in death penalty cases. For example, in ruling victim impact evidence constitutional and admissible, the supreme courts of Pennsylvania and New Jersey each cited its state's victims' rights amendment as a critical component in its decision.⁵¹

The most interesting view into the thinking of those who aggressively pursue the victims' rights cause as a method of altering criminal procedure practices can, however, be seen in the Victims' Rights Amendment proposed for the U.S. Constitution. The latest version of that proposed Amendment was introduced in April 2002.⁵² Among the rights to be guaranteed to crime victims by the proposed Amendment was the right "to be heard at public . . . sentencing . . . proceedings."⁵³ In 1999, a substantively similar version of the proposed Amendment and this guarantee⁵⁴ was approved by the Senate Judici-

⁵⁰ Mary Margaret Giannini, Note, *The Swinging Pendulum of Victims' Rights: The Enforceability of Indiana's Victims' Rights Laws*, 34 IND. L. REV. 1157, 1157 n.2 (2001) (listing thirty-two states that have victims' rights amendments).

⁵¹ In *State v. Muhammad*, 678 A.2d 164 (N.J. 1996), the Supreme Court of New Jersey found its victim impact statute constitutional, stating:

Our State Constitution explicitly provides victims of crimes with more rights than the Federal Constitution. The Victim's Rights Amendment expressly authorizes the Legislature to provide crime victims with "those rights and remedies" as it determines are necessary. Even if we were inclined to diverge from the holding in *Payne* and interpret the Cruel and Unusual Punishment Clause of our State Constitution as providing greater protections against the arbitrary imposition of the death penalty, the text of the New Jersey Constitution demands that we not pursue such an independent course. . . .

. . . To hold the victim impact statute unconstitutional would require us to ignore the Victim's Rights Amendment and the will of the electorate that overwhelmingly approved the constitutional amendment. . . . [T]he people of New Jersey, speaking through the Legislature, have repeatedly expressed a very strong "public attitude" that victims should be provided with more rights.

Id. at 174. Similarly, in *Commonwealth v. Means*, 773 A.2d 143 (Pa. 2001), the Supreme Court of Pennsylvania, in finding its state's victim impact practice constitutional, stated:

Crime victims are to be treated with dignity, respect, courtesy and sensitivity, and their rights are to be vigorously protected and defended. Crime victims have a basic bill of rights guaranteeing their input in sentencing matters, their right to restitution, and information on the potential release from custody of their assailants. Such aggressive intent to protect the rights of crime victims and involve them in the sentencing process favors the inclusion of victim impact testimony in capital cases.

Id. at 157 (citation omitted).

⁵² See S.J. Res. 35, 107th Cong. (2002); H.R.J. Res. 91, 107th Cong. (2002).

⁵³ S.J. Res. 35, § 2; H.R.J. Res. 91, § 2.

⁵⁴ Under earlier versions of the amendment, the right was described in somewhat different language: it provided that a victim of crime has a right "to be heard, if present, and to submit a statement at all such proceedings to determine . . . a sentence." S.J. Res. 3, 106th Cong., § 1 (1999); S.J. Res. 44, 105th Cong., § 1 (1998). It is impossible to determine whether the change in language was intended to modify the arguments about the cathartic justification for victim impact statements intended by the drafters, but there is no

ary Committee, which prepared a formal report that analyzed its purpose and effect.⁵⁵

Unlike *Payne*, which merely permitted states to admit victim impact statements,⁵⁶ the Amendment would require their admission. In its section-by-section analysis, the Majority Report explained further:

[C]rime victims have the right to be heard at any proceeding to determine a "sentence." This provision guarantees that victims will have the right to "allocute" at sentencing. Defendants have a constitutionally protected interest in personally addressing the court. This provision would give the same rights to victims, for two independent reasons. First, such a right guarantees that the sentencing court or jury will have full information about the impact of a crime, along with other information, in crafting an appropriate sentence. The victim would be able to provide information about the nature of the offense, the harm inflicted, and the attitude of the offender. Second, the opportunity for victims to speak at sentencing can sometimes provide a powerful catharsis. Because the right to speak is based on both of these grounds, a victim will have the right to be heard even when the judge has no discretion in imposing a mandatory prison sentence.

State and Federal statutes already frequently provide allocution rights to victims. The Federal amendment would help to ensure that these rights are fully protected. The result is to enshrine in the Constitution the Supreme Court's decision in *Payne v. Tennessee*, recognizing the propriety of victim testimony in capital proceedings. . . . At the same time, the victim's right to be heard at sentencing will not be unlimited, just as the defendant's right to be heard at sentencing is not unlimited today. Congress and the States remain free to set certain limits on what is relevant victim impact testimony. For example, a jurisdiction might determine that a victims' views on the desirability or undesirability of a capital sentence is not relevant in a capital proceeding. The Committee does not intend to alter or comment on laws existing in some States allowing for victim opinion as to the proper sentence.⁵⁷

indication of any such intent. The most authoritative analysis of intention is found in the 2000 Senate Judiciary Report described *infra* notes 55–57 and accompanying text.

⁵⁵ S. REP. NO. 106–254 (2000) [hereinafter Majority Report] (relating to S.J. Res. 3). Together with my colleague, Jeff Powell, I have previously discussed various aspects of this report, but principally focused on other provisions. See Robert P. Mosteller & H. Jefferson Powell, *With Disdain for the Constitutional Craft: The Proposed Victims' Rights Amendment*, 78 N.C. L. REV. 371 (2000).

⁵⁶ 501 U.S. 808, 824–27 (1991).

⁵⁷ Majority Report, *supra* note 55, at 32–33 (citations omitted). Earlier, in a section of the Report describing the need for specific rights, the Majority also discusses its view of the two purposes of victim statements: providing helpful information and catharsis. *Id.* at 14–22. The latter purpose was supported in the testimony of Professor Paul Cassell, quoting an abuse victim's description of her statement to the defendant "tell[ing] him how much he hurt me." *Id.* at 19.

If this view of victims' rights were made part of the U.S. Constitution, obviously changes would occur in the use of victim impact statements in capital sentencing. Although catharsis may be seen as playing a relatively minor role in sentencing practices now, it would become one of the two officially recognized bases for admitting victim information and statements. The claim of catharsis would be a sufficient justification for the admission of such statements absent an affirmative legislative judgment that the subject matter being discussed was not to be considered in sentencing as a matter of relevance. However, a determination that the information would have no effect would not render it inadmissible.

Clearly, jurisdictions would be authorized to follow Oklahoma's lead⁵⁸ to determine that victims' opinions on sentencing are relevant. Under such circumstances, not only would allowing those victims present to speak and those absent to present a statement, including a videotaped statement,⁵⁹ be constitutionally permissible, it would be a constitutional obligation. The Majority Report explicitly stated that some limitations are intended, as a victim's right to be heard is not unlimited.⁶⁰ Such limitations would presumably include violations of fundamental fairness under the Due Process Clause, which is not explicitly trumped, or the testimony going entirely too far in terms of the number of presentations.⁶¹ Nevertheless, more evidence and statements, whatever the form, would be admissible.

CONCLUSION

Having so poorly predicted the future and thus fulfilling my hopes, I will not venture any prediction on how the limitations some jurisdictions now place on victim impact evidence may shape the future. I do not have sufficient experience to know whether any are very effective in constraining the most common misuses of victim impact evidence or in preventing its introduction from having the arbitrary impact on capital sentencing predicted at the time *Booth*, *Gathers*, and *Payne* were decided. Also, I do not know how large the impact of such

⁵⁸ See *supra* notes 22–23.

⁵⁹ Majority Report, *supra* note 55, at 34 (indicating that “written” was intentionally not used to modify “statement” so that the term would encompass victims who desired to present a videotaped statement).

⁶⁰ *Id.* at 33–34.

⁶¹ S.J. Res. 3 allowed for exceptions “only when necessary to achieve a compelling interest.” S.J. Res. 3, 106th Cong., § 3 (1999). The following is an example of such an exception: “[R]estrictions on the number of persons allowed to present oral statements might be appropriate in rare cases involving large numbers of victims.” Majority Report, *supra* note 55, at 41. S.J. Res. 35 would allow restrictions “dictated by a substantial interest in public safety or the administration of criminal justice, or by compelling necessity,” S.J. Res. 35, 107th Cong., § 2 (2002), which would presumably anticipate a similar restriction.

evidence is on the outcome in the typical case,⁶² as opposed to those cases in which other especially powerful evidence is introduced.⁶³

With these caveats and great caution, my conclusion is that none of the solutions is very effective, and the courts are generally reticent to remedy even serious departures from established rules and appropriate practices. As I see it, the basic problem is that victim impact evidence is inherently uncontrollable. There are no real rules because there cannot be effective control of this type of evidence. In *Butch Cassidy and the Sundance Kid*, Paul Newman disabled his opponent with a low blow while supposedly discussing the rules of their upcoming knife fight. His opponent, dropping his guard, asked incredulously, "Rules? . . . In a knife fight?"⁶⁴ Both men understood in different ways that knife fights and rules are simply incompatible. Real rules for victim impact evidence seem to me equally incompatible.

I also see the beginnings of a shift in the use of victim impact evidence from providing information to the sentencing court to seeking catharsis or closure. Society, in a pop-psychology-way, appears to have embraced the propriety of statements directed at defendants for the purpose of helping to heal the victim. For this purpose, the impact evidence becomes even more visceral and even more difficult to constrain using ordinary rules of due process, probativity versus prejudice, relevance, and reasonableness. The knife fight analogy becomes even stronger, and the difficulty of applying rules to that type of inherently lawless enterprise becomes even more difficult. I hope this is not where we are now heading with victim impact evidence in death penalty cases.

⁶² Early empirical studies in experimental situations suggest that such impact would be substantial. See Susan Bandes, *Reply to Paul Cassell: What We Know About Victim Impact Statements*, 1999 UTAH L. REV. 545, 550-51 (describing empirical studies).

⁶³ For an example of extremely powerful evidence, see *ABC Primetime Live: You Shot the Wrong Girl* (ABC television broadcast, Aug. 13, 1997) (showing videotaped victim impact evidence created and introduced by critically injured wife of homicide victim that helped secure death penalty for defendant Randy Garcia in his California capital trial).

⁶⁴ *BUTCH CASSIDY AND THE SUNDANCE KID* (Twentieth Century Fox 1969).