

TEN YEARS OF *PAYNE*: VICTIM IMPACT EVIDENCE IN CAPITAL CASES

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INTRODUCTION

A little over a decade ago, in *Payne v. Tennessee*, the U.S. Supreme Court cleared the way for capital sentencing juries to consider “victim impact evidence” (VIE).¹ Reversing its prior decisions in *Booth v. Maryland*² and *South Carolina v. Gathers*,³ a six to three majority of the Court held 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.”⁴ Part I of this Article will discuss the Court’s prior decisions in *Booth* and *Gathers*, and Parts II and III will briefly attempt to clarify the parameters of the *Payne* holding. Part IV of this Article will survey the current legal landscape of state and federal practice regarding the admissibility of VIE and argument. Finally, this Article will offer in conclusion some brief perspec-

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¹ 501 U.S. 808, 827 (1991).

² 482 U.S. 496 (1987).

³ 490 U.S. 805 (1989).

⁴ *Payne*, 501 U.S. at 827.

tives on several unresolved issues in this particularly thorny (and misguided) area of capital punishment jurisprudence.⁵

I

THE ROAD TO *PAYNE*

Before attempting to establish *Payne*'s contours, a brief discussion of the Court's two prior decisions in this area—*Booth* and *Gathers*—is in order.

A. *Booth v. Maryland*

John Booth was charged with murdering an elderly couple in Baltimore County, Maryland.⁶ At the sentencing phase of Booth's trial, the State offered a victim impact statement (VIS).⁷ The VIS was based on interviews with the victims' son, daughter, son-in-law, and granddaughter.⁸ It contained their comments regarding the victims' personal qualities and how much they would be missed.⁹ Other parts of the VIS described various personal and emotional problems confronted by the victims' surviving family members.¹⁰

The Maryland Court of Appeals affirmed Booth's convictions and death sentence, concluding that a VIS served an important interest by ensuring that "survivors of the murdered individuals" be given consid-

⁵ This Article makes no attempt to exhaustively critique *Payne*. For a more thorough discussion of its holding and history, see Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361 (1996); Peter Brandon Bayer, *Not Interaction but Melding—The "Russian Dressing" Theory of Emotions: An Explanation of the Phenomenology of Emotions and Rationality with Suggested Related Maxims for Judges and Other Legal Decision Makers*, 52 MERCER L. REV. 1033 (2001); Matthew Engle, *Due Process Limitations on Victim Impact Evidence*, 13 CAP. DEF. J. 55 (2000); John Gibeaut, *The Last Word: Jury Is Still Out on Effects of Victim Impact Testimony*, A.B.A. J., Sept. 1997, at 42; Rachel King & Katherine Norgard, *What About Our Families? Using the Impact on Death Row Defendants' Family Members as a Mitigating Factor in Death Penalty Sentencing Hearings*, 26 FLA. ST. U. L. REV. 1119 (1999); 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 (1998); Paige McThenia, *The Role of Forgiveness in Capital Murder Cases*, 12 CAP. DEF. J. 325 (2000); Niru Shanker, *Getting a Grip on Payne and Restricting the Influence of Victim Impact Statements in Capital Sentencing: The Timothy McVeigh Case and Various State Approaches Compared*, 26 HASTINGS CONST. L.Q. 711 (1999); Joshua D. Greenberg, Comment, *Is Payne Defensible?: The Constitutionality of Admitting Victim-Impact Evidence at Capital Sentencing Hearings*, 75 IND. L.J. 1349 (2000); Amy K. Phillips, Note, *Thou Shall Not Kill Any Nice People: The Problem of Victim Impact Statements in Capital Sentencing*, 35 AM. CRIM. L. REV. 93 (1997); Ellen Kreitzberg, *How Much Payne Will the Courts Allow?*, 22 CHAMPION, Jan.-Feb. 1998, at 31; Molly J. Liskow, *Errors in Jury Charge Require Reversal of a Death Sentence*, N.J. LAW., Aug. 27, 2001, at A10; Thomas J. Phalen & Jane L. McClellan, *Speaking for the Dead at Death Sentencing: Victim Statements in Capital Cases—A Right of Survivorship?*, 31 ARIZ. ATT'Y, Nov. 1994, at 12 .

⁶ See *Booth*, 482 U.S. at 497-98.

⁷ See *id.* at 498-99.

⁸ *Id.* at 499.

⁹ See *id.*

¹⁰ See *id.* at 499-500.

eration to counterbalance “the emphasis on the perpetrator as an individual.”¹¹ The state court also held that the VIS at issue in Booth’s case contained only a “relatively straightforward and factual description of the effects of these murders on members of the [victims’] family.”¹² The Supreme Court granted certiorari.¹³

In a five-to-four decision, the Court rejected the State’s assertion that the VIS was a “circumstance” of the crime that the capital sentencing jury should have been made aware of in assessing “the full extent of the harm caused by Booth’s actions.”¹⁴ In the majority’s view, the VIS was not relevant in the unique circumstance of a capital sentencing hearing in which the jury’s function was to “express the conscience of the community on the ultimate question of life or death.”¹⁵ The Court opined that the jury’s focus should be on the defendant’s unique individual characteristics.¹⁶ The VIS, with its emphasis on the character and reputation of the victim and the crime’s effect on the victim’s family, disregarded the sentencing hearing’s focus and introduced factors which were “wholly unrelated to the blameworthiness of a particular defendant.”¹⁷ This evidence, the Court concluded, could “divert the jury’s attention away from the defendant’s background and record, and the circumstances of the crime.”¹⁸

The majority was also concerned with the difficulty of providing a capital defendant with a fair opportunity to rebut any proffered victim impact testimony.¹⁹ Noting that in some cases the defendant may decide to place before the sentencer evidence that the victim was of “dubious moral character,” the Court was troubled by “[t]he prospect of a ‘mini-trial’ on the victim’s character.”²⁰ Such a “mini-trial,” the majority reasoned, could distract the sentencing jury from its “constitutionally required task [of] determining whether the death penalty is appropriate in light of the background and record of the accused and the particular circumstances of the crime.”²¹ Because the VIS could “serve no other purpose than to inflame the jury and divert it from deciding the case on . . . relevant evidence,” the Eighth Amendment precluded its admission.²²

¹¹ Booth v. State, 507 A.2d 1098, 1103, 1124 (Md. 1986).

¹² *Id.* at 1124.

¹³ Booth v. Maryland, 479 U.S. 882 (1986).

¹⁴ *See Booth*, 482 U.S. at 503.

¹⁵ *See id.* at 504 (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968)).

¹⁶ *See id.*

¹⁷ *See id.*

¹⁸ *Id.* at 505.

¹⁹ *See id.* at 506.

²⁰ *Id.* at 507.

²¹ *Id.*

²² *See id.* at 508–09.

Both dissenting opinions agreed with the State's argument that the VIE was relevant because it assisted the jury in "weighing the degree of harm that the defendant has caused and the corresponding degree of punishment that should be inflicted."²³ Justice White's dissent pointed out that in capital sentencing hearings, "the State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in."²⁴ His dissent also noted that the majority's fair-rebuttal argument missed the mark because Maryland had not limited the right of defendants to rebut VIE.²⁵

Justice Scalia's dissent noted the rise of the victims' rights movement:

Many citizens have found one-sided and hence unjust the criminal trial in which a parade of witnesses comes forth to testify to the pressures beyond normal human experience that drove the defendant to commit his crime, with no one to lay before the sentencing authority the full reality of human suffering the defendant has produced—which (and *not* moral guilt alone) is one of the reasons society deems his act worthy of the prescribed penalty.²⁶

Justice Scalia concluded that precluding VIE and argument was "in effect to prescribe a debate on the appropriateness of the capital penalty with one side muted."²⁷

B. *South Carolina v. Gathers*

The Court was next confronted with VIE and arguments in *Gathers*.²⁸ During the guilt-or-innocence phase of the proceedings, the court admitted several items found near the scene of the offense, allegedly removed from the victim's wallet and bags, as evidence.²⁹ *Gathers* was convicted of murder.³⁰ The prosecutor's penalty phase summation focused on two of these items, a voter registration card and a religious tract called the "Game Guy's Prayer."³¹ After reading the prayer to the jury, the prosecutor made the following comments:

Reverend Haynes believed in this community. He took part. And he believed that in Charleston County, in the United States of America, that in this country you could go to a public park and sit

²³ See *id.* at 515 (White, J., dissenting); *id.* at 519–20 (Scalia, J., dissenting).

²⁴ *Id.* at 517 (White, J., dissenting).

²⁵ See *id.* at 518 (White, J., dissenting).

²⁶ *Id.* at 520 (Scalia, J., dissenting).

²⁷ *Id.* (Scalia, J., dissenting).

²⁸ 490 U.S. 805 (1989). The author submitted an *amicus curiae* brief in *Gathers* on behalf of the South Carolina Public Defenders' Association.

²⁹ See *id.* at 807.

³⁰ See *id.* at 807–08.

³¹ See *id.* at 808–09.

on a public bench and not be attacked by the likes of Demetrius Gathers.³²

Gathers was sentenced to death.³³ On direct appeal, the South Carolina Supreme Court ordered a new sentencing trial because the prosecutor's remarks "conveyed the suggestion [that Gathers] deserved a death sentence because the victim was a religious man and a registered voter."³⁴ The Court granted certiorari.³⁵

In upholding the decision, another five-to-four majority of the Court acknowledged that *Booth* left open the possibility that victim impact information might be admissible if it related directly to the circumstances of the offense.³⁶ However, the Court rejected the State's argument that the prosecutor's comments fell within the legal gray area. Although the victim's personal papers themselves were admissible as a relevant circumstance of the crime, and thus a proper subject for comment, the Court concluded that "the prosecutor's argument in this case went well beyond that fact."³⁷ The majority reasoned that there was no evidence the defendant read the victim's papers or knew their contents because the eyewitness testimony indicated that he rifled through the victim's bags very quickly and that the crime happened at night in a poorly-lit area.³⁸ Thus, "the content of the various papers . . . was purely fortuitous" and provided no "information relevant to the defendant's moral culpability."³⁹ Unless the Court were prepared to overrule *Booth*, Justice White concluded in his concurrence, the judgment below should be affirmed.⁴⁰

Justice O'Connor authored one of the dissenting opinions, in which she was joined by Chief Justice Rehnquist and Justice Kennedy.⁴¹ In her view, even if *Booth* were still good law,⁴² it "should not be read . . . to preclude prosecutorial comment which gives the sentencer a 'glimpse of the life' a defendant 'chose to extinguish.'"⁴³ She argued that nothing in the Eighth Amendment prevents a prosecutor from "conveying to the jury a sense of the unique human being whose life the defendant has taken."⁴⁴ Such evidence, in her view, was rele-

³² *Id.* at 810 (citation omitted).

³³ *Id.* at 806.

³⁴ *See State v. Gathers*, 369 S.E.2d 140, 144-45 (S.C. 1988).

³⁵ *South Carolina v. Gathers*, 488 U.S. 888 (1988).

³⁶ *See Gathers*, 490 U.S. at 811.

³⁷ *Id.*

³⁸ *See id.* at 811-12.

³⁹ *Id.* at 812.

⁴⁰ *Id.* (White, J., concurring).

⁴¹ *See id.* (O'Connor, J., dissenting).

⁴² *Id.* at 813-14 (O'Connor, J., dissenting). Justice O'Connor was prepared to overrule *Booth*, but she did not think it was necessary to do so to decide the case at bar. *Id.*

⁴³ *Id.* at 816 (O'Connor, J., dissenting) (citation omitted).

⁴⁴ *Id.* at 817 (O'Connor, J., dissenting).

vant to the sentencer's moral judgment in determining the appropriate penalty.⁴⁵ Justice O'Connor also noted an imbalance in the Court's Eighth Amendment jurisprudence arising from the fact that the defendant was permitted to present a wide array of evidence in mitigation.⁴⁶ She would have remanded the case to the state court to consider whether the prosecutor's comments manipulated the evidence and deprived the defendant of the right to rebut the evidence.⁴⁷ "Because[, in her view,] the majority instead adopts an Eighth Amendment barrier to virtually any discussion of the victim's personal characteristics at the penalty phase of a murder trial," Justice O'Connor dissented.⁴⁸

Justice Scalia filed a separate dissenting opinion, asserting again that *Booth* was wrongly decided.⁴⁹ He stated that it would be "a violation of [his] oath to adhere to what [he] consider[s] a plainly unjustified intrusion upon the democratic process in order that the Court might save face."⁵⁰ In Justice Scalia's opinion:

Booth [had no] arguable basis in the common-law background that led up to the Eighth Amendment, in any longstanding societal tradition, or in any evidence that present society, through its laws or the actions of its juries, has set its face against considering the harm caused by criminal acts in assessing responsibility.⁵¹

II

PAYNE

Pervis Tyrone Payne was charged with the murders of Charisse Christopher and her two-year-old daughter, Lacie, as well as with the attempted murder of Charisse's three-year-old son, Nicholas.⁵² Payne was convicted on all counts.⁵³ At the sentencing phase of the trial, the State presented the testimony of Charisse's mother, who testified about the effects of the murders. She described how Nicholas cried for his mother and his sister and how much he missed them.⁵⁴ The prosecution maintained that although there was nothing that could be done for Charisse's parents, there was something the jury could do for Nicholas.⁵⁵ He would "want to know what type of justice was

⁴⁵ See *id.* at 818 (O'Connor, J., dissenting).

⁴⁶ See *id.* at 817 (O'Connor, J., dissenting).

⁴⁷ See *id.* at 814, 822 (O'Connor, J., dissenting).

⁴⁸ *Id.* at 823 (O'Connor, J., dissenting).

⁴⁹ See *id.* (Scalia, J., dissenting).

⁵⁰ *Id.* at 825 (Scalia, J., dissenting).

⁵¹ *Id.* (Scalia, J., dissenting).

⁵² *Payne v. Tennessee*, 501 U.S. 808, 811 (1991).

⁵³ *Id.*

⁵⁴ *Id.* at 814.

⁵⁵ *Id.* at 815 (citation omitted).

done. . . . With your verdict,” the prosecutor asserted, “you will provide the answer.”⁵⁶ The prosecutor also argued that:

No one will ever know about Lacie Jo because she never had the chance to grow up. Her life was taken from her at the age of two years old. . . . And there won't be anybody there—there won't be her mother there or Nicholas' [sic] 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. . . . [Defense counsel] wants you to think about a good reputation, 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.⁵⁷

Payne was sentenced to death.⁵⁸ The Supreme Court of Tennessee affirmed,⁵⁹ and the Supreme Court granted certiorari to reconsider its prior decisions in *Booth* and *Gathers*.⁶⁰

Writing for the majority, Chief Justice Rehnquist identified the “two premises” of *Booth* and *Gathers*: (1) that “evidence relating to a particular victim or to the harm that a capital defendant causes a victim's family [does] not in general reflect on the defendant's ‘blameworthiness’”; and (2) that “only evidence relating to [the defendant's] ‘blameworthiness’ is relevant to the capital sentencing decision.”⁶¹ The Chief Justice believed these premises were faulty, however, because “the assessment of harm caused by the defendant as a result of the crime charged has understandably been an important concern of the criminal law.”⁶² Thus, he recognized that two equally blameworthy defendants may be punished differently solely on the basis of the harm caused.⁶³ He also noted that in recent years, in cases in which judges had exercised their sentencing discretion, “the consideration of the harm caused by the crime has been an important factor in the exercise of that discretion.”⁶⁴

The Chief Justice argued that *Booth* and *Gathers* should be overruled to right the imbalance created by the Court's lenient treatment of defense mitigation-evidence.⁶⁵ Precluding VIE “unfairly weighted

⁵⁶ *Id.* (citation omitted).

⁵⁷ *Id.* at 816 (citation omitted).

⁵⁸ *Id.*

⁵⁹ *State v. Payne*, 791 S.W.2d 10, 21 (Tenn. 1990).

⁶⁰ *See Payne v. Tennessee*, 498 U.S. 1080 (1991).

⁶¹ *Payne v. Tennessee*, 501 U.S. 808, 819 (1991).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 820.

⁶⁵ *See id.* at 822, 830.

the scales in a capital trial.”⁶⁶ Although few, if any, limits are placed on the admission of mitigating evidence regarding the defendant and his circumstances, the State is barred both from offering a “‘quick glimpse of the life’” the defendant took and from “demonstrating the loss to the victim’s family and to society which has resulted from the defendant’s homicide.”⁶⁷

The majority dispensed with the arguments that the *Booth* Court found persuasive. Addressing the difficulties in rebutting VIE while avoiding a “mini-trial” about the victim’s character, the majority argued that “the mere fact 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 a dilemma.”⁶⁸ The Court also brushed aside the argument that VIE “permits a jury to find that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy.”⁶⁹ VIE, the Chief Justice opined, is not generally “offered to encourage comparative judgments of this kind,” but is offered instead to show each victim’s ‘uniqueness as an individual human being.’”⁷⁰

Ultimately, the majority believed that “[v]ictim 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.”⁷¹ The new majority concluded:

We are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant’s moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant.

....

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. A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim’s family is relevant to the jury’s decision as to whether or not the death penalty should be imposed.⁷²

⁶⁶ *Id.* at 822.

⁶⁷ *Id.* (quoting *Mills v. Maryland*, 486 U.S. 367, 397 (1988) (Rehnquist, C.J., dissenting)).

⁶⁸ *Id.* at 823.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 825.

⁷² *Id.* at 825, 827.

The Court noted that “[i]n the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief.”⁷³ Furthermore, the Court made clear that its decision did not affect *Booth*’s holding “that the admission of a victim’s family members’ characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment.”⁷⁴

Justice O’Connor’s concurrence largely echoed the majority opinion, stating that “there is no strong societal consensus that a jury may not take into account the loss suffered by a victim’s family or that a murder victim must remain a faceless stranger.”⁷⁵ Thus, a “State may decide . . . that the jury should see a ‘quick glimpse of the life petitioner chose to extinguish.’”⁷⁶ She also recognized that in some cases, a witness’s testimony or a prosecutor’s arguments may render the sentencing proceeding fundamentally unfair under the Due Process Clause.⁷⁷ Finally, Justice O’Connor stated that *Payne* did not affect other VIE which *Booth* barred, such as “opinions of the victim’s family about the crime, the defendant, and the appropriate sentence.”⁷⁸

Justice Souter also authored a concurring opinion, joined by Justice Kennedy, in which he argued that some VIE is relevant because murder has “foreseeable consequences.”⁷⁹ Murder victims are distinct individuals, and there are always victims “left behind.”⁸⁰ “[The] foreseeability of the killing’s consequences imbues them with direct moral relevance”⁸¹ He also opined that *Booth* created an unworkable rule that threatened to produce arbitrary results because some evidence about the victim will, in many cases, be admitted at the guilt-or-innocence phase of the proceedings.⁸² Because the jury could not be deprived of “such common contextual evidence” without distorting “the comprehensibility of most trials,” *Booth*’s objective could not be maintained unless separate sentencing juries were impaneled.⁸³ Justice Souter cautioned, however, that “[e]vidence about the victim and

⁷³ *Id.* at 825 (citation omitted).

⁷⁴ *Id.* at 830 n.2.

⁷⁵ *Id.* at 831 (O’Connor, J., concurring).

⁷⁶ *Id.* at 830 (O’Connor, J., concurring) (quoting *Mills v. Maryland*, 486 U.S. 367, 397 (1988) (Rehnquist, C.J., dissenting)).

⁷⁷ *See id.* at 831 (O’Connor, J., concurring).

⁷⁸ *Id.* at 833 (O’Connor, J., concurring). Justice Scalia’s concurring opinion focused primarily on *stare decisis*, a subject beyond the scope of this Article.

⁷⁹ *Id.* at 838–39 (Souter, J., concurring).

⁸⁰ *See id.* at 838 (Souter, J., concurring).

⁸¹ *Id.* (Souter, J., concurring).

⁸² *See id.* at 839–40 (Souter, J., concurring).

⁸³ *Id.* at 841 (Souter, J., concurring).

survivors, and any jury argument predicated on it, can of course be so inflammatory as to risk a verdict impermissibly based on passion, not deliberation.”⁸⁴ He also recognized that the Court’s decision did not upset *Booth*’s holding “that a sentencing authority should not receive a third category of information concerning a victim’s family members’ characterization of and opinions about the crime, the defendant, and the appropriate sentence.”⁸⁵

Justice Marshall’s dissent focused primarily on the fact that there was no justification for abandoning *Booth* because nothing had changed except for the Court’s justices.⁸⁶ The arguments accepted by the *Payne* majority were precisely those rejected in *Booth*.⁸⁷ Justice Marshall observed: “Power, not reason, is the new currency of this Court’s decisionmaking.”⁸⁸

Justice Stevens’s dissent noted that even if *Booth* had never been decided, the Court’s Eighth Amendment decisions did not support “the majority’s conclusion that the [State] may introduce evidence that sheds no light on the defendant’s guilt or moral culpability, and thus serves no purpose other than to encourage jurors to decide in favor of death rather than life on the basis of their emotions rather than their reason.”⁸⁹

III

THE LIMITS OF *PAYNE*

Payne lifted the per se ban on the admissibility of VIE, but what does it permit? Are there any substantive restrictions on the types and modes of VIE that the prosecution may present? For example, who may testify about what? What other evidence may the sentencer hear? Are there any procedural safeguards necessary to safeguard a capital defendant’s right to a reliable sentencing determination? *Payne* provides no answers to these and other questions, and the Court has not seen fit to grant certiorari in any post-*Payne* case raising a VIE question. Furthermore, *Payne*’s dual reasons for permitting VIE—to offset the defendant’s mitigating evidence and to permit the jury to assess the specific harm resulting from the offense⁹⁰—are so vague that it is extraordinarily difficult to determine *Payne*’s scope.

On the one hand, the *Payne* majority indicated that there would be no constitutional problem if a State were to permit the prosecution

⁸⁴ *Id.* at 836 (Souter, J., concurring).

⁸⁵ *Id.* at 835 n.1 (Souter, J., concurring).

⁸⁶ *See id.* at 844 (Marshall, J., dissenting).

⁸⁷ *See id.* at 846–48 (Marshall, J., dissenting).

⁸⁸ *Id.* at 844 (Marshall, J., dissenting).

⁸⁹ *Id.* at 856 (Stevens, J., dissenting).

⁹⁰ *See id.* at 825.

to present a capital sentencing jury with “a quick glimpse of the life” the defendant took.⁹¹ Thus, one could reasonably argue that *Payne* sanctions only a very limited victim impact presentation in order to prevent the victim from being “faceless.” On the other hand, the enforcement mechanism that the Court chose—whether the evidence is “so unduly prejudicial that it renders the trial fundamentally unfair”⁹²—is so permissive that much more may be tolerable. Thus, the question of how much and what kind of VIE is permissible remains unanswered. As discussed in more detail in Part IV, however, most state and federal courts allow extensive VIE, greatly exceeding the “quick glimpse” standard of admission.⁹³

Furthermore, *Payne* did not address what procedural protections—including notice, pre-admission in *in camera* hearings, and limiting instructions—are necessary to safeguard a capital defendant’s right to a reliable determination of the appropriate penalty. It is clear, however, from the majority and concurring opinions that *Payne* left intact the *Booth* Court’s holding that a victim’s family members may not express their opinions about the crime, the defendant or the appropriate sentence.⁹⁴ However, as discussed below, some states even permit this type of VIE.⁹⁵

IV

PAYNE’S APPLICATION IN THE STATE AND FEDERAL COURTS

Payne, of course, does not require states to allow VIE; the Court held only that the “Eighth Amendment erects no per se bar.”⁹⁶ Not surprisingly, due to the increasing power of the victims’ rights movement,⁹⁷ almost all jurisdictions with the death penalty have nevertheless taken advantage of the Supreme Court’s relaxation of the constitutional ban and now authorize VIE and argument.⁹⁸ In fact, thirty-three of the thirty-eight states with the death penalty, as well as the federal government and the military, currently allow the use of VIE in capital trials.⁹⁹ Most jurisdictions have done so with little or no reasoned analysis as to why this type of evidence and argument should

⁹¹ See *id.* at 822, 827 (quoting *Mills v. Maryland*, 486 U.S. 367, 397 (1988) (Rehnquist, C.J., dissenting)); *supra* note 67 and accompanying text.

⁹² *Payne*, 501 U.S. at 825.

⁹³ See *infra* Part IV.

⁹⁴ See *supra* notes 74, 78, 85 and accompanying text.

⁹⁵ See *infra* Part IV.A.1.

⁹⁶ See *Payne*, 501 U.S. at 827 (emphasis omitted).

⁹⁷ See Andrea F. Siegel, *Civil Suits Become Forum for Payback*, BALT. SUN, Mar. 1, 2001, at D1.

⁹⁸ See *infra* Table 1.

⁹⁹ Five states have not yet decided whether VIE is admissible. See *infra* Table 1.

be admissible, other than referring to the *Payne* decision.¹⁰⁰ Furthermore, as will be discussed below, surprisingly few jurisdictions provide any substantive limits or procedural protections regulating the admission of VIE and argument. The overwhelming trend is toward the unfettered admission of a wide array of VIE and arguments.

A. State Courts

1. *Substantive Considerations*

As reflected in Table 1, thirty-three states allow VIE; however, only two states do so under somewhat limited circumstances, and five states have yet to rule on the admissibility of VIE.

TABLE 1¹⁰¹
Admissibility of Victim Impact Evidence by State

Undecided	Limited Admissibility	Admissible	
Connecticut Montana New Hampshire New York Wyoming	Indiana Mississippi	Alabama Arizona Arkansas California Colorado Delaware Florida Georgia Idaho Illinois Kansas Kentucky Louisiana Maryland Missouri Nebraska	Nevada New Jersey New Mexico North Carolina Ohio Oklahoma Oregon Pennsylvania South Carolina South Dakota Tennessee Texas Utah Virginia Washington

Indiana and Mississippi are the only two states that appear to significantly restrict the admission of VIE. Although neither jurisdiction finds VIE per se inadmissible, both states claim to utilize a higher standard of relevance. Indiana, for example, prohibits VIE unless it is relevant to one of the statutory aggravating factors.¹⁰² The Indiana Supreme Court has never upheld a trial court's admission of VIE.

¹⁰⁰ See, e.g., *State v. Johnson*, 410 S.E.2d 547, 555 (S.C. 1991) (citing *Payne* as authority and holding that it was not reversible error for the prosecutor to tell the sentencing jury that the victim's "family could not go see him, they could only visit him at the grave").

¹⁰¹ This Table and the following discussion are based on the author's research.

¹⁰² See IND. CODE ANN. § 35-50-2-9(b) (Michie 1998) (establishing the statutory aggravating circumstances); *Bivins v. State*, 642 N.E.2d 928, 957 (Ind. 1994).

However, when confronted with a case in which VIE was erroneously admitted, the court has often found the error harmless.¹⁰³

Mississippi requires that VIE be “proper and necessary to a development of the case” and further requires the prosecution to demonstrate that the evidence “could not serve in any way to incite the jury.”¹⁰⁴ Mississippi was one of the few states that initially hesitated to adopt *Payne*’s holding, stating that “*Payne* . . . is properly phrased in terms of the constitutionally permissible, not the mandatory, and in prudence, we should await another day to explore the full reach of our rediscovered freedom.”¹⁰⁵ However, the state court later held that a prosecutor’s statement that “injustice would be hard to bear by the family and friends of the victim” had some probative value and then opined that, taking the trial as a whole, the comments were not overly prejudicial.¹⁰⁶ Thus, although Mississippi technically considers VIE inadmissible,¹⁰⁷ it does not bar all VIE or argument, and trial courts appear to have discretion to determine whether, under the circumstances of the case, the prosecution may introduce VIE.

2. *What Evidence States Permit*

Payne expressly sanctioned evidence related to the victim’s personal characteristics and the emotional impact of the murder on the victim’s family.¹⁰⁸ That is precious little guidance, and a review of many cases reveals that states permit a wide array of VIE. Not surprisingly, evidence about the victim’s good character is common.¹⁰⁹ In other cases, evidence has been presented about the victim’s talents,¹¹⁰ intelligence,¹¹¹ spirituality,¹¹² work ethic and educational back-

¹⁰³ See, e.g., *Wrinkles v. State*, 749 N.E.2d 1179, 1196 (Ind. 2001); *Bivins*, 642 N.E.2d at 957.

¹⁰⁴ *Jenkins v. State*, 607 So. 2d 1171, 1183 (Miss. 1992); see also *Edwards v. State*, 737 So. 2d 275, 291 (Miss. 1999) (finding no error in admission of VIE because it was probative and not prejudicial).

¹⁰⁵ *Hansen v. State*, 592 So. 2d 114, 146–47 (Miss. 1991).

¹⁰⁶ See *Edwards*, 737 So. 2d at 291.

¹⁰⁷ See *Hansen*, 592 So. 2d at 146–47.

¹⁰⁸ See *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

¹⁰⁹ See, e.g., *Sullivan v. State*, 636 A.2d 931, 940, 942 (Del. 1994) (allowing evidence that victim was a “humble . . . gracious man”); *State v. Gray*, 887 S.W.2d 369, 389 (Mo. 1994) (holding that it was not error to allow evidence that victim did not have a “hateful bone in her body”).

¹¹⁰ See *Whittlesey v. State*, 665 A.2d 223, 250–51 (Md. 1995) (finding relevant the evidence that victim was a highly-skilled piano player).

¹¹¹ See *State v. Frost*, 727 So. 2d 417, 431–32 (La. 1998) (holding that evidence of victim’s intelligence is admissible).

¹¹² See *Turner v. State*, 486 S.E.2d 839, 842, 844 (Ga. 1997) (holding that testimony that victim had a “new found faith and spirituality” was neither prejudicial nor inadmissible); *Lucas v. Evatt*, 416 S.E.2d 646, 648 (S.C. 1992) (holding that testimony that victims were “good honest hardworking God fearing people” did not render the trial “fundamentally unfair”).

ground,¹¹³ standing in the community,¹¹⁴ and numerous other traits.¹¹⁵ In addition, most states allowing VIE place no limits on the number of VIE witnesses that may testify.¹¹⁶

Courts have also allowed wide-ranging evidence about the effects of the murder on the victim's family, with few restrictions. In one case, for example, the victim's sister was permitted to testify that her marriage ended as a result of the murder.¹¹⁷ In other cases, relatives have been permitted to testify about miscarriages,¹¹⁸ heart attacks,¹¹⁹ and other illnesses and negative effects.¹²⁰

Despite *Payne's* supposed requirement that VIE should be related to the "emotional impact of the crimes on the victim's family,"¹²¹ most states permit the admission of much broader sentiments. Some states limit VIE to family members,¹²² but most do not. Co-workers, friends,

¹¹³ See *Smith v. State*, 756 So. 2d 892, 917-18 (Ala. Crim. App. 1997) (upholding admission of witness testimony "about the victim's work ethic and college background" in the guilt phase of a capital trial).

¹¹⁴ See *State v. Simpson*, 479 S.E.2d 57, 60 (S.C. 1996) (upholding admission of testimony that related to the victim's "standing in the community").

¹¹⁵ In some cases, counsel for the capital defendant have attempted to present evidence of the victim's bad character or traits. If the victim's personal characteristics are relevant at sentencing, then they should be fair game for either side. However, courts have typically excluded this information, even though *Payne* provides no clear basis for this result. See, e.g., *Barnes v. State*, 496 S.E.2d 674, 689 (Ga. 1998) (holding that evidence of victim's bad character is inadmissible); *State v. Southerland*, 447 S.E.2d 862, 867 (S.C. 1994) (holding that the defendant is prohibited from presenting evidence regarding victim's involvement with drugs and prostitution), *overruled on other grounds by State v. Chapman*, 463 S.E.2d 314 (S.C. 1995). But see *Conover v. State*, 933 P.2d 904, 922-23 (Okla. Crim. App. 1997) (holding that refusal to permit defense counsel to cross-examine victim impact witness and refusal to admit rebuttal evidence about victim's drug use was reversible error).

¹¹⁶ See, e.g., *Pickren v. State*, 500 S.E.2d 566, 568 (Ga. 1998) (upholding admission of eight VIS and refusing to place "rigid limitations on the volume" of VIS). New Jersey is the sole exception; the general rule there is that absent special circumstances, only one witness may testify. See *State v. Muhammad*, 678 A.2d 164, 180 (N.J. 1996). Despite an express statutory provision, Illinois courts have refused to place any limits on the number of witnesses. See *People v. Gonzales*, 673 N.E.2d 1181, 1183 (Ill. App. Ct. 1996).

¹¹⁷ See *McDuff v. State*, 939 S.W.2d 607, 620 (Tex. Crim. App. 1997) (expressing hesitancy but ultimately upholding admissibility).

¹¹⁸ See, e.g., *Holmes v. State*, 671 N.E.2d 841, 848-49 (Ind. 1996) (holding that testimony that attempted murder victim had a miscarriage was admissible).

¹¹⁹ See, e.g., *Young v. State*, 992 P.2d 332 (Okla. Crim. App. 1998) (holding that testimony that victim's aunt suffered fatal heart attack when she received the news of her nephew's death was not erroneously admitted).

¹²⁰ See, e.g., *Griffith v. State*, 983 S.W.2d 282, 289 (Tex. Crim. App. 1998) (holding that testimony that victim's father gave up his bout with cancer after his daughter's murder was admissible).

¹²¹ *Payne v. Tennessee*, 501 U.S. 808, 817 (1991).

¹²² New Jersey, Idaho, Illinois, Maryland, and Virginia, for example, place limitations on who may give victim impact testimony. See *State v. Muhammad*, 678 A.2d 164, 175 (N.J. 1996) (characterizing VIE as a "brief statement from the victim's family"); IDAHO CODE § 19-5306(3) (Michie 2002) (allowing the families of homicide victims to testify at sentencing hearings); *People v. Hope*, 702 N.E.2d 1282, 1287 (Ill. 1998) (limiting the meaning of

distant family members, and neighbors have been allowed to testify regarding the impact of the victim's death on them, the victim's family, or the community.¹²³ For example, in Oklahoma, VIE comprises the following:

[I]nformation about the financial, emotional, psychological, and physical effects of a violent crime on each victim and members of their immediate family, or person designated by the victim or by family members of the victim and includes information about the victim, circumstances surrounding the crime, the manner in which the crime was perpetrated, and the victim's opinion of a recommended sentence.¹²⁴

Arguably, permitting testimony from the victim's relatives and associates is less disturbing than allowing evidence about the effect of the murder on the larger community.¹²⁵ For example, courts have admitted evidence to show the impact of a law enforcement officer's death on the "law enforcement community."¹²⁶

In addition to testimony from witnesses, courts have allowed the prosecution to present poems,¹²⁷ videotapes,¹²⁸ pre-death photo-

"crime victim" as used in the Illinois Rights of Crime Victims and Witnesses Act to a spouse, child, parent, or sibling of the victim in the case on trial); MD. ANN. CODE art. 27, § 780(a) (2002) (stating that "[i]n every case resulting in serious physical injury or death, the victim or a member of the victim's immediate family . . . may, at the request of the State's Attorney and in the discretion of the sentencing judge, address the sentencing judge or jury under oath or affirmation before the imposition of sentence"); VA. CODE ANN. § 19.2-11.01(B) (Michie 2000) (defining "victim" in a capital case as the spouse, parent, child, sibling, or legal guardian of the deceased). However, the states have not always strictly enforced the statutory limitations. *See* *People v. Hall*, 743 N.E.2d 126, 137 (Ill. 2000) (finding that because the testimony was brief and the aggravating evidence was significant, allowing VIE from the victim of another crime was harmless); *Beck v. Commonwealth*, 484 S.E.2d 898, 905-06 (Va. 1997) (noting that the Virginia statute limits neither the Commonwealth's sources of VIE, nor the court's discretion in determining admissibility of evidence).

¹²³ *See* *Mosley v. State*, 983 S.W.2d 249, 262 (Tex. Crim. App. 1998) (holding that distant "family members, close friends, or co-workers may, in a given case, provide legitimate testimony"); *see also* *Hicks v. State*, 940 S.W.2d 855, 857 (Ark. 1997) (allowing VIE that demonstrated how the "victim's death represent[ed] a unique loss to society and . . . to his family"); *Wesley v. State*, 916 P.2d 793, 804 (Nev. 1996) (allowing the testimony of the victim's neighbor); *State v. Byram*, 485 S.E.2d 360, 365-66 (S.C. 1997) (allowing testimony of the victim's co-worker).

¹²⁴ OKLA. STAT. ANN. tit. 22, § 984(1) (West 2001); *see also* *Cargle v. State*, 909 P.2d 806, 827 (Okla. Crim. App. 1995) (discussing the statute's meaning in light of *Payne*).

¹²⁵ *See* *Sullivan v. State*, 636 A.2d 931, 939-40 (Del. 1994); *McClain v. State*, 477 S.E.2d 814, 824-25 (Ga. 1996).

¹²⁶ *See, e.g.,* *Hyde v. State*, 778 So. 2d 199, 213-16 (Ala. Crim. App. 1998). *But see* *Lambert v. State*, 675 N.E.2d 1060, 1062-65 (Ind. 1996) (finding error in admission of evidence that since the murder of a police officer, the chief of police could no longer do his job properly and other officers had sought psychological counseling).

¹²⁷ *See, e.g.,* *Noel v. State*, 960 S.W.2d 439, 446-47 (Ark. 1998); *State v. Basile*, 942 S.W.2d 342, 358-59 (Mo. 1997).

¹²⁸ *See, e.g.,* *Hicks*, 940 S.W.2d at 857 (allowing a fourteen-minute videotape narrated by victim's brother as VIE); *Whittlesey v. State*, 665 A.2d 223, 251 (Md. 1995) (allowing a

graphs,¹²⁹ and handcrafted items made by the victim.¹³⁰ In one case, the State was allowed to show the jury a photograph of a dead fetus dressed in clothes that the child's mother, who was also killed, had intended for him to wear home from the hospital.¹³¹ The state court found the photograph relevant in that it showed the "individuality of the unborn child."¹³²

VIE from victims of the defendant's prior crimes is generally deemed inadmissible on the basis that it is irrelevant to the case for which the defendant is standing trial. As the Texas Court of Criminal Appeals explained, VIE should only relate to the impact of the underlying offense, not to other offenses.¹³³ Colorado, Illinois, and Nevada also have expressly rejected the admission of VIE from victims not named in the indictment.¹³⁴ On the other hand, some states have allowed victims of other crimes to testify. The North Carolina Supreme Court, for example, upheld the admission of VIE from the daughter of a woman whom the defendant murdered many years before.¹³⁵

Finally, despite *Payne's* holding to the contrary, some states permit opinion testimony about the defendant and whether the defendant should be sentenced to death. Oklahoma, Alabama, and Kansas expressly allow victim impact testimony containing the victim impact witness's opinion as to the appropriate sentence for the capital defen-

videotape as VIE); *State v. Gray*, 887 S.W.2d 369, 389 (Mo. 1994) (allowing a videotape of family Christmas-gathering as VIE); *State v. Allen*, 994 P.2d 728, 749-51 (N.M. 1999) (allowing a three-minute videotape of the victim, where other VIE was minimal, and where a photograph from the same trip had already been introduced at trial).

¹²⁹ New Jersey, for example, allows pre-homicide photographs, but gives the court discretion to prescribe the size, location and duration of their exhibition. *See* N.J. STAT. ANN. § 2C:11-3c(6) (West 2002). In Oregon, photographs are admissible "to show the general appearance . . . of the victim while alive" and may be accompanied by additional VIE for the purpose of identifying the victim. *State v. Hayward*, 963 P.2d 667, 676 & n.4, 677 (Or. 1998). California also allows photographs of the victims in order to aid the jury in determining "the size, age and vulnerability of the victims." *People v. Edwards*, 819 P.2d 436, 465 (Cal. 1991). Missouri, Ohio, South Carolina, and Texas also allow pre-homicide photographs. *See State v. Parker*, 886 S.W.2d 908, 927 (Mo. 1994); *State v. Hill*, 595 N.E.2d 884, 895-96 (Ohio 1992); *State v. Tucker*, 478 S.E.2d 260, 266-67 (S.C. 1996); *Solomon v. State*, 49 S.W.3d 356 (Tex. Crim. App. 2001). Oklahoma, however, does not. *See Cargle*, 909 P.2d at 830.

¹³⁰ *See, e.g., State v. Roberts*, 948 S.W.2d 577, 604 (Mo. 1997).

¹³¹ *See State v. Ard*, 505 S.E.2d 328, 331-32 (S.C. 1998).

¹³² *Id.* at 332.

¹³³ *See Tong v. State*, 25 S.W.3d 707, 713-14 (Tex. Crim. App. 2000); *Cantu v. State*, 939 S.W.2d 627, 637 (Tex. Crim. App. 1997).

¹³⁴ *See People v. Dunlap*, 975 P.2d 723, 744-45 & n.14 (Colo. 1999); *People v. Hope*, 702 N.E.2d 1282, 1287-89 (Ill. 1998); *Sherman v. State*, 965 P.2d 903, 914 (Nev. 1998) (holding that VIE from a previous crime is neither relevant nor admissible by statute). Additionally, Ohio does not allow VIE from noncapital victims in capital cases, because the Ohio legislature has yet to create a provision allowing such testimony. *See State v. White*, 709 N.E.2d 140, 152-53 (Ohio 1999).

¹³⁵ *See State v. Robinson*, 451 S.E.2d 196, 204-05 (N.C. 1994).

dant.¹³⁶ However, most jurisdictions deem such evidence inadmissible.¹³⁷

In addition, most jurisdictions have a fairly strict policy of only permitting VIE at the sentencing phase of the proceedings.¹³⁸ However, a few states have permitted VIE at the innocence-or-guilt phase

if the evidence is relevant to the circumstances of the murder, the existence of the statutory aggravating circumstances that permit the death penalty, and the nature and circumstances of the statutory aggravating circumstances, if the evidence is introduced to attempt to refute or rebut mitigating evidence offered, or if the defendant requests a presentence investigation report.¹³⁹

Similarly, VIE may enter the first phase of a capital trial as part of a witness's identification of a photograph of the victim.¹⁴⁰ Four states

¹³⁶ See *Ledbetter v. State*, 933 P.2d 880, 891 (Okla. Crim. App. 1997) (holding that victim impact witness may give his opinion as to the correct punishment for the defendant, but, if he does, the court will review the case with heightened scrutiny on appeal). Alabama and Kansas allow opinions as to the appropriate sentence during a sentencing hearing, unless the defendant can show that the judge improperly relied on such statements in determining the sentence. See *Hyde v. State*, 778 So. 2d 199, 213–14 (Ala. Crim. App. 1998); *State v. Gideon*, 894 P.2d 850, 863–64 (Kan. 1995).

¹³⁷ See, e.g., *Ex parte Reiber*, 663 So. 2d 999, 1006 (Ala. 1995) (holding that a presentence report containing the opinion of the victim's husband on the appropriate sentence for the defendant was harmless error); *State v. Card*, 825 P.2d 1081, 1089–90 (Idaho 1991) (finding opinion as to the proper sentence inadmissible, but harmless because sentencing judge did not consider it); *State v. Bernard*, 608 So. 2d 966, 970–73 (La. 1992) (finding survivors' opinions about the crime and appropriate punishment irrelevant and as such inadmissible); *State v. Roll*, 942 S.W.2d 370, 378 (Mo. 1997) (holding that opinion of four of the victims' family members that defendant should receive the death penalty was inadmissible, but that the error was harmless); *State v. Joubert*, 455 N.W.2d 117, 129–30 (Neb. 1990) (finding victim's family members' characterizations about the defendant or their opinions as to the appropriate sentence inadmissible, but harmless because the sentencing judge is entitled to a presumption that he did not rely upon erroneously admitted evidence); *State v. Muhammad*, 678 A.2d 164, 176–77 (N.J. 1996) (holding that admission of survivor's opinions on the correct punishment, the defendant and the crime violates the Eighth Amendment); *State v. Treesh*, 739 N.E.2d 749, 776–78 (Ohio 2001) (finding error in allowing the court to hear opinion as to the appropriate sentence, but not reversible error because there was no evidence that the judge relied on the information in affirming the jury's recommended sentence).

¹³⁸ See, e.g., N.M. CONST. art. II, § 24(A)(7) (giving the murder victim "the right to make a statement to the court at sentencing and at any post-sentencing hearings for the accused"); WASH. CONST. art. I, § 35 (giving victims the right to make a statement at sentencing); *Ex parte Reiber*, 663 So. 2d at 1005; *People v. Edwards*, 819 P.2d 436, 466 (Cal. 1991); *Card*, 825 P.2d at 1088 (Idaho 1999); *People v. Howard*, 588 N.E.2d 1044, 1067–68 (Ill. 1991); *State v. Southerland*, 447 S.E.2d 862, 867 (S.C. 1994) (holding that an opening statement may not be made at the guilt phase of the trial), *overruled on other grounds by State v. Chapman*, 454 S.E.2d 317 (S.C. 1995); *Barnes v. State*, 858 P.2d 522, 534 (Wyo. 1993) (holding that VIE is not allowed during the guilt phase of the trial because it is "absolutely irrelevant with respect to the issues before the jury" (emphasis omitted)).

¹³⁹ *White*, 709 N.E.2d at 154; see also *State v. Fautenberry*, 650 N.E.2d 878, 883 (Ohio 1995) (holding that evidence which depicts both the circumstances and impact of the murder on the victim's family is admissible at both the guilt and sentencing phases).

¹⁴⁰ See, e.g., *State v. Hayward*, 963 P.2d 667, 677 (Or. 1998).

expressly require the prosecution to establish the existence of at least one statutory aggravating factor before VIE may be admitted: Florida, Pennsylvania, Oklahoma, and Tennessee.¹⁴¹

a. *Procedural Protections—Notice (or Lack Thereof)*

Surprisingly, there is no uniform requirement that the defendant even be informed prior to trial that the prosecution intends to present VIE. A few states—Georgia, Louisiana, and New Jersey—require particularized notice of what evidence the prosecution intends to introduce.¹⁴² Similarly, Tennessee requires the prosecution to notify the defendant that it intends to present VIE so that a hearing may be requested to determine the admissibility of the particular evidence.¹⁴³ Other states, notably Kentucky, Nebraska, Oklahoma, and Pennsylvania, express a preference for notice, but do not require it. In *State v. Cargle*, the Oklahoma Supreme Court found that the State *should* give detailed notice to the defendant of the VIE it intends to introduce.¹⁴⁴ The court also held that VIE *should* be limited to that for which the State gave notice to the defendant before trial.¹⁴⁵ Similarly, the Pennsylvania Supreme Court found that the State *should* give notice to the defendant of its intention to introduce VIE.¹⁴⁶ Courts in Kentucky and Nebraska, although stopping short of recommending or requiring notice, hold that pretrial notice is an adequate procedural safeguard of a defendant's due process rights.¹⁴⁷ The remaining states have no apparent notice requirement.

¹⁴¹ See FLA. STAT. ANN. § 921.141(7) (West 2000) (allowing VIE once the prosecutor has provided evidence of at least one of the statutory aggravating factors); 42 PA. CONS. STAT. § 9711(a)(2) (2002) (allowing the jury to consider VIE if it finds at least one statutory aggravating factor); *Cargle v. State*, 909 P.2d 806, 828 (Okla. Crim. App. 1995) (finding that VIE should not be introduced unless evidence of at least one of the statutory aggravating circumstances is evident in the record); *State v. Reid*, No. M1999-00803-CCA-R3-DD, 2001 WL 584283, at *38 (Tenn. Crim. App. May 31, 2001) (holding that evidence may not be admitted until the court determines that evidence of one or more of the aggravating factors exists in the record).

¹⁴² See *Turner v. State*, 486 S.E.2d 839, 841–42 (Ga. 1997) (holding that defense must receive a copy of the pre-written victim impact statement prior to the witness testifying so the defense may object to aspects of the prepared statement that it finds problematic); *Bernard*, 608 So. 2d at 972–73 (requiring notice of the particulars of the VIE the prosecution intends to introduce); *Muhammad*, 678 A.2d at 180 (holding that if the state intends to introduce VIE, the defendant should be notified prior to the sentencing phase and the state must give the names of the witnesses it plans to call).

¹⁴³ See *State v. Nesbit*, 978 S.W.2d 872, 891 (Tenn. 1998).

¹⁴⁴ See 909 P.2d at 828.

¹⁴⁵ See *id.*

¹⁴⁶ *Commonwealth v. Natividad*, 773 A.2d 167, 177–78 (Pa. 2001).

¹⁴⁷ See *Bowling v. Commonwealth*, 942 S.W.2d 293 (Ky. 1997); *State v. Bjorklund*, 604 N.W.2d 169, 215 (Neb. 2000).

b. *Pre-Admissibility Hearings*

Five states expressly allow or require a hearing outside the presence of the jury to determine the admissibility of VIE that the prosecution intends to introduce at the sentencing phase: Georgia, Louisiana, New Jersey, Oklahoma, and Tennessee.¹⁴⁸ In the remaining states, no such hearing is required. A few states require the prosecution to submit proposed VIE in writing before it is actually admitted at trial.¹⁴⁹ In New Jersey, the statement should be limited to “a general factual profile of the victim, including information about the victim’s family, employment, education, and interests,” and “can describe generally the impact of the victim’s death on his or her immediate family.”¹⁵⁰

c. *Jury Instructions*

A handful of states, including New Jersey, Oklahoma, and Pennsylvania, require trial judges to provide the jury with limiting instructions regarding the use of VIE.¹⁵¹ The New Jersey instruction admonishes the jury that it is not to balance the life of the defendant against the life of the victim, but may consider VIE only when weighing the catch-all mitigating circumstance.¹⁵² In Oklahoma, the jury is instructed that VIE is not proof of an aggravating circumstance, but is presented only to demonstrate the “unique loss to society” caused by the murder.¹⁵³ Pennsylvania’s more limited instruction merely apprizes the jurors that VIE is another method of informing them about the nature and circumstances of the crime.¹⁵⁴ Although Tennessee courts hold that such an instruction is the better practice, it is not mandated.¹⁵⁵ Florida has also approved the use of limiting instructions.¹⁵⁶

¹⁴⁸ See *Livingston v. State*, 444 S.E.2d 748, 752 (Ga. 1994); *State v. Bernard*, 608 So. 2d 966, 972 (La. 1992); *State v. Muhammad*, 678 A.2d 164, 180 (N.J. 1996); *Cargle*, 909 P.2d at 828; *Nesbit*, 978 S.W.2d at 891.

¹⁴⁹ See, e.g., *Turner v. State*, 486 S.E.2d 839, 841–42 (Ga. 1997); *State v. Gideon*, 894 P.2d 850, 864 (Kan. 1995); *Muhammad*, 678 A.2d at 180.

¹⁵⁰ *State v. Koskovich*, 776 A.2d 144, 175 (N.J. 2001) (citing *Muhammad*, 678 A.2d at 180).

¹⁵¹ See, e.g., *State v. Hightower*, 680 A.2d 649 (N.J. 1996); *Cargle*, 909 P.2d at 828–29.

¹⁵² See *Koskovich*, 776 A.2d at 175.

¹⁵³ See *Cargle*, 909 P.2d at 828.

¹⁵⁴ See *Commonwealth v. Means*, 773 A.2d 143, 159 (Pa. 2001).

¹⁵⁵ See *State v. Bigbee*, 885 S.W.2d 797, 812–13 (Tenn. 1994) (holding that trial court was not required to instruct jury not to consider either the deterrent effect of the death penalty or the cost of maintaining a prisoner for life even though neither of these factors should enter a capital jury’s sentencing determination).

¹⁵⁶ See *Farina v. State*, 801 So. 2d 44, 53 (Fla. 2001).

TABLE 2¹⁵⁷
 PROCEDURAL PROTECTIONS IN STATES ALLOWING ADMISSION OF
 VICTIM IMPACT EVIDENCE

State	Notice to Defense Required	<i>In Camera</i> Hearing	Limits on Who May Testify and/or Number of Witnesses	Limits on Use of Evidence	Punishment Recommendation from Witness(es)
Alabama	No	No	No	No	No-Jury Yes-Judge
Arizona	Unclear	Unclear	Unclear	Unclear	Yes
Arkansas	Yes	No	No	No	No
California	Unclear	Unclear	Unclear	Unclear	Unclear
Colorado	Yes	No	Unclear	No	No
Delaware	Unclear	No	No	Unclear	Unclear
Florida	Yes	Unclear	Unclear	Yes	No
Georgia	Yes	Yes	Yes	Unclear	Unclear
Idaho	Yes	No	No	Unclear	No
Illinois	Unclear	Unclear	Yes	Unclear	Unclear
Kansas	Unclear	Unclear	Unclear	Unclear	Unclear
Kentucky	Unclear	Unclear	Unclear	Unclear	Unclear
Louisiana	Yes	Unclear	No	Unclear	No
Maryland	Yes	Unclear	Yes	Unclear	No
Missouri	No	Unclear	No	Unclear	No
Nebraska	No	Unclear	Unclear	Unclear	Unclear
Nevada	Yes	Unclear	No	Unclear	No
New Jersey	Yes	Yes	Yes	Yes	No
New Mexico	Unclear	Unclear	No	Unclear	No
N. Carolina	No	No	No	No	No
Ohio	Unclear	Unclear	Yes	Yes	No
Oklahoma	Yes	Yes	Yes	Yes	Yes
Oregon	Unclear	Unclear	Unclear	Unclear	Unclear
Pennsylvania	Yes	Unclear	Unclear	Yes	No
S. Carolina	No	Unclear	No	Unclear	No
S. Dakota	Unclear	Unclear	Unclear	Unclear	Unclear
Tennessee	Yes	Yes	Unclear	Yes	Unclear
Texas	Yes	Unclear	No	Yes	Unclear
Utah	Unclear	Unclear	Unclear	Unclear	Unclear
Virginia	No	No	No	Yes	No-Jury Yes-Judge
Washington	Yes	Unclear	Yes	Unclear	No

¹⁵⁷ Table 2 and the preceding discussion in Part IV.A.2 are based on the author's research.

B. Federal Court

VIE is admissible in federal capital cases as a non-statutory aggravating factor if the jury unanimously finds that the prosecution has established at least one statutory aggravating factor.¹⁵⁸ The federal death penalty statute permits the government to present evidence regarding

the effect of the offense on the victim and the victim's family, and may include oral testimony, a victim impact statement that identifies the victim of the offense and the extent and scope of the injury and loss suffered by the victim and the victim's family and any other relevant information.¹⁵⁹

A majority of the federal courts of appeals confronted with VIE have sanctioned various forms of VIE, including letters, videotapes, and poems.¹⁶⁰ Federal courts have also permitted VIE from persons other than family members. In *United States v. Battle*, which involved the murder of a federal prison guard, the Eleventh Circuit allowed VIE regarding the effect of the murder on other correctional officers' ability to perform their job.¹⁶¹ Furthermore, in possibly the quintessential VIE case—*United States v. McVeigh*—the VIE lasted two days and included evidence regarding survivors' last contacts with murdered family members, attempts to determine whether their family members were still alive, and the identification of family members' body parts.¹⁶² In another case, a court admitted testimony from officers

¹⁵⁸ See 18 U.S.C. § 3(d)–(e) (2000).

¹⁵⁹ *Id.* § 3593(a) (2000).

¹⁶⁰ See, e.g., *United States v. Chanthadara*, 230 F.3d 1237, 1274 (10th Cir. 2000) (allowing VIE such as photographs and tearful testimony so long as it does not render the entire proceeding fundamentally unfair). The Sixth, Ninth, Tenth, and Eleventh Circuits have allowed letters and videotapes. See *id.* at 1274 (allowing childrens' letters to dead mother); *Byrd v. Collins*, 209 F.3d 486, 531–33 (6th Cir. 2000) (allowing videotape of a television interview with the victim and his family filmed the day before the murder); *Gretzler v. Stewart*, 112 F.3d 992, 1009 (9th Cir. 1997) (holding that letter from the victim's father stating his opinion that the defendant should receive the death penalty is permissible as a "reflection of the anguish [the victim's] death caused to her family"); *Davis v. Singletary*, 853 F. Supp. 1492 (M.D. Fla. 1994) (allowing eight letters from eight family members and one close friend of the murder victim). Although *United States v. McVeigh* may not be fairly representative of current federal practice due to the number of victims involved in the case (168), the judge allowed thirty-eight victim impact witnesses to testify. See 153 F.3d 1166 (10th Cir. 1998). The evidence permitted was also quite expansive in scope. See *id.* at 1219–21. For example, the court allowed victim testimony regarding "[l]ast [c]ontacts," "[e]fforts to [d]iscover the [f]ate of [v]ictims," "[i]mpact on [l]earning of [d]eath," "[v]ictim [h]istories," and "[p]ure [l]ove and [i]nnocence of [c]hildren." *Id.*; cf. *supra* notes 127–30 and accompanying text (providing examples of the wide variety of VIE state courts have permitted).

¹⁶¹ See 173 F.3d 1343, 1349 (11th Cir. 1999).

¹⁶² See *McVeigh*, 153 F.3d at 1203, 1219–21.

about rescue efforts, including one macabre account of watching a victim die and mistaking her “gurgling blood” for “running water.”¹⁶³

The Federal Death Penalty Act of 1999 (FDPA) requires the prosecution to provide the defendant with notice of its intent to use VIE unless the prosecution introduces the VIE to directly rebut mitigating evidence introduced by the defendant.¹⁶⁴ In practice, however, courts have utilized a wide variety of procedural protections. Some district courts have required very specific notice. In *United States v. Cooper*, the court found that “the government’s notice of intent contain[ed] no specific information concerning the evidence it [sought] to introduce”¹⁶⁵ and ordered the government to amend its notice “to include more specific information concerning the extent and scope of the injuries and loss suffered by each victim, his or her family members, and other relevant individuals, and as to each victim’s ‘personal characteristics’ that the government intends to prove.”¹⁶⁶ In *United States v. Glover*, the district court used a scheme similar to that outlined by the New Jersey Supreme Court in *State v. Muhammad* and required the prosecution to provide the defense with written statements describing the testimony of each victim impact witness, the admissibility of which the court would rule on in advance.¹⁶⁷ Furthermore, the court agreed both to warn the witnesses that they could not testify if they could not control their emotions and to weigh the evidence offered for its probative value and relevance.¹⁶⁸ The court also excluded testimony as to the appropriate punishment for the defendant.¹⁶⁹

VIE is also currently admissible in military proceedings. The United States Court of Appeals for the Armed Forces and the Military Service Court of Criminal Appeals have embraced *Payne*.¹⁷⁰

CONCLUSION—PAYNE MANAGEMENT

Payne is not going away. VIE is politically popular, and it is difficult to imagine any state or federal court significantly restricting its admissibility. Furthermore, VIE is largely unregulated. Appellate

¹⁶³ See Wayne A. Logan, *Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials*, 41 ARIZ. L. REV. 143, 154–55 (1999).

¹⁶⁴ See 18 U.S.C. § 3593(a)–(b); see also *United States v. Allen*, 247 F.3d 741, 778–81 (8th Cir. 2001), *vacated on other grounds*, 122 S. Ct. 2653 (2002) (mem.) (holding that FDPA allows VIE and that the notice and unanimity requirements of the FDPA are adequate procedural safeguards).

¹⁶⁵ 91 F. Supp. 2d 90, 111 (D.D.C. 2000).

¹⁶⁶ *Id.*

¹⁶⁷ See 43 F. Supp. 2d 1217, 1235–36 (D. Kan. 1999).

¹⁶⁸ See *id.* at 1236.

¹⁶⁹ See *id.* at 1235–36.

¹⁷⁰ See *United States v. Gray*, 51 M.J. 1, 60 (C.A.A.F. 1999); *United States v. Baer*, No. 97-02044, 1999 CCA LEXIS 180, at *9 (N-M. Ct. Crim. App. June 30, 1999); *United States v. Taylor*, 41 M.J. 701, 705 (A.F. Ct. Crim. App. 1995).

court reversals for admitting VIE or argument are as rare as the proverbial hen's teeth. Only a few states—Alabama, Kentucky, Louisiana, and New Jersey—have reversed death sentences due to the admission of improper VIE.¹⁷¹ No federal appellate court has found error in the government's presentation of VIE. As Wayne Logan has noted, some of this may be due to the lack of consensus as to VIE's basic purpose.¹⁷² Regardless of the reasons, more judicial oversight is necessary on both substantive and procedural issues. *Payne* suggested that VIE should offer only a "brief glimpse" of the victim. However, most jurisdictions permit extensive evidence regarding the victim's characteristics and the impact of the crime on immediate family members. This type of detailed VIE—often including photographs, videotapes, and other memorabilia—can only invite the type of "comparative worth considerations" dismissed by the *Payne* majority. What else could a capital sentencing jury think when presented with detailed evidence about both the defendant and the victim other than that its role is to decide whether the capital defendant—the person the jury has found guilty of murder—should be permitted to live when the innocent victim and his or her family have suffered so much? As Vivian Berger has noted, if VIE is not intended to invite "comparative worth considerations," then "why do prosecutors never dwell on the dead person's vices?"¹⁷³

Payne also does not address cases in which victims' family members do not support the prosecution's efforts to obtain a death sentence. There have been cases in which the prosecution insisted on seeking the death penalty at trial despite the victims' survivors' wishes.¹⁷⁴ What then? Do the family members testify if called by the prosecution? There is no reason to believe that those who do not favor the death penalty do not suffer the same degree of pain and loss as a result of the death of their mother, father, or child as do surviving family members who believe the defendant should be executed for his

¹⁷¹ See *Wimberly v. State*, 759 So. 2d 568, 574 (Ala. Crim. App. 1999) (reversing on other grounds but noting "[i]f we were not already reversing this case for a new trial, we would set aside the sentence and remand this case to the trial court for a new sentencing phase before the jury and a new sentencing hearing before the trial court based on . . . admission of improper [VIE]"); *Clark v. Commonwealth*, 833 S.W.2d 793, 796–97 (Ky. 1991) (ordering new sentencing trial due to improper exploitation of the grief of the victim's family); *State v. Bernard*, 608 So. 2d 966, 973 (La. 1992) (remanding the case because the defendant did not receive a pretrial hearing regarding the admissibility of the VIE and more particularized notice of what VIE the State intended to introduce at trial); *State v. Hightower*, 680 A.2d 649, 662 (N.J. 1996) (holding that defendant should have been granted a mistrial because of the prejudicial effect of introducing VIE).

¹⁷² See Logan, *supra* note 163, at 169.

¹⁷³ Vivian Berger, *Payne and Suffering—A Personal Reflection and a Victim-Centered Critique*, 20 FLA. ST. U. L. REV. 21, 46 (1992).

¹⁷⁴ See Adrienne N. Barnes, *Reverse Impact Testimony: A New and Improved Victim Impact Statement*, 14 CAP. DEF. J. 245, 255 (2002).

crime. And these anti-death penalty individuals may well believe it would be an act of disloyalty to their dead loved one to refuse to testify. However, by testifying, they become part of the prosecution's efforts to kill.

Furthermore, in many cases, expansive VIE will inevitably make way for racial discrimination to operate in the capital sentencing jury's life or death decision. Virtually every statistical study, including one commissioned by the federal government, indicates that although the death penalty is rarely sought in black-victim cases, it is sought (and obtained) in a disproportionate share of cases involving black defendants and white victims.¹⁷⁵ Capital jury selection, or "death qualification," often results in predominantly or all-white juries.¹⁷⁶ As the Supreme Court has recognized, there is an inherently subjective element in capital sentencing which can allow for jurors' conscious and unconscious racial biases to play a role in their capital sentencing decisions.¹⁷⁷ Thus, VIE carries the inherent danger that white, middle-class jurors will most empathize with white middle-class victims and will thus be more likely to impose the death sentence in cases in which the victim is similar to them.

Finally, little consensus exists as to whether VIE should be limited to the testimony of family members and the impact of the offense on the victim's family or whether it should be permitted to reach into broader issues of the impact of the crime on other specific communities or the community at large. There is little or no basis in *Payne*, for example, for sanctioning evidence regarding the impact of the crime on the law enforcement community.¹⁷⁸ And, aside from the wisdom of doing so, it is difficult to find any basis in *Payne* for excluding evidence regarding the victim's bad character.

¹⁷⁵ See *McClesky v. Kemp*, 481 U.S. 279, 286-87 (1987); SAMUEL R. GROSS & ROBERT MAURO, DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING 159-211 (1989); U.S. GEN. ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5-6 (1990); John H. Blume, Theodore Eisenberg & Martin T. Wells, Explaining Death Row's Population and Racial Composition (Sept. 18, 2002) (unpublished manuscript, on file with author). But see WILLIAM WILBANKS, THE MYTH OF A RACIST CRIMINAL JUSTICE SYSTEM 17-18 (1987) (noting "that white killers were actually more likely than black killers . . . to receive the death penalty . . . [that] whites who had killed whites were more likely than blacks who had killed whites . . . to be on death row," and "that whites who killed blacks were more likely to reach death row than blacks who killed whites").

¹⁷⁶ See JEFFREY ABRAMSON, WE, THE JURY 209 (1994); see also Amy K. Phillips, Note, *Thou Shalt Not Kill Any Nice People: The Problem of Victim Impact Statements in Capital Sentencing*, 35 AM. CRIM. L. REV. 93, 103-04 (1997) (arguing that jurors consider factors such as race and class).

¹⁷⁷ See *Turner v. Murray*, 476 U.S. 28, 38 n.12 (1986).

¹⁷⁸ But see *supra* note 126 and accompanying text (citing a state court case that permitted VIE to show the impact of a law enforcement officer's death on the law enforcement community).

Procedurally, the current status quo is unsatisfactory in a number of areas. It is hardly revolutionary to suggest that the prosecution should notify a capital defendant if it intends to offer VIE. If due process means anything, it encompasses the right to notice and an opportunity to be heard.¹⁷⁹ Yet notice is not the majority rule.¹⁸⁰ Additionally, a pre-admissibility hearing outside the presence of the jury should be mandatory not only to minimize the emotional nature of the evidence, but also to provide the defendant with the opportunity to lodge legitimate objections. For example, VIE often entails inadmissible hearsay. A victim's mother may, for example, testify about calls from friends, relatives, or others expressing their grief, or she may make a comment about how "everyone loved my son." Practically speaking, however, counsel will often feel unable to object to this type of evidence, in the presence of the jury. Similarly, pre-admissibility hearings will allow objections to the number of witnesses, as well as other types of potentially inflammatory evidence, including opinion testimony. Another solution—if *Payne* is to remain the law—is to require written submission of VIE. Not only would this permit defense counsel to lodge appropriate objections, but it would also reduce some of the emotional content of the evidence, thereby reducing the likelihood of a comparative worth comparison. At present, New Jersey, and to a lesser extent Georgia and Kansas, are the only states that provide anything resembling adequate procedural safeguards.¹⁸¹

This Article attempts to set the table for the remaining contributors to this Symposium by providing a "quick glimpse" of VIE in the state and federal courts. As a professor who has studied the Supreme Court's cases and their lower court progeny, and as a lawyer who has litigated capital cases at trial, in state post-conviction proceedings, and in federal habeas corpus proceedings, both before and after VIE was deemed admissible, I think it is accurate to say that *Payne* represents a marked "sea change" in capital jurisprudence and capital litigation. The extent of this change will be explored in detail in this Symposium and in the years to come.

179 See *In re Oliver*, 333 U.S. 257, 273 (1948).

180 See *supra* Table 2.

181 See *supra* note 149 and accompanying text.