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ARTICLES

BOOTH v. MARYLAND: SILENCING THE VICTIM IN THE SENTENCING PROCEEDING

The eighth amendment's prohibition against cruel and unusual punishment contained in the United States Constitution¹ has been prevalent throughout history.² Although the death penalty³ has

¹ See U.S. CONST. amend. VIII, which provides that "[E]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id.* See also U.S. CONST. amend. XIV, §1 ("No state shall . . . deprive any person of life, liberty, or property, without due process of law."). See, e.g., *Furman v. Georgia*, 408 U.S. 238, 257 (1972) (fourteenth amendment prohibits states from inflicting cruel and unusual punishments); *Powell v. Texas*, 392 U.S. 514, 542 (1968) (state infliction of cruel and unusual punishments violates fourteenth amendment); *Malloy v. Hogan*, 378 U.S. 1, 6 n.6 (1964) (ban against cruel and unusual punishment applies to states through fourteenth amendment); *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963) (protections against the federal government have become valid against states through fourteenth amendment); *Robinson v. California*, 370 U.S. 660, 666 (1962) (prohibitions of eighth amendment apply to states through due process clause of the fourteenth amendment); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 462-63 (1947) (fourteenth amendment prohibits states from inflicting cruel and unusual punishments).

² See *Exodus* 21:25. The prohibition of excessive punishment was first expressed in the Old Testament of the *Bible* in the book of *Exodus*. *Id.* One of the laws given to Moses by God was "an eye for an eye, a tooth for a tooth." *Id.* In his book, Block notes that "[t]he Code of Hammurabi is one of the first known laws to have recognized the concept of an 'eye for an eye', and consequently to have accepted death as an appropriate punishment for homicide." E. BLOCK, *AND MAY GOD HAVE MERCY* . . . 13-14 (1962). See also ARISTOTLE, *ETHICS* 148-49 (Penguin Classics ed. 1955) (concern for equality of crime and punishment was also expressed in early Greek philosophy).

The phrase "cruel and unusual punishment" has its origin in English law. W.& M., 2d. Sess. (1689). In his article, Anthony Granucci notes that this very phrase was included in the English Bill of Rights, enacted December 16, 1689, which reads: "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Granucci, "*Nor Cruel and Unusual Punishments Inflicted*": *The Original Meaning*, 57 CALIF. L. REV. 839, 849 (1969). Many historians believe that the treason trials of 1685 - the "Bloody Assizes" - spurred the adoption of the Bill of Rights which contains the very

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commanded much scrutiny under this constitutional provision, the constitutionality of this punishment has been well settled by the Supreme Court.⁴ The High Court does however continuously ex-

words used in the eighth amendment to the United States Constitution. *See, e.g.*, 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 71, 276 (1971) (believes the truth of the phrase "cruel and unusual punishment" and its inclusion in the Bill of Rights was due in part to the "Bloody Assizes").

The precise language used in the eighth amendment first appeared in America on June 12, 1776, in Virginia's "Declaration of Rights." Granucci, *supra*, at 840. "Following its inclusion in the Virginia constitution, eight other states adopted the clause, the federal government inserted it into the Northwest Ordinance of 1787, and it became the eighth amendment to the United States Constitution in 1791." *Id.* In *Furman*, Justice Marshall noted there was no doubt that in borrowing this language from the English Bill of Rights and including it in our Constitution that our Founding Fathers intended to outlaw torture and other cruel punishments. *Furman*, 408 U.S. at 319 (Marshall, J., concurring). *But see* *McGautha v. California*, 402 U.S. 183, 197-98 (1971) (common-law rule imposed mandatory death sentence on all convicted murderers).

³ *See* *People v. Anderson*, 6 Cal. 3d 628, 651, 493 P.2d 880, 896, 100 Cal. Rptr. 152, 167-68, *cert. denied*, 406 U.S. 958 (1972). The death penalty is said to serve three principle social purposes: retribution and deterrence of a capital crime by prospective offenders as well as the incapacitation of dangerous criminals and the consequent prevention of future crimes they may commit. *Id.* One author has recognized that to a certain degree, capital punishment is an expression of society's moral outrage at particular offensive conduct. H. PACKER, LIMITS OF THE CRIMINAL SANCTION 43-44 (1968). The Court agreed with this proposition and noted that the very decision "that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." *Gregg v. Georgia*, 428 U.S. 153, 184 (1976).

⁴ *See* *Gregg*, 428 U.S. at 169. The Court held that the punishment of death does not invariably violate the Constitution. *Id.* at 169. *See also* *Jurek v. Texas*, 428 U.S. 262, 276 (1976) (upholding Texas' guided discretion death penalty statute); *Proffitt v. Florida*, 428 U.S. 242, 247 (1976) (Court rejected petitioner's argument that imposition of the death penalty under any circumstances is cruel and unusual punishment).

"It is apparent from the text of the Constitution itself that the existence of capital punishment was accepted by the Framers." *Gregg*, 428 U.S. at 177. "Indeed, the First Congress of the United States enacted legislation providing death as the penalty for specified crimes." *Id.* The fifth amendment, adopted at the same time as the eighth, and the fourteenth amendment adopted over three quarters of a century later, also contemplated the continued existence of this punishment by the limits they impose. *Id.* The Supreme Court has held for over 200 years that the death penalty, when benefiting the offense, is not cruel and unusual punishment *per se*. *Id.* at 178.

Several Supreme Court Justices have even expressed their individual opinions concerning the constitutionality of the death penalty. *See, e.g.*, *McGautha v. California*, 402 U.S. 183, 226 (1971) (separate opinion of Black, J.) (cruel and unusual punishment cannot be construed to prohibit capital punishment); *Trop v. Dulles*, 356 U.S. 86, 99 (1958) (Warren, C.J.) (capital punishment cannot be said to violate constitutional concepts of cruelty); *Id.* at 125 (Frankfurter, J., dissenting) (words cruel and unusual punishment should not be read broadly to give them meaning beyond their intended scope). *But see* *Trop v. Dulles*, 356 U.S. 86, 99 (1958) (Warren, C.J.) ("[T]he existence of the death penalty is not a license to the government to devise any punishment short of death within the limit of the imagination"); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 473 (1947) (Burton, J., dissenting) ("Taking human life by unnecessarily cruel means shocks the most fundamental in-

amine the methods by which the penalty is imposed by the lower courts.⁵ The Supreme Court has decided that where sentencing discretion is granted in a capital case, the scope of information to be considered by the sentencing body should not be limited.⁶ One

instincts of civilized man.").

⁵ See *Eddings v. Oklahoma*, 455 U.S. 104, 111 (1982). "Beginning with *Furman*, the Court has attempted to provide standards for a constitutional death penalty that would serve both goals of measured, consistent application and fairness to the accused." *Id.* See also *Woodson v. North Carolina*, 428 U.S. 280 (1976). The plurality held that mandatory death sentencing was not a constitutionally valid response to the Court's fear of arbitrary death sentencing. *Id.* at 305. "[T]he fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Id.* at 304. See, e.g., *Roberts (Harry) v. Louisiana*, 431 U.S. 633, 636 (1977) (principles stated above applied in capital sentencing decision); *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325 (1976) (mandatory death sentence rejected - sentence needs to be individualized).

"[T]he concept of individualized sentencing in criminal cases generally, although not constitutionally required, has long been accepted in this country." *Lockett v. Ohio*, 438 U.S. 586, 602 (1978). See, e.g., *Williams v. New York*, 337 U.S. 241, 247-48 (1949) (circumstances of the offense as well as the character and propensities of the offender must be considered by the sentencing authority). The Court recognized that classification of crimes does not automatically determine a penalty. *Williams v. Oklahoma*, 358 U.S. 576, 585 (1959). See also *Furman v. Georgia*, 408 U.S. 238, 402 (1972) (Burger, C.J., dissenting) (19th century movement away from mandatory death penalties is rooted in the recognition "that individual culpability is not always measured by the category of the crime committed."); *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55 (1937) ("For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed.").

The Court held that the sentencing process must satisfy the requirements of the due process clause. *Gardner v. Florida*, 430 U.S. 349, 358 (1977). The defendant has a valid interest in the quality of the proceeding which determines the sentence which he is to receive even though he has no right to request or to object to a particular result in the sentencing process. See generally *Witherspoon v. Illinois*, 391 U.S. 510, 521-23 (1968) (defendant is entitled to an impartial objective sentencing proceeding as part of his right to due process of law).

⁶ See 18 U.S.C. § 3577 (1982). "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing the appropriate sentence." *Id.* See also *Jurek v. Texas*, 428 U.S. 262, 271 (1976) (it is essential during capital sentencing proceedings that the jury have before it all possible relevant information about individual defendant whose fate it must determine); *Gregg v. United States*, 394 U.S. 489, 492 (1969) ("no formal limitations on [the] contents [of presentence reports], and they may rest on hearsay and contain information bearing no relation whatsoever to the crime with which the defendant is charged"); *Williams v. New York*, 337 U.S. 241, 247 (1949) (where sentencing discretion is granted the sentencing authority's "possession of the fullest information possible concerning the defendant's life and characteristics is highly relevant - if not essential - to the selection of an appropriate sentence . . ."); *Warner & Cabot, Changes In The Administration Of Criminal Justice During The Past Fifty Years*, 50 HARV. L. REV. 538, 607 (1937) (judge should have greater information so he can act more intelligently); Note, *Reform In Federal Penal Procedure: The Federal Corrections And*

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source of information considered by courts in the past has been Victim Impact Statements (VIS).⁷ Recently, however, in *Booth v. Maryland*,⁸ the Supreme Court held a Maryland statute⁹ unconstitutional insofar as it required the sentencing authority¹⁰ in a capital case to consider VIS.

In *Booth*, Irwin Bronstein, 78, and his wife Rose, 75, were robbed and murdered in their West Baltimore home.¹¹ The murderers, John Booth and Willie Reid, bound and gagged the vic-

Parole Improvement Bills, 53 YALE L.J. 773, 775 (1944) (accompanying great discretion should be wide range of information about defendant to better enable judge to impose proper sentence).

Although the lack of limitations may seem prejudicial to the defendant, the requirement of accurate information is rooted in the Constitution. See U.S. CONST. amend. V. The Constitution provides that "[N]o person shall . . . be deprived of life, liberty, or property without due process of law." *Id.* The Court held that as applied to sentencing, due process has come to require that sentences be based on accurate information. *Townsend v. Burke*, 334 U.S. 736, 740-41 (1948). The Court also recognized in *Woodson v. North Carolina*, 428 U.S. 280 (1976), that the death penalty is qualitatively different, both in severity and irrevocability, from any other potential punishment and therefore demands the highest degree of reliability. *Id.* at 305.

⁷ See McLeod, *Victim Participation at Sentencing*, 22 CRIM. L. BULL. 501, 508 (1986). The victim impact statement (VIS) is introduced at the sentencing hearing, most often as an attachment to the presentence report. *Id.* A presentence report is defined as a document prepared by a probation officer that contains information for use by the sentencing authority. BLACK'S LAW DICTIONARY 1066 (5th ed. 1979). The most common form of VIS is described as one which includes objective data on the effects of the crime on the victim. McLeod, *supra*, at 503. Legislatures have generally identified a victim as any person against whom a crime has been committed or who has suffered harm as a result of criminal activity, thereby including the victim's family. *Id.* at 509. The author hereinafter adopts this definition of victim throughout the Article.

Although the VIS focuses primarily on the victim it also retains procedural protections for the defendant. Posner, *Victim Impact Statements and Restitution: Making the Punishment Fit the Victim*, 50 BROOKLYN L. REV. 301, 308 (1984). 18 U.S.C. § 3580(c) requires that the VIS be disclosed to the defendant. *Id.* "The court shall disclose to both the defendant and the attorney for the Government all portions of the presentence or other report pertaining to the matters described in subsection (a) of this Section". *Id.*

⁸ 107 S. Ct. 2529 (1987).

⁹ See MD. ANN. CODE art. 41, § 4-609 (1986).

¹⁰ MD. ANN. CODE art. 27, § 413 (b) (1982) reads in pertinent part:

This proceeding shall be conducted: (1) Before the jury that determined the defendant's guilt; or (2) Before a jury impaneled for the purpose of the proceeding if: (i) The defendant was convicted upon a plea of guilty; (ii) The defendant was convicted after a trial before the court sitting without a jury; (iii) The jury that determined the defendant's guilt has been discharged by the court for good cause; or (iv) Review of the original sentence of death by a court of competent jurisdiction has resulted in a remand or resentencing; or (3) Before the court alone; if a jury sentencing proceeding is waived by the defendant.

Id.

¹¹ *Booth*, 107 S. Ct. at 2530.

tims and then repeatedly stabbed them in the chest with a kitchen knife.¹³ The bodies were found two days later by the Bronsteins' son.¹³ Booth was convicted in the Circuit Court, Baltimore City, where a jury found him guilty of two counts of first-degree murder, two counts of robbery and conspiracy to commit robbery.¹⁴ At the sentencing proceeding the prosecution requested the death penalty,¹⁵ and Booth chose to have his sentence decided by the jury¹⁶ as opposed to the trial judge. The jury was instructed to consider all the relevant evidence including the VIS.¹⁷ After deliberation, the jury sentenced Booth to death for the murder of Mr. Bronstein and to life imprisonment for the murder of Mrs. Bronstein.¹⁸

The Maryland trial court denied defense counsel's motion to suppress the VIS and held that the jury was entitled to consider any and all evidence which would bear on the sentencing decision.¹⁹ On automatic appeal,²⁰ the Maryland Court of Appeals af-

¹³ *Id.* The murderers entered the victims' home for the apparent purpose of stealing money to buy heroin. *Id.* Booth, however, was a neighbor and knew the elderly couple could identify him so he killed them. *Id.*

¹⁴ See *Booth v. Maryland*, 306 Md. 172, 173, 507 A.2d 1098, 1103 (1986).

¹⁴ *Id.* at 174, 507 A.2d at 1125. Booth's accomplice, Willie Reid, was convicted and sentenced to death as the principal in the first degree for the murder of Mrs. Bronstein. *Id.* The conviction was affirmed and his sentence is currently under review. See *Reid v. State*, 305 Md. 9, 501 A.2d 436 (1985).

¹⁵ *Booth*, 107 S. Ct. at 2530. Under the Maryland Annotated Code there are alternative punishments for persons found guilty of first degree murder: "A person found guilty of murder in the first degree shall be sentenced either to death or to imprisonment for life." MD. ANN. CODE art. 27, § 412(b) (1982).

¹⁶ See *Booth*, 306 Md. at 174, 507 A.2d at 1103. The Court recognized that a jury has the authority to sentence a defendant convicted of first-degree murder to death without violating the eighth amendment, as long as certain procedural safeguards are in place to "guide" and "channel" the jury's discretion. *Barclay v. Florida*, 463 U.S. 935, 950 (1983).

¹⁷ *Booth*, 107 S. Ct. at 2532. The VIS in this case was based on interviews with the Bronsteins' son, daughter, son-in-law, and granddaughter. *Id.* Many of their comments emphasized the victims' personal qualities, and noted how deeply the Bronsteins would be missed. *Id.* Other parts of the VIS described the emotional and personal problems that the family had faced as a result of the crimes. *Id.*

¹⁸ *Id.*

¹⁹ *Booth*, 306 Md. at 174, 507 A.2d at 1124. See *supra* note 5 and accompanying text (any and all relevant information should be presented to the sentencing authority for their consideration).

²⁰ See MD. ANN. CODE art. 27, § 414(a) (1982) which provides in pertinent part: "whenever the death penalty is imposed, and the judgment becomes final, the court of appeals shall review the sentence on the record." *Id.*

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firmed the conviction and the sentences.²¹ The majority found that the impact of the crime on the victim was a relevant circumstance surrounding the commission of the offense and was, therefore, admissible as part of the presentence report.²² The court reviewed the VIS and found it to be an objective statement as to the effects the crime had on the victim's family.²³ The court was also satisfied that the sentence of death for Booth was not imposed under the influence of passion, prejudice or any other arbitrary factor.²⁴

Writing for the Court, Justice Powell stated that the introduction of a VIS at the sentencing phase of a capital murder trial violates the eighth amendment hence the Court ruled the Maryland statute invalid to the extent that it requires consideration of this information.²⁵ Addressing the nature of the information contained in a VIS, the majority held that its introduction creates an impermissible risk that capital sentencing will be done in an arbi-

²¹ See *Booth*, 306 Md. at 174, 507 A.2d at 1125.

²² *Id.* at 174, 507 A.2d at 1124. The court of appeals relied on *Lodowski v. State*, 302 Md. 691, 735-42, 490 A.2d 1228, 1251-54 (1985). In *Lodowski*, the court, after careful analysis of the legislative history of victim impact evidence, held that it was clear that the legislature did not believe that victim impact evidence was an arbitrary factor in the sentencing process. *Id.* at 735-42, 490 A.2d at 1252. The *Lodowski* court recognized that the statute requiring the consideration of victim impact evidence in capital cases, Art. 41, § 124, was reenacted in 1983 despite Art. 27, § 414(e)(1) which deals with "arbitrary factors." *Id.* at 736, 490 A.2d at 1252. The court also examined the purpose of the presentence report and concluded that information regarding the victim is included in the objective of providing the sentencing authority with "a complete description of the offense and the circumstances surrounding it." *Id.* (quoting ABA COMPENDIUM OF MODEL CORRECTION AT LEGISLATION AND STANDARDS, PROBATION STANDARDS § 2.3(ii)(A) (1972 & Supp. 1975)).

²³ See *Booth*, 306 Md. at 175, 507 A.2d at 1124.

²⁴ See *id.* See also MD. ANN. CODE art. 27, § 414(e)(1) (1982) which provides:

In addition to the consideration of any errors properly before the Court on appeal, the Court of Appeals shall consider the imposition of the death sentence. With regard to the sentence the Court shall determine: (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

Id.; *Booth*, 107 S. Ct. at 2536 (court held introduction of VIS could serve no purpose other than to inflame jury and divert their attention away from relevant issues and defendant thereby prejudicing him).

²⁵ *Booth*, 107 S. Ct. at 2536. The Court in *Booth* found that a state statute which allows consideration of factors other than the defendant's record, the defendant's characteristics, and circumstances of the crime, must be carefully scrutinized to ensure that such information has a bearing on the defendant's personal responsibility and moral guilt. *Id.* at 2533. See also *Enmund v. Florida*, 458 U.S. 782, 801 (1982) (punishment must be tailored to defendant's responsibility and moral guilt).

trary manner.²⁶ In addition, the majority concluded that the degree to which a family is willing and able to express its grief is irrelevant to the sentencing decision and its consideration would result in a shift of the focus of the sentencing proceeding away from the defendant.²⁷ Finally, the Court recognized that while the

²⁶ *Booth*, 107 S. Ct. at 2534. In *Godfrey v. Georgia*, the Supreme Court held that if a state wishes to impose capital punishment, it has a constitutional responsibility to apply the law in such a way as to avoid the "arbitrary and capricious infliction of the death penalty." *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980). The Supreme Court further held that any decision to impose the death sentence must "be, and appear to be, based on reason rather than caprice or emotion." *Gardner v. Florida*, 430 U.S. 349, 358 (1977). *See also* *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (discretion of sentencing body in capital case must be directed to minimize the risk of arbitrary and capricious action); *Furman v. Georgia*, 408 U.S. 238, 245 (1972) (Douglas, J., concurring) (penalty of death cannot be imposed under sentencing procedures which create the risk of punishment being inflicted "unusually" in an arbitrary and capricious manner).

Hence the Court in *Booth* found that admission of a VIS during the sentencing phase of a capital murder trial "is irrelevant to a capital sentencing decision," and "creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." *Booth* 107 S. Ct. at 2534. *But see* *Lodowski v. State*, 302 Md. 691, 740, 490 A.2d 1228, 1253-54 (1985) (victim impact statement relevant in a capital sentencing proceeding as an objective factor surrounding the defendant and the offense).

The Court in *Booth* noted, however, that victim impact statements may be relevant and admissible in other contexts and for other purposes. *Booth*, 107 S. Ct. at 2535 n.10. For example, such information may be admissible because it directly relates to the facts and circumstances of the crime. *Id.* Further, there may be times when the victim's personal characteristics are relevant to the proceeding. *See, e.g.*, FED. R. EVID. 404(a)(2) (prosecutor may show victim had peaceable nature to rebut charge that victim was aggressor). Discretion still vests in the trial judge in deciding when such information is sufficiently relevant to the proceeding, and when its probative value outweighs any potential prejudicial effect. *Booth*, 107 S. Ct. at 2535 n.10.

²⁷ *Booth*, 107 S. Ct. at 2534. The Court was concerned that when the VIS is used, an inference can be drawn that defendants whose victims were assets to the community are more deserving of punishment than defendants whose victims were not perceived as such. *Id.* at 2534 n.8.

As one court, in *People v. Levitt*, 156 Cal. App. 3d. 500, 516-17, 203 Cal. Rptr. 276, 287-88 (1984), recently stated:

The purpose of sentencing is to punish defendants in accordance with their level of culpability [A] defendant's level of culpability depends not on fortuitous circumstances such as the composition of his victim's family, but on circumstances over which he has control [The fact that a victim's family is irredeemably bereaved] is relevant to damages in a civil action, but it has no relationship to the proper purposes of sentencing in a criminal case.

Id. In his concurring opinion in *Lodowski*, Judge Cole wrote that to allow this evidence into a capital sentencing proceeding injects factors that have nothing to do with the defendant's level of culpability in the offense for which he is being sentenced. *See* *Lodowski v. State*, 302 Md. at 746, 490 A.2d at 1269 (Cole, J., concurring). The Supreme Court in *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968), has expressly interpreted the eighth amendment as requiring the jury when determining the sentence in a capital case to focus on the defendant as a uniquely individual human being. *Id.*

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defendant had a statutory and constitutional right to rebut the information, he would rarely be able to prove that the family members had exaggerated their emotional pain and suffering.²⁸

In his dissenting opinion, Justice White argued that while some of the information contained in a VIS may be inappropriate, this was not an inherent fault in all victim impact statements.²⁹ Justice White concluded that most information contained in VIS was appropriate evidence for capital sentencing proceedings, since the state had a valid interest in rebutting the mitigating evidence introduced by the defendant, and therefore, admission of the VIS during such proceeding is not unconstitutional *per se*.³⁰

In a separate dissenting opinion, Justice Scalia found that the information contained in a VIS concerning the amount of harm the defendant had caused bears upon the extent of his "personal responsibility."³¹ He determined that, as such, the VIS is a relevant factor to be considered consistent with the attempt to individualize the sentencing process.³²

Although the *Booth* majority has sought to maintain an objective standard for the imposition of the death penalty, it is submitted that the Court erred in formulating a rigid rule calling for the

²⁸ See *Booth*, 107 S. Ct. at 2535. The Court did not anticipate a procedural problem concerning the defendant's ability to cross examine the family members, but recognized that the defendant's ability to rebut the victim impact evidence regarding the degree of sleeplessness, depression or emotional trauma suffered would be difficult if not impossible. *Id.* See also Md. ANN. CODE art. 27, § 413(c)(v) (1982). The defendant's right to rebut all information proffered is guaranteed by the Maryland death penalty statute which provides that all evidence is admissible which the "court deems of probative value and relevant to the sentence, provided that the defendant is accorded a fair opportunity to rebut any statements." *Id.*

²⁹ *Booth*, 107 S. Ct. at 2541 (White, J., dissenting).

³⁰ *Id.* at 2539 (White, J., dissenting). Justice White further maintained that "if punishment can be enhanced in non-capital cases on the basis of harm caused, irrespective of the offender's specific intention to cause such harm," the same approach should not be unconstitutional in capital cases. *Id.* at 2540. See also *Lodowski*, 302 Md. at 736, 490 A.2d at 1252 n.5 (legislature has expressly authorized consideration of victim impact evidence in non-capital cases).

³¹ See *Booth*, 107 S. Ct. at 2541 (Scalia, J., dissenting). See, e.g., *Tison v. Arizona*, 107 S. Ct. 1676, 1680 (1987) (defendants were sentenced to death not because of their degree of blameworthiness, but because of their "personal responsibility, i.e., . . . the degree of harm that they had caused."); *Enmund v. Florida*, 458 U.S. 782, 801 (1982) (defendant's sentence must be made to suit his personal responsibility and moral guilt).

³² *Booth*, 107 S. Ct. at 2541-42 (Scalia, J., dissenting). See also *Lodowski*, 302 Md. at 737, 490 A.2d at 1254 (reasonable nexus between impact of offense upon victim's family and facts and circumstances surrounding crime).

total exclusion of VIS at all capital sentencing proceedings. This article will discuss the rationale supporting the admissibility of VIS at capital sentencing proceedings, and discuss the advantages of victim participation in the sentencing phase of criminal prosecutions.

Booth v. Maryland: UNNECESSARY PROCEDURAL REFORM

The *Booth* holding does not address the procedural safeguards found in the Maryland death penalty statute designed to insure against arbitrary capital sentencing.³³ These safeguards eliminate the need for disqualifying certain relevant evidence on the basis of potential arbitrariness.³⁴ The statute lists several factors for the

³³ See MD. ANN. CODE art. 27, §§ 412-14 (1986). The statute provides the following three provisions which guard against the concerns raised by the Court in *Booth*. First, a bifurcated trial is required so that guilt and punishment will be separately decided. *Id.* at § 413(a). Second, imposition of the death penalty is restricted to cases in which certain aggravating circumstances are established and where the sentencing authority has considered any existing mitigating circumstances. *Id.* at § 413(d)-(g). Finally, an expedited appellate review of all death sentences is required as a check against the random or arbitrary imposition of the death penalty. *Id.* at § 414(a). See, e.g., *Jurek v. Texas*, 428 U.S. 262 (1976) (Court upheld Texas death penalty statute requiring similar safeguards); *Proffitt v. Florida*, 428 U.S. 242 (1976) (Court upheld Florida death penalty statute containing similar provisions); *Gregg v. Georgia*, 428 U.S. 242 (1976) (Court upheld Georgia death penalty statute containing these three safeguards).

An additional safeguard in the Maryland statute requires that the determination of the court or jury be in writing, and, if a jury, it should be unanimous and signed by the foreman. MD. ANN. CODE art. 27, § 413(i). To further aid the court's review of the determination to impose the death penalty, the statute clearly outlines what the appellate court should consider. *Id.* at § 414(e). This section provides:

In addition to the consideration of any errors properly before the court on appeal, the Court of Appeals shall consider the imposition of the death sentence. With regard to the sentence, the Court shall determine: (1) Whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; (2) Whether the evidence supports the jury's or court's finding of a statutory aggravating circumstance under § 413(d); (3) Whether the evidence supports the jury's or court's finding that the aggravating circumstances are not outweighed by mitigating circumstances; and (4) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Id.

³⁴ See *Barclay v. Florida*, 463 U.S. 939, 960 (1982) (Stevens, J., concurring). In *Barclay*, the Court recognized a common theme among Supreme Court decisions putting "emphasis on procedural protections that are intended to ensure that the death penalty will be imposed in a consistent, rational manner." *Id.* In other words, the Supreme Court's decisions have made it clear that states may impose the ultimate sentence of death "only if they follow procedures that are designed to insure reliability in sentencing determinations." *Id.* at 958. But see *California v. Brown*, 107 S. Ct. 837, 840 (1987) (Court held "by limiting the

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jury's consideration during the sentencing process in an attempt to guide the jury's discretion.³⁵ These procedural safeguards insure that the constitutional standards for imposing the punishment of death³⁶ are sufficiently satisfied.³⁷ With respect to capital

jury's sentencing considerations to record evidence, the state also ensures the availability of meaningful judicial review, another safeguard that improves reliability of the sentencing process.'"); *Lockett v. Ohio*, 438 U.S. 586, 604 n.12 (1978) (court's retain their traditional authority "to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense"); *Roberts v. Louisiana*, 428 U.S. 325, 335 n.11 (1976) (evidence outside the record concerning sentencing consequences is not substantiated and therefore no judicial review to safeguard against capricious sentencing determinations can be had).

³⁵ See MD. ANN. CODE art. 27, § 413 (d)&(g) (1986). The statute provides a list of aggravating and mitigating circumstances which the jury shall consider in determining whether or not to impose the death sentence. Examples of aggravating circumstances include: if the victim was a law enforcement officer who was murdered in the performance of his duties, § 413 (d)(1), if the defendant committed the murder while incarcerated, § 413 (d)(2), if the defendant committed more than one offense of murder in the first degree arising out of the same incident, § 413 (d)(9). Examples of mitigating circumstances include: if the defendant has no record, 413 (g)(1)(i), if the victim was a participant in the defendant's conduct and consented to the act which caused his death, § 413 (g)(2), if the defendant acted under substantial duress, domination or provocation of another person, (but not so substantial as to operate as a complete defense to the prosecution), § 413 (g)(3).

³⁶ See *Furman v. Georgia*, 408 U.S. 238, 282 (1972) (Brennan, J., concurring). The constitutional test for the validity of any punishment under the cruel and unusual punishment clause of the eighth amendment is a cumulative one: (1) if a punishment is unusually severe, (2) if it is likely that it is being inflicted arbitrarily, (3) if the punishment does not coincide with the accepted social standards of the time, and (4) if there is no reason to believe that it serves some necessary function that a less severe punishment could not serve, then the continued infliction of that punishment violates the cruel and unusual punishment clause of the eighth amendment. *Id.* In *Furman*, the Court also noted that punishment is cruel and unusual, and, therefore, in violation of the eighth amendment if it does not coincide with human dignity. *Id.* at 270.

From the state court opinion in *Booth* we learn that the eighth and fourteenth amendments require two basic safeguards in capital sentencing proceedings, which form the modern death penalty statutes. *Booth v. Maryland*, 306 Md. 172, 176, 507 A.2d 1098, 1128 (1986) (Cole, J., concurring in part, dissenting in part). First the death penalty "must not be imposed under sentencing procedures that create a substantial risk that it [will] be inflicted in an arbitrary and capricious manner." *Id.* Second, capital sentencing procedures must "guide and focus the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender." *Id.* See, e.g., *Roberts v. Louisiana*, 428 U.S. 325, 336 (1976) (invalidating Louisiana's statute making death the mandatory punishment for all first-degree murderers); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (invalidating North Carolina's statute making death mandatory for first-degree murderers); *Jurek v. Texas*, 428 U.S. 262, 276 (1976) (upholding Texas' guided discretion death penalty statute requiring the jury to find one statutory aggravating factor before death could be imposed); *Proffitt v. Florida*, 428 U.S. 242, 259-60 (1976) (upholding Florida's guided discretion sentencing statute in which aggravating circumstances are weighed against mitigating circumstances by the sentencer); *Gregg v. Georgia*, 428 U.S. 153, 207 (1976) (upholding Georgia's guided discretion statute for the death penalty). *But see McCleskey v. Kemp*, 107 S. Ct. 1756, 1778 (1987) (quoting *Singer v. United*

punishment, the Supreme Court has moved away from mandatory death sentences and toward individualized sentencing, thus advancing towards a flexible sentencing process.⁸⁸ However, it is submitted that the *Booth* decision has taken a step away from individualized sentencing by implementing a rigid rule prohibiting the consideration of certain relevant evidence by the sentencing authority in all capital cases.

A. *Absence of Deference to Legislative Determination*

The majority in *Booth* has also failed to give the required deference to the legislature's determinations of what constitutes appropriate sentencing considerations.⁸⁹ Appropriate sentences for par-

States, 380 U.S. 24, 35 (1965) (sentencing considerations should be limited to record evidence)).

⁸⁷ See *Gregg v. Georgia*, 428 U.S. 153, 195 (1970). In *Gregg*, the Court stated that "the concerns . . . that the penalty of death not be imposed in an arbitrary and capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. *Id.* at 195. See also *Furman*, 408 U.S. at 309-10 (Stewart, J., concurring) (standardless jury discretion must be replaced by procedures that safeguard against the arbitrary and capricious imposition of the death sentence); *Barclay v. Florida*, 463 U.S. 939, 958-59 (1983) (Stevens, J., concurring) (sentencer's discretion must be guided in a constitutionally adequate way); *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976) (must replace arbitrary and wanton jury discretion with objective standards to guide and regulate process for imposing death sentence).

Therefore, the sentencer's discretion in a capital sentence proceeding must be channeled and guided by clear, specific, and objective standards. *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980). See, e.g., *Proffitt v. Florida*, 428 U.S. 242 (1976) (Florida's capital sentencing proceeding provided specific and detailed guidelines); *Jurek v. Texas*, 428 U.S. 262 (1976) (Texas' death sentencing procedures provided sentencing authority with clear and specific guidelines); *Roberts v. Louisiana*, 431 U.S. 633 (1977) (Louisiana's death sentencing procedures lacked standards to guide jury and were therefore deemed unconstitutional).

⁸⁸ See *Furman v. Georgia*, 408 U.S. 238, 402 (1972) (Burger, C.J., dissenting). Thus in *Jurek v. Texas*, 428 U.S. 262, 273-74 (1976), the Court noted that the proper focus in a capital sentencing proceeding must be upon the circumstances "of the individual offender". *Id.* See also *supra* notes 5 & 6 and accompanying text (recent trend towards flexible, individual sentencing proceedings).

⁸⁹ See *Booth*, 107 S. Ct. at 2539 (White, J., dissenting). See also *Furman*, 408 U.S. at 468 (Rehnquist, J., dissenting) ("The task of judging constitutional cases . . . must surely be approached with the deepest humility and genuine deference to legislative judgment."); *Trop v. Dulles*, 356 U.S. 86, 119-21 (1958) (Frankfurter, J., dissenting) (courts are not representative bodies, and thus, in a democratic society, it is the legislature's responsibility to respond to the will and ultimately the moral values of the people); *Dennis v. United States*, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring) ("History teaches that the independence of the judiciary is jeopardized when the courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.").

In *Furman*, Justice Rehnquist realized that the judiciary's invalidation of certain laws

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ticular crimes and appropriate sentencing considerations are clearly questions of legislative policy.⁴⁰ In addition, legislative judgment is presumed to embody the contemporary standards of society, and this presumption can only be overcome by clear and convincing legislative error.⁴¹ Court decisions indicate that those who attempt to invalidate the judgment of the people's elected representatives must meet a heavy burden.⁴²

In his dissenting opinion, Justice White recognized that the legislature had decided that a jury should have the information contained in a VIS.⁴³ Although he did not address the prejudicial effects of the VIS in the sentencing process, Justice White explained that this information would aid the sentencing body to completely evaluate the harm caused by the defendant.⁴⁴ It is clear that the Maryland legislature, and other state legislatures, who have incorporated the requirement of the victim impact evidence in their death penalty statutes, have attempted to insure that some consideration be given to the victims of certain types of crimes.⁴⁵ It is

duly enacted by the people's representatives because they are constitutionally insulted by this responsiveness to popular will makes a democratic society, by the people and for the people, unworkable. *Furman*, 408 U.S. at 466 (Rehnquist, J., dissenting). See generally *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (information on federalism and the necessity for separation of powers and judicial review).

⁴⁰ See *Gore v. United States*, 357 U.S. 386, 393 (1958). The apportionment of crimes and punishments is not an area into which the judiciary is constitutionally authorized to enter. *Id.* See also *Gregg v. Georgia*, 428 U.S. 153, 176 (1976) (quoting *Gore v. United States*, 357 U.S. 386, 393 (1958)) (the deference owed to the legislature by the Court "[u]nder our federal system is enhanced where the specification of punishment is concerned, for those are peculiar questions of legislative policy"); *Furman*, 408 U.S. at 431 (Powell, J., dissenting) ("The designation of punishments for crimes is a matter peculiarly within the sphere of the state and federal legislative bodies."); See, e.g., *Trop v. Dulles*, 356 U.S. 86, 103 (1958) (courts are not to determine the wisdom of any statute, it must rely on Congress - the courts must simply examine the constitutionality of the statute); *In re Kemmler*, 136 U.S. 436, 446-47 (1890) (it is for the legislature to provide sentences for crimes - the court is only to examine their constitutionality whether they agree with the punishment or not).

⁴¹ See *Furman*, 408 U.S. at 384. (Burger, C.J., dissenting). See also *Gregg v. Georgia*, 428 U.S. 153, 175 (1976) ("[I]n assessing a punishment selected by a democratically elected legislature against the constitutional measure" the court will "presume its validity."); *Dennis v. United States*, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring) (legislative measure imposing specific punishments for crimes are not to be set aside by the courts unless there is no reasonable basis for it).

⁴² See *Gregg*, 428 U.S. at 175.

⁴³ *Booth*, 107 S. Ct. at 2539 (White, J., dissenting).

⁴⁴ See *id.* at 2539-40 (White, J., dissenting).

⁴⁵ See *Lodowski v. State*, 302 Md. 691, 736, 490 A.2d 1228, 1256 (1985). "It is evident

not surprising that in an age where there is a growing tide of support for victim justice that victim impact legislation would be enacted.⁴⁶

Although legislative power to determine sentences is exclusive, it is not absolute.⁴⁷ The court does play a role in interpreting the constitutionality of certain punishments.⁴⁸ The court serves as a check on the legislative power to apportion crimes and punishments.⁴⁹

B. Sentencing Discretion and the Jury

It is submitted that an inflexible rule disqualifying all VIS from consideration by a capital sentencing authority merely because their value as evidence is within the discretion of the jury is an

that the legislative intent in enacting victim impact statement legislation was to establish minimum standards for the information to be provided to judges and to make this information available in as many cases as fiscal constraints allowed." *Id.* See also *Booth*, 107 S. Ct. at 2540 (White, J., dissenting) (victim is an individual whose death represents a unique loss to which consideration should be given).

⁴⁶ See *Lodowski*, 302 Md. at 736, 490 A.2d at 1256. See also *Booth*, 107 S. Ct. at 2542 (Scalia, J., dissenting) (rise in popular concern for "victims' rights" has led to an increase in victim impact legislation); E. ZIEGENHAGEN, VICTIMS, CRIME, AND SOCIAL CONTROL, 91 (1977) ("Current interest in individual victims of crime has been expressed by many groups")

⁴⁷ See *Gregg*, 428 U.S. at 174 n.19. Legislative measures adopted by the people's chosen representatives are an important factor in determining contemporary social values but they are not determinative. *Id.* In *Weems v. United States*, 217 U.S. 349, 372-73 (1910) the Court expressed its fear that unlimited legislative power to impose punishments is the most "potent instrument of cruelty . . . put into the hands of power." *Id.* In *Furman*, more than sixty years later, the Court expressed this fear again by recognizing the necessity of restraining legislative power. *Furman v. Georgia*, 408 U.S. 238, 258-69 (1972). See also *McCleskey v. Kemp*, 107 S. Ct. 1756, 1773 (1987) (legislature is not without limits where community values have demonstrated opposition to the death penalty). See, e.g., *Crocker v. Georgia*, 433 U.S. 584, 592 (1977) (Court held a state may not constitutionally impose the death penalty upon a defendant convicted of raping an adult woman).

⁴⁸ See, e.g., *Gregg* 428 U.S. at 174 ("It seems conceded by all that the amendment imposes some obligation on the judiciary to judge the constitutionality of the punishment and that there are punishments that the amendment would bar whether legislatively approved or not.") (quoting *Furman*, 408 U.S. at 313-14 (White, J., concurring)); *Furman*, 408 U.S. at 267 (Brennan, J., concurring) ("[T]he responsibility lies with the courts to make certain that the prohibition of the Clause is enforced."); *Dennis v. United States*, 341 U.S. 494, 526 (1951) (Frankfurter, J., concurring) (although the courts must allow the "full scope of governmental discretion," its main focus is on the fairness and the constitutionality of the punishment in question).

⁴⁹ See *Gregg*, 428 U.S. at 174-75. The courts main function when assessing the constitutionality of a particular punishment is to "insure that constitutional bounds are not overreached" *Id.* See also *supra* note 48 (functions of judiciary in determining validity of punishments imposed by legislature).

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unfair and unnecessary exclusion of the victim from the sentencing proceeding. Discretion is an indispensable ingredient in the sentencing process.⁵⁰ The moral, factual and legal judgments of each juror should play a meaningful role in the sentencing decision.⁵¹ Each juror is expected to exercise his discretion in light of his common experiences and knowledge.⁵² Faith may be placed in the jurors to put aside their personal bias and to administer justice objectively and equitably.⁵³

⁵⁰ See *McCleskey v. Kemp*, 107 S. Ct. 1756, 1769 (1987). The Court noted that the implementation of laws against murder "necessarily requires discretionary judgement." *Id.* In addition, the Court held that because discretion is an indispensable part of the justice system a very high standard of proof must be met when one claims that it has been abused. *Id.*

The Supreme Court has stated that "[a]s long as that sentencing authority's discretion is guided in a constitutionally adequate way . . . and as long as the decision is not so wholly arbitrary as to offend the Constitution, the Eighth Amendment cannot and should not demand more." *Barclay v. Florida*, 463 U.S. 939, 950-51 (1983). See also *California v. Ramos*, 463 U.S. 992, 1008 (1983) (jury can consider a "myriad of factors to determine whether death is the appropriate punishment" after all elements of the capital crime have been proven beyond reasonable doubt); *Zant v. Stephens*, 462 U.S. 862, 874 (1983) (discretion of jury in a capital sentencing must be guided to reduce risk of "arbitrary and capricious action"); *Gregg*, 428 U.S. at 189 (in capital cases "discretion must be suitably directed and limited so as to limit the risk of solely arbitrary and capricious action"). But see *McGautha v. California*, 402 U.S. 183, 204 (1971) (the task of developing standards and guidelines for channeling jury discretion "and to express these characteristics in language that can be fully understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability."); MODEL PENAL CODE, § 2d. § 6, comment 3 at 71 (Text Draft No. 9, 1959) ("factors which determine whether the sentence of death is the appropriate penalty in particular cases are too complex to be compressed within the limits of a simple formula . . .").

⁵¹ See *Barclay*, 463 U.S. at 950. The majority in *Barclay* stated that the Supreme Court has never suggested that the sentencing process be a "rigid and mechanical" practice of simply weighing statutory factors. *Id.* But see *California v. Brown*, 107 S. Ct. 837, 840 (1987) (Supreme Court has never held "that conjecture, passion, prejudice, public opinion, or public feeling should properly play any role in the jury's sentencing determination.").

⁵² See *Barclay*, 463 U.S. at 950. The Court recognized that sentencing without judgment is both impossible and undesirable. *Id.* The Court stated that such an important decision cannot be made in a vacuum, as if the juror had no experiences. *Id.*

⁵³ See *McGautha v. California*, 402 U.S. 183, 213 (1971). See, e.g., *Barclay*, 463 U.S. at 950 ("We expect that sentencers will exercise their discretion in their own way and to the best of their ability"); *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968) ("A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the state and can thus obey the oath he takes as a juror."); *Cf. Eddings v. Oklahoma*, 455 U.S. 104, 113 (1982) (capital sentence vacated because it was imposed without consideration by sentencer of mitigating factors required by eighth amendment); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (sentencers cannot be prevented from considering any mitigating factor in capital sentencing proceedings).

Recently, in *California v. Brown*, 107 S. Ct. 837 (1987), the Supreme Court limited the holdings in *Lockett* and *Eddings*, however, by holding that an instruction during the sentenc-

The Court's definition of "cruel and unusual" punishment changes as society evolves.⁵⁴ One way the court can measure public attitude toward a particular sanction is by evaluating objective data.⁵⁵ The jury also serves a very important function in the evaluation of the legal standard of "cruel and unusual" by maintaining a link between the contemporary standards of society and the penal system.⁵⁶ A jury choosing between life and death expresses the beliefs of the community on the question of capital punishment.⁵⁷ It is suggested that by excluding certain evidence from the jury's consideration during the sentencing phase of a capital

ing phase of a capital murder trial that jurors must not be swayed by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or retain public feeling" did not violate the eighth or fourteenth amendments. *Id.* at 840. The Court stated that such an instruction would "serve the useful purpose of confining the jury's imposition of the death sentence by cautioning it against reliance on extraneous emotional factors, which, we think, would be far more likely to turn the jury against a capital defendant than for him." *Id.* The Court also stated that the jury should be limited to consideration of matters that have been introduced into evidence in order to foster the eighth amendment's requirement of reliability in capital sentencing and to ensure the availability of meaningful judicial review. *Id.* See also *Roberts v. Louisiana*, 428 U.S. 325, 335 (1976) (a procedure that lacks standards to guide jury invites them to disregard their oaths and choose a verdict arbitrarily). *But see Bruton v. United States*, 391 U.S. 123, 135 (1968) ("[t]here are some contents in which the risk that the jury will not, or cannot follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.")

⁵⁴ See *McCleskey*, 107 S. Ct. at 1770. "[T]he Court recognized that the constitutional prohibition against cruel and unusual punishments is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Id.* (quoting *Weems v. United States*, 217 U.S. 349, 378 (1910)). The Court noted that throughout history Supreme Court decisions on the validity of certain punishments have been reflections of society's values at the time. *McCleskey*, 107 S. Ct. at 1771.

⁵⁵ *McCleskey*, 107 S. Ct. at 1771. "In assessing contemporary values, we have eschewed subjective judgment, and instead have sought to ascertain 'objective indicia that reflect the public attitude toward a given sanction.'" *Id.* (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)). The Court in *McCleskey*, using the framework set in *Gregg*, listed the indicia employed by the Court to gauge public attitude. *McCleskey*, 107 S. Ct. at 1771. These include: "the decisions of the state legislatures 'because the . . . legislative judgment weighs heavily in ascertaining' contemporary standards." *Id.* (quoting *Gregg*, 428 U.S. at 175). The past sentencing determinations were made by juries because they are a "significant and reliable objective index of contemporary values." *Id.* (quoting *Gregg*, 428 U.S. at 181).

⁵⁶ See, e.g., *McCleskey*, 107 S. Ct. at 1771 (jury is reliable index of contemporary values); *Proffitt v. Florida*, 428 U.S. 242, 252 (1976) (jury sentencing in a capital case performs "an important societal function"); *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968) (function of a jury is to serve as "link between contemporary community standards and the penal system"). *But cf. McCleskey*, 107 S. Ct. at 1773 n.25 (Court has never suggested that jury sentencing is constitutionally required in a capital case despite the function they serve) (citing *Proffitt*, 428 U.S. at 252.).

⁵⁷ See *supra* note 56.

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trial, community standards cannot properly be gauged and therefore the definition of the eighth amendment cannot be constitutionally monitored.

VICTIM PARTICIPATION

The Victim and Witness Protection Act of 1982 (Act)⁶⁸ was signed into law on October 12, 1982. The purpose of the Act, which provides for victim impact statements, is to encourage victim participation in criminal prosecutions.⁶⁹ Prior to this movement toward victim involvement, it had frequently been noted that the voices least heard by the criminal justice system were those of the victims.⁶⁰ The victim's input may be justified as representative of the public, which has always been acknowledged as having a proper place in the proceeding.⁶¹

Victim participation is essential to the swift and effective administration of justice.⁶² The justice system is improved by more "effi-

⁶⁸ Pub. L. No. 97-291, 96 Stat. 1248 (codified at 18 U.S.C. §§ 1512-1515, 3146(a), 3579, 3580 (1982)); FED. R. CRIM. P. 32(c)(2). The Victim and Witness Protection Act (ACT) provides that: (1) before sentencing a criminal defendant, the judge must be informed of the crime's impact on the victim, FED. R. CRIM. P. 32(c)(2); (2) one who tampers with or retaliates against a witness, victim or informant is subject to both severe criminal sanctions and civil sanctions, 18 U.S.C. §§ 1512-1514; (3) a defendant must pay restitution to the victim if ordered by the sentencing judge, 18 U.S.C. §§ 3579-3580; (4) the Attorney General shall develop guidelines for the fair treatment of victims and witnesses by the criminal justice system, 18 U.S.C. § 1512 (comments); and (5) the Attorney General shall report to Congress on the usefulness of any laws necessary to prevent federal criminals from deriving profit from the sale of the crime story, 18 U.S.C. § 3579 (comments).

⁶⁹ See SENATE JUDICIARY COMM., VICTIM AND WITNESS PROTECTION ACT OF 1982, S. REP. NO. 532, 97th Cong., 2d Sess., reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 2515, 2515 [hereinafter Committee Report]. The Committee Report noted that the law had not previously provided for a Victim Impact Statement. *Id.* at 2517. The report stated that the committee regarded the victim impact statement "as a first step to ensure that the victim's side is heard and considered by adjudicative officials." *Id.* at 2519. Also noted in the report was "that the definition of victims is purposely broad to include other 'indirect' victims such as family members of homicide victims." *Id.* at 2519.

⁶⁰ See Committee Report, *supra* note 59, at 2516 ("[v]ictim has been 'forgotten person' in the criminal justice system.") See also Comment, *The Effect of External Pressures on Sentencing Judges*, 11 FORDHAM URB. L.J. 263, 275 (1982) (crime victims have traditionally been ignored by legislators).

⁶¹ See Committee Report, *supra* note 60, at 2516. "Without the cooperation of victims and witnesses, the criminal justice system would simply cease to function and few criminals, if any, would be brought to justice." See also Rubel, *Victim Participation in the Sentencing Proceedings*, 28 CRIM. L.Q. 226, 226 (1986) (trend toward victim participation in Canada as well).

⁶² See *supra* note 61 and accompanying text (discussion of the necessity of victim partici-

cient and effective" resolution of cases.⁶³ The victim's input into the sentencing process may be one of the best ways to clearly present the facts to the court.⁶⁴ It is essential not only that government officials communicate freely and effectively with the victim and his family but that throughout the entire proceeding attention and consideration are given to their feelings.⁶⁵ Judges must realize that in certain cases the best interest of all the parties involved can only be served by taking serious recognition of the victim.⁶⁶

Even though the VIS may appear to be more emotional or subjective than factual, this does not mean that the sentencing authority would be unduly influenced.⁶⁷ In fact, the defense may want to use the VIS in order to show the sentencing authority that the victim or the victim's family is satisfied with restitution, or that they feel some sympathy towards the defendant.⁶⁸

pation in the criminal proceeding). *See also* Committee Report, *supra* note 59, at 2520 (testimony of Chairman of New York State's Compensation Board) ("the victim impact statement will lend balance to the present information available to the court and therefore improve the quality of justice administered by the sentencing court"); M. HYDE, *THE RIGHTS OF THE VICTIM*, 61 (1983) ("Since the participation of victims and witnesses is critical to the effective administration of justice, one can easily see the importance of reducing the problems of the victims."). *See generally* VICTIM/WITNESS ASSISTANCE PROJECT, VICTIM/WITNESS LEGISLATION: CONSIDERATION FOR POLICY MAKERS 1981 A.B.A. Sec. Crim. Just. viii (advantageous policy ramifications of increased victim participation).

⁶³ *See supra* note 62. *See also* E. ZEIGENHAGEN, *supra* note 46, at 105 (victim participation is "an opportunity of gaining a better appreciation of contemporary norms regarding criminal behavior through noting kinds of sentences that are most often acceptable to victims."); McLeod, *supra* note 7, at 505 ("The primary benefits of increased victim participation are expected to come from enhanced system efficiency and effectiveness, system efficiency, simply put, refers to the processing of the maximum number of cases with minimal resistance.").

⁶⁴ *See* Rubel, *supra* note 61, at 236 (victim's participation plays a key role in fact finding).

⁶⁵ *See* E. ZIEGENHAGEN, *supra* note 46, at 92-96. Keeping doors of criminal justice system open to victim throughout all stages of criminal prosecution increases victim understanding and ultimately participation. *Id.*

⁶⁶ *See* McLeod *supra* note 7, at 506. "This is the position advanced by the President's Task Force on Victims of Crime: 'Two lives - the defendant's and the victim's - are profoundly affected by a criminal sentence. The court cannot make an informed decision on a just punishment if it hears from only one side.' " *Id.* *See also* PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME - FOUR YEARS LATER 1 (1986) (consideration of the victims' interests must be consistent throughout the criminal proceeding; "[b]efore plea bargains are accepted, sentences are imposed, or parole releases are granted.").

⁶⁷ *See* Rubel, *supra* note 61, at 236.

⁶⁸ *Id.*

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ALTERNATIVE SOLUTIONS

A uniform system of rules governing the substance, preparation and presentation of VIS,⁶⁹ would reduce any chance of undue prejudicial influence. It is suggested that by limiting the questions and answers to the direct effect of the crime on the victim or his family and keeping the information included within the scope of the interviewee's personal knowledge and experiences any arbitrary or prejudicial information could be eliminated. Verification of the VIS may operate to insure its accuracy and reliability.⁷⁰ A format designed to objectively list factors of victim impact may serve to limit differences of victim impact statements between jurisdictions as well as limit any prejudicial emotional information.⁷¹ Although the safeguards suggested would reduce any prejudicial element of the VIS, it is difficult to identify any potential prejudice to the defendant from its use in light of the fact that it does not go to the defendant's guilt or innocence but only to the jury's choice between life imprisonment or capital punishment.⁷²

After *Booth*, the VIS may still have a proper role in sentencing if it is viewed by the judge and not put before the jury.⁷³ Allowing only the judge to view this evidence may eliminate the discrepancies between cases in which the death penalty is imposed and the cases where it is not chosen, without eliminating individualized

⁶⁹ See McLeod, *supra* note 7, at 508.

[T]here is minimal consensus as to (1) the procedural bases for the authorization of a VIS, (2) the definitional criteria for what constitutes a victim for the purposes of preparing a VIS, (3) the specifications of the necessary and allowable contents of a VIS, (4) the authorized methods of VIS preparation, and (5) the formats for VIS presentation.

Id.

⁷⁰ *Id.* at 513.

⁷¹ *Id.*

⁷² See MD. ANN. CODE art. 27, § 413 (a) (1986) which provides in pertinent part:

Separate sentencing proceedings required - If a person is found guilty of murder in the first degree, and if the state had given the notice required under section 412 (b), a separate sentencing proceeding shall be conducted as soon as practicable after the trial has been completed to determine whether he shall be sentenced to death or imprisoned for life.

Id.

⁷³ See *supra* note 58. The recently amended Victim and Witness Protection Act deals exclusively with the judge viewing the presentence report and taking into account the crime's impact on the victim. *Id.*

sentencing.⁷⁴ The resulting equality among cases imposing the death penalty for specific crimes will dissipate any constitutional claims that the death penalty is imposed unusually in violation of the eighth amendment.⁷⁵

Although the judge may possess the ability to view the evidence more objectively than a jury, it is submitted that the jury should not be totally excluded from the proceeding. An *in camera* inspection is suggested, allowing the judge to separately view the evidence extracting all prejudicial elements before giving it to the jury for examination.⁷⁶

CONCLUSION

Victims should be informed about, and involved in, the criminal justice process.⁷⁷ Although some information contained in the VIS in *Booth* was prejudicial to the defendant, that should not have totally invalidated their use at all capital sentencing proceedings. This article has examined several advantages to encouraging the victim to participate in the criminal justice process. One of the best methods for increasing victim participation is the use of the VIS. It is now clear that the majority's holding excluding all victim impact statements from capital sentencing proceedings is both dangerous and unnecessary. In capital cases it is imperative that all relevant evidence be admitted for consideration by the sentenc-

⁷⁴ See *McCleskey v. Kemp*, 107 S. Ct. 1756, 1777 n.35 (1987). *But see id.* at 1778 ("any mode for determining guilt or punishment 'has its weaknesses and the potential for misuse.'") (quoting *Singer v. United States*, 380 U.S. 24, 35 (1965)).

⁷⁵ *Id.* at 1778 n.36.

⁷⁶ See, e.g., *Murray v. Carrier*, 106 S. Ct. 2639, 2641 (1986) (victim's statements made prior to trial suppressed after judge made *in camera* examination and found them too prejudicial). See generally FED. R. EVID. 612 (court shall examine evidence *in camera* to determine relevance).

⁷⁷ See *Hyde*, *supra* note 62, at 62. There is a present movement of many criminal justice agencies toward a better system of informing the victim about all stages of the proceeding. *Id.*

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ing authority for the decision to be made is truly one of life and death.

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