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Fulfilling the Promise of *Payne*: Creating Participatory Opportunities for Survivors in Capital Cases

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INTRODUCTION

When the Supreme Court held in *Payne v. Tennessee*[1] that the admissibility of victim impact evidence in capital cases is a question of state law,[2] it opened the door to victims seeking greater participation in the criminal justice system.[3] *Payne* was seen as a solid victory for victims' rights advocates in that it adopted key values from the victims' rights movement, namely that victims (including murder victims' family members, referred to here as "survivors"), not just defendants, should have rights,[4] and that victim impact evidence is "only fair" when the defendant has the right to introduce mitigation evidence.[5]

In the two decades since *Payne*, it has become clear that opportunities to participate in capital cases have not been evenly distributed among all survivors. Some survivors are silenced[6] because of due process considerations.[7] Other

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1. 501 U.S. 808 (1991).

2. *Id.* at 827.

3. While there is a variety of information that could be included in a victim impact statement, *Payne* specifically addressed the admissibility of information about the "victim's attributes and value to society," and "information about the impact of the murder on the survivors and the community at large." Joseph L. Hoffmann, *Revenge or Mercy? Some Thoughts About Survivor Opinion Evidence in Death Penalty Cases*, 88 CORNELL L. REV. 530, 530 (2003).

4. *See Payne*, 501 U.S. at 825–26.

5. *Id.* at 859 (Stevens, J., dissenting) ("Because our decision in *Lockett* recognizes the defendant's right to introduce all mitigating evidence that may inform the jury about his character, the Court suggests that fairness requires that the State be allowed to respond with similar evidence about the *victim*. This argument is a classic non sequitur: The victim is not on trial; her character, whether good or bad, cannot therefore constitute either an aggravating or a mitigating circumstance." (emphasis in original) (citations omitted)); *see also* Evan J. Mandery, *Notions of Symmetry and Self in Death Penalty Jurisprudence (With Implications for the Admissibility of Victim Impact Evidence)*, 15 STAN. L. & POL'Y REV. 471 (2004) (analyzing the argument that admitting victim impact evidence is fair because it creates symmetry with the admissibility of a defendant's mitigation evidence).

6. Robert P. Mosteller, *Victim Impact Evidence: Hard to Find the Real Rules*, 88 CORNELL L. REV. 543, 553 (2003) [hereinafter Mosteller, *Real Rules*] ("[A] victim's right to be heard is not unlimited.").

7. *See, e.g.*, Jeremy A. Blumenthal, *The Admissibility of Victim Impact Statements at Capital Sentencing: Traditional and Nontraditional Perspectives*, 50 DRAKE L. REV. 67 (2001); Hoffmann, *supra* note 3; Erin O'Hara, *Victim Participation in the Criminal Process*, 13 J.L. & POL'Y 229 (2005).

survivors find their newly minted role usurped by prosecutors facing tremendous social and political pressures.[8] Regardless of the reason, limiting who may speak and what they may say deprives survivors of the opportunity to fully participate in capital proceedings.[9] This strategic silencing denies survivors the rights that the victims' rights movement[10] has worked so hard to have the criminal justice system acknowledge. Even today, there is disagreement about the role (if any) in the criminal justice system that the State is obliged to provide to survivors.[11] States, however, have overwhelmingly recognized as legitimate survivors' claim to a place in the criminal justice system.[12] Once the State recognizes survivors' claims as legitimate, it needs to provide a mechanism for *all* survivors to participate. Otherwise, the State runs the risk that a procedure devised to help survivors will hurt some of them when they are denied the participatory opportunities offered to others.

This Note does not argue for the propriety of survivor participation generally or victim impact evidence specifically, both of which have been convincingly critiqued on everything from their constitutionality to their evidentiary relevance.[13]

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8. *See* Charles F. Baird & Elizabeth E. McGinn, *Re-Victimizing the Victim: How Prosecutorial and Judicial Discretion Are Being Exercised to Silence Victims Who Oppose Capital Punishment*, 15 STAN. L. & POL'Y REV. 447 (2004); Brian L. Vander Pol, Note, *Relevance and Reconciliation: A Proposal Regarding the Admissibility of Mercy Opinions in Capital Sentencing*, 88 IOWA L. REV. 707, 709 & n.2 (2003) (describing the "acute (and ever intensifying) political pressure" on prosecutors "to seek the death penalty").

9. As one commentator has noted, "Being afforded the right to participate in the solemn rite of a trial signals to the speaker that what she has to say is valued." Mary Margaret Giannini, *Equal Rights for Equal Rites?: Victim Allocution, Defendant Allocution, and the Crime Victims' Rights Act*, 26 YALE L. & POL'Y REV. 431, 433 (2008).

10. As mentioned previously, the term "survivors" is used here to encompass the family members of murder victims. The victims' rights movement, however, encompasses all crime victims, of which survivors are a subset. Like all other victims, survivors are a part of the victims' rights movement and are intended beneficiaries of the movement.

11. *See, e.g.*, Vik Kanwar, *Capital Punishment as "Closure": The Limits of a Victim-Centered Jurisprudence*, 27 N.Y.U. REV. L. & SOC. CHANGE 215, 240 (2001) ("Whatever the actual merits and psychological benefits of individualization of victims' experience of the process (e.g., 'right to view' statutes or 'post-sentence victim allocution'), the social costs of an aggressively victim-centered discourse should be clear: it takes the focus off blameworthiness and individualization of the criminal accused, and attends to contingent and unstable emotions." (footnote omitted)).

12. *See infra* Part I.C.

13. *See, e.g.*, Elizabeth E. Joh, *Narrating Pain: The Problem with Victim Impact Statements*, 10 S. CAL. INTERDISC. L.J. 17 (2000) (arguing that the admission of victim impact statements in capital cases fundamentally changed the sentencing process and improperly shifted the focus away from defendants and toward victims); 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 (1999); Katie Morgan & Michael J. Zydney Mannheimer, *The Impact of Information Overload on the Capital Jury's Ability to Assess Aggravating and Mitigating Factors*, 17 WM. & MARY BILL RTS. J. 1089, 1090 (2009) ("In order to ease the potential effects of information overload, death penalty jurisdictions, with the approval of the Supreme Court, should reduce the amount of information presented at the penalty phase of capital trials. One logical way of doing this is to limit aggravating and mitigating circumstances at the penalty-selection stage to those that reflect on the individual

Rather, it points out that victim and survivor participation is the law of the land and thus a reality in our criminal justice system. Focusing on capital sentencing proceedings, this Note argues that the haphazard and inconsistent manner in which survivors are allowed to participate fails to further the values underlying federal and state victims' rights statutes and Supreme Court case law regarding survivor participation by re-victimizing survivors through exclusion and silencing.

To attempt to remedy survivor re-victimization while also addressing the concerns of critics of victims' rights, this Note proposes a procedure known as "post-sentence victim allocution"[14] as a feasible means to help survivors while sidestepping due process and trial strategy concerns. Post-sentence victim allocution is a formal procedure that occurs after sentencing and allows survivors to address the defendant and the court in front of the judge. While post-sentence victim allocution would not have any bearing on guilt or sentencing decisions, it could be open to the public.

As the rhetoric of "closure" has permeated discussion surrounding and justifying capital punishment,[15] survivors who participate in criminal proceedings have come to expect they should and will feel some degree of closure as a result of that participation.[16] While closure has no accepted meaning in either the legal or clinical psychological context,[17] the term "closure" is used here to convey a regained sense of control survivors may feel as they move toward peace with their new status as survivors.[18] While it is true that not all survivors who participate experience closure from their participation,[19] many find the experience to be both significant and

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culpability of the offender for the crime of conviction."); Bryan Myers & Edith Greene, *The Prejudicial Nature of Victim Impact Statements*, 10 PSYCHOL. PUB. POL'Y & L. 492 (2004) (recommending that courts limit the scope of victim impact evidence admitted during trial or sentencing).

14. Texas already provides a general right for victims to make a statement post-sentence, TEX. CODE CRIM. PROC. ANN. art. 42.03, § 1(b) (West 2006 & Supp. 2010), and Indiana provides specifically for a post-sentence statement by survivors in capital cases, IND. CODE § 35-50-2-9(e) (2004 & Supp. 2010).

15. *See* Susan A. Bandes, *Victims, "Closure," and the Sociology of Emotion*, LAW & CONTEMP. PROBS., Spring 2009, at 1, 10 [hereinafter Bandes, *Sociology of Emotion*].

16. *See id.*; Jody Lyneé Madeira, *A Constructed Peace: Narratives of Suture in the News Media*, 19 CAN. J.L. & SOC'Y 93, 108 (2004). *But see* Marilyn Peterson Armour & Mark S. Umbreit, *The Ultimate Penal Sanction and "Closure" for Survivors of Homicide Victims*, 91 MARQ. L. REV. 381, 398 (2007) ("The notion of closure is rarely advanced by the survivors themselves. Many, if not most, vehemently deny that there is closure or that closure will ever be possible for them; they abhor the word because it implies 'getting over it.'").

17. *See* Bandes, *Sociology of Emotion*, *supra* note 15, at 16.

18. For a number of alternate definitions and conceptions of closure, see Armour & Umbreit, *supra* note 16, at 417–19; Kanwar, *supra* note 11, at 237–51.

19. *See* Bandes, *Sociology of Emotion*, *supra* note 15, at 16; *cf.* Kanwar, *supra* note 11, at 239 ("[I]ndividual requirements for 'closure' are so personal that it would be difficult to conceive of any generalized remedy that could be properly tailored to this purpose.").

helpful.[20] Silenced survivors are deprived of the *opportunity* to discover if participation would be beneficial to them.[21]

Because it affects neither conviction nor sentencing, some may criticize post-sentence victim allocution as an empty gesture—an opportunity for survivors who are foreclosed from "real" participation to merely vent their feelings. "Venting" itself can, however, be valuable,[22] and post-sentence victim allocution provides an opportunity for survivors who would otherwise be excluded entirely from the criminal justice process to be heard. Revising victims' rights statutes to provide for post-sentence victim allocution can benefit those survivors who may be excluded from giving victim impact evidence in the sentencing phase without infringing the defendant's right to a fair trial.[23]

Part I of this Note discusses the history of the victims' rights movement and the various state and federal statutes that have created a plethora of rights for victims to participate in criminal sentencing proceedings. It then analyzes the goals of the victims' rights movement in light of the Supreme Court's decisions in *Booth v. Maryland*,[24] *South Carolina v. Gathers*,[25] and *Payne v. Tennessee*.[26] This Part concludes with a focus on what survivors seek to obtain from their interaction with the criminal justice system. Part II explains the two major obstacles to survivor participation: the systemic safeguards intended to protect defendants' due process rights and the intense social and political pressures that come to bear on prosecutors in capital cases. Finally, Part III proposes that post-sentence victim allocution can

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20. For a discussion of the potential for secondary victimization through participation, see Armour & Umbreit, *supra* note 16, at 413–17.

21. *See* Baird & McGinn, *supra* note 8, at 448.

22. *See* Giannini, *supra* note 9, at 435 ("While victim allocution exists partly to give victims an opportunity to provide information that could affect the court's sentencing determination, the practice also exists to enhance the dignity of the speaker, to provide the speaker with a therapeutic and cathartic outlet, to educate other participants in the sentencing proceeding, and to enhance the perceived fairness of the legal system."); Jody Lyneé Madeira, *When It's So Hard to Relate: Can Legal Systems Mitigate the Trauma of Victim-Offender Relationships?*, 46 HOUS. L. REV. 401, 461 (2009) [hereinafter Madeira, *When It's So Hard to Relate*] (noting that post-adjudication mediation, while outside the context of the courtroom completely, nonetheless "offers victims and their family members the opportunity to replace the involuntary, negative para-social ties that characterize the victim-offender relationship with voluntary and likely more positive interpersonal dialogue").

23. *Cf.* Bandes, *Sociology of Emotion*, *supra* note 15, at 13 ("Some survivors may benefit from the ability to participate, and some may feel co-opted or re-victimized by the process. There are also significant risks to the capital defendant, who is entitled to a jury whose decision about whether to take or spare his life is based on constitutionally acceptable criteria."); Aya Gruber, *A Distributive Theory of Criminal Law*, 52 WM. & MARY L. REV. 1, 54–55 (2010) ("[A]lthough some have argued that victim participation does not necessarily cause detriment to defendants, the victims' rights movement and victim impact law generally assume an adversarial relationship. While admitting victims' statements of anger and anguish, courts continue to prohibit victims from advocating against the death penalty." (footnotes omitted)).

24. 482 U.S. 496 (1987).

25. 490 U.S. 805 (1989).

26. 501 U.S. 808 (1991).

eliminate silencing by providing a mechanism for participation to those survivors who may be unable or unwilling to provide victim impact evidence.

I. CREATING A ROLE FOR VICTIMS AND SURVIVORS

The idea of "victims' rights" is a relatively recent innovation in modern criminal law.[27] The central purpose of the American criminal justice system is to determine the guilt or innocence of a defendant and to impose the proper punishment, not to protect victims.[28] Because the criminal justice system has been structured to focus on the guilt or innocence of the defendant, many victims feel shut out or ignored.[29] As a report prepared by Murder Victims' Families for Reconciliation explains, "Victimization is about powerlessness; victims' rights are about the reclaiming of power. Being victimized strips people of their dignity; victims' rights offer opportunities to restore dignity. Murder silences its victims; victims' rights let the surviving family have a voice in the aftermath of the trauma."[30] This Part will first discuss the history and evolution of the victims' rights movement and the ways in which victims are currently able to participate at both the state and federal levels. Because "death is different,"[31] the rights and remedies available to victims of noncapital crimes have not necessarily been extended to survivors of murder victims. After discussing victims' rights generally, this Part focuses on survivors' rights specifically and concludes with an explanation of capital trial procedures and

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27. *See, e.g.*, PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT (1982) [hereinafter PRESIDENT'S TASK FORCE]. Assertion of victims' rights is still also highly contested. *See* Kanwar, *supra* note 11, at 223.

28. *See* Ashley Paige Dugger, Note, *Victim Impact Evidence in Capital Sentencing: A History of Incompatibility*, 23 AM. J. CRIM. L. 375, 404 (1996) ("The purpose of the sentencing phase is a determination as to whether the defendant should be spared the death penalty or whether he should receive it. The focus is no longer on the amount of harm he caused others through his crime. It is purely on the defendant himself. The sentencing phase is not designed to be a contest between the victim and the defendant as to whose life is worth more. With the admission of victim impact evidence, the defendant will surely lose in most instances.").

29. Chief Justice Richard Barajas & Scott Alexander Nelson, *The Proposed Crime Victims' Federal Constitutional Amendment: Working Toward a Proper Balance*, 49 BAYLOR L. REV. 1, 1–2 (1997); Giannini, *supra* note 9, at 439 ("Victims' rights advocates have emphasized this imperfection of the public prosecution model by pointing out that 'while criminal defendants have an array of rights under law,' 'victims, and their families, [are] ignored, cast aside, . . . treated as non-participants in a critical event in their lives,' and granted few rights or protections throughout the criminal justice process." (alterations in original) (footnotes omitted) (quoting Senate Floor Statements in Support of the Crime Victims' Rights Act, 105 Cong. Rec. S460, S4269 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein), *reprinted in Senate Floor Statements in Support of the Crime Victims' Rights Act*, 19 FED. SENT'G REP. 62, 63 (2006))).

30. ROBERT RENNY CUSHING & SUSANNAH SHEFFER, MURDER VICTIMS' FAMILIES FOR RECONCILIATION, DIGNITY DENIED: THE EXPERIENCE OF MURDER VICTIMS' FAMILY MEMBERS WHO OPPOSE THE DEATH PENALTY 8 (2002).

31. *E.g.*, Woodson v. North Carolina, 428 U.S. 280, 303–04 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) ("[D]eath is a punishment different from all other sanctions . . . .").

an analysis of the three Supreme Court opinions dealing with the propriety and admissibility of victim impact evidence in the capital context.

A. The Victims' Rights Movement

Emerging in the late 1970s,[32] agitation for victims' rights has developed over the last several decades into a cohesive movement,[33] of which the survivors' rights movement is an integral part. Previously, "[v]ictims . . . were simply not entitled to [either] support or standing in the criminal justice system as it existed. These parties were voiceless throughout the proceedings, and as a result, often felt 're-victimized' by the system that was set up to help them."[34] The victims' rights movement grew out of a widespread sentiment that the legal system did not accord victims the respect or sympathy they deserved, and this lack of support resulted in negative interactions with the criminal justice system.[35] As it grew, the victims' rights movement became a "more or less organized social movement that advocates changes in criminal law and procedure designed to provide crime victims, collectively and individually, more satisfaction within the legal system."[36]

While the desires of specific victims are deeply personal, the shared core belief of the victims' rights movement is that victims have a right to be heard in criminal justice proceedings[37] and that participation is a valuable experience.[38] Underlying this belief is the premise that victims desire and deserve empowerment or closure

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32. *See* MARLENE YOUNG & JOHN STEIN, NAT'L ORG. FOR VICTIM ASSISTANCE, THE HISTORY OF THE CRIME VICTIMS' MOVEMENT IN THE UNITED STATES 1–4 (2004), *available at* http://www.ncjrs.gov/ovc_archives/ncvrw/2005/pg4c.html.

33. Baird & McGinn, *supra* note 8, at 451–52. For more information on the victims' rights movement and the plethora of social services that have been established to support victims and survivors, see YOUNG & STEIN, *supra* note 32.

34. Dugger, *supra* note 28, at 377; *see also* O'Hara, *supra* note 7, at 239 ("[V]ictims are often completely sidelined in the criminal process. Many victims never have an opportunity to meet with the prosecutors in their cases and those who do very often report that they do not feel as though their concerns were taken into account.").

35. *See* Baird & McGinn, *supra* note 8, at 451; *see also* PRESIDENT'S TASK FORCE, *supra* note 27, at 77 ("The idea that the victim should speak at sentencing has been met with resistance. That opposition and the force with which it has been projected by judges and lawyers is one measure of their lack of concern for victims. It is also an indication of how much is wrong with the sentencing system.").

36. Kanwar, *supra* note 11, at 223.

37. *See, e.g.*, PRESIDENT'S TASK FORCE, *supra* note 27, at 33–35.

38. Giannini, *supra* note 9, at 451 ("The transformative nature of the ritual of trial is particularly important when one examines crime from a relational standpoint. Through the commission of crime, the defendant's acts place him in a position superior to the individual he has harmed. The defendant's acts objectify the victim by treating that person as a means to an end—the commission of the crime—and simultaneously indicate his belief that community norms do not apply to him. While others may be bound to follow the law, the offender, by departing from social norms, emphasizes that he rejects being a part of, and living in relation to, his community. Crime, then, represents a social and moral imbalance between the victim, defendant, and society. The legal system, and more specifically, the ritual of trial, seeks to redress this imbalance.").

from their participation in trial or sentencing proceedings.[39] Additionally, participation may prove therapeutic for some victims by promoting recovery from their trauma, as well as making them feel as though things are "fair" because they had the opportunity to be heard.[40]

Since the beginning of the victims' rights movement, scholars have debated the proper role of the victim in the criminal justice system[41] and the proper role of the criminal justice system in helping victims with the healing and closure process.[42] In the wake of a violent crime, especially murder, survivors experience a wide range of emotions and, correspondingly, desire a wide range of outcomes from the criminal justice system.[43] These outcomes include information as to what happened to a loved one and why, justice for the loved one, revenge against the perpetrator, and closure on an emotionally painful experience. They also have a host of other needs that the criminal justice system cannot meet, such as loss of companionship or financial support from the immediate victim of the crime. However, the existence of a coherent victims' rights movement speaks eloquently to victims' shared desire for opportunities for greater participation in the criminal justice process and their common belief that such participation is central to achieving empowerment[44] and, ultimately, closure.[45]

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39. Mosteller, *Real Rules*, *supra* note 6, at 548 (discussing the "growing use of the concept of victim catharsis to justify victim impact evidence"); *id.* at 548–49 ("I suspect victim catharsis is an implicit motivation behind the giving, and perhaps the receipt, of many victim impact statements. What appears to be happening is an effort by the survivor or victim to bring 'closure' to an event; to have catharsis."); *id.* at 554 ("Society, in a pop-psychology-way, appears to have embraced the propriety of statements directed at defendants for the purpose of helping to heal the victim. For this purpose, the impact evidence becomes even more visceral and even more difficult to constrain using ordinary rules of due process, probativity versus prejudice, relevance, and reasonableness.").

40. Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611, 611–12 (2009).

41. *See, e.g.*, Robert P. Mosteller, *The Effect of Victim-Impact Evidence on the Defense*, CRIM. JUST., Spring 1993, at 24 [hereinafter Mosteller, *Effect*].

42. *See, e.g.*, Susan Bandes, *When Victims Seek Closure: Forgiveness, Vengeance and the Role of Government*, 27 FORDHAM URB. L.J. 1599, 1603 (2000) [hereinafter Bandes, *Closure*].

43. *See id.* at 1602–03 ("The little empirical evidence of which I am aware supports the intuitively obvious view that different victims have different needs, and that an individual victim's needs may change over time.").

44. *See* Jody Lyneé Madeira, *"Why Rebottle the Genie?": Capitalizing on Closure in Death Penalty Proceedings*, 85 IND. L.J. 1477, 1511 (2010) [hereinafter Madeira, *Why Rebottle the Genie?*] ("Creating a narrative of a murder's aftermath is one way to establish some degree of control, and may indeed aid victims' families in coming to terms with their new status and its implications.").

45. This is not intended to be an argument for the objective existence of closure. Rather, it is an acknowledgement of the cultural existence of the *idea* of closure, which permeates discussion of victims' rights and is held out as the ultimate result that survivors desire. For an in-depth discussion of the role of closure in capital proceedings, see *id*.

B. Existing Victims' Rights

The victims' rights movement has been very successful in attracting attention and support for its goals. Various strategies have been developed on both state and national levels to afford victims a greater role in the criminal justice process. A key element of the creation, acknowledgement, and protection of these participatory rights has been the passage of federal and state statutes, intended to create participatory opportunities for victims.[46] All fifty states as well as the federal government have enacted some form of victims' rights legislation.[47] On the state level, some states have amended their constitutions to provide for victims' rights,[48] while other states have enacted statutes that provide for victim participation or for services and amenities for victims.[49]

At the federal level, the Victims of Crime Act, enacted in 1984, authorized collection of monetary damages from convicted criminals, which are then distributed to states to fund services for victims.[50] The federal Victims' Rights and Restitution Act (known as the "Victims' Bill of Rights"), enacted in 1990, grants victims the right to be notified of and present at all stages of the criminal prosecution and to be informed about the status of trial, sentencing, and parole matters.[51] Several additional federal statutes expanding victim access to trials were enacted in the wake of the bombing of the Alfred P. Murrah Federal Building in Oklahoma City.[52]

More recently, President Bush signed the Justice for All Act into law in 2004.[53] The Act modifies some existing rights, but it also adds some significant new rights including the right of victims "to be reasonably heard at any public proceeding

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46. *Cf.* Barajas & Nelson, *supra* note 29, at 17.

47. Victoria Schwartz, *The Victims' Rights Amendment*, 42 HARV. J. ON LEGIS. 525, 526 (2005); *see, e.g.*, IND. CONST. Art. I, § 13(b) (2009); ARIZ. REV. STAT. ANN. §§ 13-4401 to 13-4440 (2010); CAL. PENAL CODE § 679.02 (2010).

48. *See, e.g.*, IND. CONST. Art. I, § 13(b) (2009) ("Victims of crime, as defined by law, shall have the right to be treated with fairness, dignity, and respect throughout the criminal justice process; and, as defined by law, to be informed of and present during public hearings and to confer with the prosecution, to the extent that exercising these rights does not infringe upon the constitutional rights of the accused.").

49. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 13-4401 to 13-4440 (2010) ("Crime Victims' Rights"); CAL. PENAL CODE § 679.02 (2010) (enumerating statutory rights of victims and witnesses of crimes).

50. *See* Baird & McGinn, *supra* note 8, at 454; 42 U.S.C. § 10601 (2006).

51. *See* Baird & McGinn, *supra* note 8, at 454; 18 U.S.C. § 3771 (2006).

52. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (requiring closed-circuit televising of proceedings for victims in cases where the trial venue is moved out of state and more than 350 miles from which it originally would have taken place); Victim Rights Clarification Act of 1997, Pub. L. No. 105-6, 111 Stat. 12 (preventing judges from excluding victims who plan to give victim impact evidence from the courtroom during trial).

53. Justice for All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260; *see also* OVC FACT SHEET, U.S. DEP'T OF JUSTICE OFFICE FOR VICTIMS OF CRIME, THE JUSTICE FOR ALL ACT (Apr. 2006), *available at* www.ojp.usdoj.gov/ovc/publications/factshts/justforall/fs000311.pdf.

involving release, plea, or sentencing."[54] A subsequent Ninth Circuit case[55] interpreting a portion of the Justice for All Act called the Crime Victims' Rights Act (CVRA)[56] found that Congress intended for victims to be able to actually speak at sentencing, not just submit written victim impact statements,[57] and that the right to speak extends to any criminal sentencing, even if there is more than one sentencing proceeding in the case.[58] In his opinion for the panel, Judge Kozinski noted that "[t]he criminal justice system has long functioned on the assumption that crime victims should behave like good Victorian children—seen but not heard. The Crime Victims' Rights Act sought to change this by making victims independent participants in the criminal justice process."[59] That independence is key both for victims—who may be unable or unwilling to work through the prosecutor—and for prosecutors—who can worry less about being improperly influenced by highly sympathetic victims.[60]

Despite the widespread creation of a greater role for victims, constitutional considerations prohibit an even balancing between the rights of victims and those of defendants.[61] Nowhere is this more apparent than in the capital sentencing arena, where survivor participation has been a matter of great debate and controversy.[62] The remainder of this Part will explain the justifications given for survivor participation in capital sentencing proceedings and the current state of the law regarding survivor participation. It concludes with an analysis of the three Supreme Court opinions dealing with the admissibility of victim impact evidence in capital sentencing proceedings.

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54. OVC FACT SHEET, *supra* note 53, at 2. The OVC Fact Sheet is careful to note, however, that "the Act is not intended to impair prosecutorial discretion in the handling of the case." *Id.*

55. Kenna v. U.S. Dis't. Ct. for the Cent. Dist. of Cal., 435 F.3d 1012 (9th Cir. 2006).

56. 18 U.S.C. § 3771 (2006).

57. *Kenna*, 435 F.3d at 1016. A district court interpreting the CVRA went even further, declaring "even if a victim has nothing to say that would directly alter the court's sentence, a chance to speak still serves important purposes. As the First Circuit has pithily explained, 'allocution is both a rite and a right.'" United States v. Degenhardt, 405 F. Supp. 2d 1341, 1349 (D. Utah 2005) (quoting United States v. De Alba Pagan, 33 F.3d 125, 129 (1st Cir. 1994)).

58. *Kenna*, 435 F.3d at 1016.

59. *Id.* at 1013.

60. *See infra* Part II.B. For a more detailed analysis of the CVRA, see Richard A. Bierschbach, *Allocution and the Purposes of Victim Participation Under the CVRA*, 19 FED. SENT'G REP. 44 (2006); Giannini, *supra* note 9.

61. *Cf.* Payne v. Tennessee, 501 U.S. 808, 860 (1991) (Stevens, J., dissenting).

62. *See, e.g.*, Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 392–93 (1996) [hereinafter Bandes, *Empathy*] ("Victim impact statements are stories that should not be told, at least not in the context of capital sentencing, because they block the jury's ability to hear the defendant's story. Moreover, they evoke emotions that do not belong in that context.").

C. Survivor Participation in Capital Sentencing Proceedings

Particular attention has been paid to survivors of murder victims because society recognizes that the violent death of a loved one is an especially severe trauma.[63] As Armour and Umbreit have noted, "Although murder is a social issue that affects the survival and safety of civilized society, survivors are the ones most directly affected by the crime and how society responds to it."[64] Because they are the ones most directly affected, survivor participation can also increase the perceived legitimacy of the criminal justice system.[65] When the crime is one that may warrant the imposition of the death penalty, survivors' views and opinions have become central to prosecutorial decision making.[66] In some cases, prosecutors may be so deferential to survivors that survivor views become "dispositive with respect to the prosecutor's decision to accept a guilty plea."[67]

The opportunity to participate and be heard throughout the proceeding is important to many survivors.[68] Some "seek both revenge and strong social condemnation of criminals"[69] as well as "vindication and validation from society."[70] Some hope or believe that participation will heal them,[71] empower them, or help them to regain control of their lives[72] as they attempt to come to terms with the effects of the crime.[73] Survivor participation provides a means for

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63. *See* Bennett L. Gershman, *Prosecutorial Ethics and Victims' Rights: The Prosecutor's Duty of Neutrality*, 9 LEWIS & CLARK L. REV. 559, 575–76 (2005).

64. Armour & Umbreit, *supra* note 16, at 422.

65. Giannini, *supra* note 9, at 433.

66. Gershman, *supra* note 63, at 575–76 ("There is one area in which the victim's concerns receive special attention: death penalty cases. Such disparate treatment probably is not uncommon. In deciding whether to seek the death penalty or allow a capital defendant to plead guilty to a certain term of life imprisonment, some prosecutors may rely heavily on the views of the victim's family. . . . To these prosecutors, as well as under the law, the magnitude of the crime and the enormous impact it has on the survivors apparently gives them a special claim to being heard on the ultimate punishment." (footnote omitted)).

67. *Id.*

68. A report prepared by Murder Victims' Families for Reconciliation identified several rights as particularly important: (1) the right to speak and be heard through the criminal justice process, (2) the right to receive information about the process, and (3) the right to receive help from victims' advocates. CUSHING & SHEFFER, *supra* note 30, at 9.

69. O'Hara, *supra* note 7, at 234.

70. *Id*.

71. *See* Cassell, *supra* note 40, at 621–23.

72. Madeira, *Why Rebottle the Genie?*, *supra* note 44, at 1512 ("Successful participation—defined by one's ability to carry out the participative task, not by sentencing outcome—restores agency and control and allows for the display of self-control, allowing the victim to step away from a state of perceived powerlessness, silence, and incapacity.").

73. O'Hara, *supra* note 7, at 244 ("Experts on the psychological effects of crime have emphasized the importance to victims of [participation] by noting that 'failure to offer victims a chance to participate in criminal proceedings can "result in increased feelings of inequity on the part of victims, with a corresponding increase in crime-related psychological harm."' At the same time, 'there is mounting evidence that "having a voice may improve victims' mental condition and welfare." For some victims, making a statement helps restore balance between themselves and the offenders.'" (quoting *2002 Victims' Rights Amendment:*

"acknowledging the victim's wishes to be treated with dignity; promoting psychological healing; and reminding judges, juries, and prosecutors that behind the state's case is a real person with a real interest in the case's resolution."[74]

It is also important for survivors to have the opportunity to participate and speak for themselves, because they (or their needs) are often invoked as a justification for pursuing a particular legal decision.[75] In capital cases, this often takes the form of the prosecutor urging the jury to impose the death penalty out of a sense of responsibility to and respect for the murder victim and his or her survivors.[76] Implicit in such rhetoric is the assertion that "failure to sentence a particular defendant to death or to a long prison term is . . . devaluing of the worth of the victim's life."[77] Additionally, invocations of the emotional and psychological needs of survivors are specifically used to justify capital sentences, as it is commonly assumed that a death sentence and subsequent execution will provide survivors with the closure they seek.[78] As Armour and Umbreit point out, "Until survivors speak for themselves . . . society will continue to project its hoped-for outcome on their experiences, and the voice of survivors will only be heard in reaction to the presumptions and misrepresentations of their journey."[79]

Hearings on H.J. Res. 91 Before the Subcomm. on the Constitution of the Comm. on the Judiciary, 107th Cong. 2d Sess. 57 (2002) (prepared statement of Steven J. Twist)) (internal citations omitted)).

74. Schwartz, *supra* note 47, at 538.

75. *See, e.g.*, Payne v. Tennessee, 501 U.S. 808, 815 (1991) (quoting prosecutor's closing argument which specifically invoked the future needs of the surviving victim as a justification for imposition of a death sentence); *see also* Gruber, *supra* note 23, at 56–57 ("Today, prosecutors seeking the death penalty do not just present the arguably foreseeable effects of death on family members; they introduce evidence regarding community opinion, highly inflammatory descriptions of decompositions and burials, and even carefully crafted videos portraying the victim from childhood through adulthood. The undertone of all these strategies is to remind the jury that it can vindicate victims' interests (both living and dead) by imposing the death penalty."); Kanwar, *supra* note 11, at 216 ("[T]he cultural production of a feeling of closure for the [survivors] has become, at least implicitly, an independent justification for the retention and enforcement of the death penalty in the United States.").

76. Bandes, *Closure*, *supra* note 42, at 1605. It was precisely this conflation of the culpability of the defendant with the suffering of the victim or the survivors that the Supreme Court found to create a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner when it held victim impact evidence to be unconstitutional in *Booth v. Maryland*. 482 U.S. 496, 502–03 (1987); *see also* Mosteller, *Effect*, *supra* note 41, at 26.

77. Bandes, *Closure*, *supra* note 42, at 1605; *see also* Bandes, *Sociology of Emotion*, *supra* note 15, at 8 ("Institutional structure is influenced by assumptions about what people feel and ought to feel.").

78. Ironically, as mercy opinions (in which victims express their desire for mercy in the sentencing of the defendant) are generally excluded from victim impact evidence as irrelevant, survivors who will not find closure in a death sentence or execution are prevented from correcting this erroneous assumption and, at the same time, their silence is often assumed to be tacit acceptance of or support for a death sentence. *See* CUSHING & SHEFFER, *supra* note 30, at 8–9.

79. Armour & Umbreit, *supra* note 16, at 424.

Thirty-four states, the federal government, and the U.S. military have capital punishment.[80] Thirty states allow some form of victim impact evidence in capital trials, while the remaining four states have yet to determine its admissibility.[81] This type of jurisdictional variation is another way survivors can be silenced. Because the admissibility of victim impact evidence is a matter of state law, survivors in states that narrowly circumscribe its use (or prohibit it outright) may be deprived of an opportunity available to survivors in other states.

The opportunity to participate may take several forms. First, the survivor, if she or he was a witness to the crime or has other information about the crime itself, may be called as a witness during the guilt phase of the trial. Second, once guilt has been established, the prosecutor may informally seek survivors' input on sentencing before making a sentencing recommendation.[82] Third, survivors may give victim impact evidence during the sentencing phase in which they personally share with the jury the effect of the crime.[83] Any of these avenues of participation has the potential to help survivors move toward closure as a result of "the sense of catharsis that comes of speaking publicly about one's loss."[84]

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80. DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY (Mar. 10, 2011), *available at* http://www.deathpenaltyinfo.org/documents/FactSheet.pdf. Those states are Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. *Id.* While New Mexico no longer has the death penalty, two inmates remain on death row. *Id.* For more information on the use of victim impact evidence in federal capital trials, see Wayne A. Logan, *Victim Impact Evidence in Federal Capital Trials*, 19 FED. SENT'G REP. 5 (2006) (surveying federal capital trials since *Payne* that have permitted victim impact evidence).

81. *Cf.* John H. Blume, *Ten Years of* Payne*: Victim Impact Evidence in Capital Cases*, 88 CORNELL L. REV. 257, 268 (2003). Since Professor Blume published his study four states have repealed the death penalty—Illinois, New Jersey, New Mexico, and New York. *See* John Schwartz & Emma G. Fitzsimmons, *Illinois Governor Signs Capital Punishment Ban*, N.Y. TIMES, Mar. 10, 2011, at A18; Jeremy W. Peters, *Death Penalty Repealed in New Jersey*, N.Y. TIMES (Dec. 17, 2007), http://www.nytimes.com/2007/12/17/nyregion/17cnd-jersey.html; *Death Penalty Is Repealed in New Mexico*, N.Y. TIMES, Mar. 19, 2009, at A16; Al Baker, *Effort to Reinstate Death Penalty Law Is Stalled in Albany*, N.Y. TIMES, Nov. 18, 2004, at A1.

82. Gershman, *supra* note 63, at 575–76.

83. For example, in *Payne*, where Charisse Christopher and her young daughter died but her toddler son Nicholas survived, the prosecution called Charisse's mother to testify about the effect of the murders on Nicholas. She testified, "He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie." Later, in his closing argument, the prosecutor recalled this testimony:

> Somewhere down the road Nicholas is going to grow up, hopefully. He's going to want to know what happened. And he is going to know what happened to his baby sister and his mother. He is going to want to know what type of justice was done. He is going to want to know what happened. With your verdict, you will provide the answer.

Payne v. Tennessee, 501 U.S. 808, 814–15 (1991).

84. Bandes, *Sociology of Emotion*, *supra* note 15, at 2. This is a narrow definition of

Capital trials differ from other criminal trials in a number of ways. Capital trials are generally bifurcated into two phases—a guilt phase and a sentencing phase.[85] The same judge presides and the same jury tries both phases, but the determination of guilt is separated from the imposition of the sentence.[86] A defendant who is convicted of a capital crime in the trial phase is considered to be "death eligible" in the sentencing phase.[87] In the sentencing phase, the prosecution introduces any aggravating factors that warrant the imposition of a death sentence,[88] and the defense introduces any mitigating factors that would make the imposition of a death sentence inappropriate.[89] Each state determines which offenses are considered capital crimes in that state, as well as which aggravating or mitigating factors are admissible for consideration.[90] Only when the aggravating factors outweigh the mitigating factors is the imposition of a death sentence appropriate.[91]

D. Payne *and Its Progenitors*

It is this balancing of aggravation and mitigation that ultimately led victims' rights advocates to argue that "fairness requires that the State be allowed to respond [to mitigation evidence] with similar evidence about the *victim*."[92] The Supreme Court has confronted this issue in three cases. After twice rejecting victim impact

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closure, and many scholars agree that speaking publicly about the murder is merely one potential avenue toward catharsis or closure. *See, e.g.*, Madeira, *Why Rebottle the Genie?*, *supra* note 44, at 1482–85. *But see* Bandes, *Empathy*, *supra* note 62, at 405 ("A major problem with victim impact statements is that they may not be helpful to the victim—or even true to the victim's experience—despite the victims' rights rhetoric.").

85. *See* MICHAEL DOW BURKHEAD, A LIFE FOR A LIFE: THE AMERICAN DEBATE OVER THE DEATH PENALTY 67 (2009); *e.g.*, Gregg v. Georgia, 428 U.S. 153, 191 (1976).

86. *See* 18 U.S.C. § 3593 (2006).

87. Dugger, *supra* note 28, at 385; Morgan & Mannheimer, *supra* note 13, at 1094.

88. Morgan & Mannheimer, *supra* note 13, at 1094.

89. *See* JENNIFER L. CULBERT, DEAD CERTAINTY: THE DEATH PENALTY AND THE PROBLEM OF JUDGMENT 91 (2008); *see, e.g.*, Lockett v. Ohio, 438 U.S. 596, 604–05 (1978) ("[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital cases, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (emphasis in original)).

90. *See* CULBERT, *supra* note 89, at 91.

91. Dugger, *supra* note 28, at 385.

92. Payne v. Tennessee, 501 U.S. 808, 859 (1991) (Stevens, J., dissenting) (emphasis in original). Susan Bandes has criticized the *Payne* Court's acceptance of this argument, pointing out,

> *Payne* incorrectly assumes that victim impact statements remedy an inequality of treatment between victim and defendant. However, there is no requirement of parity in the treatment of victim and defendant. . . .
>
> . . . [E]ven assuming the playing field between victim and defendant ought to be level, the *Payne* Court is incorrect in believing that victim impact statements achieve this purpose.

Bandes, *Empathy*, *supra* note 62, at 402–03 (footnotes omitted).

evidence as unconstitutional in the late 1980s,[93] it reversed course in 1991, ruling that the admissibility of victim impact evidence was a matter of state law.[94]

The Supreme Court first confronted victim impact evidence in *Booth v. Maryland* in 1987. John Booth was found guilty of two counts of first-degree murder for the stabbing deaths of an elderly couple, the Bronsteins; his accomplice, Willie Reid, was convicted as a principal in the first degree for the death of Mrs. Bronstein.[95] Pursuant to a Maryland statute, the presentence report compiled by the State Division of Parole and Probation contained a victim impact statement which detailed "any physical injury suffered by the victim . . . along with its seriousness and permanence" as well as "any request for psychological services initiated by the victim or the victim's family."[96] Holding that the Eighth Amendment prohibited a capital sentencing jury from considering victim impact evidence,[97] the opinion emphasized that sentencing considerations should focus on the defendant's culpability.[98]

Two years later, the Supreme Court granted certiorari in *South Carolina v. Gathers*[99] to address an issue left open by *Booth*, specifically whether "the kind of information contained in victim impact statements could be admissible if it 'relate[d] directly to the circumstances of the crime.'"[100] Demetrius Gathers was convicted of murder and sentenced to death for killing Richard Haynes.[101] During the commission of the crime, Gathers went through Haynes' belongings and

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93. *See* Booth v. Maryland, 482 U.S. 496, 504 (1987); South Carolina v. Gathers, 490 U.S. 805, 810–12 (1989).

94. *Payne*, 501 U.S. at 808.

95. *Booth*, 482 U.S. at 498 & n.1.

96. *Id.* at 498–99. I highlighted these two considerations because they are typical of the information included in victim impact evidence. The statute required the Victim Impact Statement to contain six pieces of information:

> (i) Identify the victim of the offense;
> (ii) Itemize any economic loss suffered by the victim as a result of the offense;
> (iii) Identify any physical injury suffered by the victim as a result of the offense along with its seriousness and permanence;
> (iv) Describe any change in the victim's personal welfare or familial relationships as a result of the offense;
> (v) Identify any request for psychological services initiated by the victim or the victim's family as a result of the offense; and
> (vi) Contain any other information related to the impact of the offense upon the victim or the victim's family that the trial court requires.

Id. (quoting MD. ANN. CODE art. 41, § 4-609(c) (1986)).

97. *Id.* at 509.

98. *Id.* at 502 (asserting that sentencing considerations should focus on the defendant's "record, characteristics, and the circumstances of the crime"); *id.* at 504 ("While the full range of foreseeable consequences of a defendant's actions may be relevant in other criminal and civil contexts, we cannot agree that it is relevant in the unique circumstance of a capital sentencing hearing.").

99. 490 U.S. 805 (1989).

100. *Id.* at 811 (quoting *Booth*, 482 U.S. at 507 n.10).

101. *Id.* at 806–07.

scattered them around.[102] These belongings, including Haynes' voter registration card and some religious tracts, were admitted as evidence during the guilt phase of the trial.[103] The prosecutor referenced this evidence, which was readmitted during the sentencing phase, in closing arguments, at one point reading extensively from a religious tract.[104] Despite the fact that the evidence had been admitted at trial and the fact that that the evidence arguably related directly to the circumstances of the crime, the Supreme Court found that "the content of the various papers the victim happened to be carrying when he was attacked was purely fortuitous and cannot provide any information relevant to the defendant's moral culpability."[105] As the evidence did not relate directly to the circumstances of the crime, the jury should not have considered it during sentencing.

Justice O'Connor's dissent in *Gathers* echoes a tenet of the victims' rights argument, the idea that victim impact evidence should be seen as an analog of and counterweight to mitigation evidence presented by the defense.[106] The thought is that it is "only fair" that prosecutors be allowed to introduce victim impact evidence when defendants introduce mitigation evidence.[107] Leaving the jury with only mitigation evidence does not tell the whole story and improperly focuses the jury on the defendant's personal history, rather than the crime of which he or she is accused and its consequences to others.[108] From the survivors' point of view,

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102. *Id.*

103. *Id.* at 806–11.

104. *Id.* at 811–12.

105. *Id.* at 812.

106. *See id.* at 817–18 (O'Connor, J., dissenting) (noting that mitigation evidence is not "directly relevant" to the crime, but is "relevant to the jury's assessment of respondent himself and his moral blameworthiness").

107. Booth v. Maryland, 482 U.S. 496, 520 (1987) (Scalia, J., dissenting) ("To require . . . that all mitigating factors which render capital punishment a harsh penalty in the particular case be placed before the sentencing authority, while simultaneously requiring, as we do today, that evidence of much of the human suffering the defendant has inflicted be suppressed, is in effect to prescribe a debate on the appropriateness of the capital penalty with one side muted.").

108. *See id.* at 517 (White, J., dissenting) ("I would think that victim impact statements are particularly appropriate evidence in capital sentencing hearings: the State has a legitimate interest in counteracting the mitigation evidence which the defendant is entitled to put in . . . by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family."); *see also* Payne v. Tennessee, 501 U.S. 808, 826 (1991) ("It is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of Defendant . . . , without limitation as to relevancy, but nothing may be said that bears upon the character of, or the harm imposed, upon the victims." (quoting State v. Payne, 791 S.W.2d 10, 19 (Tenn. 1990)); *id.* at 839 (Souter, J., concurring) ("Indeed, given a defendant's option to introduce relevant evidence in mitigation, sentencing without such evidence of victim impact may be seen as a significantly imbalanced process." (citation omitted)).

justice demands that the victim's story be told at the same time and with the same import as the defendant's.[109]

This appeal to fairness ultimately prevailed in *Payne v. Tennessee*,[110] which held that the Eighth Amendment does not erect a per se bar to victim impact evidence, and that its admissibility is a matter for state law.[111] The Court characterized victim impact evidence as "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."[112] Victim impact evidence is therefore characterized instrumentally, as a tool to assist the finder of fact in ascertaining the full degree of harm caused by the crime.[113]

The dissenters in *Payne*, however, were highly skeptical of this argument. Justice Marshall, for example, expressed many of the concerns that had prompted the majorities in both *Booth*[114] and *Gathers*[115] to exclude victim impact evidence:

> As Justice Powell explained in *Booth*, the probative value of [victim impact] evidence is always outweighed by its prejudicial effect because of its inherent capacity to draw the jury's attention away from the character of the defendant and the circumstances of the crime to such illicit considerations as the eloquence with which family members express their grief and the status of the victim in the community.[116]

Interestingly, the majorities in both *Booth* and *Gathers* and the dissenters in *Payne* assume that victim impact evidence would be damaging to the defendant, implicitly accepting the premise that mercy opinions (in which victims express their desires for mercy in the sentencing of the defendant) would not be admissible as victim impact evidence.[117] In his dissent in *Payne*, Justice Stevens asserts that victim impact evidence "serves no purpose other than to encourage jurors to decide in favor of death rather than life on the basis of their emotions rather than their

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109. PRESIDENT'S TASK FORCE, *supra* note 27, at 72 ("The victim, no less than the defendant, comes to court seeking justice. When the court hears . . . from the defendant, his lawyer, his family and friends, his minister, and others, simple fairness dictates that the person who has borne the brunt of the defendant's crime be allowed to speak.").

110. 501 U.S. 808 (1991).

111. *Id.* at 827 ("We thus hold that if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar. 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. There is no reason to treat such evidence differently than other relevant evidence is treated." (emphasis in original)).

112. *Id.* at 825.

113. Mosteller, *Effect*, *supra* note 41, at 27.

114. Booth v. Maryland, 482 U.S. 496, 503–06 (1987).

115. South Carolina v. Gathers, 490 U.S. 805, 810–12 (1989).

116. *Payne*, 501 U.S. at 846 (Marshall, J., dissenting).

117. As one commentator pointed out, "In light of the rhetoric of individualization of victims' desires for closure that permeates the Victims' Rights Movement, it is hypocritical to deny mercy pleas from similarly situated [survivors] who would be able to enter a statement if they supported death." Kanwar, *supra* note 11, at 248.

reason."[118] These types of concerns have served as significant obstacles to survivor participation in capital sentencing proceedings.

II. OBSTACLES TO SURVIVOR PARTICIPATION

Victim impact evidence has been seen as inconsistent with the traditional societal goals of sentencing.[119] Because capital defendants are entitled to greater procedural protection than noncapital defendants,[120] concern for systemic integrity leads to fears about victim impact evidence's potentially negative effect on defendants' due process rights.[121] Additionally, various practical considerations might lead a prosecutor to exclude a survivor from his or her witness list for the sentencing phase. From the survivor's point of view, both limitation on expression and outright exclusion are forms of silencing, and either can frustrate the survivor's attempts to work through trauma by participating.

As briefly discussed earlier, victim impact evidence is admitted by most states, and most death penalty states permit some sort of survivor statement. However, it has long been recognized that "death is different,"[122] and a significant amount of attention has been paid to the systemic ramifications of permitting victim impact evidence in capital sentencing proceedings. Legitimacy concerns, such as whether the public views the justice system as fair and impartial, give rise to procedural due process protections for the defendant. The rise of the victims' rights movement, however, demonstrated that the public will not perceive the justice system to be legitimately just unless crime victims feel vindicated, which typically requires more than merely securing a conviction. Many victims want to participate to regain feelings of agency or control or to find catharsis or closure in the experience, regardless of the outcome.[123] Greater victim participation leads, however, to renewed concerns about how victims' rights will impact defendants' rights.

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118. *Payne*, 501 U.S. at 856 (Stevens, J., dissenting). *But see* Bandes, *Empathy*, *supra* note 62, at 401 ("Contrary to Justice Stevens's assertion in his dissent in *Payne*, the problem with victim impact statements is not that they evoke emotion rather than reason. Rather, it is that they evoke unreasoned, unreflective emotion that cannot be placed in any usable perspective. In evidentiary terms, victim impact statements are prejudicial and inflammatory." (footnotes omitted)).

119. Dugger, *supra* note 28, at 403.

120. Jeffrey Abramson, *Death-Is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117, 118 (2004).

121. *See* Walker A. Matthews, III, Note, *Proposed Victims' Rights Amendment: Ethical Considerations for the Prudent Prosecutor*, 11 GEO. J. LEGAL ETHICS 735, 741–42 (1998) (noting that, as officers of the court, prosecutors have a professional and ethical duty to safeguard the due process rights of the defendant).

122. *See supra* note 31.

123. *See* O'Hara, *supra* note 7, at 241 ("[S]tudies of victim impact statements indicate that the statements have little or no effect on sentencing, although they seem to contribute significantly to victim satisfaction in the resolution of the cases.").

A. Systemic Integrity

One major concern about victim impact evidence is that it may cause juries to impose the death penalty in an arbitrary way.[124] For example, a jury could impose the death penalty because of the sympathetic character of the victim instead of the culpable action of the defendant.[125] The introduction of victim impact evidence at sentencing has raised serious questions about whether juries are imposing the death penalty for impermissible reasons, such as their sympathy with the suffering of the victim.[126] As Jeremy Blumenthal notes,

> Courts and commentators have criticized the use of [victim impact statements (VIS)] as tending to emotionally bias capital jurors, most likely in favor of a death sentence, but in any event away from the factors and evidence that are in fact "relevant" to the sentencing decision. These critics argue that the powerful emotion generated by VIS undermines rational and reasoned decision-making of the sort the Court has deemed necessary in capital sentencing.[127]

Thus, there is concern that victim impact evidence will turn into a moral referendum on the value of the victim by inviting the jury to draw unflattering comparisons between the worth of the victim and the worth of the defendant,

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124. Payne v. Tennessee, 501 U.S. 808, 866 (Stevens, J., dissenting) ("In reaching our decision today, however, we should not be concerned with cases in which the victim impact evidence will not make a difference. We should be concerned instead with the cases in which it will make a difference. In those cases, defendants will be sentenced arbitrarily to death on the basis of evidence that would not otherwise be admissible because it is irrelevant to the defendant's moral culpability.").

One study found that the introduction of victim impact evidence had a small, but measurable, effect on the likelihood of the imposition of a death sentence in a mock-jury situation. Jeremy A. Blumenthal, *Affective Forecasting and Capital Sentencing: Reducing the Effect of Victim Impact Statements*, 46 AM. CRIM. L. REV. 107, 120 (2009). Professor Blumenthal's recommendation for counteracting the biasing effect of victim impact evidence was to provide more information to the jury regarding the potential for bias. *See id.* at 125. Given the strength of the victims' rights movement, it seems unlikely that states will move to exclude victim impact evidence entirely. Giving the jury more information, however, can cause its own set of problems. *See* Morgan & Mannheimer, *supra* note 13, at 1088–89. Other studies, however, have found that jurors do not consider victim impact evidence and indeed may have already decided on a penalty before victim impact evidence is presented. *See* BURKHEAD, *supra* note 85, at 68.

125. *See Payne*, 501 U.S. at 823 ("Payne echoes the concern voiced in *Booth*'s case that the admission of victim impact evidence 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."); *see also* Abramson, *supra* note 120, at 123–24; Mosteller, *Effect*, *supra* note 41, at 26–28.

126. *E.g.*, Booth v. Maryland, 482 U.S. 496, 500–01 (1987) ("Defense counsel moved to suppress the [victim impact statement] on the ground that this information was both irrelevant and unduly inflammatory, and that therefore its use in a capital case violated the Eighth Amendment of the Federal Constitution.").

127. Blumenthal, *supra* note 124, at 109 (footnote omitted).

especially in cases involving survivors willing and able to put on a show for the jury.[128] Alternately, the arbitrariness could appear on a more macro level—if the death penalty is systematically imposed more often in cases where victim impact evidence is introduced than in cases where no survivors speak.[129] This type of arbitrariness may become manifest through disparate use of victim impact evidence; for example, where prosecutors fail to utilize victim impact evidence in cases with minority or indigent victims.[130] Either of these types of sentencing disparities are cause for concern from a systemic perspective.[131]

A related concern is the fear that the introduction of victim impact evidence, which is likely to include visible displays of emotion, could lead to convictions being overturned on appeal. Under the Due Process Clause, defendants can claim that victim impact evidence "so infect[ed] the sentencing proceeding as to render it fundamentally unfair."[132] It seems distinctly plausible that victim impact evidence given by a survivor "may easily become excessively emotional and thereby produce a basis for reversing the death sentence."[133] Because of the emotionalism inherent in the situation, a concern about reversible error may influence a prosecutor's decision to present victim impact evidence and a court's decision to permit it.

Because survivors are not parties to the trial or sentencing, they cannot present evidence of their own; their evidence can only enter the record as part of the prosecutor's case.[134] Therefore, survivors become witnesses for the prosecution, with all of the attendant perils and pitfalls.[135] The ease with which victim impact evidence could cross the line may make prosecutors reluctant to introduce it in an attempt to reduce the risk of reversal on appeal.[136] In addition, to become part of

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128. Mosteller, *Effect*, *supra* note 41, at 28–29; *see also* Bandes, *Sociology of Emotion*, *supra* note 15, at 18–19 ("There is some evidence that victim impact evidence, particularly when it conveys intense emotional pain, evokes sympathy and anger in jurors. . . . There is some evidence that the anger [the jurors] feel upon hearing victim impact statements translates into feelings of punitiveness."); Dugger, *supra* note 28, at 382 ("The admission of victim impact evidence often leads the jury to a utilitarian assessment of the harm inflicted by the defendant.").

129. *See* Mosteller, *Effect*, *supra* note 41, at 28.

130. *Id.*

131. For a more detailed deconstruction of the potential due process problems raised by victim impact evidence including the difficulty of determining who qualifies as a victim, what can be said about the victim, the defendant's ability to rebut victim impact evidence by introducing bad victim evidence, and the difficulty of determining what counts as "impact," see Logan, *supra* note 13.

132. Payne v. Tennessee, 501 U.S. 808, 831 (1991) (O'Connor, J., concurring); *id.* at 825 (majority opinion); *see also* Mosteller, *Effect*, *supra* note 41, at 29; Myers & Greene, *supra* note 13, at 506–07 (recommending that courts limit the scope of victim impact evidence admitted during trial or sentencing).

133. Mosteller, *Effect*, *supra* note 41, at 29.

134. *See* Baird & McGinn, *supra* note 8, at 449–50.

135. *See id.* at 465–66 (noting that survivors who oppose the death penalty are often treated differently by the prosecutor than survivors who support the death penalty).

136. Mosteller, *Effect*, *supra* note 41, at 25. However, some convictions have been upheld on appeal despite the introduction of prejudicial and inflammatory victim impact

the record, victim impact evidence must be *admissible* evidence.[137] As such, it is subject to the trial court's application of the jurisdiction's rules of evidence, specifically determinations weighing the perceived relevance of the testimony the survivor desires to give versus its potential for unfair prejudice to the defendant.[138] These limitations on the evidence survivors may offer can leave survivors feeling as if they have been used and as if their voice has been taken from them.[139]

Additionally, due process requires that defendants have the opportunity to rebut the first type of victim impact evidence discussed in *Booth*, information regarding the nature of the crime and personal characteristics of the victim. However, that is problematic for a number of reasons.[140] While rebuttal is possible in theory, in actuality victim impact evidence is nearly impossible to rebut[141] because it "offers an account of grief that can be neither challenged nor verified."[142] Any defense attorney would be reluctant to risk attacking survivors on the stand and thereby turning the sentencing hearing into a "mini-trial" on the character of the victim.[143]

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evidence because it was deemed "harmless" in light of evidence admitted to support other aggravating factors. Mosteller, *Real Rules*, *supra* note 6, at 545.

137. *See Payne*, 501 U.S. at 827 ("There is no reason to treat such evidence differently than other relevant evidence is treated."); *see also* Blumenthal, *supra* note 7, at 78 ("[I]t is vital for there to be explicit evidentiary limits on the admissibility of VIS. It must be borne in mind that, because VIS is 'simply another form or method of inform[ation],' it is thus another form of evidence. Before VIS testimony is admitted, it should satisfy evidentiary relevance and undue prejudice criteria." (alteration in original) (footnotes omitted)).

138. *See, e.g.*, Robison v. Maynard, 943 F.2d 1216, 1218 (10th Cir. 1991) (holding that the wishes of the victim's family—in this case, mercy for the defendant—were irrelevant because they did not relate to the harm caused by the defendant's actions); *see also* Mosteller, *Real Rules*, *supra* note 6, at 552 ("For example, a jurisdiction might determine that a victims' [sic] views on the desirability or undesirability of a capital sentence is not relevant in a capital proceeding." (quoting S. REP. NO. 106-254, at 32–33 (2000))).

139. *See* Bandes, *Sociology of Emotion*, *supra* note 15, at 12 ("To treat the victim impact statement like a private or familial expression of grief is to ignore the ways in which the survivor's message is channeled, translated, even transformed in light of the expression rules and role expectations of the forum. The extrapolation from the private realm also elides the competing agendas that come into play when a survivor gives victim impact testimony in a capital trial. Specifically, the survivor may find herself in conflict with or in reluctant collaboration with a prosecutorial agenda that affects her own autonomy. Moreover, the audience for the victim impact statement—at least the only audience with any power to act on the information conveyed—is a collective entity: the penalty-phase jury.").

140. *E.g.*, Mosteller, *Effect*, *supra* note 41, at 63 ("All sides in both *Booth* and *Payne* recognized that the defendant has a right to rebut victim-impact evidence with negative information about the life of the victim, a terribly distasteful prospect wrought by *Payne*."). The better strategy for the defense may be to attempt to severely limit the victim impact evidence that is admitted, or to get it excluded entirely. Ellen Kreitzberg, *How Much* Payne *Will the Courts Allow?*, CHAMPION, Jan.–Feb. 1998, at 31 (detailing techniques defense attorneys can use to attempt to exclude or limit the admission of victim impact evidence).

141. Booth v. Maryland, 482 U.S. 496, 506 (1987).

142. Joh, *supra* note 13, at 25 (arguing that the admission of victim impact statements in capital cases fundamentally changed the sentencing process and improperly shifted the focus away from defendants and toward victims).

143. Mosteller, *Effect*, *supra* note 41, at 64 ("As dreadful as it is to contemplate, the consequence of *Payne* is the prospect of confronting survivors with the failures of the

In addition to being in poor taste, such a display could inflame the jury and increase the odds of a death sentence.

B. Prosecutorial Ethics and Discretion

Due process considerations are not the only constraints on survivor participation. Despite the common assumption that prosecutors and survivors are working toward the same goal, there are two aspects of the role of prosecutors that may put them at cross-purposes with survivors. As officers of the court, prosecutors are ethically obligated to conduct themselves with propriety and fairness,[144] which may result in an undesirable outcome from the perspective of survivors who seek an opportunity to direct at the defendant their grief and anger over the murder of a loved one. Conversely, intense social and political pressures may divert prosecutors from their idealized role as justice seekers. In particular, a single-minded focus on obtaining a death sentence may lead prosecutors to exclude or silence survivors who oppose the death penalty.[145]

The criminal justice system grants prosecutors broad discretion in charging decisions and sentencing recommendations. Due to the "vague nature" of victims' rights statutes and the "lack of guidance" in *Payne*, that discretion extends to deciding if and when victim impact evidence will be given in a capital trial.[146] It may seem incongruous to assert that prosecutors are not victims' advocates as the aims of both are intuitively the same: convicting offenders. A slightly deeper analysis of the role of the prosecutor in our modern criminal justice system, however, reveals that prosecutors' interests may quickly and deeply diverge from the interests of victims' families. Prosecutors are responsible for exercising their discretion in a way that protects three separate (and sometimes conflicting) interests: that of the public, the victim, and the defendant.[147] Because the prosecutor is obligated to consider and balance society's interests in each and every criminal prosecution,[148] his or her focus is much wider than that of survivors, who are generally only interested in seeing justice done for their murdered loved one. In our

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murder victim."). However, it does not appear that defendants have actually capitalized on their opportunity to rebut victim impact evidence. Mosteller, *Real Rules*, *supra* note 6, at 546–47.

144. Matthews, *supra* note 121, at 739–40 (quoting Berger v. United States, 295 U.S. 78, 84 (1935)); Gershman, *supra* note 63, at 563 ("[T]he role of a prosecutor is not to win a case (and achieve professional and media acclaim) but, rather, to behave in a fair and lawful manner to promote the cause of justice.").

145. Vander Pol, *supra* note 8, at 709 ("With prosecutors under acute (and ever intensifying) political pressure to seek the death penalty, the families of murder victims who oppose capital punishment are being ignored. Despite the recent emergence of the victim's rights movement, it appears such rights are recognized only when doing so would lead to harsher punishment for the capital defendant." (footnotes omitted)).

146. *Id.*

147. Gershman, *supra* note 63, at 561.

148. *See* Berger v. United States, 295 U.S. 78, 88 (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.").

legal system, prosecutors are supposed to be public advocates, representatives of "the people," not victims' advocates.[149]

Because of their duty to serve justice, prosecutors must guard against being swayed by the powerful emotional impact of victim impact evidence and its potential to cause them to improperly overempathize with survivors.[150] Prosecutors who, due to their close relationship with the victim, end up taking the victim's "side" compromise their ability to objectively evaluate the interests of justice in that case.[151] Careful prosecutors may be reluctant to overly involve themselves with survivors, fearing that such close identification will cloud their focus on justice for society and fairness for the defendant.[152] Alternately, survivors may be asked not to testify because prosecutors fear that the survivors will be unable to control themselves on the stand and that their emotional or inflammatory statements may be the basis for a reversal of the conviction on appeal.

Some states have passed constitutional amendments providing victims with a voice in "important prosecutorial decisions."[153] But an obligation to consider the input and wishes of survivors may cause ethical problems for the prosecutor who is supposed to be seeking justice and vindication for society, not necessarily the victim's survivors.[154] In fact, abdicating responsibility for decisions that fall within the ambit of prosecutorial discretion to bereaved survivors would be a violation of the prosecutor's duty to "exercise prosecutorial authority fairly, neutrally, and equitably for all of the people."[155] The public attention to victims' rights, the political clout of victims' rights groups, and statutory obligations to consider or consult victims all serve to focus the prosecutor's attention on survivors and their desires.[156] This focus becomes problematic if it "erodes prosecutorial control over cases and the predictability of outcomes when prosecutorial sentencing recommendations are disregarded."[157]

Prosecutors and survivors may also be at odds when the roles are reversed and the prosecutor desires a death sentence and the survivors oppose it. This issue may present itself more often than anticipated as a significant minority of survivors

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149. *See* Matthews, *supra* note 121, at 739; *cf.* Julian V. Roberts, *Listening to the Crime Victim: Evaluating Victim Impact at Sentencing and Parole*, 38 CRIME & JUST. 347, 349 (2009) ("As the justice system expands the rights of victims and imposes more obligations upon criminal justice officials to inform or consult victims about key decisions, the bipartite (state-offender) character of adversarial proceedings expands to reflect the interest of the victims.").

150. *See* Matthews, *supra* note 121, at 747; *cf.* Steven Lubet, *When Good People Do Good Things: The Ethical Dimension of Judicial Involvement in Victim Assistance Programs*, 69 JUDICATURE 199, 200–01 (1985).

151. *See* Gershman, *supra* note 63, at 579.

152. *See id.* at 569–70 ("By involving themselves too closely in the personal tragedies of their victims, however, these prosecutors may find it difficult to carry out their ethical responsibilities.").

153. Barajas & Nelson, *supra* note 29, at 13.

154. Matthews, *supra* note 121, at 735.

155. Gershman, *supra* note 63, at 574.

156. *See id.* at 570.

157. Schwartz, *supra* note 47, at 538.

opposes the death penalty.[158] Prosecutors may attempt to exclude the testimony of anti–death penalty survivors[159] and only call survivors who favor a death sentence to give victim impact evidence.[160] This kind of discrimination does not comport with the recommendations of the President's Task Force on Victims, "which stated that 'better treatment of victims should be a high priority for prosecutors,' and that prosecutors 'must ensure that victims will not be victimized again, either by the criminal or the system that was designed to protect the innocent.'"[161] This exclusion hurts survivors and may lead to feelings of helplessness and frustration with the criminal justice system.[162] Limitations on mercy opinions ensure that victim impact evidence can only be used to hurt the defendant's chances of receiving leniency and can prevent victims who are statutorily guaranteed a voice in the criminal justice system from exercising their rights. The assumption that survivors favor the death penalty and desire execution[163] is so strong that even within the victims' rights movement anti–death penalty viewpoints are often excluded.[164] The desire to participate may be so great that survivors feel forced to

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158. *See* Barbara A. Melville, *Does the Death Penalty Deliver Solace?*, SKIDMORE SCOPE, Winter 2004, at 14, 16, *available at* http://www.skidmore.edu/scope/winter2004/features/deathsolace.html (reporting that an estimated ten percent of victims' families oppose the death penalty); *see also* RACHEL KING, DON'T KILL IN OUR NAMES: FAMILIES OF MURDER VICTIMS SPEAK OUT AGAINST THE DEATH PENALTY (2003); MURDER VICTIMS' FAMILIES FOR HUMAN RIGHTS, http://www.mvfhr.org/victims-rights ("[f]or victims, against the death penalty"); MURDER VICTIMS' FAMILIES FOR RECONCILIATION, http://www.mvfr.org/ (MVFR is a "national organization of family members of victims of both homicide and executions who oppose the death penalty in all cases").

159. CUSHING & SHEFFER, *supra* note 30, at 8; *see also* Baird & McGinn, *supra* note 8, at 448 ("However, in the area of victim impact evidence in capital cases, that empowerment is being usurped by prosecutors and judges whose actions render the voices of many crime victim survivors mute."). For personal narratives of survivors who have been excluded as a result of their opposition to the death penalty, see CUSHING & SHEFFER, *supra* note 30, at 8–12.

160. Baird & McGinn, *supra* note 8, at 462–65; *see also* Bandes, *Sociology of Emotion*, *supra* note 15, at 15.

161. Baird & McGinn, *supra* note 8, at 464 (quoting PRESIDENT'S TASK FORCE, *supra* note 27, at 64); *see also* Bandes, *Sociology of Emotion*, *supra* note 15, at 15.

162. CUSHING & SHEFFER, *supra* note 30, at 9; *cf.* Deborah P. Kelly, *Have Victim Reforms Gone Too Far—Or Not Far Enough?*, CRIM. JUST., Fall 1991, at 22, 28 ("Victims who perceived themselves to be included or consulted in decision-making were more satisfied with the criminal justice system and more willing to cooperate with prosecutors in the future than those who were not informed or consulted.").

163. CUSHING & SHEFFER, *supra* note 30, at 8, 15; *see also* MURDER VICTIMS' FAMILIES FOR HUMAN RIGHTS, *supra* note 158 ("The assumption that all victims' families favor the death penalty is so entrenched that families who oppose the death penalty sometimes experience discrimination within the criminal justice system from prosecutors, judges, or court-appointed victims' advocates.").

164. Joh, *supra* note 13, at 28 ("[N]either the victims' rights community nor the Supreme Court generates or tolerates narratives in which victims' families can exercise mercy, kindness, or forgiveness towards defendants.").

hide their true views, or to mislead the jury about their views, in exchange for the opportunity to confront the defendant in court.[165]

> [I]f the victim's family does not wish to seek vengeance, they are left with two equally unappealing options. They may choose to remain silent at the sentencing phase, possibly preventing them from experiencing any sense of closure, with the attendant risk that jurors will still assume that they desire death. Conversely, they may take the stand in an effort to convey to the jury their opposition to death.[166]

As another commentator rather understated, "A procedure which inherently encourages one type of victim (who would recommend no death) to waive the right to participate in sentencing but not another (who would recommend death) is far from ideal."[167]

Silencing and exclusion can be particularly hurtful now that survivors are aware that they have rights and are often encouraged to exercise them by victim assistance programs.[168] When participation has been held out as a means to begin the healing process but is then denied to some survivors, that denial takes on social significance much greater than that of merely excluding an irrelevant or superfluous bit of evidence.[169]

III. A PARTICIPATORY MODEL FOR ALL SURVIVORS

Because victim impact evidence creates the issues detailed above and does not further the traditional goals of sentencing,[170] some commentators have proposed abolishing it in capital cases.[171] Abolition would, however, deprive *all* survivors of the participatory rights won by the victims' rights movement. Such an outcome seems both harsh and unnecessary,[172] especially given that "[e]very aspect of the

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165. *See* Baird & McGinn, *supra* note 8, at 467; *see also* Bandes, *Sociology of Emotion*, *supra* note 15, at 19–20 ("Survivors who do not support the death penalty may feel the need to stay off the witness stand rather than be conscripted onto the prosecution team, but in doing so may be painted as (or may feel themselves to be) disloyal to the victim's memory.").

166. Vander Pol, *supra* note 8, at 725.

167. Douglas E. Beloof, *Constitutional Implications of Crime Victims as Participants*, 88 CORNELL L. REV. 282, 296 (2003).

168. Bandes, *Sociology of Emotion*, *supra* note 15, at 11.

169. *Id.* at 11–12.

170. *See* Dugger, *supra* note 28, at 398 (noting that victim impact evidence, while slightly retributive, does not further any of the other traditional goals of sentencing—deterrence, incapacitation, or rehabilitation).

171. *Id.*; Catherine Guastello, Comment, *Victim Impact Statements: Institutionalized Revenge*, 37 ARIZ. ST. L.J. 1321 (2005) (arguing that, because of their tendency toward vengefulness, victim impact statements should not be permitted in capital sentencing proceedings).

172. *Cf.* O'Hara, *supra* note 7, at 234 ("[V]ictims have been involved in the disposition of criminal cases for much longer than they have been marginalized, and they are unlikely to remain impotent forces in the disposition of cases. As a consequence, advocates must think

capital system has been recast as serving therapeutic goals—specifically, helping survivors heal and attain closure."[173] Many ideas have been put forward to modify victim impact evidence or create alternate procedures that would embrace victims' rights while remaining within the bounds of constitutional protections for defendants.[174] Proposals to "fix" victim impact evidence to better address survivors' emotional needs, however, are widely recognized to be a "grievous error" which present insurmountable due process issues.[175] Thus, the proposal advanced in this Note, post-sentence victim allocution, is not intended to "fix" victim impact evidence, but rather to remedy the injury to survivors caused by due process limitations on victim impact evidence, which necessitates the censoring or silencing of some survivors.

A. Implementing Post-Sentence Victim Allocution

Post-sentence victim allocution already exists in two states.[176] While each state's legislators are free to craft a post-sentence victim allocution procedure that meets the individual needs of their states, comparing and contrasting the key procedures implemented by Texas and Indiana provides a useful starting point for shaping the procedures adopted by other states.

Texas provides for post-sentence victim allocution immediately after sentencing by a "close relative of a deceased victim"—defined as a spouse, parent, adult sibling, or child.[177] The close relative of a deceased victim is permitted to appear in person in front of the court and the defendant[178] and make a statement about "the

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creatively about how to provide victims with participation at a minimal cost to existing procedural protections for defendants.").

173. Bandes, *Sociology of Emotion*, *supra* note 15, at 1. *But see* Bandes, *Empathy*, *supra* note 62, at 409 ("The important point, both generally and in regard to victim impact statements, is that not every story should be told, or every voice heard, in the legal context. The question is *always* which narratives we should privilege and which we should marginalize or even silence." (emphasis in original)).

174. *See, e.g.*, Blumenthal, *supra* note 124 (incorporating expert testimony regarding affective forecasting into sentencing post-victim impact statement); Giannini, *supra* note 9, at 474–84 (expanding defendant allocution rights at sentencing); Trey Hill, Note, *Victim Impact Statements: A Modified Perspective*, 29 LAW & PSYCHOL. REV. 211 (2005) (requiring mens rea and limiting victim impact evidence to that information); Rachel Alexandra Rossi, Note, *Meet Me on Death Row: Post-Sentence Victim-Offender Mediation in Capital Cases*, 9 PEPP. DISP. RESOL. L.J. 185 (2008); Beth E. Sullivan, Note, *Harnessing* Payne*: Controlling the Admission of Victim Impact Statements to Safeguard Capital Sentencing Hearings from Passion and Prejudice*, 25 FORDHAM URB. L.J. 601 (1998) (constitutional amendment); Christine A. Trueblood, Note, *Victim Impact Statements: A Balance Between Victim and Defendant Rights*, 3 PHOENIX L. REV. 605 (2010) (modifying existing victim impact evidence to provide more consistency regarding who can testify and what can be said).

175. Madeira, *Why Rebottle the Genie?*, *supra* note 44, at 1489.

176. *See* IND. CODE § 35-50-2-9(e) (2004 & Supp. 2010); TEX. CODE CRIM. PROC. ANN. art. 42.03, § 1(b) (West 2006 & Supp. 2010). Texas's statute has been sharply criticized. *See* Keith D. Nicholson, Comment, *Would You Like More Salt with That Wound? Post-Sentence Victim Allocution in Texas*, 26 ST. MARY'S L.J. 1103 (1995).

177. TEX. CODE CRIM. PROC. ANN. art. 56.01(1).

178. The statute makes no mention of whether the jury is dismissed prior to the post-

person's views about the offense, the defendant, and the effect of the offense on the victim."[179] The close relative may not ask the defendant questions, and the allocution is not recorded by the court reporter.[180]

Where Texas provides for general post-sentence victim allocution, Indiana provides specifically for post-sentence victim allocution in capital cases but, like Texas, the allocution occurs directly after sentencing.[181] Indiana, however, seems to invite a much broader category of potential participants, permitting a representative of "the victim's family and friends"[182] to give a statement rather than the narrowly circumscribed immediate family allowed to make a statement under Texas's law. Like Texas, Indiana's statute provides that the post-sentence victim allocution be made in the presence of the defendant[183] and provides the opportunity to make a statement "regarding the impact of the crime on family and friends."[184]

States considering adopting post-sentence victim allocution should construe "survivors" broadly, like Indiana's inclusion of "friends and family." Additionally, Texas's prohibition on directing questions to the defendant strikes an appropriate balance by allowing survivors to be heard without forcing the defendant to be anything more than a passive participant. Texas's statute also seems to permit a wider range of feelings and opinions to be expressed,[185] providing greater freedom of expression for survivors, including those wishing to express mercy or forgiveness, who are often excluded by the prosecution.[186] Unlike Texas's statute, however, states adopting post-sentence victim allocution should require that it be transcribed by the court reporter for two reasons. First, having a written record of the allocution could help survivors feel that the offer of post-sentence victim allocution is more than an empty gesture. Second, the record of the allocution serves to document how survivors actually feel, rather than how they are assumed to feel, which could help validate the feelings of survivors who do not fit the stereotype. Despite the Indiana statute's reference to *a* representative, post-sentence victim allocution could also address practical problems survivors may face, such as mass murder situations where there are more survivors who wish to testify than can reasonably be accommodated in the sentencing phase.[187]

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sentence victim allocution.

179. TEX. CODE CRIM. PROC. ANN. art. 42.03, § 1(b).

180. *Id.*

181. IND. CODE § 35-50-2-9(e).

182. *Id.*

183. *Id.* The Indiana statute does not specify whether the jury is present or whether the statement is recorded by the court reporter.

184. *Id.*

185. Texas permits the statement to include "the person's views about the offense, the defendant, and the effect of the offense on the victim," TEX. CODE CRIM. PROC. ANN. art. 42.03, § 1(b), whereas Indiana only permits a statement "regarding the impact of the crime on family and friends," IND. CODE § 35-50-2-9(e).

186. *See supra* notes 161–72.

187. *See* Bandes, *Sociology of Emotion*, *supra* note 15, at 24 ("If, on the other hand, victim impact statements are meant to serve as a vehicle for healing and catharsis, the exclusion of any single survivor's testimony becomes problematic for a different reason. Once the ability to make a statement is held out as a gesture of respect for victims and a means toward healing for survivors, the exclusion of any survivor comes to seem a cruel withholding—both of respect for the value of the victim's life, and of the survivor's means

Post-sentence victim allocution should supplement, not supplant, victim impact evidence that may currently be permitted during the guilt or sentencing phases. The key to this proposal is to shift the focus toward meeting the needs and desires of survivors in a way that minimizes the impact a survivor's participation has on the defendant and the prosecution.[188] Rather than expanding or contracting victims' rights vis-à-vis defendants, post-sentence victim allocution would serve to assure more equal rights among survivors by providing participatory opportunities to survivors who are currently excluded altogether. Since survivors may have different opinions, post-sentence victim allocution should allow all survivors to speak out while simultaneously preventing dissent within victims' families from causing confusion for the jury or reversible error for the defendant. As a genuine and legitimate part of the trial, post-sentence victim allocution would maximize the emotional impact for survivors who wish to speak out[189] while at the same time minimizing the impact of their compelling emotional pleas on the defendant. Taking place after the sentencing of capital defendants who have been found guilty, it would effectively address the concerns from the survivors' perspective that accompany limiting victim impact evidence without violating defendants' constitutional rights.[190]

B. Balancing Procedural Concerns with the Needs of Survivors

Because the proposed victim allocution would occur post-sentencing, there is no possibility that the defendant's due process rights would be violated by improper victim impact evidence or the jury's improper consideration of that evidence. Due process constraints can create an inauthentic goal for victim impact evidence given during sentencing by making the statement a scripted, rather than a genuine expression of emotion.[191] Survivors would also be freed from the constraints of evidence rules and due process concerns that serve to limit or circumscribe what they can say and how they can say it when giving victim impact evidence. Post-sentence victim allocution could allow survivors to address issues (such as their

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of achieving closure."); *see also* Blumenthal, *supra* note 7, at 90 (noting that New Jersey limits the number of witnesses who are permitted to give victim impact evidence).

188. *But see* Kanwar, *supra* note 11, at 240 ("Whatever the actual merits and psychological benefits of individualization of victims' experience of the process (e.g., 'right to view' statutes or 'post-sentence victim allocution'), the social costs of an aggressively victim-centered discourse should be clear: it takes the focus off blameworthiness and individualization of the criminal accused, and attends to contingent and unstable emotions.").

189. Madeira, *Why Rebottle the Genie?*, *supra* note 44, at 1519 ("This voice does not speak to garner a reply, but speaks to bear witness, to deliver a message, inviting the possibility for empathetic interpretation.").

190. It could be argued that post-sentence victim allocution would violate a defendant's right to a speedy trial. As a practical matter, most post-sentence victim allocution statements would likely be relatively short and the judge presumably would know in advance how many survivors wished to allocute and could thus allot time among them accordingly. *See* Nikki Morton, Comment, *Cleaning Salt from the Victim's Wound: Mandamus as a Remedy for the Denial of a Victim's Right of Allocution*, 7 TEX. WESLEYAN L. REV. 89, 101 (2000). Ms. Morton also notes that post-sentence victim allocution does not delay the trial because it is not part of the trial. *Id.*

191. *See* Bandes, *Sociology of Emotion*, *supra* note 15, at 14.

opinion on the brutality of the crime or what they thought the proper sentence should have been) that, even after *Payne*, would not be admissible as victim impact evidence.[192]

Although neither the Texas nor the Indiana statute expressly addresses the presence of the jury, this Note presumes that the jury would be dismissed prior to the post-sentence victim allocution to avoid possible face-to-face recriminations between survivors and members of the jury over the defendant's sentence. The jury's dismissal does not preclude the jury from learning the contents of the post-sentence victim allocution and being affected by the sentiments that survivors expressed during their statements.[193] However, the effect would be considerably muted compared to that which would be associated with a face-to-face confrontation with survivors. From a systemic perspective, avoiding the face-to-face confrontation is probably essential to respecting the critical and already challenging role the jury is required to play in capital trials.

The judge and prosecutor may feel uncomfortable when, after sentencing, a survivor stands up and proceeds to explain why he or she desired a different outcome for the case. The judge may feel as if the survivor is disrespecting his or her hard work throughout the trial and blaming him or her for a sentencing decision he or she did not make. The presence of the judge, however, is essential to making post-sentencing victim allocution an official and serious part of the capital trial process, which is, in turn, important to achieving closure and the other goals of survivor participation. The prospect of post-sentence victim allocution may encourage prosecutors to find out how individual survivors actually feel, rather than, for example, assuming they all support capital punishment and seeking a death sentence in their names. Additionally, the prosecutor would no longer be faced with the ramifications of victim impact evidence on his or her case. Exercising prosecutorial discretion appropriately, the prosecutor could focus on presenting victim impact evidence that is relevant and not prejudicial, knowing that survivors whose statements do not meet those criteria will still have an opportunity to participate post-sentence. As a result, the prosecutor would not need to worry about violating professional and ethical obligations by overidentifying with survivors in the course of witness preparation or feel obliged to exclude or silence some survivors to ensure imposition of the death penalty. Knowing that their victim allocution will occur post-sentence would also alert survivors to the fact that their opinions would not be a factor in sentencing, eliminating any misconceptions they might have about their role in the proceedings.[194]

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192. Mosteller, *Effect*, *supra* note 41, at 28; *see also* Schwartz, *supra* note 47, at 533–34 ("Another witness explained how his wife was shot a few months before their fiftieth anniversary, and how his impact statement to the jury was limited by the Court, which barred him from expressing how he wanted the perpetrator to be sentenced.").

193. While this is a valid concern, it is not unique to post-sentence victim allocution. There is nothing stopping disgruntled survivors from going to the press or otherwise publicly explaining their dissatisfaction with the outcome of the case. In fact, one family of survivors even spoke before the state legislature in an attempt to stop the execution of their loved one's murderer. CUSHING & SHEFFER, *supra* note 30, at 9.

194. While it would not be possible for survivors to know definitively whether victim impact evidence given during sentencing had an effect on the jury, an adverse jury decision

Post-sentence victim allocution would provide survivors with a participatory alternative to the current choice between giving victim impact evidence limited by constitutional constraints and saying nothing.[195] Some survivors are ambivalent about giving victim impact evidence in court because they are reluctant to share their rage and pain in such a public setting.[196] Even those who are willing or even eager to give victim impact evidence may find the experience unsatisfying as their words are shaped and molded to fit the prosecutor's trial strategy and skirt the defendant's due process rights.[197] Because post-sentence victim allocution would create opportunities for survivors who would otherwise be excluded entirely and would expand opportunities for survivors who wish to offer nontraditional statements, it seems likely that it would be embraced by the victims' rights movement.

It is possible that survivors who specifically wished to give victim impact evidence during sentencing but were not able to do so would find post-sentence victim allocution to be an unfulfilling second-best option. But, given the choice between post-sentence victim allocution and being excluded from the proceedings entirely, it seems likely that many if not most survivors would seize any opportunity to participate.

Altering the structure of a capital trial does elicit concerns regarding the justice system in general. For instance, it has been argued that post-sentence victim allocution takes up the court's time and makes the court appear undignified when it becomes a forum for such incredible displays of emotion.[198] Because survivors are the most affected by the crime, however, their feelings of fairness and justice are important in themselves. Moreover, they are also a key to the continued legitimacy of the criminal justice system with the public at large. Since the entire community's feelings regarding the outcome of a case can be shaped by the feelings of the survivors, it seems that providing the opportunity for survivors to participate is a very valuable use of the court's time. Significantly, post-sentence victim allocution would offer a forum for survivors whose thoughts, feelings, and desires regarding the trial do not conform to the

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may leave survivors feeling as if they have been ignored. *Cf.* Schwartz, *supra* note 47, at 538 ("[O]pponents dispute the benefit of victim participation for the victims themselves, as it can create false expectations that can be painful for the victims if their opinions are ignored by the court.").

195. Survivors, like all victims, are "likely to feel negative, involuntary ties to defendants in the aftermath of violent crime," and participation can mitigate those negative feelings and help survivors regain a sense of control. Madeira, *When It's So Hard to Relate*, *supra* note 22, at 457–60.

196. Mosteller, *Effect*, *supra* note 41, at 28 ("While some survivors want to demonstrate their anguish in court, others do not. Some who do not are angered that their grief is given such strategic importance and that they are required to demonstrate it in a certain way, and some would not want their grief to be used for the purpose of imposing death on someone.").

197. *Id.*

198. Nicholson, *supra* note 176, at 1114, 1126–29 (critiquing post-sentence victim allocution in Texas and arguing that the statute "gives victims an unnecessary right, at the expense of the legal system").

stereotypical assumption that survivors want vengeance in the form of death[199] and that only execution can bring closure.[200]

In fact, it is often the case that, more than vengeance or execution, survivors want public acknowledgement of their loss and grief.[201] Since prosecutors regularly invoke the feelings, beliefs, and needs of survivors, survivors should be allowed to speak out about whether or not the stereotypical "survivor" invoked by the prosecutor is anything like the actual survivors in the case. Allowing such sentiments to be included as post-sentence victim allocution helps to create space for survivors whose desires and beliefs do not conform to societal stereotypes. Inclusion of post-sentence victim allocution could have a catalytic effect—empowering survivors who fear their feelings are unorthodox or improper to speak out thereby empowering other survivors to do the same.

While historically the focus of the victims' rights movement has been on the "front end" of the criminal justice system, since the late 1980s advocates have increasingly focused on post-sentence procedures.[202] Recognizing that the needs of victims do not end when the trial does, many states as well as the federal government have created post-sentence rights and services for victims.[203] Ranging from voluntary participation in victim-offender mediation[204] to a statutory right to make a statement at parole hearings,[205] these procedures focus squarely on addressing the rights and needs of victims. Like these other procedures, post-sentence victim allocution would acknowledge and address the needs which survivors have that extend beyond testifying at or observing a capital trial. Most

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199. *See* Mosteller, *Effect*, *supra* note 41, at 29 ("While some [survivors] change their view [on the death penalty] as a result of the murder, most who formerly opposed the death penalty do not become supporters of it after the murder."); Vander Pol, *supra* note 8, at 722 ("[S]ince courts generally do not consider the possibility that the victim's family would want to testify against the death penalty, instead of formulating new rules regarding mercy opinions, courts have simply applied the ban on opinion testimony without considering its underlying rationale.").

200. Bandes, *Closure*, *supra* note 42, at 1606 ("Closure is too easily transformed, particularly in capital cases, into an ending that forecloses, too early, the societal obligation not to put an accused to death until he has a fair chance to show himself unworthy of the conviction and sentence.").

201. Mosteller, *Effect*, *supra* note 41, at 29 ("[C]onversations with victims' families indicate that more than retribution, some want to see public acknowledgement of what happened and of the worth and dignity of the victim. It may be that these results can be achieved through a noncapital guilty plea and a sentencing hearing in which the defendant acknowledges what he or she did and expresses remorse.").

202. *For Victim Services in Corrections*, NAT'L CENT. FOR VICTIMS OF CRIME, http://www.ncvc.org/ncvc/main.aspx?dbName=DocumentViewer&DocumentID=32565#VictimImpactStatements.

203. *See, e.g.*, 18 U.S.C. § 3771 (2006) (right of victim to be "reasonably heard" at parole proceedings); DEL. CODE ANN. tit. 11, § 9502 (2007) (establishment of victim-offender mediation program); MD. CODE ANN. CRIM. PROC. § 11-1002(b)(12) (LexisNexis 2008) (right of victim to receive restitution); N.M. STAT. ANN. § 31-26-4 (West 2003) (right of victim to make a statement at any post-sentencing hearing).

204. *E.g.*, DEL. CODE ANN. tit. 11, § 9502.

205. *E.g.*, 18 U.S.C. § 3771.

importantly, post-sentence victim allocution offers survivors an opportunity to participate and be heard in a way that no other post-sentence right or service can.

CONCLUSION

Since the emergence of the victims' rights movement, states have been grappling with how best to accommodate victims' desires to participate in the criminal justice system. The Supreme Court's decision in *Payne* further complicated the field by ruling that the admissibility of victim impact evidence in capital cases is a matter of state law. This has left states in a double bind. Survivors, as much if not more than other victims, deserve the opportunity for personal empowerment and closure that can result from participating in the criminal justice process initiated to convict and punish the person who caused the death of their loved one. However, death is different as punishment as well, so capital defendants are entitled to the greatest procedural protection the criminal justice system can provide to minimize the likelihood of erroneous or arbitrary imposition of the death penalty. This double bind has left the promise of *Payne* unfulfilled for some survivors. The adoption of post-sentence victim allocution as a supplement to traditional victim impact evidence creates an alternative path for states to provide an opportunity for all survivors who wish to do so to speak freely and openly about their pain and suffering, while preventing the defendant's due process rights from being violated by presenting such emotionally compelling statements to the jury prior to sentencing.