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BOOTH V. MARYLAND: WHETHER VICTIM IMPACT STATEMENTS ARE UNCONSTITUTIONAL IN DEATH PENALTY CASES

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INTRODUCTION

The Bronsteins' son arrived at his parents' house to drive himself and his father to pick up their tuxedos for an upcoming wedding. The son found his father and mother in their living room; each had been bound, gagged, and stabbed twelve times in the chest. The impact upon the son was devastating and spread quickly to the other members of the family.[1] It is the impact upon the family and its place in the sentencing of a convicted murderer that is the subject of this student comment.

After Maryland police apprehended the Bronsteins' murderers and brought them to trial, the jury convicted them of murder as principals in the first degree, punishable by life imprisonment or death. At the time, Maryland law required the jury to consider a victim impact statement (VIS) during the trial's sentencing phase.[2] The Maryland Division of Parole and Probation prepared the Bronsteins' VIS based on interviews with their family members.

The jury chose the death sentence. John Booth, the defendant, appealed the decision, eventually to the United States Supreme Court. In *Booth v. Maryland*,[3] the Court vacated the death sentence, reasoning that the evidence in the VIS was irrelevant and inflammatory and thus created the risk that the death penalty would be administered in an arbitrary and capricious fashion. To do so violated the eighth amendment's bar against cruel and unusual punishment.[4]

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* B.A. 1985, Thomas Aquinas College; J.D. 1989, University of Notre Dame; Thos. J. White Scholar, 1987-89. To my father and mother.

1. Booth v. Maryland, 107 S.Ct. 2529, 2537 (1987).

2. "In any case in which the death penalty is requested . . . a presentence investigation, including a victim impact statement, shall be completed by the Division of Parole and Probation, and it shall be considered by the court or jury before whom the separate sentencing proceeding is conducted . . . ." MD. ANN. CODE art. 41, § 4-609(d) (1986).

3. 107 S.Ct. 2529 (1987).

4. *Id.* at 2532.

Booth is wrongly decided. The majority opinion excludes VIS from *any* capital sentencing process.[5] The dissenting opinions would have left the Maryland statute intact.[6] It is argued here that neither position withstands legal and normative scrutiny. From a legal and moral standpoint, the jury should consider VISs, but only when the murderer knew of his victim's connection with others in the community or when that information was criminally foreseeable. Before presenting this position in greater detail, this comment will first review the history and rationale of VISs in general and Maryland's VISs in particular.

I. VICTIM IMPACT STATEMENTS IN GENERAL: DEFINITION AND RATIONALE

Before June 1987, when the Supreme Court decided *Booth*, thirty-six states had statutes that called for sentencers to consider VISs.[7] Likewise, the Federal Rules of Criminal Procedure, intended as a model for the states,[8] included a VIS in presentence reports.[9] The statutes varied as to content and application, however.[10]

In general, a VIS describes the harm suffered by the victim and is usually included in a presentence report. In some states, *victim* includes the victim's family.[11] Early VISs contained a description of physical and psychological injuries, economic losses, and changes in the victim's family relationships that resulted from the offense.[12] Some of the later statutes restricted the content of a VIS to the personal and economic loss of the victim and defined victim narrowly to exclude a victim's family members.[13] The VIS envisioned by the Federal

5. "We conclude that the introduction of a VIS at the sentencing phase of a capital murder trial violates the Eighth Amendment, and therefore the Maryland Statute is invalid to the extent it requires consideration of this information." *Id.* at 2536.

6. *Id.* at 2539, 2541.

7. McLeod, *Victim Participation at Sentencing*, 22 CRIM. L. BULL. 501, 507 n.22 (1986).

8. Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 2(b)(3), 96 Stat. 1248, 1249 (1982).

9. *Id.*

10. McLeod, *supra* note 7, at 508.

11. MASS. GEN. LAWS ANN. ch. 258B, § 1 (Supp. 1988); NEV. REV. STAT. § 213.005 (1986).

12. S. REP. No. 532, 97th Cong., 2d Sess. 12, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 2515, 2518 [hereinafter S. REP. No. 532].

13. McLeod, *supra* note 7, at 511, quoting a Connecticut statute that limits the contents "solely to the facts of the case and the extent of any

Rules of Criminal Procedure includes financial, social, psychological, and physical harm to any victim of the offense.[14] Congress purposely adopted a broad definition of *victim* to include indirect victims, for instance, the family members of murder victims.[15]

Maryland erred on the side of a broader range of information. The statute permitted reports concerning physical and economic loss to the victim. It also allowed any request for psychological services by the victim or his family members and, at the court's discretion, any other information related to the impact of the offense on the victim or his family.[16] The Maryland Court of Appeals ruled that in capital cases "the victims include survivors of the murdered individual."[17]

A. *Justification for Using VISs*

Proponents justified VISs on two grounds: victim participation and sentence proportionality. In this regard, the legislative history accompanying the Victim and Witness Protection Act of 1982 (which amended the Federal Rules of Criminal Procedure to include a VIS in presentence reports) pointed out that the criminal process had neglected victims' concerns.[18] Although defendants had lawyers who could explain the criminal process, victims had "no assistance and few rights."[19] The victim rarely knew what finally happened to the defendant or what possible causes of action or compensation were avail-

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injuries, financial losses and loss of earnings directly resulting from the crime for which the defendant is being sentenced." *Id.*

14. FED. R. CRIM. P. 32(c)(2)(c).

15. S. REP. NO. 532, *supra* note 12, at 2519.

16. The VIS is to

(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 court requires.

MD. ANN. CODE art. 41, § 4-609(c)(3) (1986).

17. Booth v. State, 306 Md. 172, 223, 507 A.2d 1098, 1124 (1986).

18. S. REP. NO. 532, *supra* note 12, at 2516.

19. *Id.*

able.[20] Congress felt that because of this neglect victims were hesitant to participate in criminal proceedings; yet their cooperation was essential. Congress hoped that VISs would facilitate the victim's input.[21] Studies buttressed this Congressional belief that victims might more readily cooperate in the criminal process if given some way to contribute.[22]

In addition to recognizing the victim, participation may help the victim "regain a sense of control over his life and fulfill a desire for retributive justice."[23] In essence, a VIS provides a catharsis for the victim. One victim who testified before Congress complained that she did not have the chance to tell anyone about what happened to her.[24] VISs, it was thought, would remedy this problem by giving the victim his say in court.[25]

Besides victim participation, proponents claim VISs would help the sentencer construct a more proportionate sentence.[26] The first federal courts relied on VISs to provide judges with information "that might not otherwise be brought to his attention."[27] In *Lodowski v. State*,[28] in which the Maryland Court of Appeals held that VISs were constitutional, the court voiced similar concerns: "[t]here is 'a paucity of restraints being placed on a judge possessing the responsibility to impose punishment, lest he be "forced to bridle himself with mental blind-

20. *Id.* at 2516, 2518.

21. *Id.*

22. "Victim witness agencies . . . have continued to be concerned about the lack of witness cooperation. In evaluating this 'persistent phenomenon,' Davis (1983) suggested that victims might be more cooperative if they were given a chance to have their opinions heard in court." Villmoare & Neto, *Victim Appearances at Sentencing Under California's Victims' Bill of Rights*, August 1987, NATIONAL INSTITUTE OF JUSTICE, RESEARCH IN BRIEF, 5.

Another advantage of the VIS is that it recognizes the "forgotten" victim. In the report just mentioned, California judges commented that a victim's appearance at the trial under California's Bill of Rights (which included the victim's statement of the impact of the crime) "has been a real significant step toward victim recognition and awareness. It is as important as a public statement as it is as a court tool." *Id.* at 4.

23. McLeod, *supra* note 7, at 504.

24. S. REP. No. 532, *supra* note 12, at 2518.

25. The same judges in the report *supra* at note 22 observed that VISs allow victims to "get it off their chest" and hence feel as if the system is listening.

26. "This is the position advanced by the President's Task Force on Victims of Crime: 'Two lives—the defendant's and the victim's—are profoundly affected by a criminal sentence. The court cannot make an informed decision on a just punishment if it hears from only one side.' " McLeod, *supra* note 7, at 506.

27. S. REP. No. 532, *supra* note 12, at 2517-18.

28. Lodowski v. State, 302 Md. 691, 490 A.2d 1228 (1985).

ers and thus enter the process of imposing sentence with impaired vision." ' "[29] In short, the punishment should fit the crime—and the crime includes harm to the victim and the victim's family.[30]

B. *Maryland's VIS*

Even before the Maryland legislature codified the use of VISs, Maryland courts were considering such information.[31] The Maryland legislature amended its code in 1982 to set minimum standards for the contents of VISs and to provide the use of VISs in as many cases as were fiscally possible.[32]

The purposes behind the legislation were no different than the purposes listed earlier in this note. The bill's sponsor wanted to increase the victim's participation in the criminal process and provide the sentencer with information that would help him construct a more proportionate sentence.[33]

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29. *Id.* at 744, 490 A.2d at 1255 (citation omitted).

30. Punishment may also include compensation to the victim, either from the defendant or state victim assistance programs. Here again the impact on the victim is relevant. The victim mentioned above who complained to Congress that she did not have a chance to tell her story, also complained that her medical bills as a result of the crime were over $11,000. She received only $350. She called the probation officer who told her he was unaware of her injuries because they were not mentioned in her file. S. REP. No. 532, *supra* note 12, at 2519.

Congress used this example to manifest the need for the victim's input to adequately compensate the victim for his loss. The Federal Rules of Criminal Procedure specifically called for any information that "may aid the court in sentencing, including the restitution needs of any victim of the offense." FED. R. CRIM. P. 32(c)(2)(D). Congress reasoned that the VIS could also alert state officers and agencies to other needs of the victim in addition to compensation, for instance, problems with the victim's employer over loss of time at work, or with creditors of the victim. S. REP. No. 532, *supra* note 12, at 2519.

31. "[B]efore the legislative enactments concerning victim impact statements, it was not uncommon for the State's Attorney in at least five of the larger jurisdictions in this State to submit such statements for the court's consideration in imposing sentence." Lodowski v. State, 302 Md. 691, 741, 490 A.2d 1228, 1253 (1985).

32. *Id.* at 745, 490 A.2d at 1256.

33. [I] object to the type of one-sided compassion, practiced in many courtrooms. I refer to the tendency to concentrate on seeking out mitigating circumstances and rehabilitative potential as a rationale for meting out less than harsh sentences to offenders. Surely, there should be some place in the sentencing procedure to view the victim with compassion and assess the harm done. And just as surely, the extent of that harm should be a major factor to be considered when sentencing is determined.

Reid v. State, 302 Md. 811, 816, 490 A.2d 1289, 1292 (1985) (quoting the

The legislature was not the only one who wanted VISs. The Maryland Division of Parole and Probation thought the VISs would be helpful at parole hearings and supervisions and as a measure of compensation due the victim.[34]

The Maryland legislature specifically required the use of VISs in capital sentencing cases.[35] The constitutionality of this provision was challenged in *Lodowski v. State*.[36] In *Lodowski*, the jury found the defendant guilty of first degree murder, and it sentenced him to death after considering a presentence report that included a VIS. Lodowski argued that the evidence in the VIS was irrelevant to his guilt and was, therefore, an "arbitrary factor"[37] in the sentencing decision.[38]

The Maryland court's response to this argument was one of deference to the Maryland legislature:

> We see no constitutional impediment to the legislature's determination that victim impact statements are relevant in a capital sentencing proceeding, and we bow to the legislative judgment that such statements are relevant. Since they are relevant they do not constitute an arbitrary factor.[39]

Lodowski's second argument arose from a Maryland Court of Appeals decision which "emphasized that the sentence should be fashioned . . . to the facts and circumstances surrounding the crime and the individual then being sentenced."[40] That earlier decision did not rely on any precedent for its claim, but felt it was "elementary."[41] The court noted that punishment should be proportionate to the offense and that the circumstances reveal the magnitude of the offense in a particular case. The court also stated that each defendant is unique and should be treated as an individual. Considering the circumstances of the crime furthers that end by enabling the

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statement of Senator Garrity in a hearing before the Maryland Senate Judicial Proceedings Committee on January 19, 1982).

Thus, Maryland's statute required its courts to consider the VIS "in determining the appropriate sentence, and in entering any order of restitution to the victim." MD. ANN. CODE art. 41, § 4-609(c)(iii) (1986).

34. *Reid*, 302 Md. at 817, 490 A.2d at 1292.

35. MD. ANN. CODE art. 27, § 124(d) (1986).

36. Lodowski v. State, 302 Md. 691, 490 A.2d 1228 (1985).

37. *Id.* at 738, 490 A.2d at 1252.

38. *Id.*

39. *Id.* at 740, 490 A.2d at 1253.

40. *Id.*

41. Henry v. State, 273 Md. 131, 150, 328 A.2d 293, 304 (1974).

sentencer to make his punishment fact specific, that is, particular to the individual before the court.[42]

Lodowski claimed that the evidence fell outside the facts and circumstances of the crime and thus was irrelevant to the sentencer's decision.[43]

The Maryland court found that Lodowski's construction of "facts and circumstances"[44] was too narrow. The court stated, "We believe that there is a reasonable nexus between the impact of the offense upon the victim's family and the facts and circumstances surrounding the crime especially as to the gravity or aggravating quality of the offense."[45] To further buttress its position, the court cited an Alaska Supreme Court case, which held that "information regarding . . . victims is encompassed within the objective of providing the sentencing court with a 'complete description of the offense and the circumstances surrounding it' in the presentence report."[46]

Judge Cole dissented from the majority's reasoning and predicted that Maryland's VISs in capital sentencing procedures was "on a direct collision course with the constitutional ban against cruel and unusual punishment."[47] Of course, Maryland's statute finally did collide with the Supreme Court in *Booth v. Maryland*.[48]

C. *Booth v. Maryland*

On the evening of May 18, 1983, John Booth and an accomplice bound and gagged Irvin (seventy-eight years old) and his wife Rose (seventy-five years old) Bronstein in their living room and then stabbed each in the chest twelve times. The murderers' purpose was to steal money in order to buy heroin. Booth later explained to his girlfriend that he and his friend had killed the Bronsteins because they knew him.[49]

As mentioned earlier, the Maryland jury convicted Booth of murder and sentenced him to death. In the process, the jury considered a VIS that the Division of Parole and Probation prepared from interviews with the Bronsteins' son, daughter, son-

42. *Id.* at 149-50, 328 A.2d at 304.
43. Lodowski v. State, 302 Md. 691, 741, 490 A.2d 1228, 1253 (1985).
44. *Id.* at 741, 490 A.2d at 1253-54.
45. *Id.* at 741-42, 490 A.2d at 1254.
46. *Id.* at 742, 490 A.2d at 1254 (quoting Sandvik v. State, 564 P.2d 20 (Alaska 1977)).
47. *Lodowski*, 302 Md. at 755, 490 A.2d at 1261.
48. Booth v. Maryland, 107 S. Ct. 2529 (1987).
49. Booth v. State, 302 Md. 172, 185, 507 A.2d 1098, 1104 (1986).

in-law, and granddaughter.[50] The statute required the VIS to include a description of any changes in the victim's family relationships or any family requests for psychological services stemming from the offense.[51] In addition, the statement was to include any other information related to the impact of the offense on the victim's family that the court felt necessary.[52]

The Bronsteins' son reported his parents' happy marriage and their productive lives at the time of their death. He also noted the close relationship that he and his sister had with their parents. He described the devastating impact of finding his parents murdered in their living room. For example, he found his parents at 4:00 p.m. and as a result would think of them each day at that time and would awake at 4:00 each morning. He felt his parents "were not killed, but were butchered like animals."[53] He was "fearful for the first time in his life," and his family worried about his health.[54]

The daughter related the numbness she felt on learning that her parents were murdered. She and her husband could not eat dinner for three days after the news, and both cried for four months. She stated that she was withdrawn and mistrustful and that even the sight of a kitchen knife brought back painful memories. She felt she could never forgive her parents' murderers and that they were beyond rehabilitation.[55]

The granddaughter pointed out that the murder turned her sister's wedding (a few days later) into a gloomy occasion. She received psychological counseling for several months, but stopped because she thought she was beyond help.[56]

The interviewer summed up the interview by observing that the murder

> is such a shocking, painful, and devastating memory to [the family] that it permeates every aspect of their daily lives. It is doubtful that they will ever be able to fully recover from this tragedy and not be haunted by the memory of the brutal manner in which their loved ones were murdered and taken from them.[57]

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50. Booth v. Maryland, 107 S. Ct. at 2531.

51. MD. ANN. CODE art. 41, § 4-609(c)(3) (1986). For the text of the provision, see *supra* note 16.

52. *Id.*

53. Booth v. Maryland, 107 S. Ct. at 2537.

54. *Id.*

55. *Id.* at 2537-38.

56. *Id.* at 2538.

57. *Id.* at 2539.

D. *The Majority Opinion*

Justice Powell wrote the majority opinion[58] vacating Booth's death sentence and holding that the "Eighth Amendment prohibits a capital sentencing jury from considering victim impact evidence."[59] The Court began its analysis with a review of prior Supreme Court decisions. In brief, the decisions held that (1) the jury may not impose the death penalty in an arbitrary and capricious manner, (2) the jury should make its decision based on the "individual circumstances of the crime,"[60] and (3) the jury must view only evidence that "has some bearing on the defendant's personal responsibility and moral guilt."[61] Reduced to its simplest terms, the Court's reasoning is as follows: VISs are inflammatory and irrelevant to the defendant's guilt. As such they inject an arbitrary and capricious factor into the death sentence. An arbitrary and capricious death penalty is cruel and unusual punishment, barred by the eighth amendment. Thus, the Maryland statute is unconstitutional.[62]

In the Court's opinion, the majority of the Bronsteins' VISs described the "personal characteristics of the victims and the emotional impact of the crimes on the family."[63] The Court rejected the Maryland court's reasoning that the information revealed the "full extent of the harm caused by Booth's actions"[64] and that by knowing the impact on the family the jury was in a better position to measure the "gravity and aggravating quality of the offense."[65]

The Court determined relevancy by requiring that the evidence be part of the circumstances of the crime. The Court relied on *Zant v. Stephens*,[66] which held that a capital jury must make an "individualized determination of whether the defendant in question should be executed, based on the 'character of

58. Justices Brennan, Marshall, Blackmun, and Stephens joined Powell's opinion. Chief Justice Rehnquist, Justices O'Connor and Scalia joined Justice White's dissenting opinion. Scalia also wrote his own dissenting opinion, in which Rehnquist, O'Connor, and White joined.

59. Booth v. Maryland, 107 S. Ct. at 2532.

60. *Id.*

61. *Id.* at 2533.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. 426 U.S. 862 (1983).

the individual and the circumstances of the crime.' "[67] The Court's concern was that the defendant be treated with dignity. By requiring lower courts to consider the circumstances of the offense and the offender's background, the Court added insurance that defendants would not be treated as members of a "faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death."[68] The Court reasoned that the information about the victim and the impact on his family was beyond the circumstances of the offense and offender. The Court thought that a defendant is often unaware of the victim's family and may choose to kill the victim without intending to harm the victim's family. The VIS "thus could divert the jury's attention away from the defendant's background and record, and the circumstances of the crime."[69]

The Court's other objection to VISs was that they may often contain inflammatory remarks. Powell quoted many of the same remarks that the Maryland dissent found objectionable: the son's comment that his parents were "butchered like animals" and that he did not think the defendants should be able to get away with it; the daughter's remarks that she could never forgive her parents' murderers and that she did not think they could be rehabilitated.[70]

E. *The Dissenting Opinions*

Justice White

Justice White first noted that a murderer injures not only his victim, but also the community at large and especially the victim's family. He then pointed to early Supreme Court decisions which held that "determinations of appropriate sentencing considerations" were "peculiarly questions of legislative policy."[71] He claimed that the Maryland legislature's decision to include VISs in the sentencing process should remain untouched on a principle of deference.[72]

White then attacked the majority's statement that "only evidence going to blameworthiness is relevant to the capital sentencing decision."[73] White used the example of two reck-

67. Booth v. Maryland, 107 S.Ct. at 2533 (quoting Zant v. Stephens, 426 U.S. at 879).
68. Woodson v. North Carolina, 428 U.S. 280, 304 (1976).
69. Booth v. Maryland, 107 S. Ct. at 2534.
70. *Id.* at 2535-36.
71. *Id.* at 2539.
72. *Id.*
73. *Id.*

less drivers, one who happens to kill a pedestrian and one who does not. Most people, claimed White, would be inclined to say that the one who killed someone deserves more punishment than the other, even though each had the same interior disposition. Likewise, White reasoned that a similar approach may be used in capital cases.[74] In addition, wrote White, evidence in a VIS balances the "mitigating evidence which the defendant is entitled to put in."[75]

White acknowledged the majority's hesitation to say a defendant who kills a "sterling member of the community" is more deserving of punishment than a defendant who kills someone of "questionable character."[76] White, however, would not hesitate to use such information, because he thought it was a valid measure of the "particularized harm that an individual's murder causes to the rest of society . . . and in particular to his family."[77]

As to the majority's concern that some families may be more articulate than others in expressing their grief, White responded that the same is true for other witnesses and prosecutors, "but there is no requirement in capital cases that the evidence and argument be reduced to the lowest common denominator."[78] Finally, White reasoned that although a particular VIS may be inflammatory, they are not inherently so. Thus, the Court was wrong to find VISs unconstitutional *per se* on those grounds.

Justice Scalia

Like White, Justice Scalia thought that "the amount of harm one causes does bear upon the extent of his 'personal responsibility.' "[79] Scalia used the example of one bank robber who shoots a guard and another who intends to, but cannot because the gun misfires. Scalia pointed out that although the moral guilt in both situations is the same, the one who shoots may receive the death penalty, whereas the other may not.

Scalia went further than White in his attack on the majority's principle that punishment should be proportionate to the defendant's blameworthiness. Scalia cited a recent Supreme Court decision in which two brothers helped their father

74. *Id.* at 2539-40.
75. *Id.* at 2540.
76. *Id.*
77. *Id.*
78. *Id.* at 2540-41.
79. *Id.*

escape from prison.[80] In the process, the father murdered a married couple and their two children. The brothers received the death penalty. Scalia noted that if their father had not killed the family, the brothers would have lived. "The difference between life and death for these two defendants was thus a matter 'wholly unrelated to the[ir] blameworthiness.' . . . But it was related to their personal responsibility, i.e., to the degree of harm that they had caused."[81] Scalia ended his opinion by echoing White's concern for judicial deference and a balance against the defendant's claims of mitigating factors.[82]

In sum, the dissents presented five arguments against the majority's holding. First, although some witnesses for the victim may be more articulate than others, the same argument applies to prosecutors and their witnesses. The law is not required to make the defendant's case easy. Second, punishment should be in proportion not only to the defendant's guilt, but also to the harm he causes. Third, VISs balance the mitigating evidence offered by the defendant. Fourth, VISs are not inherently inflammatory. Fifth, courts should defer to a legislature's determination of what is relevant to a jury's consideration.

II. LEGAL ANALYSIS

A. *Relevance*

Few would dispute that the jury should not consider irrelevant evidence. The question is whether a VIS is always irrelevant. Because VISs are relevant in certain cases, Justice Powell erred in precluding a jury from *ever* considering evidence in a VIS. In this regard, Powell's first argument against the relevance of VISs is that they contain information outside of the circumstances of the offense and the offender. For instance, Powell reasoned that a particular defendant might not know his victim's family or status in the community. Nevertheless, a defendant may in fact know his victim's family and status and even choose to kill him with those factors in mind. For example, a street gang might kill an opposing gang member as a way to "get even" with the opposing gang. In those cases, Powell would have no reason, based on the defendant's knowledge, to exclude the information in a VIS.[83]

80. Tison v. Arizona, 107 S. Ct. 1676 (1987).
81. Booth v. Maryland, 107 S. Ct. at 2542.
82. *Id.*
83. In fact, Booth did know his victims, which at least raises the question as to whether he also knew the victims' family members.

Further, prior interpretations of "circumstances of the offense and offender" would allow a legislature to include the information of a VIS as an aggravating factor. As stated earlier, the Court relied on *Zant v. Stephens* for the proposition that the sentencer must consider the individual circumstances of the offense and the offender.[84] *Zant v. Stephens* was restating what a line of Supreme Court decisions had held up to that time.[85] Each of those decisions used "circumstances" to refer to the aggravating or mitigating factors surrounding the murder.[86]

The use of aggravating and mitigating circumstances is traceable to *Furman v. Georgia*.[87] In *Furman*, the Supreme Court struck down a number of state death penalty statutes (as unconstitutional), because they lacked guidelines for the exercise of the sentencer's discretion.[88] Georgia's was among those declared unconstitutional. Later the Supreme Court scrutinized Georgia's revised death penalty statute in *Gregg v. Georgia*.[89] A Georgia jury had found the defendant Gregg guilty of armed robbery and murder, and it sentenced him to death using a list of aggravating and mitigating circumstances.[90] On review, the Supreme Court first found that capital punishment was not inherently cruel and unusual. It then decided that the Georgia statute, by providing the jury with guidelines for exercising discretion, was constitutional and satisfied the *Furman* concerns that death not be imposed in an arbitrary and capricious manner.[91]

The Court noted the fact that Georgia's aggravating and mitigating circumstances focused the jury's attention on the

> circumstances of the crime and the criminal. . . . Was [the murder] committed in the course of another capital felony? Was it committed for money? Was it committed upon a peace officer or judicial officer? Was it committed

84. Zant v. Stephens, 462 U.S. 862, 879 (1983).

85. Eddings v. Oklahoma, 455 U.S. 104, 110-12 (1982); Lockett v. Ohio, 438 U.S. 586, 601-05 (1978); Roberts (Harry) v. Louisiana, 431 U.S. 633, 636-37 (1977); Gregg v. Georgia, 428 U.S. 155, 190 (1976); Proffitt v. Florida, 428 U.S. 242, 252 (1976); Woodson v. North Carolina, 428 U.S. 280, 303-04 (1976).

86. *See* cases cited *supra* note 85.

87. 408 U.S. 238 (1972).

88. *Id.*

89. 428 U.S. 153 (1976).

90. *Id.* at 161. The Georgia court informed the jury that it must find at least one aggravating circumstance before it could punish the defendant with death. For Georgia's then existing list of the aggravating circumstances, see *id.* at 165 n.9.

91. *Id.* at 188, 199.

in a particularly heinous way or in a manner that endangered the lives of many persons?[92]

The information in answer to these last two categories would include the information in a VIS. If the victim's status in the community as a police officer is relevant, so should the victim's status in the community as a family member be relevant. The family is the basic building block of society and is as essential to the community's survival as a police officer. An attack on an officer is worse than an attack on a layman because it is an attack on society. Similarly, an attack on a family member injures his family, and thus is an attack on a vital component of society.[93] In addition, the heinousness of the murder surely increases if, other factors being equal, the murderer intends both to kill his victim and in the process to injure the victim's family. Moreover, the fact that the Supreme Court presently allows the jury to consider a capital defendant's future dangerousness[94] (and thus, his potential to harm) should, *a fortiori*, permit some consideration of his actual harm as well.

Powell's concern about the relative articulateness of family members is also overbroad. As Justice White answered, "there is no requirement in capital cases that the evidence and argument be reduced to the lowest common denominator."[95] Further, Powell's perceived inequity is premised on more certainty than human capacity allows. "[I]t is evidently equally foolish to accept probable reasoning from a mathematician and to demand from a rhetorician scientific proofs."[96] Sentencing pertains to human actions, which are contingent and variable. Since contingent and variable matters by their very nature admit of less certainty, sentencing too admits of less certainty than other matters might. More or less talented witnesses and prosecutors are part of the variableness of human actions, and they give rise to a lack of mathematical certainty that is inherent in the sentencing process.

B. *Balance*

An additional argument in favor of VISs relates to their importance in balancing the wide scope of mitigating factors

92. *Id.* at 197.

93. This notion will be developed more fully in the Ethical Analysis *infra*.

94. Jurek v. Texas, 428 U.S. 262, 274-76 (1976).

95. Booth v. Maryland, 107 S. Ct. at 2540-41.

96. ARISTOTLE, *Nichomachean Ethics*, in THE BASIC WORKS OF ARISTOTLE 936 (R. McKeon ed. 1941).

that a jury may consider at the request of the defendant.[97] In *Lockett v. Ohio*,[98] the Supreme Court generally defined the scope of mitigating factors a jury might consider. The Court stated that the jury may consider "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."[99] More concretely, this information may include evidence of the defendant's youthful age, "of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance."[100] Georgia's Supreme Court "allowed relatives of the defendant to testify concerning their love for the defendant and their wish not to see the defendant executed."[101]

Most of this mitigating evidence cannot be said to be relevant to the particular features of the crime. Instead, the evidence is designed to place the crime in the often troubled context of a defendant's life. The implicit premise of such contextual material is that society may bear a portion of the blame for the defendant's aberrant behavior triggered by a disadvantaged background. Perhaps so. Nevertheless, if the relatives of a murderer are able to tell the jury how much they would mourn his loss as a matter of context-setting, should not the innocent party's family be able to list the financial and emotional loss they have already suffered?

C. *Deference*

The final difficulty for Powell is the dissent's claim of judicial deference to the Maryland legislature's decision to include VISs in the sentencing process. The Supreme Court has been more concerned over a state's procedures for sentencing a per-

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97. The victim, no less than the defendant, comes to court seeking justice. When the court hears, as it may, 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.

PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 77 (December 1982).

98. Lockett v. Ohio, 438 U.S. 586 (1978).

99. *Id.* at 604. In a note, the Court made clear that the evidence must be relevant, that is, have some "bearing on the defendant's character, prior record, or the circumstances of his offense." *Id.* at 604 n.12.

100. Eddings v. Oklahoma, 455 U.S. 104, 115 (1982). Some death penalty statutes restrict the number of aggravating factors a jury may consider, but do not similarly limit the list of mitigating factors. *See, e.g.*, N.C. GEN. STAT. § 15A-2000(e)-(f) (1983).

101. Note, *State v. Huffstetler: Denying Mitigating Instructions in Capital Cases on Grounds of Relevancy*, 63 N.C.L. REV. 1122, 1132 (1985).

son to death than it has over the substantive factors a state uses. As White stated: "determinations of appropriate sentencing considerations are 'peculiarly questions of legislative policy.' "[102]

Simply because a legislature specified what factors the jury will consider does not mean that its decision is unreviewable. The Supreme Court has outlawed overly vague standards, considerations outside the "characteristics of the offender and his crime,"[103] limited lists of mitigation factors, and presentence reports "containing information that the defendant has had no opportunity to explain or deny."[104] Still, the principle of deference creates a strong presumption in favor of the Maryland legislature's decision.

III. ETHICAL ANALYSIS

Assuming the morality of the death penalty,[105] an issue not addressed in this case note, this section argues on a normative

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102. Booth v. Maryland, 107 S. Ct. at 2539.

103. California v. Ramos, 463 U.S. 992, 1001 (1983).

104. *Id.*

105. This does not mean the use of capital punishment is without justification. Saint Thomas Aquinas argues for capital punishment based on the analogy between the body and the body politic. Just as a cancerous organ is removed from a person's body to preserve the whole, so those who present a serious threat to the body politic are removed in order to preserve society. SAINT THOMAS AQUINAS, SUMMA THEOLOGICA, II-II, Q. 64, A. 2.

Some argue that while the state has the right to use capital punishment, present circumstances call for its abolition. A number of American Bishops took this stance in 1980 and, more recently, so did Ohio's Bishops in a statement they released in March 1987. Ohio Bishops, *A Reassessment of the Death Penalty*, 16 ORIGINS 726 (1987).

Arguing from a "consistent ethic of life, an ethic that gives witness to the sacredness and values of every human life from conception until natural death," the Bishops reasoned that "more destruction of human life through capital punishment would not enhance people's respect for the sacredness of the life of every person." *Id.* at 726-27. Society already witnesses enough disrespect for life "expressed in abortion and euthanasia, in political terrorism and assassinations, in the murderous policies of some political regimes, in the threat of nuclear war and even in violent crime itself." *Id.* at 727.

The Bishops' phrasing is troublesome. Capital punishment is not simply "more destruction of human life." Rather, it is the destruction of human life that is guilty of a grievous crime. Thus capital punishment does not belong in the same category as abortion, euthanasia, political terrorism, etc., which involve the taking of innocent life.

While taking innocent life contributes to a general disrespect for life, taking guilty life could have the opposite effect. Instead of cheapening life, the death penalty shows society's high regard for life, so much so that those who take man's greatest natural good must pay with their own.

If the state does have the right to use capital punishment, as the Bishops

basis that a capital sentencing jury should consider VISs when the defendant knows the victim's status in the community or when that information is criminally foreseeable. The reasons are that (1) the injury to a person connected with others is more grievous than injury to a person who is not connected, (2) the injury to a virtuous person is worse than injury to a vicious one, (3) the blame for such injury may attach to the defendant, and (4) the VIS satisfies the requirements of a just law.

A. *Injury to a Person Connected with Others is Greater*

All things being equal, an injury to persons connected with others[106] is an injury to a greater number of people.[107] This premise finds support in common experience. A normal individual, for instance, will take offense at an insult directed toward his mother or father. Similarly, a police officer's connection with others in the community may explain why murdering such an officer is often an aggravating factor in death penalty statutes. The person's connection with others creates a form of unity, such that an injury to him is an injury to those he is connected with, just as an injury to the hand is an injury to the whole man.[108] The same reasoning applies to the family of a murder victim. Not only is the family a unit itself that suffers from the loss of its member, but in addition the family is connected with society as an essential part to the whole. Thus, the attack on a member of a family is truly an attack on the community.

B. *Injury to a Virtuous Person is Greater*

An injury to a virtuous man is greater than an injury to a vicious man for several reasons. First, in theological terms, the Christian charity one person owes another springs from the goodness in that other. Thus the virtuous man, who by definition possesses greater goodness than the vicious man, is more worthy of charity. To kill the virtuous man, then, is a greater sin against charity. Second, the virtuous man is less deserving of injury, and thus to kill him is a greater offense against justice. Third, the virtuous man is connected with society, and more than anyone else he preserves and promotes the common

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of Ohio admit in their statement, then perhaps a person's time is better spent fighting those circumstances that actually do foster a disrespect for life.

106. For example, family, neighbors, co-workers, et cetera.

107. That is, to those connected with him. SAINT THOMAS AQUINAS, *supra* note 105, II-II, Q. 65, A. 4.

108. *Id.*

good. His murder is therefore worse to the extent that it demoralizes the community and deprives it of a greater good.[109]

C. *Blame May Attach to the Defendant*

In common speech, to blame someone for an action means to impute that action to the person. A person may impute an action to an individual only if it was voluntary.[110] The nature of a voluntary act is better understood when compared to an involuntary act. An involuntary act is done under compulsion and (or) by reason of ignorance of the particular circumstances of the act.[111]

> A man may be ignorant . . . of who he is, what he is doing, what or whom he is acting on, and sometimes also what (e.g. what instrument) he is doing it with, and to what end (e.g. he may think his act will conduce to one's safety), and how he is doing it (e.g. whether gently or violently).[112]

A voluntary act is the opposite, an act in which the moving principle is in the agent himself and which is done with a knowledge of the particular circumstances.[113] Hence, if the murderer was not under compulsion and was aware of the particular circumstances (to illustrate, if he knew of his victim's virtue and connection with others), the injury to the family and society is done voluntarily.

Even a defendant who claims ignorance of the fact that his victim was the father of five children or the mayor of the city is not automatically excused without a further finding of fact, namely whether that information was criminally foreseeable. Ignorance may be antecedent or consequent to the defendant's will. Antecedent ignorance is ignorance (1) that is not willed by the agent, (2) that causes him to do something he would not have done, and (3) that concerns a fact the agent (defendant) was not bound to know. For example, an agent may take proper precautions while handling a gun, but be unaware of a hidden defect that causes the gun to fire and injure someone. Such ignorance causes involuntariness and, therefore, excuses the agent.[114] Consequent or voluntary ignorance is ignorance

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109. *Id.*, II-II, Q. 64, A. 6.
110. *Id.*, I-II, Q. 21, A. 3.
111. ARISTOTLE, *supra* note 96, at 964-67.
112. *Id.* at 966.
113. *Id.* at 967.
114. SAINT THOMAS AQUINAS, *supra* note 105, I-II, Q. 6, A. 8.

willed by the agent.[115] This kind of ignorance lessens the voluntariness of the action, but should not excuse if the jury determines that the fact in question was criminally foreseeable. To do otherwise places a premium on ignorance.

D. *VISs Satisfy the Requirements of Justice*

Law is an ordination of reason, promulgated by him who has care of the community, for the sake of the common good.[116] Laws are just

> both from the end, when, to wit, they are ordained to the common good,—and from their author, that is to say, when the law that is made does not exceed the power of the lawgiver,—and from their form, when, to wit, burdens are laid on the subjects, according to an equality of proportion and with a view to the common good.[117]

As discussed below, VISs satisfy all of these requirements.

1. VISs are not Outside the Lawmaker's Power to Use

To be just, a law must not exceed the power of the lawmaker. For example, if a court decided a case over which it had no jurisdiction, such a ruling would be unjust because it would be outside its power. VISs are not only within the power of the sentencer, but in fact assist it in reaching its decision.

A jury exceeds its power if it punishes an individual for something outside the scope of his blameworthiness. To act within its power and fashion a punishment that fits the crime, the sentencer must know the relevant facts that increase or decrease the defendant's blameworthiness. Blame for the injury recorded in a VIS attaches to a defendant either when he had actual knowledge of the circumstances, or when that information was criminally foreseeable. Consequently, if a jury uses a VIS under those circumstances, it does not look beyond the defendant's blameworthiness and so does not exceed its power.

Further, the "purpose of the jury trial . . . is to prevent oppression by the Government."[118] Governmental oppression may take a number of forms, including an arbitrary and capricious sentence. To avoid such a result, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury

115. *Id.*
116. *Id.*, I-II, Q. 90, A. 1-4.
117. *Id.*, I-II, Q. 96, A.4.
118. Williams v. Florida, 399 U.S. 78, 100 (1970).

of people who may never before have made a sentencing decision."[119] VISs reveal the aggravating quality of the offense and thereby help the juror isolate out the defendant who is worthy of the death penalty. In this way, VISs help minimize the risk of an arbitrary and capricious sentence. Oppression also exists when the government silences one side of the debate, as Justice Scalia and Justice White suggested with reference to the Court's decision in *Booth*. As it now stands, only the death of a police officer or certain other government officials constitutes an aggravating circumstance. Yet, society may also suffer. Equally serious losses may result when those connected with others in a family or the community are killed. Wealth, position, and law enforcement authority are hardly exhaustive determinants of human worth. In the absence of VISs, the victim's family and community are unable to voice the extent of that injury. VISs would remove this form of oppression as well.

2. VISs Advance the Common Good

To be just, a law must not only be within the power of the lawmaker, but must also be ordered to the common good. To illustrate, if a state law required that all taxes be set aside for the governor's personal use, that law would be unjust because it is ordered to the private good of an individual rather than the common good of society.

The common good includes the "collection of public commodities and services (roads, ports, and schools) which the organization of common life presupposes, the sound fiscal condition of the state and military power, [and] the body of just laws, good customs and wise institutions."[120] The jury is one of these wise institutions. "Providing an accused with the right to be tried by a jury of one of his peers [gives] him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."[121] Besides preventing government oppression, juries add a "common sense judgment"[122] to the sentencing process. "Our civilization has decided, and very justly decided that determining the guilt or innocence of men is a thing too important to be trusted to trained men."[123] By assisting the jury—an institu-

119. Gregg v. Georgia, 428 U.S. 191 (1976).
120. J. MARITAIN, THE PERSON AND THE COMMON GOOD 52 (1966).
121. Duncan v. Louisiana, 391 U.S. 145, 156 (1968).
122. *Williams*, 399 U.S. at 101.
123. Chesterton, *Foreword* to L. MOORE, THE JURY, TOOL OF KINGS, PALLADIUM OF LIBERTY at v (1973).

tion which itself advances the common good—VISs become a part of that effort.

The common good also includes the virtue of the individuals that compose a society.[124] Whether or not the sentencing authority is a jury, VISs, if properly used, provide a broader view of the case. As a result, the sentencer can better appreciate the nature of the crime. Although peculiar to the modern ear, VISs are ordered to the virtue of the potential murderer. This is so because a VIS conveys the message that a convicted murderer will be held accountable for the impact of his act on the victim's family and community. Knowledge that this accounting will be undertaken may thus deter and, in so doing, impart virtue. Finally, VISs are a way for the victim's family, which has had its integrity severely breached, to be re-united with and assured by the fairness of civil society. Importantly, this occurs through their own civic participation in the criminal process.

3. VISs Lay Burdens Proportionately

A just law must lay burdens proportionately on the citizens of a society. In the context of punishment, this means that a sentencer should punish a defendant in proportion to his guilt.[125] The very purpose of a VIS is to help insure that the sentencer recommends death only in those cases that deserve it. The death penalty is appropriate where the defendant either knew of his victim's importance to the community or where that information was criminally foreseeable. Thus the defendant does not pay for more than he bargained for. And because the use of VISs is within the sentencer's power, the sentencer likewise is not overburdened.

CONCLUSION

The *Booth* decision is a blow to victim's rights advocates. State courts and legislatures will probably not challenge the Supreme Court. In fact, the Maryland Supreme Court has already conformed to the Supreme Court's wishes; it no longer includes VISs in the capital sentencer's considerations.[126] As a result, judges and juries will continue to sentence with "impaired vision."[127]

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124. "Justice and moral righteousness are . . . essential to the common good." J. MARITAIN, THE RIGHTS OF MAN AND THE NATURAL LAW 9 (1949).

125. That is, guilt as measured by human law.

126. Mills v. State, 310 Md. 33, 72 n.14, 527 A.2d 3, 22 n.14 (1987).

127. Lodowski v. State, 490 A.2d 1228, 1255 (1985).

The majority in *Booth* is one extreme. It excludes VISs entirely from the capital sentencer's decision, even when the defendant knew his victim's connection with others in the community or when that information was criminally foreseeable. The dissenters are the other extreme. They would allow the jury to consider a VIS, even when the defendant had no knowledge of his victim's connections with others.

The middle position is most defensible. The sentencer should consider VISs, but only when the defendant knew of his victim's character and (or) connection with others in the community or when that information was criminally foreseeable. Only then does blame attach to the defendant, and only then does the VIS become relevant to measuring the full extent of the harm the defendant caused.[128]

128. As this student comment went to press, the United States Supreme Court handed down its decision in South Carolina v. Gathers, 57 U.S.L.W. 4629 (U.S., June 13, 1989). In *Gathers*, a narrowly divided Court held that prosecutorial comment on the character of a homicide victim was, in the circumstances of that case, a violation of the principle established in *Booth*. From Justice White's brief concurring opinion and from the dissenting opinions of Justices O'Connor and Scalia, it is reasonable to infer that there are several votes on the Court in favor of either reversing *Booth* or limiting its scope. This comment has argued that there are good normative grounds for limiting *Booth* to the middle position described above.