



10-1-1998

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Recommended Citation

Meghan E. Miller, *Victim Impact Testimony in Texas: The Need for Reformation and Clarification*, 5 Tex. Wesleyan L. Rev. 121 (1998).

Available at: <https://doi.org/10.37419/TWLR.V5.I1.6>

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VICTIM IMPACT TESTIMONY IN TEXAS: THE NEED FOR REFORMATION AND CLARIFICATION

INTRODUCTION

Victim Impact Testimony, also referred to as victim impact statements or evidence, has played an important and controversial role in the sentencing phase of capital murder trials. Victim impact statements are “statement[s] read into the record during the sentencing phase of a criminal trial to inform the court about the impact of the crime on the victim and the victim’s family.”¹ Over the last ten years, the use and type of victim impact testimony allowed during the punishment phase has become hotly debated and thoroughly discussed among the Justices of the Supreme Court and the several states. The issue is whether victim impact testimony can be admitted in the sentencing phase of a capital murder trial without compromising the rights of the defendant. Thus, a process of balancing the constitutional rights of the defendant against the rights of victims’ families to speak out for the victim is evolving.

The debate focuses on the relevancy and adequacy of victim impact testimony. Many scholars disagree as to what types of victim impact evidence, if any, should be considered. Opponents argue that allowing a victim’s family to explain the victim’s moral character, reputation, personal qualities, and characteristics is not relevant to the moral blameworthiness and culpability of the convicted murderer.² As Justice Powell argued in *Booth v. Maryland*,³ victim impact testimony is irrelevant to the defendant’s culpability and blameworthiness because “defendants rarely select their victims based on whether the murder will have an effect on anyone other than the person murdered.”⁴ It has been further argued that allowing victim impact testimony will create a “utilitarian assessment” of harm caused by the defendant.⁵ For example, a defendant who murders a drunken, homeless prostitute will not be judged as having caused as much harm as a defendant who has murdered a prominent businessman with a family.⁶ The actual harm caused and blameworthiness of the defendant may be equal in both murders, but the jury will punish the second defendant much more harshly.⁷ Thus, victim impact testimony will result in dif-

1. BLACK’S LAW DICTIONARY 1567 (6th ed. 1990).

2. See *Booth v. Maryland*, 482 U.S. 496 (1987).

3. 482 U.S. at 504.

4. *Id.*

5. See Ashley Paige Dugger, *Victim Impact Evidence in Capital Sentencing: A History of Incompatibility*, 23 AM. J. CRIM. L. 375, 382 (1996).

6. See *id.*

7. See *id.*

ferent sentences for the same or similar crimes. However, this argument assumes that the jury will view the life and social worth of the businessman more highly than the life of the prostitute.

Others argue that the impact of the victim's murder on the family and society is quite relevant at the sentencing phase. As one writer commented, "To suggest that the impact of a victim's murder is not relevant to a defendant's sentencing is to marginalize the crime."⁸ Moreover, it seems that Justice Powell's statement only supports the use of victim impact testimony.⁹ The defendant's act of committing a murder does not end when he takes an individual's life. Murder is much more than that. It paralyzes the lives of the victim's family and friends, as well as society. At the time of the crime, a defendant may not know the victim personally and may not understand the overall consequences to the family or society. However, logic and moral conscience tell us that the defendant can appreciate that his actions will create consequences beyond his act.¹⁰ "It is this callous disregard of 'whether the murder will have an affect on anyone other [than] the person murdered' that makes [victim impact testimony] relevant."¹¹ Allowing the victim's family and friends to testify about the effects of the defendant's action on them and society gives the defendant and the jury a clear picture of his moral culpability and blameworthiness.

In the most well known case involving victim impact testimony, *Payne v. Tennessee*,¹² the Supreme Court paved the way for states to permit the admission of victim impact testimony. In *Payne*, the Court held that victim impact testimony is essentially admissible, but it left the ultimate decision of admissibility to the discretion of the individual states.¹³

Since *Payne*, the Texas Court of Criminal Appeals¹⁴ has made several attempts to address the admissibility of victim impact testimony in capital sentencing cases, but the court's decisions have only confused the situation. This Note discusses the confusion and inconsistencies of these decisions and advocates that the Texas Court of Criminal Appeals permit the use of all victim impact evidence in capital murder sentencing proceedings.

Part I of this Note defines victim impact evidence and summarizes the development of victim impact testimony in capital murder cases. That section also discusses the different types of victim impact testi-

8. Brian J. Johnson, *The Response to Payne v. Tennessee: Giving the Victim's Family a Voice in the Capital Sentencing Process*, 30 IND. L. REV. 795, 824 (1997).

9. *See id.* at 825.

10. *See id.*

11. *Id.*

12. 501 U.S. 808 (1991).

13. *See id.* at 824-25.

14. In Texas, the Court of Criminal Appeals is the court of last resort for criminal matters. *See* LYDIA M.V. BRANDT, TEXAS LEGAL RESEARCH: AN ESSENTIAL LAWYERING SKILL 77 (1995).

mony and the intent behind the use of such evidence. Part II analyzes the Supreme Court's attempts to determine which specific types of victim impact testimony are constitutional. That section addresses the Court's evolving standard for admissibility by focusing primarily on the Court's analysis in two significant cases: *Booth v. Maryland*¹⁵ and *Payne v. Tennessee*.¹⁶

Part III analyzes how *Payne* has influenced the Texas Court of Criminal Appeals in the development of Texas's current position on the use of victim impact evidence in capital sentencing. Part IV discusses the current insufficient standard in Texas and the dilemmas posed by limiting the types of admissible testimony. That section focuses on special concerns involving the victim, the victim's family, the convicted murderer, the sentencing jury, and society. Part V concludes with arguments for the admission of all types of victim impact testimony, a discussion on the impact of such evidence in the sentencing process, and explores the importance of the victim's rights.

I. DEVELOPMENT AND USE OF VICTIM IMPACT TESTIMONY

A. *The History of Victim Impact Testimony*

Historically, when a person was charged with a criminal offense, the individual making the claim handled the presentation of the case.¹⁷ This created a heavy financial burden on private citizens.¹⁸ As a result, a system devoted to the public prosecution of criminal matters evolved.¹⁹ Unfortunately, since the adoption of a public prosecution system, the role of the victim in the process has become largely de-emphasized. Many perceive that the modern criminal justice system favors the criminal by providing him with several constitutional and legal advantages. For example, the Eighth and the Fourteenth Amendments provide several safeguards for a person accused of a crime, but victims do not have corresponding protection.²⁰

In the 1980s, the "Victim Impact Movement" evolved due to perceived "institutional insensitivity" toward victims.²¹ One fundamental goal of this movement was to provide a voice for victims in the criminal justice system.²² Until this time, the system, theoretically set up to

15. 482 U.S. 496 (1987).

16. 501 U.S. 808 (1991).

17. See Jose Felipe Anderson, *Will the Punishment Fit the Victims? The Case For Pre-Trial Disclosure, and the Uncharted Future of Victim Impact Information in Capital Jury Sentencing*, 28 RUTGERS L.J. 367, 391 (1997).

18. See *id.* In England and across Europe, criminal cases were tried by private citizens. The individual citizen was responsible for investigating and conducting the private prosecution of a criminal case. See *id.*

19. See *id.*

20. As a general note, there are no explicit or implicit provisions in the Constitution that provide victims with similar types of protection in capital or noncapital cases.

21. See Dugger, *supra* note 5, at 377.

22. See *id.*

help these victims throughout criminal proceedings, essentially "re-victimized" them by prohibiting participation in the trial and sentencing.²³ The movement, however, created a general awareness of the social costs of crime and victimization.²⁴ Consequently, Congress passed several acts that enabled victims and witnesses to have a voice in the proceedings that affected their lives and the lives of others.²⁵ Furthermore, society began to recognize that victims were not simply voiceless individuals engaged in the criminal process but that they "have a right to be involved, and they are needed."²⁶

Cases involving capital punishment are divided into two stages: the determination of guilt or innocence and the sentencing phase. Today, the criminal justice system is dependent on the use of victim impact testimony throughout the entire process of a criminal case but especially in the sentencing phase. Witnesses and experts play a major role in the prosecution and conviction of the accused during the trial phase, but it is the family's statements during the sentencing phase that provide justice to the victims. These statements inform the court, the jury, and the defendant about the "impact of the crime on the victim and the victim's family."²⁷ Not only does the victim's family provide essential information to the case at this stage, they become the voice of the victim who is now silent.²⁸ As the victim's right movement emphasized:

Every victim must be allowed to speak at the time of sentencing. The victim, no less than the defendant, comes to court to seek justice. When the court hears, as it may, from the defendant, his lawyer, his family and friends, . . . simple fairness dictates that the person who has borne the brunt of the defendant's crime be allowed to speak.²⁹

Justice cannot prevail if the story is one-sided. In order to reach a just and fair outcome, the victim's family and friends must be given the right to testify about the effects of the crime on them and society.

B. *The Different Types of Victim Impact Testimony*

There are many variations of victim impact testimony. It can include such information as the personal character and background of the victim, the emotional impact of the murder on the victim's family, and an assessment of the defendant's moral culpability and blamewor-

23. *See id.*

24. *See id.*

25. *See id.* (citing Victim and Witness Protection Act of 1982, 18 U.S.C. § 1512 (1982); Comprehensive Crime Control Act of 1984, 18 U.S.C. § 2113 (1984); and Crime Control Act of 1990, 28 U.S.C. § 509 (1990)).

26. Dugger, *supra* note 5, at 378.

27. BLACK'S LAW DICTIONARY 1567 (6th ed. 1990).

28. *See Dugger, supra* note 5, at 381.

29. *Id.* (citation omitted).

thiness.³⁰ Nevertheless, not all victim impact testimony is admissible in the trial phase since it may be irrelevant or cause substantial prejudice. Again, determination of the admissibility of such testimony depends in large part on the jurisdiction's statutes, rules of evidence, and case law.³¹ However, evidence that is normally inadmissible at trial may become admissible in the sentencing phase.³² For example, during the sentencing phase, the mother of a murdered child may testify as to how the crime affected her emotionally or how her child must have suffered during the murder. In another example, a wife may describe her deceased husband's personal qualities, his relationship with his children, or how the murder has affected the family. Such evidence would be inadmissible during the conviction phase because it would prejudice or bias the jury. But in the sentencing phase, victim impact testimony gives the jury a more complete picture.

II. THE SUPREME COURT'S DECISIONS REGARDING VICTIM IMPACT TESTIMONY

A. *Booth v. Maryland*

The issue of admissibility of victim impact testimony in capital murder cases was first considered in the 1987 case of *Booth v. Maryland*.³³ The *Booth* case involved the killing of the Bronsteins, an elderly couple residing in West Baltimore.³⁴ John Booth and his accomplice entered the victims' home with the intent to steal money to buy drugs.³⁵ Fearing that the couple could identify him, Booth bound, gagged, and repeatedly stabbed the victims in the chest.³⁶ Two days later, the son discovered the couple's bodies.³⁷

Booth was convicted of two counts of first degree murder.³⁸ The prosecutor sought the death penalty, and Booth elected to have the jury decide his sentence.³⁹ As part of the sentencing phase, the State Division of Parole and Probation compiled a description of the defendant's background, education, employment history, and criminal record.⁴⁰ Under the applicable Maryland statute,⁴¹ this presentation

30. *See id.* at 381-82.

31. *See generally id.* at 381.

32. *See id.*

33. 482 U.S. 496 (1987).

34. *See id.* at 497.

35. *See id.* at 497-98.

36. *See id.* at 498.

37. *See id.*

38. *See id.* Booth also was found guilty of two counts of robbery and conspiracy to commit robbery. *See id.*

39. *See id.*

40. *See id.*

41. *See* MD. ANN. CODE art. 41, § 4-609 (1997). In an amendment to the Victim Impact Statement law, the Maryland General Assembly added: "In any case in which the death penalty . . . is requested . . . a pre-sentence investigation, including a victim impact statement . . . shall be completed by the Division of Parole and Probation, and

report also included a victim impact statement from the victims' son, daughter-in-law, and granddaughter describing the victims' outstanding personal qualities, the emotional impact of the crimes on the family, and the family members' opinions of the crime.⁴² Other parts of the statement described the emotional and personal problems that each had faced as a result of the brutal crime. For example, the son explained that for the first time in his life he was fearful and that he felt that his parents were "butchered like animals."⁴³

At the sentencing hearing, Booth's counsel objected to the use of the victim impact statement arguing that such evidence was "irrelevant and unduly inflammatory."⁴⁴ He argued that if the evidence were admitted, it would violate the Eighth Amendment as cruel and unusual punishment under the United States Constitution.⁴⁵ The trial court denied the motion, and the jury sentenced Booth to death for Mr. Bronstein's murder and life imprisonment for Mrs. Bronstein's murder.⁴⁶ On automatic appeal, Maryland's Court of Appeals reviewed the victim impact statement and rejected the claim that the statement interjected an arbitrary factor during the sentencing phase.⁴⁷ The court concluded that such evidence allowed the jury to determine the proper punishment by providing it with information regarding the full effect of the harm caused by the crime.⁴⁸

The United States Supreme Court, in a 5-4 decision, reversed the Maryland Court of Appeals by holding that the introduction of victim impact testimony at Booth's sentencing phase violated his Eighth Amendment rights.⁴⁹ The majority's concern was that admitting such evidence into the sentencing phase might cause the jury to impose the death penalty in an arbitrary and capricious manner.⁵⁰

shall be considered by the court or jury before whom the separate sentencing proceeding is conducted" § 4-609(d). The items to be included within the victim impact statement were listed in *Booth*. See *Booth*, 482 U.S. at 498-99.

42. See *Booth*, 482 U.S. at 499.

43. *Id.* at 500.

44. See *id.*

45. See *id.* at 501. Defense counsel argued that the use of the victim's family members in live testimony would increase the inflammatory effect of the information presented to the jury. See *id.* A defendant could argue that presentment of live testimony would only prejudice the jury because they would try to put themselves in the family member's shoes, thus risking cruel and unusual punishment.

46. See *id.* (ruling that the jury was entitled to contemplate "any and all evidence which would bear on the sentencing decision"). Thus, early in the use of victim impact testimony, trial courts allowed the jury to consider not only mitigating evidence by the defense (e.g. the defendant's character, demeanor, etc.), but also aggravating evidence by the prosecution.

47. See *Booth v. State*, 507 A.2d 1098, 1124 (Md. 1986).

48. See *id.*

49. See *Booth v. Maryland*, 482 U.S. 496, 509 (1987). The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII.

50. See *Booth*, 482 U.S. at 502 (holding that the jury's decision to sentence an individual to death must be "suitably directed and limited so as to minimize the risk of

The prosecution argued that by "knowing the extent of the impact [of the crime], the jury [would be] better able to assess the 'gravity or aggravating quality' of the offense."⁵¹ The Court disagreed.⁵² It ruled that when deciding the punishment of death, the jury must look to the culpability and blameworthiness of the defendant by only considering the "defendant's background and record, and the circumstances of the crime."⁵³ The Court found that victim impact statements may be completely unrelated to blameworthiness and include irrelevant factors such as the grief process of the victim's family or the victim's character.⁵⁴

In Justice White's dissent, he argued that the harm caused by the defendant's violent crime on the family does contribute to his blameworthiness.⁵⁵ Justice White believed that the jury was entitled to hear the full extent of the harm caused regardless of whether the jury would look less favorably upon the defendant.⁵⁶ Blameworthiness should not rest solely on the direct consequences of the criminal act, but also on the consequences to the victims, the victim's family, and society.⁵⁷ Justice White explained that victim impact testimony reminds "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."⁵⁸ Since the defendant is entitled to present evidence that individualizes the defendant, so too should the prosecution be allowed to present such evidence of the "particularized harm that an individual's murder causes to the rest of society."⁵⁹ Through victim impact testimony, the jury is provided all the relevant evidence to decide the fate of a convicted murderer. Therefore, the majority's reliance on the argument that the admission of victim impact testimony would impose the death penalty in an arbitrary and capricious manner is without merit.⁶⁰

wholly arbitrary and capricious action." (quoting *Gregg v. Georgia*, 428 U.S. 153, 189 (1976)).

51. *Id.* at 504. As Justice Scalia quoted in a dissenting opinion, "the amount of harm one causes does bear upon the extent of his 'personal responsibility.'" *Id.* at 519 (Scalia, J., dissenting). Furthermore, Justice Scalia questions the constitutionality and historical support for the exclusion of victim impact testimony in determining the moral blameworthiness of the defendant. *See id.*

52. *See id.* at 507.

53. *See id.* at 505.

54. *See Booth*, 482 U.S. at 504.

55. *See id.* at 516 (White, J., dissenting).

56. *See id.* In his dissent, Justice White discussed the use of victim impact testimony in noncapital cases and concluded that such evidence is appropriate in capital cases. *See id.* at 517. He argued that the State has a legitimate interest in "counteracting the mitigating evidence which the defendant is entitled to put in." *Id.*

57. *See id.* at 516

58. *Id.* at 517.

59. *Id.*

60. *See id.* at 518.

B. Payne v. Tennessee

Four years after the controversial *Booth* decision, the United States Supreme Court returned to the issue of whether victim impact testimony should be admissible in the sentencing phase of a capital case. In *Payne v. Tennessee*,⁶¹ the Court considered the events of Saturday, June 27, 1987, when Tyrone Payne entered the apartment of Charisse Christopher and began making sexual advances.⁶² Previously that day, Payne had ingested a large amount of cocaine and had been reading a pornographic magazine.⁶³ When Charisse refused to submit to sexual activity, Payne murdered both Charisse and her two-year-old daughter Lacie and severely wounded her three-year-old son Nicholas.⁶⁴ The police were dispatched after a neighbor heard a "blood curdling scream" coming from Christopher's apartment.⁶⁵ Upon arriving at the scene, police arrested Payne as he was fleeing the building. The police testified at the trial that Payne was covered in so much blood that he looked as though he was "sweating blood."⁶⁶

Payne was convicted of first degree murder of Charisse and Lacie Christopher and one count of assault with intent to commit murder against Nicholas.⁶⁷ He was sentenced to death.⁶⁸ Applying the Supreme Court's decision in *Booth*, Payne argued that admission of testimony by Charisse's grandmother was a violation of his rights under the "cruel and unusual punishment" clause of the Eighth Amendment and that it "create[d] a . . . risk of an arbitrary imposition of the death penalty."⁶⁹ The defense further argued that the statements did not relate to his personal responsibility and moral guilt.⁷⁰

Again, the Supreme Court was faced with the question of whether victim impact testimony was admissible at the sentencing phase of a capital case. The Court granted certiorari and reconsidered its prior holdings. In reversing *Booth* and *South Carolina v. Gathers*,⁷¹ the Court held that the Eighth Amendment did not bar the introduction of victim impact testimony and that such evidence was in fact admissi-

61. 501 U.S. 808 (1991).

62. *See id.* at 811-12.

63. *See id.* at 812.

64. *See id.* at 811.

65. *See id.* at 812.

66. *See id.*

67. *See id.* at 811.

68. *See id.*

69. *Id.* at 825.

70. *See id.* at 817.

71. 490 U.S. 805 (1989). Two years prior to *Payne*, the Court was faced with the dilemma of whether to include the use of victim impact testimony in the sentencing phase of a capital murder trial. *See id.* In a 5-4 decision, the Court ruled that victim impact testimony regarding the personal characteristics of the victim was inadmissible in the sentencing phase. *See id.* at 812. The Court held that although the statement was read by the prosecutor rather than family members, such a statement was equivalent to the type made in *Booth*. *See id.* at 811.

ble and relevant when sentencing a convicted murderer.⁷² Therefore, the grandmother's testimony about Nicholas's physical and mental condition was a necessary part in determining the defendant's blameworthiness.⁷³

Based in part on society's changing views on the use of victim impact testimony and the fear that the scales of justice were being tipped in favor of defendants, the Court realized its holding in *Booth* prejudiced the victim.⁷⁴ In previous decisions, the defendant was given the opportunity to present mitigating evidence about his character, traits, and personality, while the victim had no such opportunity. The Court recognized that victim impact evidence was not offered to encourage comparative judgments, but to show the jury that the victim was in fact an individual human being with rights just as important as the defendant's rights.⁷⁵ Therefore, the Court determined, states should be allowed to permit the sentencer to consider victim impact evidence to determine the specific harm caused at the hands of the defendant.⁷⁶ To support this, Chief Justice Rehnquist adopted Justice White's statement in *Booth* that:

the State has a legitimate interest in counteracting the mitigating 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.⁷⁷

As a result, the sentencer is no longer forced to look at the victim as a "faceless stranger"⁷⁸ but may now look to the victim as a person with individual qualities and characteristics. This gives the sentencer the "full moral force" of evidence available so that he may decide the necessary and just punishment for the crime.⁷⁹ Such victim impact testimony illustrates the harm and aftermath caused by the killing and that "there is nothing unjust in allowing the jury to keep in mind the harm the defendant has caused and at the same time consider the mitigating evidence introduced by the defendant."⁸⁰

In Justice O'Connor's concurring opinion, she agreed that a jury deciding the fate of a convicted murderer should understand the full

72. See *Payne*, 501 U.S. at 824.

73. See *id.* at 817.

74. See generally Michael Q. Berkley, *Constitutional Law—What You Don't Know Can Kill You: The Rehnquist Court's Allowance of Unforeseeable Victim Impact Evidence in the Era of Disposable Precedent—Payne v. Tennessee*, 27 WAKE FOREST L. REV. 741, 747 (1992).

75. See *Payne*, 501 U.S. at 823.

76. See *id.* at 825.

77. *Id.* (citing *Booth v. Maryland*, 482 U.S. 496, 517 (1987)).

78. See *id.* (citing *South Carolina v. Gathers*, 490 U.S. 805, 821 (1989) (O'Connor, J., dissenting)).

79. See *id.*

80. *Id.* at 826.

consequence of the harm caused by the crime, which includes the emotional impact of the death on the family and the community.⁸¹ Not only has the family lost a loved one, the community at large has lost a member of society. Justice O'Connor further argued that "murder is the ultimate act of depersonalization"⁸² and that allowing victim impact testimony would provide an image of the victim as a unique human being whose life was ended abruptly by the immoral act of the murderer.⁸³

III. THE IMPACT OF *PAYNE V. TENNESSEE* IN TEXAS

Just as the United States Supreme Court has struggled with the use and types of victim impact testimony, so too has the Texas Court of Criminal Appeals. Among the problems with the court's decisions regarding the admissibility of victim impact testimony is its vacillation between the decisions in *Booth* and *Payne*. Thus, the question of what victim impact evidence is admissible remains unanswered.

A. *Seven Criteria for the Admission of Victim Impact Testimony in Texas*

Texas has struggled with what types of victim impact statements should be admissible in the sentencing phase of a capital murder case,⁸⁴ resulting in significant confusion.⁸⁵ To date, victim impact testimony is admissible in a capital murder case if it meets seven criteria: (1) evidence must be relevant to a special issue during punishment or offered to rebut the defense's theory of punishment; (2) probative value cannot be outweighed by the danger of undue prejudice; (3) testimony must come from either a surviving victim of the crime, a family member, or a legal guardian of the victim; (4) testimony must

81. *See id.* at 830.

82. *Id.* (citation omitted).

83. *See id.* at 831. Justice O'Connor also briefly discussed the societal consensus in allowing such evidence. *See id.*

84. *See Johnson v. State*, No. 72046, 1997 WL 209527, at *1 (Tex. Crim. App. Apr. 30, 1997) (citation omitted).

85. *See McDuff v. State*, 939 S.W.2d 607 (Tex. Crim. App. 1997) (en banc) (holding that victim impact testimony related to consequences foreseeable to the defendant and his moral culpability were admissible); *Ford v. State*, 937 S.W.2d 456 (Tex. Crim. App. 1996) (holding that evidence of the victim's character must be relevant to a special issue during punishment or offered to rebut a defense may not be introduced unless it is used to rebut the defendant's theory of punishment); *Goff v. State*, 931 S.W.2d 537 (Tex. Crim. App. 1996) (concluding that victim impact evidence which relates to the victim's character is generally inadmissible unless it meets certain criteria and is not prejudicial); *Ford v. State*, 919 S.W.2d 107 (Tex. Crim. App. 1996) (en banc) (holding that all victim impact testimony relating to the moral blameworthiness of the defendant was admissible and relevant as long as it was limited to the impact of the victim's death on the family); and *Smith v. State*, 919 S.W.2d 96 (Tex. Crim. App. 1996) (en banc) (stating that victim impact testimony related to the victim's character was inadmissible because it encouraged comparative judgment of the worth of the victim).

concern the impact of the crime on that individual's life; (5) testimony cannot create a comparative judgment situation, but must show the uniqueness of the loss of the victim as an individual; (6) evidence may not pertain to the character of the victim unless it is introduced to rebut the defense's theory offered during punishment; and (7) testimony may not discuss the value of the individual to the community.⁸⁶

This section focuses on the decisions where evidence pertaining to the character of the victim is introduced to rebut a defense theory and where testimony demonstrates the victim's contribution to the community. The two recent cases discussing the admissibility of victim impact testimony will be addressed. As *Ford v. State*⁸⁷ and *Smith v. State*⁸⁸ illustrate, the court has had a difficult time deciding what evidence is admissible.

B. Ford v. State

In *Ford v. State*, the defendant was convicted of the capital murder of Armando Murillo and the attempted capital murder of Myra Murillo during an attempted robbery of the family at home on December 18, 1991.⁸⁹ During the sentencing phase, the defendant argued that he was not involved in the shooting but was outside in the getaway car.⁹⁰ The State presented testimony from the decedent's father and the other victims involved in the shooting including the victim's mother and two sisters.⁹¹ The witnesses testified about the victim's character, the impact of the crime on the surviving victims, and the impact of the decedent's death on the family.⁹² The Court of Criminal Appeals held that such evidence was relevant to sentencing and admissible in determining the punishment of the defendant.⁹³

Under Texas statutory procedures, admissibility of evidence during the sentencing phase is determined by whether it is "relevant to sentenc[ing]."⁹⁴ "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence."⁹⁵ Following an instruction to weigh the defendant's blameworthiness and personal moral culpability, the

86. See *Johnson*, 1997 WL 209527, at *4 (summarizing the holdings of *Payne v. Tennessee*, 501 U.S. 808 (1991); *Janecka v. State*, 937 S.W.2d 456 (Tex. Crim. App. 1996); *Goff v. State*, 931 S.W.2d 537 (Tex. Crim. App. 1996); *Ford v. State*, 919 S.W.2d 107 (Tex. Crim. App. 1996); and *Smith v. State*, 919 S.W.2d 96 (Tex. Crim. App. 1996)).

87. 919 S.W.2d 107 (Tex. Crim. App. 1996).

88. 919 S.W.2d 96 (Tex. Crim. App. 1996).

89. See *Ford*, 919 S.W.2d at 110.

90. See *id.*

91. See *id.*

92. See *id.* at 110-11.

93. See *id.* at 115-16.

94. See *id.* at 115.

95. *Id.*

jury sentenced Ford to death, and the trial court upheld the sentence.⁹⁶

Following the precedent set forth in *Payne v. Tennessee*,⁹⁷ the Court of Criminal Appeals noted that "there is nothing unfair about allowing the jury to bear in mind . . . [the victim impact] at the same time as it considers the mitigating evidence introduced by the defendant."⁹⁸ Victim impact testimony in this regard is relevant and is an important factor in the jury's decision whether to impose the death penalty.⁹⁹ Thus, evidence presented by the State regarding the victim's character and the impact of the death on the victim's family is admissible. However, victim impact testimony has only limited reference since it is admissible only to show the impact of the victim's death on the immediate family member or surviving victims.¹⁰⁰

The court in *Ford* took a major step in holding that victim impact testimony could be admissible at the punishment phase of a capital murder trial.¹⁰¹ In complete contrast, a similar case, *Smith v. State*,¹⁰² rejected the use of victim impact testimony relating to the victim's character and background.¹⁰³ Consequently, there is an ambiguity regarding the type of victim impact testimony allowed in Texas capital cases.

C. *Smith v. State*

The holding of *Smith* clouded *Ford* even though both cases were decided on the same day. In *Smith*, the defendant appealed his conviction contending that the trial court had erred in allowing witnesses to testify at the sentencing phase about the victim's good character and her relationship and contribution to society.¹⁰⁴ Although the court supported the decision to allow the victim's family to discuss her personal characteristics and the impact of her death on her family, they tempered their response by rejecting the trial court's decision to allow evidence regarding her impact on close friends and co-workers.¹⁰⁵

96. *See id.*

97. 501 U.S. 808 (1991).

98. *Ford*, 919 S.W.2d at 144 (quoting *Payne v. Tennessee*, 501 U.S. 808, 826 (1991)).

99. *See id.*

100. *See Johnson v. State*, No. 72046, 1997 WL 209527, at *2 (Tex. Crim. App. Apr. 30, 1997); *see also McDuff v. State*, 939 S.W.2d 607 (Tex. Crim. App. 1997) (en banc); *Janecka v. State*, 937 S.W.2d 456 (Tex. Crim. App. 1996) (en banc); and *Goff v. State*, 931 S.W.2d 537 (Tex. Crim. App. 1996) (en banc).

101. *See Ford*, 919 S.W.2d at 115-16.

102. 919 S.W.2d 96 (Tex. Crim. App. 1996) (en banc).

103. *See id.* at 102.

104. *See id.* at 97.

105. *See id.* at 102.

The majority clearly followed the overruled opinion in *Booth* and completely disregarded the precedent set by *Payne*.¹⁰⁶ This is demonstrated by its conclusion that the use of victim impact testimony regarding the personal qualities of a victim and her relationship to the community were completely irrelevant in the punishment phase.¹⁰⁷ The court went on to add that, under Texas law, the evidence of the decedent's good character and personal attributes to society are not admissible unless and until such character is brought into question by the defendant.¹⁰⁸

In contrast, the prosecution in *Smith* introduced the victim impact testimony. The court held that because the defendant did not question the victim's good character, evidence as to the personal character and qualities of the victim was admissible as a matter of law. The evidence was not directly related to the circumstances of the offense or necessary for rebuttal.¹⁰⁹

The court's concern was that such testimony introduced by the State would lead to "comparative judgment" of the worth of the victim.¹¹⁰ In other words, a jury might look less favorably on a murderer who killed a hardworking and dedicated father than one who killed a transient.¹¹¹ However, the court misinterpreted *Payne*. In *Payne*, the Supreme Court rejected the idea that victim impact testimony encouraged a comparative analysis of the victim's worth.¹¹² In contrast, victim impact testimony is designed to show the jury that the victim was an individual, a unique person regardless of his or her contribution to society. By allowing the prosecution to include such testimony only in rebuttal to the defendant's mitigating evidence, the jury is prevented from understanding the full force of the crime. This decision disregards the precedent set out in *Payne* and brings the fight for the admissibility of victim impact testimony back to square one.

IV. INCONSISTENCY AND INSUFFICIENCY OF THE CURRENT STANDARD IN TEXAS

As illustrated in *Ford* and *Smith*, the standard for determining the relevance and admissibility of victim impact testimony is ambiguous, and the holding in *Smith* that such evidence is only admissible on rebuttal is unjust. Those who sentence the murderer should be entitled to hear not only evidence directly relating to the circumstances of the

106. See generally *id.* ("[V]ictim impact evidence is inadmissible as a matter of law . . . to the extent it is not directly related to the circumstances of the offence or necessary for rebuttal.")

107. See *id.*

108. See *id.*

109. See *id.*

110. See *id.* (citing *Payne v. Tennessee*, 501 U.S. 808, 823 (1991)).

111. See *Payne v. Tennessee*, 501 U.S. 808, 823 (1991).

112. See *id.*

offense, but also how the murderer has taken from society and the victim's family a person of worth. The court should follow the precedent set by *Payne* and its own decision in *Ford*.

It must be remembered that victim impact testimony is not to be used as a "comparative analysis" regarding the victim's worth. It is incomprehensible to suggest that a killer of a loving and devoted mother deserves the death penalty more than a killer of a homeless person.¹¹³ Instead, victim impact testimony is designed to show that the victim is an individual human being with unique qualities and characteristics regardless of what the jury believes the loss to the community might be.¹¹⁴ The focus of victim impact testimony is to provide the jury with all the essential elements to sentence the defendant. It would be inconsistent to allow the defendant to present mitigating evidence of his moral character and traits while excluding those of the victim. As the defendant's uniqueness is important, so too is the victim's unique character. To reach the appropriate sentence, a jury must consider many factors including the foreseeable fact that when a murder occurs, it happens to an individual, and after it happens other victims are left behind.¹¹⁵ The only way to provide the jury with the full extent of the consequences of the defendant's act is to provide it with a victim impact statement.

Furthermore, the sentencing phase of the capital trial gives the families of victims the opportunity to confront the convicted murderer in a more personal and intimate way than during the trial. They are able to personalize the victim and let the offender know what he has done. In addition, it is believed that a jury who is able to listen to the real emotions and feelings of family members will be able to relate more to the victim and find a stronger reason to hold the defendant responsible.¹¹⁶

Victim impact testimony also enables families to heal from the experience and gain control over their lives once again.¹¹⁷ No longer are they at the mercy of the defendant. It is their chance to say to the defendant "this is what you have done." Victim impact testimony also encourages participation in the criminal justice system and illustrates to society that the system really does work. Not only can it help the immediate needs of the families suffering through the process, it may decrease the likelihood of vigilantism.¹¹⁸ As one commentator has noted, "victim impact [testimony] should be considered . . . an adequate substitute for citizens taking matters of punishment into their

113. *See generally id.* (noting that "victim impact testimony evidence is not offered to encourage comparative judgments").

114. *See id.*

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

116. *See generally* Anderson, *supra* note 17, at 399.

117. *See id.* at 400.

118. *See id.*

own hands.”¹¹⁹ In this sense, victim impact testimony allows family and friends to feel that they have avenged the death of their loved ones while compelling the system to prescribe a just punishment.

In Texas, victim impact testimony is relevant to the jury’s statutorily required consideration of “mitigating evidence.”¹²⁰ The defendant is allowed to call witnesses and show that he is an individual person with characteristics, feelings, and emotions. There is a double standard when a deceased victim’s family and friends are not entitled to the same opportunity to present similar evidence in favor of the victim. The only way to cure the injustice of such a dilemma is to allow all testimony regarding the victim’s character and background into the proceedings. Otherwise the victim’s family is “re-victimised.” Thus, *Smith* should be overturned to the extent that it bars admission of such victim impact testimony.

CONCLUSION

Imagine a mother of a teenage girl sitting in the witness stand trying to explain in a statement without emotion the impact of her daughter’s death on her life and the lives of other family members. This mother will never see her daughter again, never touch her hair, and never see her grow into a woman, get married, and have children of her own.

This is what victim impact testimony is all about. If limitations are placed on victim impact testimony in any way, the goal of providing the victim with a voice is lost forever. The victim, like the defendant, has a right to be heard. Unfortunately, in a capital murder case, the victim’s voice has been silenced by the convicted murderer. Therefore, to protect the integrity of the criminal justice system, all types of victim impact testimony must be admissible in the sentencing phase of the victim’s killer. This gives the jury more than a “faceless name” to equate with the victim.

Every murderer knows that, when he takes the life of his victim, there will be severe consequences if he is caught. A killer is generally aware that the victim is a person with a family, friends, and business associates. The defendant should be aware that these “survivors” will be greatly impaired by the harm caused by his actions. “Just as defendants know that their victims are not faceless human ciphers, they know that their victims are not valueless fungibles.”¹²¹ Thus, when a murderer chooses to take the life of another, this choice affects not only the immediate family members of the victim but society as a whole.

119. *Id.* at 401.

120. *See Ford v. State*, 919 S.W.2d 107, 115 (Tex. Crim. App. 1996).

121. *Payne v. Tennessee*, 501 U.S. 808, 838 (1991) (Souter, J., concurring).

In Texas, limitations placed on the use and types of victim impact testimony create a prejudice against the victim. Failure to take into account the victim's individuality and the emotional and psychological effects of his murder on family members, friends, and the community causes a significant imbalance in the process.¹²²

As Justice Cardozo noted, "Justice, though due to the accused, is due to the accuser also."¹²³ Punishment should be allocated against the wrongdoer according to the harm he has inflicted on the victim, the victim's family, and society. There must be more balance between victim participation in the criminal justice process and the rights guaranteed to the convicted murderer. Entitling the defendant to present mitigating evidence to the jury, while limiting the admissibility of aggravating evidence, is an ineffective method of protecting the innocent victim. Therefore, the Texas Court of Criminal Appeals should follow the precedent in *Payne* and hold that all victim impact testimony is admissible.

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122. *See id.* at 839 (citing *Mills v. Maryland*, 486 U.S. 367, 397 (1988) (Rehnquist, J., dissenting)).

123. *Id.* at 827 (quoting *Synder v. Massachusetts*, 291 U.S. 97, 122 (1934)).