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BEYOND THE ROAR OF THE CROWD: VICTIM IMPACT TESTIMONY COLLIDES WITH DUE PROCESS

by Marshall N. Perkins

I. INTRODUCTION

A. Victim's Rights

In early Anglo-American law, the victim played a significant role in the administration of criminal justice.¹ As the antecedents to American common law developed, however, the state replaced the victim as the prosecuting party in a criminal action.² The evolution of the American criminal justice system positioned lawyers, rather than victims, as the agents of the state responsible for prosecuting criminal activity.³ The diminution of the victim's role in the criminal justice system reflects the fundamental principle that criminal offenses are committed against the community as a whole.⁴ In conflict with this principle of community representation, there are contemporary concerns that the American criminal justice system ignores the impact on the victim and denies the victim participation in the process.⁵ Originating as a campaign by women's groups to inform the public about the problems confronting rape complainants,⁶ this movement to reform the criminal justice system has gained momentum, seeking to accord greater weight to the interests of victims of

crime.⁷

One vehicle developed for vindicating the interests of victims allows testimony during the sentencing proceeding by the victim as to the impact of the crime on the victim's life.⁸ The purpose of allowing the victim an active role in the sentencing decision is to provide the victim with a sense of dignity and respect, and also to ensure that the offender's punishment corresponds to the full extent of the harm caused.⁹ In effect, such testimony seeks to influence courts to redress the specific harm suffered by victims.¹⁰

Ostensibly, the victim rights' movement has sought to alter the criminal justice system to reflect the proper balance between the interests of victims and the rights of criminal defendants.¹¹ This balance cannot ignore, however, the principle that the sentencing process must necessarily focus on the particular characteristics of the offender and the direct circumstances of the crime.¹² Victim impact

¹See Patrick M. Fahey, Note, *Payne v. Tennessee: An Eye for an Eye and Then Some*, 25 CONN. L. REV. 205, 208 (1992).

²See *id.*

³See Keith D. Nicholson, Note, *Would You Like More Salt with that Wound? Post-Sentence Victim Allocution in Texas*, 26 ST. MARY'S L. J. 1103, 1109 (1995).

⁴See Katie Long, Note, *Community Input at Sentencing: Victim's Right or Victim's Revenge?*, 75 B.U. L. REV. 187, 225 (1995) ("[T]he American system is based on the very notion that criminal offenses are committed against 'the people.'").

⁵See Craig Edward Gilmore, Note, *Payne v. Tennessee: Rejection of Precedent, Recognition of Victim Impact Worth*, 41 CATH. U. L. REV. 469, 478-79 (1992).

⁶See Nicholson, *supra* note 3, at 1111.

⁷Kathryn E. Bartolo, Note, *Payne v. Tennessee: The Future Role of Victim Statements of Opinion in Capital Sentencing Proceedings*, 77 IOWA L. REV. 1217, 1219 (1992) (observing that the victim's movement "seeks to reform the process by giving greater weight to the interests of other parties affected by crime — namely victims") (footnote omitted).

⁸See Fahey, *supra* note 1, at 211 (noting such testimony is one of "the most controversial means of vindicating victim's interests").

⁹See *id.* at 211-12.

¹⁰See Bartolo, *supra* note 7, at 1219.

¹¹See Fahey, *supra* note 1, at 210; Booth v. Maryland, 482 U.S. 496, 520 (1987) (Scalia, J., dissenting) ("Many citizens have found one-sided and hence unjust the criminal trial in which a parade of witnesses comes forth to testify to the pressures beyond normal human experience that drove the defendant to commit his crime, with no one to lay before the sentencing authority the full reality of human suffering the defendant has produced . . .").

¹²See Dina R. Hellerstein, *The Victim Impact Statement: Reform or Reprisal?*, 27 AM. CRIM. L. REV. 391, 398 (1989) ("The

testimony immediately before sentencing introduces elements of retaliation and personal vengeance into the proceedings.¹³ The practical impact of such testimony must therefore be analyzed against the erosion of a criminal defendant's constitutional rights.¹⁴

B. *Booth v. Maryland*

In need of money to satiate their heroin habit, between 8:30 and 9:00 p.m. on May 18, 1983, John Marvin Booth and Willie Reid entered the Baltimore home of Irvin and Rose Bronstein.¹⁵ Aware that their robbery victims knew Booth, the conspirators separately bound and gagged both Mr. and Mrs. Bronstein.¹⁶ Booth then stabbed Mr. Bronstein in the chest twelve times, while Reid administered a dozen equally fatal stab wounds to Mrs. Bronstein.¹⁷ The Bronsteins' bodies were found in their living room by their son on May 20.¹⁸

Booth's first trial ended in a mistrial.¹⁹ At his second trial before a jury in the Circuit Court for Baltimore City, Booth was convicted as a principal in the first degree of the premeditated and felony murder of Mr. Bronstein.²⁰ At the bifurcated capital sentencing proceeding, the trial judge admitted victim impact statements pursuant to a recently enacted statute.²¹

The victim impact evidence included a statement by the Bronsteins' son that "his parents were not killed, but were butchered like animals," and that he

did not "think anyone should be able to do something like that and get away with it."²² The evidence introduced also included a statement by the victims' daughter that "animals wouldn't do this. They didn't have to kill because there was no one to stop them from looting The murders show the viciousness of the killers' [*sic*] anger-" and the daughter further opined that she did not "feel that the people who did this could ever be rehabilitated."²³

Relying on its analysis in *Lodowski v. State*, the Court of Appeals of Maryland rejected Booth's argument that the introduction of such victim impact evidence violated the Eighth and Fourteenth Amendments by injecting an arbitrary factor into the capital sentencing proceeding.²⁴ In affirming Booth's death sentence, the Court of Appeals rejected the assertion that the victims' statements may have allowed the sentencing jury to impermissibly act upon "passion, prejudice or any other arbitrary factor."²⁵

The United States Supreme Court then granted a writ of certiorari to resolve whether the Constitution prohibits a jury from considering a "victim impact statement" during the sentencing phase of a capital murder trial.²⁶ A narrow five justice majority reversed Booth's death sentence. Writing for the Court, Justice Powell recognized that "a jury's discretion to impose the death sentence must be 'suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.'"²⁷ Powell reasoned that this necessarily individualized determination must reflect

sentencer is then implicitly encouraged to weigh the relative blameworthiness of the offender and the victim.") (footnote omitted).

¹³*See id.*

¹⁴*See id.* at 397.

¹⁵*See Booth v. State*, 306 Md. 172, 182, 507 A.2d 1098, 1103 (1986) (hereinafter *Booth I*).

¹⁶*Id.* at 185, 507 A.2d at 1104.

¹⁷*Id.*

¹⁸*See id.* at 181, 507 A.2d at 1103.

¹⁹*See Booth v. State*, 301 Md. 1, 481 A.2d 505 (1984).

²⁰*See Booth I*, 306 Md. at 182, 507 A.2d at 1103.

²¹*See id.* at 222-223, 507 A.2d at 1123-1124; *see Md. Ann. Code*, art. 41, § 124 (Supp. 1995).

²²*Booth I*, 306 Md. at 236, 507 A.2d at 1131 (Cole, J., concurring in part and dissenting in part).

²³*Id.* at 238, 507 A.2d at 1132 (Cole, J., concurring in part and dissenting in part).

²⁴*See id.* at 222-23, 507 A.2d at 1123-1124.

²⁵*See id.* at 223, 507 A.2d at 1124 ("We have also reviewed the particular victim impact statement submitted in this case. Given the nature of the subject matter, *it is a relatively straightforward and factual description* of the effects of these murders on members of the Bronstein family.") (emphasis added).

²⁶*See Booth v. Maryland*, 479 U.S. 882 (1986).

²⁷*Booth v. Maryland*, 482 U.S. 496, 502 (1987) (hereinafter *Booth II*) (quoting *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (plurality opinion)).

the defendant's "personal responsibility and moral guilt."²⁸ "To do otherwise would create the risk that a death sentence will be based on considerations that are 'constitutionally impermissible or totally irrelevant to the sentencing process.'"²⁹

In concluding that victim impact evidence created an unacceptable risk that a death sentence would be imposed in an arbitrary manner, the Court reasoned that such evidence is "wholly unrelated to the blameworthiness of [the] particular defendant."³⁰ Justice Powell further reasoned that the decision on whether the defendant should be sentenced to death may not "turn on the perception that the victim was a sterling member of the community rather than someone of questionable character."³¹ Thus, over the vigorous dissent of four justices,³² the Supreme Court's decision in *Booth* almost entirely barred the introduction of victim impact evidence to a sentencing jury in a capital proceeding.³³

Eleven days after *Booth* was decided, Justice Powell retired,³⁴ and he was replaced by the relatively conservative Justice Anthony M. Kennedy.³⁵ Accordingly, when the Supreme Court's 1987-88 term began,

five sitting justices were potentially inclined to overturn *Booth*.³⁶ However, when initially confronted in 1989 with the opportunity to recognize the constitutionality of victim impact testimony in a capital sentencing proceeding, Justice White declined the invitation to overturn *Booth*.³⁷ Ultimately, the issue returned to the Court in 1991, when the Supreme Court granted certiorari to review Tennessee's imposition of a death sentence subsequent to the introduction of victim impact testimony.³⁸

C. *Payne v. Tennessee*

On June 27, 1987, Pervis Tyrone Payne passed the early morning and afternoon hours ingesting cocaine, beer, and malt liquor while awaiting the return of his girlfriend.³⁹ Apparently agitated by his girlfriend's absence, and presumably impaired from his consumption of mind-altering substances, Payne entered the apartment of Charisse Christopher, who lived across the hall from Payne's girlfriend with her two year-old daughter Lacie and her three year-old son Nicholas.⁴⁰ When Christopher resisted Payne's sexual advances, he turned violent.⁴¹

Attacking Christopher with a butcher's knife, Payne inflicted 84 wounds with 41 separate thrusts which aggregately killed Christopher due to severe blood loss.⁴² Next to her mother's body on the kitchen floor, police found Lacie's corpse with stab wounds to the chest, abdomen, back, and head.⁴³ Miraculously, even though he suffered multiple stab wounds which

²⁸See *id.* (quoting *Enmund v. Florida*, 458 U.S. 782, 801 (1982)).

²⁹See *id.* (quoting *Zant v. Stephens*, 462 U.S. 862, 885 (1983)).

³⁰*Id.* at 504.

³¹*Id.* at 506 (footnote omitted).

³²See *id.* at 515-519 (White, J., dissenting, joined by Justices O'Connor and Scalia and Chief Justice Rehnquist); *id.* at 519-521 (Scalia, J., dissenting, joined by Justices White and O'Connor and Chief Justice Rehnquist).

³³*Cf. id.* The Supreme Court's resolution of the case necessarily left open the question of the degree to which victim impact testimony would be admissible in non-capital cases. Also unresolved was the admissibility of such evidence when heard by a judge, as opposed to a sentencing jury.

³⁴See Vivian Berger, *Payne and Suffering — A Personal Reflection and a Victim-Centered Critique*, 20 FLA. ST. U. L. REV. 21, 33 (1992).

³⁵See, e.g., *United States v. Cavanagh*, 807 F.2d 787 (9th Cir. 1987); *United States v. Wiley*, 794 F.2d 514 (9th Cir. 1986); *United States v. Brone*, 792 F.2d 1504 (9th Cir. 1986); *United States v. Meyer*, 802 F.2d 348 (9th Cir. 1986). *But see, e.g., United States v. Spilotro*, 800 F.2d 959 (9th Cir. 1986); *Vickers v. Ricketts*, 798 F.2d 369 (9th Cir. 1986).

³⁶See Berger, *supra* note 34, at 33-34.

³⁷See *South Carolina v. Gathers*, 490 U.S. 805, 812 (1989) (White, J. concurring) ("Unless *Booth v. Maryland* is to be overruled, the judgment below must be affirmed.") (citation omitted); see also Berger, *supra* note 34, at 37-40 (discussing the Supreme Court's dismissal of "improvidently granted" certiorari in a *Booth*-related case, *Ohio v. Huertas*, 498 U.S. 336 (1991)).

³⁸See *Payne v. Tennessee*, 498 U.S. 1076 (1991).

³⁹See *Payne v. Tennessee*, 501 U.S. 808, 812 (1991).

⁴⁰See *id.* at 811-812.

⁴¹See *id.* at 812.

⁴²See *id.* at 813.

⁴³See *id.*

completely penetrated his body from front to back, Payne's third victim, Nicholas, survived the attack after seven hours of surgery.⁴⁴ Payne's criminal lark left the walls and floor of the Christopher apartment covered with blood.⁴⁵ When the police found Payne exiting Christopher's apartment building, he looked as if he was "sweating blood."⁴⁶

Rejecting the defendant's testimony that another, unidentified assailant perpetrated the orgy of criminality in the Christopher apartment prior to Payne's innocent arrival at the scene, a jury convicted Payne on two counts of first-degree murder, and one count of assault with intent to murder in the first degree.⁴⁷ At the bifurcated capital sentencing phase of the trial, four defense witnesses took the stand, pleading for the jury to spare Payne's life.⁴⁸ In contrast, the state offered the impact testimony of Nicholas' grandmother:

[Nicholas] cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He cries to me many times during the week and asks me, Grandmamma, do you miss my Lacie? And I tell him yes. He says, I'm worried about my Lacie.⁴⁹

The prosecutor further emphasized this emotional testimony in rebuttal to Payne's closing argument:

You [heard] what Nicholas Christopher will carry in his mind forever. When you talk about cruel, when you talk about atrocious, and when you talk about heinous, that picture will always come into your mind, probably throughout the rest of your lives . . . [Petitioner's attorney] wants you to think about a good reputation He doesn't want you to think about the people

who love Charisse Christopher, her mother and daddy who loved her. The people who loved little Lacie Jo, the grandparents who are still here. The brother who mourns for her every single day⁵⁰

The Supreme Court of Tennessee affirmed the jury's sentence of death on each murder count.⁵¹ Subsequently, the Supreme Court granted certiorari⁵² to revisit the Court's former decisions in *Booth* and *South Carolina v. Gathers* which had held that victim impact evidence was precluded from consideration in a capital sentencing proceeding by the Eighth Amendment.⁵³

With Justice White joining Justice Kennedy and the three remaining *Booth* dissenters, the Court reversed *Booth* and *Gathers*.⁵⁴ Writing for the Court, Chief Justice Rehnquist noted that *Booth* and *Gathers* were based upon the dual premises that only evidence relating to blameworthiness is relevant at a capital sentencing proceeding, and that victim impact evidence does not reflect the offender's blameworthiness.⁵⁵ Rehnquist rejected the latter premise:

[T]he assessment of harm caused by the defendant as a result of the crime charged has understandably been an important concern of the criminal law . . . in determining the appropriate punishment. Thus, two equally blameworthy criminal defendants may be guilty of different offenses solely because their acts cause differing amounts of harm.⁵⁶

⁴⁴See *id.*

⁴⁵See *id.*

⁴⁶See *id.* at 812.

⁴⁷See *id.* at 813-814.

⁴⁸See *id.* at 814.

⁴⁹*Id.* at 814-815.

⁵⁰*Id.* at 815-16.

⁵¹See *State v. Payne*, 791 S.W.2d 10 (Tenn. 1990).

⁵²See *Payne v. Tennessee*, 498 U.S. 1076 (1991).

⁵³See *Payne v. Tennessee*, 501 U.S. 808, 817 (1991).

⁵⁴See *id.* at 830 n.2 (noting that the *Payne* holding did not address the admissibility of a "victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence").

⁵⁵See *id.* at 819.

⁵⁶*Id.* ("If a bank robber aims his gun at a guard, pulls the trigger, and kills his target, he may be put to death. If the gun unexpectedly misfires, he may not. His moral guilt in both

The *Payne* majority observed that where a judge is given broad discretion in determining the appropriate sentence for a specific crime, the consideration of the harm caused by the crime is an essential factor in properly exercising that discretion.⁵⁷ Thus, the Court reasoned that allowing states to introduce victim impact evidence was constitutionally permissible to illustrate each victim's "uniqueness as an individual human being."⁵⁸ Invoking the long shadow cast by *Williams v. New York*, the Court concluded that victim impact evidence is a permissible method "of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities."⁵⁹ Implicitly concluding that the victim impact testimony presented by the State of Tennessee was not so unduly prejudicial so as to deprive Payne of a fair trial, the Supreme Court affirmed Payne's death sentences.⁶⁰

II. THE FOUR THEORIES OF PUNISHMENT

As exemplified by biblical law and the Code of Hammurabi, early theories of sentencing focused upon retribution.⁶¹ Strictly retrospective in

instances is identical, but his responsibility in the former is greater.") (quoting Booth II, 482 U.S. 496, 519 (1987)(Scalia, J., dissenting)).

⁵⁷*See id.* at 821 ("We think it desirable for the [sentencer] to have as much information before it as possible when it makes the sentencing decision.") (quoting *Gregg v. Georgia*, 428 U.S. 153, 204 (1976)(plurality)).

⁵⁸*Id.* at 823; *see id.* at 826 ("[T]h[is] testimony illustrated quite poignantly some of the harm that Payne's killing had caused; there is nothing unfair about allowing the jury to bear in mind that harm at the same time as it considers the mitigating evidence introduced by the defendant.") (emphasis added).

⁵⁹*Id.* at 825; *see also id.* at 821 ("While the admission of this particular kind of evidence — designed to portray for the sentencing authority the actual harm caused by a particular crime — is of recent origin, this fact hardly renders it unconstitutional.") (citations omitted).

⁶⁰*See id.* at 825 ("[T]he evidence adduced in this case was illustrative of the harm caused by Payne's double murder.").

⁶¹*See* Susan Ann Cornille, Note, *Retribution's "Harm" Component and the Victim Impact Statement: Finding a Workable Model*, 18 U. DAYTON L. REV. 389, 396 (1993).

application, retribution punishes an offender in relation to both the harm inflicted and the moral wrongfulness of the act.⁶² During the 1950s, the predominant goals of punishment in the American criminal justice system shifted from retribution and incapacitation⁶³ to general deterrence⁶⁴ and the rehabilitation of the offender.⁶⁵ This trend was illustrated by California's indeterminate sentencing provisions, where the length of prison sentences for most crimes committed was left almost entirely to the discretion of penological authorities.⁶⁶ As Chief Justice Rehnquist has noted, however, "the pendulum has swung back."⁶⁷ General disdain for the proposition that most criminals can be rehabilitated to any significant degree has once again shifted the focus of punishment to the core of retributive theory: the moral wrongfulness and the actual harm caused by the act.⁶⁸

This second, or "actual harm" element of

⁶²*See* Steven Grossman, *Proportionality in Non-Capital Sentencing: The Supreme Court's Tortured Approach to Cruel and Unusual Punishment*, 84 KY. L.J. 107, 162-63 (1995-96).

⁶³*See* J.M. BURNS & J.S. MATTINA, SANCTIONS, SENTENCING, AND CORRECTIONS: LAW, POLICY, AND PRACTICE 13 (Nicholas N. Kittrie & Elyce H. Zenoff, eds., Foundation Press 1981) ("A second great purpose of sentencing is that of separation of the criminal defendant from society. This end is sometimes referred to as incapacitation. . . . The separation rationale assumes that the conduct in these crimes is so serious and the chance of repetition so great that the judge, acting for society, must conclude that protection of the public is the primary objective.").

⁶⁴*See id.* at 12-13 ("[G]eneral deterrence . . . rests on the notion that by the sentence imposed on an individual defendant, and by communication of that sentence to others who might commit similar crimes, the latter will forego their projected criminal behavior out of fear they will suffer the same or similar sentence.") (internal quotations omitted); *see* Grossman, *supra* note 62, at 164.

⁶⁵*See* Cornille, *supra* note 61, at 396-97 ("The rehabilitative model is founded upon the premise that a criminal can be cured of his tendency to commit crime through treatment. Since the focus is upon the criminal defendant, concern for the victim becomes secondary.") (footnotes omitted).

⁶⁶*See* *Payne v. Tennessee*, 501 U.S. 808, 820 (1991).

⁶⁷*Id.*

⁶⁸*See* Cornille, *supra* note 61, at 397; *see also* *Payne*, 501 U.S. at 819-821.

retribution has emerged as the principle theory⁶⁹ justifying the introduction of victim impact testimony immediately prior to sentencing: "Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question."⁷⁰ Such testimony offers a glimpse of the life upon which the defendant chose to inflict harm, and also demonstrates the injury to the victim, the victim's family, and to society.⁷¹ This testimony is therefore relevant to the sentencing determination because it indicates the full extent of the emotional and psychological harm caused by the offender's act.⁷² Thus, the argument proceeds, full consideration of the level of harm caused by the defendant's crime is necessary to fashion a proportional sentence which inflicts a punishment reflecting what the offender justly deserves.⁷³

Initially appealing, the retributionist justification for the introduction of victim impact testimony fails under stricter scrutiny. Retribution is based upon principles of equality which demand that the offender receive punishment commensurate with the sentencer's *objective* determinations of moral blameworthiness and the harm caused by the criminal acts.⁷⁴ By contrast, inherently subjective victim

impact testimony is not competent to offer an objective determination of the actual harm caused by a criminal act for two reasons.⁷⁵ First, crime victims react in a plethora of ways, and any individual's reaction to a single criminal act will be a subjective response to those unique circumstances.⁷⁶ Second, no process has been persuasively advanced which allows for the accurate and objective assessment of victim harm to be comprehensively applied in a practical fashion throughout the entire criminal justice system.⁷⁷ Any sentencer is thus compelled to apply victim impact testimony in an arbitrary, emotional, and subjective fashion.

The use of victim impact testimony is more appropriately analyzed in terms of personal revenge rather than retribution.⁷⁸ Retribution is a rationally proportioned punishment fixed by society through its elected representatives; conversely, personal revenge is arbitrarily inflicted by the victim and knows no principled limitations.⁷⁹ Information offered by a grieving victim or third party encourages the sentencer to sympathize with these individuals, and to accord weight to information offered solely for the purpose of imposing a harsher penalty to the offender.⁸⁰ This deference to personal vengeance is not an acceptable justification for punishment.⁸¹

Victim impact testimony thus impermissibly invites the sentencer to extract punishment beyond the

⁶⁹Neither incapacitation nor general deterrence has been advanced to justify the introduction of victim impact testimony. If it is true that such testimony might aid in the rehabilitation of the offender, then it follows such testimony would assist rehabilitation when presented in any forum besides the inherently prejudicial atmosphere of a sentencing proceeding. See Long, *supra* note 4, at 213.

⁷⁰Payne, 501 U.S. at 825; see Cornille, *supra* note 61, at 401 ("In the context of retribution, victim impact statements are relevant because they provide the sentencer with an assessment of the harm component. A retributivist needs to consider harm along with blameworthiness in order to calculate an appropriate sentence.") (footnotes omitted).

⁷¹See Payne, 501 U.S. at 822 (quoting *Mills v. Maryland*, 486 U.S. 367, 397 (1988) (Rehnquist, C.J., dissenting)).

⁷²See Cornille, *supra* note 61, at 416.

⁷³See *id.*; Grossman, *supra* note 62, at 162-63.

⁷⁴See BURNS & MATTINA, *supra* note 63, at 39-40 (quoting IMMANUEL KANT, *METAPHYSISCHE ANFANGSGRUNDE DER REICHTSLEHRE* (T. & T. Clark 1887)).

⁷⁵See Fahey, *supra* note 1, at 256 ("It is difficult to see how this standard can be met with the use of information which is *inherently subjective*.") (emphasis added).

⁷⁶See Long, *supra* note 4, at 217.

⁷⁷See Cornille, *supra* note 61, at 414.

⁷⁸See Bartolo, *supra* note 7, at 1243 ("[I]ndividual vengeance is not accepted as a justification for punishment."); see also Fahey, *supra* note 1, at 261 ("The evidence encourages sentencers to sympathize with not only the victim, but also the survivors.").

⁷⁹See Fahey, *supra* note 1, at 262.

⁸⁰See *id.* But see Donald J. Hall, *Victims' Voices in Criminal Court: The Need for Restraint*, 28 AM. CRIM. L. REV. 233, 244 (1991) (observing evidence of victims' desire to extract personal vengeance is inconclusive).

⁸¹See Bartolo, *supra* note 7, at 1243.

reasonably foreseeable effects of a specific crime.⁸² The touchstone of our criminal justice system is a criminal code representing measured, communal blame as articulated by the legislature.⁸³ Fundamental notions of justice therefore demand that the offender should be punished only for the results of reasonably foreseeable acts which have been proscribed as criminal by the legislature, rather than attenuated, unforeseeable emotional harm to the victim or to third parties.⁸⁴ In other words, the only harm to the victim which may justify enhanced punishment is the harm which "is both foreseeable to the defendant and clearly identified in advance of the crime by the legislature as *class of harm that should in every case result in more severe punishment*."⁸⁵ Bentham hypothesized that if crimes of unequal gravity were punished equally, then "the public would lose the important ability to distinguish serious wrongs from more trivial ones."⁸⁶ A fair extension of this corollary is that equal crimes should not be punished unequally based upon fortuitous, unforeseen circumstances.⁸⁷ To legitimately reflect retributionist theory, differences in punishment must reflect objectively identifiable differences in either moral blameworthiness or in reasonably foreseeable actual harm as clearly articulated by the legislature in proscribing criminal conduct.⁸⁸ To the contrary, victim impact testimony encourages punishment based upon arbitrary, *post hoc* appraisals of personal vengeance rather than established standards of communal blame.⁸⁹ "The victim's opinion is

irrelevant to any legitimate sentencing factor"⁹⁰

III. EQUAL PROTECTION OF THE LAWS

The basic tenet of faith upon which our predecessors founded the United States of America was the stated premise that "all men are created equal."⁹¹ As Justice Marshall observed, the historical record adequately signifies that our forefathers did not feel compelled to practice in fact this belief they so eloquently stated in theory.⁹² As the Fourteenth Amendment to the United States Constitution demonstrates, however, the principles of Equal Protection guaranteed by that amendment are evolutionary in nature.⁹³ Thus, our judicial system should no more be limited by recently propounded interpretations of Equal Protection that do not vindicate the Fourteenth Amendment than it was wed to illegitimate, archaic dogma bearing the imprimatur of racism.⁹⁴

It is gospel to our Equal Protection jurisprudence that the State may not arbitrarily select one individual, or class of individuals, and inflict upon them a penalty which is not imposed upon others equally guilty of the

⁹⁰See Hellerstein, *supra* note 12, at 429.

⁹¹THE DECLARATION OF INDEPENDENCE (U.S. 1776).

⁹²See Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2-5 (1987).

⁹³See U.S. CONST. amend. XIV.; see also Marshall, *supra* note 92, at 2-5.

⁹⁴*Cf.* Brown v. Board of Education of Topeka, 347 U.S. 483, 495 (1954) ("Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs . . . are . . . deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.") (citation omitted); Plessy v. Ferguson, 163 U.S. 537, 551 (1896) ("We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority We cannot accept this proposition."); *id.* at 555 (Harlan, John Marshall, J., dissenting) ("[S]uch legislation, as that here in question, is inconsistent not only with the equality of rights which pertains to citizenship, National and State, but with the personal liberty enjoyed by every one within the United States.").

⁸²See Fahey, *supra* note 1, at 241.

⁸³See Hall, *supra* note 80, at 260.

⁸⁴*Cf. id.* at 261 ("Another concern . . . is the issue of whether victim participation statutes are logically or practically consistent with structured or guided sentencing procedures.").

⁸⁵See Payne v. Tennessee, 501 U.S. 808, 863 (1991) (Stevens, J., dissenting) (emphasis added); see Fahey, *supra* note 1, 239-41.

⁸⁶Grossman, *supra* note 62, at 167.

⁸⁷See Booth II, 482 U.S. 496, 502 (1987) (noting that such arbitrariness relies upon considerations "constitutionally impermissible [and] totally irrelevant to the sentencing process") (quoting Zant v. Stephens, 462 U.S. 862, 885 (1983)).

⁸⁸See Hall, *supra* note 80, at 260.

⁸⁹*Id.* at 261.

same offense.⁹⁵ This prohibition extends with equal force to laws which, though fair and impartial on their face, are administered in a discriminatory fashion.⁹⁶

The Equal Protection Clause also requires the State to extend identical protection against criminal conduct to every individual's life and liberty.⁹⁷ Thus, "the protection given by the laws of the States shall be equal in respect to life and liberty . . . no matter how poor, no matter how friendless, no matter how ignorant" the person.⁹⁸ America's original Fourteenth Amendment principles therefore bar treating similarly situated *victims* of crime differently based upon a victim's subjective characteristics.

As *Booth* acknowledged, the consequence of allowing the introduction of victim impact evidence is the inescapable practical effect that offenders will receive harsher punishment for committing criminal acts against victims deemed by society to be more worthy of protection.⁹⁹ Introduction of victim impact testimony compels the inescapable inference that courts can and should assess a defendant's wrong according to the relative weight of the victim's societal merits.¹⁰⁰ "Since every victim is unique, the presentation of this information can 'only be intended to identify some victims as more worthy of protection than others.'"¹⁰¹

Concededly, current Equal Protection analysis does not lend itself to successfully assailing victim

impact evidence on that ground. Defendants unfairly prejudiced by the introduction of such testimony are neither members of a suspect classification,¹⁰² nor is equal treatment for crimes against similarly situated victims one of the few fundamental rights recognized within the Equal Protection framework.¹⁰³ This practical reality, however, does not conceal the conspicuous fact that the determination of criminal sanctions based upon the subjective traits of the victim has been given actual "backdoor" effect via victim impact evidence.¹⁰⁴ Although the law does not allow the sentencer to weigh relative characteristics of the victim in apportioning an appropriate punishment,¹⁰⁵ victim impact evidence effectively sanctions this methodology. In doing so, victim impact testimony repudiates the intent of the Framers of the Fourteenth Amendment that "all men are equal in the rights of life and liberty before the majesty of American law."¹⁰⁶

IV. DUE PROCESS OF LAW

A. Introduction

In contrast to Equal Protection, the Due Process Clause of the Fourteenth Amendment provides fertile ground on which to attack unfairly prejudicial victim impact testimony.¹⁰⁷ In *Williams v. New York*, the Supreme Court established the modern principle that the Constitution does not bar a judge from considering all relevant evidence in fashioning an appropriate criminal sentence.¹⁰⁸

A generation later, however, the Court narrowed

⁹⁵See *Gulf, Colorado & Santa Fe R.R. v. Ellis*, 165 U.S. 150, 153-61 (1897) ("[A]lways [presuming good faith on the part of a legislature] is to make the protecting clauses of the Fourteenth Amendment a mere *rope of sand*." (emphasis added)).

⁹⁶See *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886).

⁹⁷See *Berger*, *supra* note 34, at 47 n.130; *Jacobus tenBroek, Equal Under Law* 230-31 (Collier 1951).

⁹⁸CONG. GLOBE, 39th Cong., 1st Sess. 1094 (1865) (Representative John A. Bingham of Ohio, recognized as the author of Section 1 of the Fourteenth Amendment). See generally *tenBroek*, *supra* note 97, at 320.

⁹⁹See *Booth II*, 482 U.S. 496, 506 n.8 (1987); *Fahey*, *supra* note 1, at 243-44.

¹⁰⁰See *Sandvik v. State*, 564 P.2d 20, 28 (Alaska 1977) (Boochever, C.J., dissenting).

¹⁰¹See *Fahey*, *supra* note 1, at 244 (quoting *Payne*, 501 U.S. at 866 (Stevens, J., dissenting)).

¹⁰²See, e.g., *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

¹⁰³See *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966); *Griffin v. Illinois*, 351 U.S. 12 (1956).

¹⁰⁴See *Fahey*, *supra* note 1, at 247 ("If such a facial classification of victim consideration would be invalid, how could the [Supreme] Court ever permit the same comparisons to be made implicitly through the use of victim impact evidence?").

¹⁰⁵*State v. Cadwallader*, 434 N.W.2d 506, 509-10 (Neb. 1989).

¹⁰⁶CONG. GLOBE, 39th Cong., 1st Sess. 1094 (1865).

¹⁰⁷See *Payne v. Tennessee*, 501 U.S. 808, 836 (1991) (Souter, J., concurring).

¹⁰⁸See *Williams v. New York*, 337 U.S. 241, 246 (1949).

this doctrine by declaring “it is now clear that the sentencing process . . . must satisfy the requirements of the Due Process Clause.”¹⁰⁹ A defendant therefore has a constitutional interest in the integrity of the sentencing procedure, even though that defendant may have no right to object to the particular sentence actually imposed.¹¹⁰

Thus, the threshold inquiry is “what process is due?”¹¹¹ “To comply with due process . . . the sentencing court must assure itself that the information upon which it bases the sentence is reliable and accurate.”¹¹² Consequently, inflammatory victim impact testimony which causes the sentencer to act upon passion and emotion, rather than reason and deliberation, so infects the sentencing proceeding with unfair prejudice as to render the result a denial of due process.¹¹³

B. *Cianos v. State*

In apparent harmony with this constitutional mandate, section 780 of Article 27 of the Annotated Code of Maryland provides that at the request of the State’s Attorney, and within the sound discretion of the trial court, a victim may address the “sentencing judge or jury under oath or affirmation before the imposition of a sentence.”¹¹⁴ Reflecting the recent trend that “a victim of crime has a constitutional right to be treated with dignity, respect, and sensitivity during all phases of the criminal justice process,”¹¹⁵ on November 8, 1994, the voters of the State of Maryland approved Article 47 of the Maryland Declaration of Rights, which provides, *inter alia*, that “a victim of crime shall have the right . . . upon request and if

practicable . . . to be heard at a criminal proceeding, as these rights . . . are specified by law.”¹¹⁶

In reviewing the sentence imposed upon Sean Patrick Hall after his conviction for two counts of automobile manslaughter, the Court of Appeals of Maryland recently clarified the allocution rights of victims at a sentencing proceeding.¹¹⁷ The Court of Appeals held that the representatives of Hall’s victims were precluded from challenging a final criminal judgment, even though they had been denied the opportunity to verbally address the court prior to the imposition of Hall’s sentence.¹¹⁸ The Court of Appeals, however, was not content to merely dispose of the case at hand. In considered though extensive *dicta*, Maryland’s court of last resort proceeded to opine:

The mandate of the people is clear. In response to that mandate, trial judges *must* give appropriate consideration to the impact of crime upon the victims. An important step towards accomplishing that task is to accept victim impact testimony wherever possible. Therefore, *ordinarily* a request by the sentencing judge to the victims that they waive their *right* to address the court as to the impact of the crimes upon them *should not be made* [P]etitioners were arguably *denied their rights* guaranteed by Md. Code § [780](a).¹¹⁹

The implication of this language is clear: The Court of Appeals has dismissed the discretionary language of Article 47 and section 780, and in its place has mandated an almost irrebuttable presumption that victims, or their representatives, *shall* have the right to

¹⁰⁹Gardner v. Florida, 430 U.S. 349, 358 (1977) (plurality).

¹¹⁰See *id.*; see also State v. Conn, 669 P.2d 581, 583 (Ariz. 1983).

¹¹¹Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

¹¹²People v. Outley, 610 N.E.2d 356, 360 (N.Y. 1993).

¹¹³Payne, 501 U.S. at 836 (Souter, J., concurring).

¹¹⁴MD. ANN. CODE art. 27, § 780 (1996). Unless otherwise specified, all subsequent statutory references are to MD. ANN. CODE art. 27 (1996).

¹¹⁵1994 Md. Laws 102, at 1195-96.

¹¹⁶Maryland Declaration of Rights, art. 47 (emphasis added).

¹¹⁷See *Cianos v. State*, 338 Md. 406, 659 A.2d 291 (1995).

¹¹⁸See *id.* at 411, 659 A.2d at 293-94 (“An appeal by a victim is collateral to and may not interrupt a criminal case, and such an appeal cannot result in a reversal of the judgment and a reopening of the case.”).

¹¹⁹*Id.* at 413, 659 A.2d at 295 (emphasis partially added) (internal citations omitted).

testify prior to the imposition of a criminal sentence.¹²⁰

C. Victim Impact Testimony's Sole Purpose

Fundamental notions of fairness require that the imposition of a criminal sentence be a reasoned response to both the harmful effects of the crime and the moral blameworthiness of the criminal.¹²¹ As the Supreme Court has cogently recognized:

It is no doubt constitutionally permissible, *if not constitutionally required*, for the State to insist that the individualized assessment of the appropriateness of the . . . penalty [be] a moral inquiry into the culpability of the defendant, and *not an emotional response to the . . . evidence*.¹²²

In other words, irrelevant information or inflammatory rhetoric that diverts the sentencer's attention or invites an irrational, purely subjective response is repugnant to the elemental notions of fairness guaranteed by the Due Process Clause of the Fourteenth Amendment.¹²³ The inherently cathartic testimony of victims, or their representatives, requires a sentencer's focus to shift to subject matter not bearing upon the defendant's culpability or the circumstances of the offense: "The passion and prejudice that results from this type of testimony does not require explanation."¹²⁴

Victim impact evidence has generally been characterized within one of three broad categories.¹²⁵ The first broad category concerns testimony about the

direct harm to the victim flowing from the circumstances of the crime.¹²⁶ Second, victim testimony may indicate the psychological or physiological impact upon the victim, or upon the victim's family and friends, that results from the offender's act.¹²⁷ Third, in some cases, the sentencer is allowed to hear a victim's opinion as to the character of the offender, or as to the sentence which should ultimately be imposed.¹²⁸ As will be shown, none of these categories contributes to an objective sentence based upon either the offender's moral blameworthiness or the harm caused by the crime.

The first broad category of victim impact testimony portrays to the sentencing authority the subjective harm caused by a specific crime.¹²⁹ This category of testimony suffers from a number of defects. Foremost is the clear implication that the offender receives a windfall at sentencing when the harm to the victim is less than the offender intended.¹³⁰ Moreover, as the inquiry moves farther away from the verifiable, objective consequences of the criminal act, a sentence imposed by considering "a quick glimpse of the life" of the victim is more likely to be based upon the arbitrary, subjective characteristics of the victim and the subjective, emotional response of the sentencer.¹³¹

The second broad category of impact testimony relates to the psychological or physiological effects upon the victim, or the victim's family and friends.¹³² Within this class of testimony, the Supreme Court of Idaho has allowed the introduction of the statement: "I

¹²⁰See *Dix v. County of Shasta*, 963 F.2d 1296, 1299 (9th Cir. 1992) (Kozinski, J.) (by analogy, setting forth a two-prong test for individual State establishment of a federally enforceable procedural due process right for victims to testify at State criminal proceedings).

¹²¹See *infra* Part II.

¹²²*Saffle v. Parks*, 494 U.S. 484, 492-93 (1990) (emphasis added) (internal citations and quotations omitted).

¹²³*People v. Raley*, 830 P.2d 712, 742 (Cal. 1992).

¹²⁴*Lodowski v. State*, 302 Md. 691, 781, 490 A.2d 1228, 1274 (1985) (Cole, J., concurring), *vacated and remanded on other grounds*, 475 U.S. 1078 (1986).

¹²⁵See *Hall*, *supra* note 80, at 255-56.

¹²⁶See *Cornille*, *supra* note 61, at 394-95.

¹²⁷See *Hall*, *supra* note 80, at 256.

¹²⁸See *Cornille*, *supra* note 61, at 395.

¹²⁹See *Payne v. Tennessee*, 501 U.S. 808, 822 (1991).

¹³⁰See *Hall*, *supra* note 80, at 255.

¹³¹See *id.* at 255-56; *Payne*, 501 U.S. at 822.

¹³²*Cf.* *Payne*, 501 U.S. at 826 ("It is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of Defendant (as was done in this case), without limitation as to relevancy, but nothing may be said that bears upon the character of, or the harm imposed, upon the victims.") (quoting *Payne*, 791 S.W.2d at 19).

think someone could probably have cut off my right arm, and I would not have missed it as much as I have my daughter."¹³³ Similarly, the Court of Appeals of Maryland has allowed a daughter's statement, "who is going to be my daddy now that my daddy is gone" and testimony that a father "often has chest pains as if a bullet pierces through his right lung — where [the victim] was hit at close range with a gun shot."¹³⁴ It is difficult to fathom how such inflammatory testimony objectively demonstrates "the loss to the victim's family and to society."¹³⁵

The third genre of impact testimony allows the victim or the victim's representatives to offer opinion as to the offender's character, or as to an appropriate sentence.¹³⁶ Ignoring the admonition that such testimony is merely a biased opinion from someone having "a great personal interest in the outcome,"¹³⁷ a victim's mother has been allowed to testify: "I feel that the death penalty is a fair penalty, and I believe that under the law it should be administered in a case such as this."¹³⁸ Not to be outdone, Maryland's highest court has not only sanctioned the observation, "personally, I feel, if you kill anyone, you should be put to death," but the Court of Appeals has also endorsed the general theories of incapacitation and deterrence introduced by a victim's wife at the offender's sentencing: "[I]f [appellant is] put to death, he won't kill another policeman, and . . . other people [will] know you can't get away with it, get out in

twenty years and walk the streets."¹³⁹ Such testimony represents the thinly veiled primordial scream for personal vengeance rather than the objective "individualized consideration"¹⁴⁰ of a "standard for determining the severity of the sentence that will be meted out."¹⁴¹

D. Effect Upon The Sentencer

In addressing the effects of impact testimony upon the sentencer, some courts have drawn a distinction between evidence offered to a jury, and evidence offered to a judge.¹⁴² Other courts have more realistically acknowledged that even where the victim impact testimony is presented only to a judge, such evidence may be "simply too powerful for a human sentencer to ignore."¹⁴³ Thus, in many circumstances, a judge may be affected as much as a jury by intensely potent impact testimony, even though normally accustomed to mentally excluding impermissible evidence.¹⁴⁴ As Judge Weinstein has recognized:

An impractical rule of total suppression would almost invite self-deception by a judge forced to deny that he had considered a factor that was strongly influencing his subconscious reactions. The judge's capacity to ignore such information is probably better than a juror's, *but it is limited*.¹⁴⁵

¹³³State v. Fain, 809 P.2d 1149, 1151 (Idaho 1991).

¹³⁴Lodowski v. State, 302 Md. 691, 767, 490 A.2d at 1228, 1268 (Cole, J., concurring), *vacated and remanded on other grounds*, 475 U.S. 1078 (1986).

¹³⁵Payne v. Tennessee, 501 U.S. 808, 822 (1991).

¹³⁶See Payne, 501 U.S. at 830 n.2. While victims' family members' opinion testimony regarding the crime, the defendant, and the appropriate sentence was rejected by the *Booth II* majority as unconstitutional, *Payne* expressly refused to pass upon the constitutionality of such testimony. See *id.*

¹³⁷State v. Huertas, 553 N.E.2d 1058, 1065 (Ohio 1990); see State v. Carlson, 406 N.W.2d 139, 140 (Neb. 1987) ("[A] judge must not and cannot allow the judgments and conclusions of the victim to be substituted for those of the court in imposing sentence. To do so constitutes an abuse of discretion.")

¹³⁸Fain, 809 P.2d at 1152.

¹³⁹Lodowski, 302 Md. at 782, 490 A.2d at 1275 (Cole, J., concurring).

¹⁴⁰Payne, 501 U.S. at 822; see also Berger, *supra* note 34, at 28-29.

¹⁴¹Payne, 501 U.S. at 820 (quoting S. Wheeler, et al., SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS 56 (1988)).

¹⁴²Randell v. State, 846 P.2d 278, 280 (Nev. 1993); People v. Johnson, 594 N.E.2d 253, 270 (Ill. 1992); State v. Keith, 754 P.2d 474, 488 (Mont. 1988).

¹⁴³See People v. Simms, 520 N.E.2d 308, 314 (Ill. 1988).

¹⁴⁴See Hellerstein, *supra* note 12, at 416; cf. Hall, *supra* note 80, at 246 ("[T]here is disagreement as to the extent to which the statements actually influence judges' decisions.")

¹⁴⁵United States v. Schipani, 315 F. Supp. 253, 260 (E.D.N.Y. 1970) (emphasis added); see Post v. Ohio, 484 U.S. 1079, 1082

Certainly a judge is not entitled to more latitude than a jury in imposing an arbitrary or capricious sentence.¹⁴⁶ “[T]he presumption that judges know and apply the rules of evidence should not be converted into license to conclude that judges are inhuman, incapable of being moved by passion as well as reason.”¹⁴⁷

Thus, the appropriate standard under a due process analysis is determining the point at which the sentencer’s emotional outrage to the introduction of victim impact testimony prevents that sentencer “from imposing a properly individualized sentence.”¹⁴⁸ It is difficult to reconcile a rape victim’s statement, “[a]fter all, your daughter may be next,” with the premise that a sentencing judge will always, or even frequently, be able to disregard such visceral testimony.¹⁴⁹ “[T]here is no reason to denigrate th[is] danger simply because the recipients of the evidence wore judicial robes.”¹⁵⁰

E. Non-Capital Cases

Just as it contravenes human experience to presume victim impact evidence will not unfairly prejudice a sentencing *judge*, similarly, no logical reason exists to distinguish between the use of such evidence in capital versus non-capital sentencing proceedings.¹⁵¹ While “death is different” under Eighth Amendment analysis, the Supreme Court has drawn no such distinction when applying the Due Process Clause of the Fourteenth Amendment.¹⁵²

To the contrary, relevant constitutional precedent unambiguously suggests that a non-capital “sentencing process . . . must satisfy the requirements of the Due Process Clause.”¹⁵³ The fairness guaranteed by the Due Process Clause therefore requires that in *every* case the unfair prejudice of victim impact testimony be weighed against the probative value of that evidence.¹⁵⁴

F. Relevance

Regardless of society’s desire to give the victim of crime a greater role in America’s criminal justice system, victim impact testimony simply has no legitimate role in a sentencing proceeding.¹⁵⁵ Such testimony distracts the sentencer from the constitutionally mandated focus upon the offender.¹⁵⁶ Additionally, such testimony substantially increases the risk that the subsequent sentence will be imposed in an arbitrary and capricious basis.¹⁵⁷

Gardner was a death penalty case, we perceive no reason why its rationale should not be applied to penalties of lesser severity.”)(citing *Gardner v. Florida*, 430 U.S. 349 (1977)); *id.* at 87 n.7 (noting that in deciding *Gardner*, “Justice Stevens relied on non-capital cases, such as *Mempha v. Rhay*, 389 U.S. 128 (1967).”).

¹⁵³*Gardner v. Florida*, 430 U.S. 349, 358 (1977). While concededly *Gardner* was a capital case, the Supreme Court expressly proffered a due process justification *in addition to this factor*: “[T]here have been two constitutional developments which require us to scrutinize a State’s capital-sentencing procedures more closely than was necessary in 1949. First, five Members of the Court have now expressly recognized that death is a different kind of punishment from any other which may be imposed in this country *Second, it is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause.*” (emphasis added) (footnote omitted).

¹⁵⁴*See Hall, supra* note 80, at 255 (“[T]o the extent that these concerns are based upon due process considerations, the capital versus non-capital dichotomy collapses.”).

¹⁵⁵*See Lodowski v. State*, 302 Md. 691, 767, 490 A.2d 1228, 1267 (1985)(Cole, J., dissenting), *vacated and remanded on other grounds*, 475 U.S. 1078 (1986).

¹⁵⁶*See Hellerstein, supra* note 12, at 398.

¹⁵⁷*See Randell Coyne, Inflicting Payne on Oklahoma: The Use of Victim Impact Evidence During the Sentencing Phase of Capital*

(1988) (Marshall, J., dissenting) (“It would be unrealistic and unwise to presume that no judge could be moved, in both heart and deed, by the anguish and rage expressed by a murder victim’s family.”).

¹⁴⁶*See State v. Charboneau*, 774 P.2d 299, 320 (Idaho 1989).

¹⁴⁷*Post v. Ohio*, 484 U.S. at 1082 (Marshall, J., dissenting).

¹⁴⁸*State v. Brand*, 506 So. 2d 702, 706 (La. App. 1987).

¹⁴⁹*State v. Yanez*, 469 N.W.2d 452, 455 (Minn. App. 1991).

¹⁵⁰*Post v. Ohio*, 484 U.S. at 1082 (Marshall, J., dissenting).

¹⁵¹*See Hellerstein, supra* note 12, at 419.

¹⁵²Steven Paul Smith, Note, *Unreliable and Prejudicial: The Use of Extraneous and Unadjudicated Offenses in the Penalty Phases of Capital Trials*, 93 COLUM. L. REV. 1249, 1259-60 (1993); *see State v. Skaff*, 447 N.W.2d 84, 87 (Wis. App. 1989) (“Although

The Supreme Court has mandated that a criminal sentence must be "directly related to the personal culpability of the criminal offender."¹⁵⁸ Indirect injury to the victim, or the bereavement of the victim's family, may not properly be relied upon to aggravate an offender's sentence because these factors bear "no rational relationship to [any] degree of culpability."¹⁵⁹ Thus, the sympathy and prejudice aroused by victim impact testimony undercut the constitutional imperative that a sentence must be a "reasoned moral response" to the offender and the crime.¹⁶⁰

Similarly, by its nature, victim impact testimony demands a purely arbitrary calculus in response to its introduction.¹⁶¹ The clear implication in receiving such testimony is that an offender's culpability will turn not on the reasonably foreseeable consequences of the offender's own criminal conduct; but rather upon fortuitous factors, such as the composition of the victim's family:¹⁶²

I cannot comprehend how the victim's social and charitable activities and the extent of the parents' grief can be considered as part of 'the offense and the circumstances surrounding it' and therefore pertinent to sentencing.¹⁶³

While invoking sympathy, such evidence does not guide the sentencer's discretion in a permissible manner. To the contrary, victim impact testimony impermissibly invites increased punishment based, not upon the crime or the criminal, but upon the fortuitous, subjective characteristics of the victim.¹⁶⁴

Cases, 45 OKLA. L. REV. 589, 624 (1992).

¹⁵⁸Tison v. Arizona, 481 U.S. 137, 149 (1987).

¹⁵⁹People v. Levitt, 203 Cal. Rptr. 276, 287 (Cal. App. 1984).

¹⁶⁰See Fahey, *supra* note 1, at 252 (quoting Saffle v. Parks, 494 U.S. 484, 493 (1990)).

¹⁶¹See Robison v. Maynard, 829 F.2d 1501, 1505 (10th Cir. 1987).

¹⁶²See Levitt, 203 Cal. Rptr. at 287.

¹⁶³Sandvik v. State, 564 P.2d 20, 27 (Alaska 1977)(Boochever, C.J., dissenting).

¹⁶⁴Lodowski, 302 Md. at 765-66, 490 A.2d at 1266 (Cole, J., concurring).

A criminal sentence should be fashioned "to the facts and circumstances surrounding the crime and the individual then being sentenced."¹⁶⁵ Victim impact testimony relates to neither of these factors and is therefore irrelevant in a sentencing proceeding.¹⁶⁶

G. Inherent Flaws

Victim impact testimony additionally suffers from several inherently prejudicial flaws which counsel against its introduction during a sentencing proceeding.¹⁶⁷ Studies which suggest uneven and minimal participation of victims, or their representatives, at sentencing proceedings support the premise that victim impact testimony which contributes to aggravating a sentence in any one case is the functional equivalent of "lightning striking" that particular offender.¹⁶⁸

The impossibility of formulating discernible, judicial standards at the appellate level to determine if a trial court has been unfairly prejudiced by impact testimony is a second inherent flaw in allowing victim

¹⁶⁵*Id.* at 773, 490 A.2d at 1270 (quoting Henry v. State, 273 Md. 131, 150, 328 A.2d 293, 304 (1974)).

¹⁶⁶See Robison, 829 F.2d at 1505 ("[T]he lesson taught in *Booth* is equally applicable here because the underlying reasoning for limiting the scope of evidence allows for no distinction between misdirected evidence offered by either party"); *Lodowski*, 302 Md. at 774, 490 A.2d at 1270 (Cole, J., concurring) ("Manifestly, the survivors of the murder victims cannot relate any relevant facts concerning the circumstances of the murders because the survivors were not present at the time of the crime."); *cf.* Gathers, 490 U.S. 805, 811 ("Notwithstanding that the papers had been admitted into evidence for another purpose, their content cannot be said to relate directly to the circumstances of the crime.") (emphasis added).

¹⁶⁷See Robison, 829 F.2d at 1503-05 (questioning whether a victim's representative's views against administering the death penalty must be admitted); Coyne, *supra* note 157, at 627-28 (questioning whether defense counsel is required to impugn the character of a victim); Berger, *supra* note 34, at 54-57 (questioning whether racial or other biases are augmented by the introduction of such testimony).

¹⁶⁸See Hall, *supra* note 80, at 241-43 (citing a study that victims or victim representatives made an oral statement in less than ten percent of the cases); Berger, *supra* note 34, at 48.

testimony.¹⁶⁹ “Unlike a verdict of guilt or innocence, sentencing decisions involve subjective factors.”¹⁷⁰

Another fatal flaw which accompanies victim impact evidence is the mere appearance of unfair prejudice which accompanies the introduction of such testimony.¹⁷¹ As Justice Marshall noted, “victim impact evidence [is] inadmissible because it create[s] a constitutionally unacceptable risk that the sentencer would impose the . . . penalty in an arbitrary manner.”¹⁷² Hence, due process guarantees are implicated not only at the point where unfair prejudice can be proven, but rather at the mere introduction of such evidence.¹⁷³

H. The *Darden* Standard

Where no specific constitutional right has been abridged, the general standard to determine if improperly admitted evidence violates the Due Process Clause is whether the violation “so infected the trial with unfairness as to make the result . . . a denial of due process.”¹⁷⁴ In the context of victim impact evidence, the appropriate constitutional inquiry is whether victim testimony risks a sentence “based on passion, not deliberation.”¹⁷⁵ In other words, does

such testimony threaten to inflame the passions of the sentencer “more than did the facts of the crime?”¹⁷⁶ The Fourteenth Amendment thus requires the trial judge to balance these factors in each particular case to ensure the introduction of victim impact testimony does not violate the defendant’s due process rights.¹⁷⁷

The *dicta* of the *Cianos* majority is repugnant to this constitutional requirement of individualized assessment.¹⁷⁸ Supreme Court precedent clearly indicates that the Due Process Clause “include[s] certain evidentiary principles which override state rules with which they conflict.”¹⁷⁹ Thus, the probative value of evidence introduced by the State is an issue of constitutional magnitude.¹⁸⁰

The rule of *Cianos* scorns any assessment of the probative value of specific victim impact evidence. Indeed, any such balancing of “probative value” against “unfair prejudice” would leave little such testimony admissible, because the narrow probative value of such evidence¹⁸¹ pales in relation to the tendency of such testimony to suggest imposing a sentence on an improper, emotional basis.¹⁸² Since the Court of Appeals of Maryland has dictated that a trial court ordinarily shall make no individualized assessment of any improper effects of victim testimony upon the sentencer’s emotions or biases,

¹⁶⁹See *Hellerstein*, *supra* note 12, at 420 (“The Maryland Court of Appeals found the V.I.S. to be ‘relatively straightforward and factual.’ Yet the Supreme Court found the same V.I.S. to be ‘emotionally charged and prejudicial.’ If the same V.I.S. can be viewed in two ways by two courts, *it will be difficult to achieve a uniform standard* distinguishing between victim evidence that is forbidden, and victim evidence that is admissible.”) (footnotes omitted) (emphasis added).

¹⁷⁰*People v. Simms*, 520 N.E.2d 308, 315 (1988).

¹⁷¹See *Post v. Ohio*, 484 U.S. 1079, 1081 (1988) (Marshall, J., dissenting).

¹⁷²*Id.* (internal citations omitted).

¹⁷³*Id.*

¹⁷⁴*Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)).

¹⁷⁵*Payne v. Tennessee*, 501 U.S. 808, 836 (1991) (Souter, J., concurring) (“Evidence about the victims and survivors, and any jury argument predicated on it, can of course be so inflammatory as to risk a verdict impermissibly based on passion, not deliberation.”).

¹⁷⁶*Id.* at 832 (O’Connor, J., concurring).

¹⁷⁷*Id.* at 836 (Souter, J., concurring) (“[I]n each case there is a traditional guard against the inflammatory risk, *in the trial judge’s authority and responsibility to control the proceedings consistently with due process . . .*”) (emphasis added).

¹⁷⁸See *supra* notes 117-20 and accompanying text.

¹⁷⁹Jonathan H. Levy, Note, *Limiting Victim Impact Evidence and Argument After Payne v. Tennessee*, 45 STAN. L. REV. 1027, 1040 (1993) (citing *Washington v. Texas*, 388 U.S. 14 (1967); *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Green v. Georgia*, 442 U.S. 95 (1979) (*per curiam*)).

¹⁸⁰See *id.*

¹⁸¹See *supra* notes 121-41 and accompanying text; see also Levy, *supra* note 179, at 1044-45.

¹⁸²See Levy, *supra* note 179, at 1046; see also Smith, *supra* note 152, at 1293 (“[A]ccording to *Black’s Law Dictionary*, ‘unfair prejudice,’ means ‘undue tendency to suggest decision on improper basis, commonly, though not necessarily an emotional one.’”).

such testimony may frequently taint the trial so as to make the resulting sentence a denial of due process.¹⁸³ "Evidence that has the effect of arousing the passion and prejudice of the sentencer does not satisfy this constitutional standard."¹⁸⁴

V. ALTERNATIVE AVENUES

As the United States Court of Appeals for the Tenth Circuit has recognized, limiting the admissibility of evidence lacking probative value "allows for no distinction between misdirected evidence offered by either party."¹⁸⁵ Hence, the Due Process Clause requires that if society wishes to involve victims in the criminal justice process, society must choose alternative fora besides the inherently inflammatory arena of a sentencing hearing.¹⁸⁶ Cited examples of such alternatives include the prevention of crime through neighborhood watch programs or citizens' police academies.¹⁸⁷ Most significant, however, is the practical reality that victims *are* represented at the sentencing proceeding through their elected lawmakers, through prosecutors elected by the community, and through the judges appointed by, and the police hired by, popularly elected executive officials.¹⁸⁸

VI. CONCLUSION

Victim impact testimony impermissibly allows a sentencing authority to impose a punishment based neither upon the offender's moral blameworthiness nor the direct circumstances of the crime.¹⁸⁹ As Justice Stevens recognized in his *Payne*

¹⁸³See *Darden v. Wainwright*, 477 U.S. 168, 181 (1986).

¹⁸⁴*Lodowski v. State*, 302 Md. 691, 765, 490 A.2d 1228, 1266 (1985)(Cole, J., concurring), *vacated and remanded on other grounds*, 475 U.S. 1078 (1986).

¹⁸⁵*Robison v. Maynard*, 829 F.2d 1501, 1505 (10th Cir. 1987).

¹⁸⁶See *Berger*, *supra* note 34, at 65.

¹⁸⁷See *Long*, *supra* note 4, at 226.

¹⁸⁸See *id.* at 219-21.

¹⁸⁹See *supra* notes 156-66 and accompanying text.

dissent, such evidence of victim impact may "have strong political appeal but no proper place in a reasoned judicial opinion."¹⁹⁰ It is a fundamental premise of American jurisprudence that if a legislature wishes to impose a penalty graduated to a particular harm, then the legislature should classify that harm.¹⁹¹ To the contrary, victim impact evidence graduates punishment based upon fortuitous, arbitrary, and inflammatory considerations:

There is a world of difference between presenting the basic facts necessary for the judge to be informed adequately of the circumstances surrounding the offense and including an emotion-laden narrative pertaining to the victim.¹⁹²

Since, under Maryland law, the trial court is not required, nor even arguably allowed, to balance the unfair prejudice of victim impact testimony against its relatively low probative value, such testimony when offered will frequently contaminate the sentencing proceeding with such unfairness as to result in a denial of due process.¹⁹³

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¹⁹⁰*Payne v. Tennessee*, 501 U.S. 808, 859 (1991)(Stevens, J., dissenting).

¹⁹¹See *Fahey*, *supra* note 1, at 240.

¹⁹²*Sandvik v. State*, 564 P.2d 20, 28 (Alaska 1977) (Boochever, C.J., dissenting).

¹⁹³See *supra* notes 117-20 and accompanying text; *cf.* *Kaylor v. State*, 285 Md. 66, 69, 400 A.2d 419, 421 (1979) ("The restraints on a judge's power to impose sentence are, generally, that the sentence not constitute cruel and unusual punishment, *that the sentencing judge not be motivated by ill-will, prejudice or other improper considerations* and, that the sentence fall within statutory limits.") (emphasis added).

