

THE PREJUDICIAL NATURE OF VICTIM IMPACT STATEMENTS

Implications for Capital Sentencing Policy

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Victim impact evidence is presented during sentencing hearings to convey the harm experienced by victims and victims' relatives as a result of a crime. Its use in capital cases is highly controversial. Some argue that the Supreme Court's decision to allow the admission of victim impact statements (VIS) during capital sentencing proceedings (*Payne v. Tennessee*, 1991) invites prejudice and judgments based on emotion rather than reason. Others reason that it provides an important voice for survivors and affords the jury an opportunity to learn about the victim. The authors outline the chief psychological issues that arise in the context of VIS, including their relevance to jurors' judgments of blameworthiness, concerns that the social worth of the victim will influence jurors' sentencing decisions, and issues related to the emotional appeal of VIS. Psycholegal research on the influence of VIS on mock jurors is reviewed, and implications of this work for capital sentencing policy and suggested directions for future research are discussed.

Crime victims have historically been neglected by the criminal justice system (Henderson, 1985). In recent years this oversight has been addressed by a wave of legislative reforms concerning the treatment and rights of victims (e.g., Megan's law, rape shield laws). As part of that reform, victims are now given the opportunity to testify in both capital and noncapital cases about the harm they experienced as a result of the crime. The use of these *victim impact statements* (VIS) has become increasingly common in recent years, and some form of victim impact legislation exists in nearly every state (Davis & Smith, 1994b; Erez, 1994).

Victim impact statements are presented to jurors, judges, or parole officers. They generally concern the impact of the defendant's crime on the victim (i.e., primary victim) or, in the case of a capital crime, the victim's surviving relatives (i.e., related victim). Although the particulars of VIS may vary from one jurisdiction to another, they typically contain information that (a) identifies the offender, (b) indicates financial losses suffered by the victim, (c) lists physical injuries suffered by the victim including seriousness and permanence, (d) describes changes to the victim's personal welfare or familial relationships, (e) identifies requests for psychological services initiated by the victim or the victim's surviving family, and (f) contains other information related to the impact of the offense on the victim or the victim's family (*Booth v. Maryland*, 1987, p. 2531).

The current practice of allowing the introduction of VIS during sentencing is the result of a slow evolution in the role of the victim in judicial proceedings.

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Leaders of various victims' rights organizations have called for greater involvement by victims in the criminal justice process. This concern for victims' rights was initiated in the 1940s and intensified in the 1970s. It coincided with increasing acceptance of conservative views regarding the "crime control" model of criminal justice that emphasizes efficiency over due process concerns (Henderson, 1985). Heightened attention to the role of crime victims in judicial proceedings is probably driven by multiple factors: public dissatisfaction with the treatment of victims by the criminal justice system, prosecutors' beliefs about the benefits of cooperation from victims in securing convictions, and politicians' desires to portray themselves as tough on criminals and sympathetic toward victims.

Those who advocate the use of VIS during sentencing cite numerous advantages including psychological benefits to the victim and fairer sentencing decisions (Kilpatrick & Otto, 1987). Providing the jury with information about the harm suffered by victims is believed to enhance the chances that sentencing will be consistent with the principle of proportionality (Erez, 1990). Additionally, proponents argue that fairness requires that victims have the same opportunities as perpetrators to speak before the jury and share their personal qualities and character traits (Erez, 1994; Sumner, 1987). The use of VIS may also promote improved attitudes among victims with regard to the criminal justice process (Kelly, 1984) and could result in a greater willingness on the part of victims to participate in the prosecution of crimes.

Many criticisms surround the use of VIS during sentencing hearings. For example, there appears to be little empirical support for the notion that opportunities for victim participation in the criminal justice process affect how victims perceive the process. Although most jurisdictions allow victims to make a statement during sentencing, the majority of victims do not (Brammer, 1992). One survey found that less than 18% of victims attended sentencing hearings and only 9% made oral statements to a judge or jury (McLeod, 1987). Davis and Smith (1994b) conducted interviews with victims and found little evidence that, after making a VIS, they felt any more involved in the sentencing process or any greater satisfaction with the criminal justice system.

Opponents cite the following additional concerns: (a) VIS are inconsistent with the notion that crime is a violation against the state rather than against individual victims (Ashworth, 1993); (b) VIS serve to introduce inconsistencies in sentencing (Hall, 1991); (c) because VIS are typically highly emotional in nature and focus on the victim rather than the defendant, factors associated with the emotionality of the testimony and qualities of the victim (and not the qualities of the defendant) become prime elements in sentencing judgments (Berger, 1992); and (d) the defendant's difficulty in attempting to rebut testimony concerning the victim's character (Logan, 1999a).

More noteworthy, however, is the concern that victim impact testimony may be prejudicial because it diverts the jury's attention away from the facts that should be scrutinized (i.e., the circumstances of the crime and the background and character of the defendant) and focuses on facts that should not be considered (i.e., victim character and experienced harm; see *Booth v. Maryland*, 1987, p. 2532, citing *Zant v. Stephens*, 1983; *Enmund v. Florida*, 1982; Shanker, 1999). VIS may also be prejudicial because they are inflammatory (*Booth v. Maryland*, 1987, p. 2536; Long, 1995). That is, the information may be so emotion-laden in its

content that jurors may be persuaded more by how they feel about the testimony than by the facts of the case.

So, on the one hand, VIS may provide some degree of empowerment to victims and their relatives. On the other hand, the testimony by a victim or a victim's family member is, arguably, both irrelevant and so emotionally moving as to be considered prejudicial.

In this article, we first describe a series of Supreme Court rulings on the use of VIS in capital cases. Next, we examine the major issues with regard to the introduction of VIS during capital sentencing proceedings. Specifically, we review the empirical evidence on (a) the relevance of VIS to judgments of blameworthiness, (b) the likelihood that social value judgments will promote arbitrariness in sentencing, and (c) the inflammatory nature of VIS and its tendency to lead to capricious decisions. With this evidence in mind, we outline a sentencing policy that, in our minds, better reflects the true state of affairs regarding VIS in capital cases.

VIS in Capital Cases: U.S. Supreme Court Decisions

"Arbitrariness" and "Capriciousness" in Sentencing Judgments

The questionable relevance of VIS to the defendant's culpability, their obvious focus on the victim, and the emotional nature of the information have led many to argue that victim impact testimony is prejudicial and leads to arbitrary and capricious decisions in capital cases (Anderson, 1997; *Booth v. Maryland*, 1987, p. 2530; Logan, 2000). Concerns about arbitrariness and capriciousness in capital cases can be traced to the landmark Supreme Court decision, *Furman v. Georgia* (1972), which deemed the death penalty to be unconstitutional as it was being applied at that time. The Court noted that judgments were applied in a haphazard fashion, and therefore, that the capital sentencing process violated the Eighth Amendment prohibition against cruel and unusual punishment. In particular, the Court noted that the lack of standardization in capital sentencing procedures across states allowed for discrepancies in application that rose to the level of arbitrariness and capriciousness. Four years later, in *Gregg v. Georgia* (1976), the Court again considered the constitutionality of capital sentencing guidelines and concluded that the concerns raised in the *Furman* case could best be addressed by a bifurcated proceeding in which the sentencer was provided with information relevant to sentencing and guidelines on use of that information.

Along with establishing guidelines, the *Furman* and *Gregg* decisions legitimated limiting the information to which jurors are exposed during capital sentencing proceedings. This is particularly relevant in the case of VIS because debate surrounding this testimony largely turns on whether courts can legitimately limit victim input during sentencing. We next explore the controversy about whether VIS should be excluded from sentencing proceedings on the grounds that they are irrelevant.

The Relevance of VIS to the Defendant's Blameworthiness

The U.S. Supreme Court has ruled directly on the constitutionality of VIS in capital cases on three occasions (*Booth v. Maryland*, 1987; *Payne v. Tennessee*,

1991; *South Carolina v. Gathers*, 1989). These decisions focused largely on issues of the relevance of VIS to the defendant's blameworthiness.

In the first case, John Booth and an accomplice entered the home of an elderly couple, bound and gagged them, and repeatedly stabbed them in the chest with a kitchen knife. Booth was convicted of first-degree murder.

During the penalty phase of the trial, a VIS that outlined the influence of the crime on the victims' surviving family members was read to the jury. It included accounts of the emotional and psychological impact of the crime on the family, descriptions of the couple's personal characteristics, and family members' opinions and characterizations of the crimes and the defendant. Defense counsel moved to suppress the VIS on the grounds that it was inflammatory and irrelevant to sentencing judgments. The motion was denied, and Booth was sentenced to death. Upon automatic appeal, the Maryland Court of Appeals rejected Booth's claim that VIS introduce arbitrariness into sentencing decisions.

But in a 5–4 decision, the U.S. Supreme Court set aside Booth's death sentence, reasoning that “[VIS] information is irrelevant to a capital sentencing decision, and its admission creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner” (p. 2529). The majority in *Booth* questioned whether information about the victim is relevant to judgments of the defendant's blameworthiness and sought instead to focus jurors on aspects of the defendant, such as his or her character:

[a] sentencing jury must focus on the background and record of the accused and the particular circumstances of the crime. The VIS information in question may be wholly unrelated to the blameworthiness of a particular defendant, and may cause sentencing decisions to turn on irrelevant factors. (p. 2530)

This decision made it clear that because the focus of VIS is not on the defendant and because the degree of harm experienced by the victim's relatives does little to inform the sentencer of the defendant's blameworthiness, VIS have little relevance to capital sentencing decisions.

This line of reasoning continued in the case of *South Carolina v. Gathers* (1989). Demetrius Gathers and three friends encountered the victim in a park. Gathers beat him severely, inserted an umbrella into his anus, and returned later to stab him. A jury convicted Gathers of first-degree murder and sentenced him to death.

During the sentencing hearing, the prosecutor noted that the victim had little in his possession when he was killed except a voter's registration card and a religious tract known as “the Game Guy's Prayer.” The prosecutor read extensively from this tract during the hearing and made the following points during his closing arguments:

Among the many cards [the victim] had among his belongings was this card. It's in evidence. Think about it when you go back there. He had this [*sic*] religious items, his beads. He had a plastic angel. Of course, he is now with the angels now [*sic*], but this defendant, Demetrius Gathers, could care little about the fact that he is a religious person. Cared little of the pain and agony he inflicted on a person who is trying to enjoy one of our public parks. (*South Carolina v. Gathers*, 1989, p. 2210).

In reasoning that the victim impact information offered in this case was irrelevant to the capital sentencing decision, Supreme Court Justice William Brennan noted:

[The prosecutor] read to the jury at length from the religious tract the victim was carrying and commented on the personal qualities he inferred from [the victim's] possession of the "Game Guy's Prayer" and the voter registration card. The content of the cards, however, cannot possibly have been relevant to the circumstances of the crime. (*South Carolina v. Gathers*, 1989, p. 2211)

The *Gathers* decision essentially reiterated the logic in *Booth* and clarified that VIS bear little relevance to sentencing judgments, even when the information is presented by the prosecutor rather than by a witness.

Two years later, the Court reexamined the issue of relevance and significantly modified its earlier position by indicating that the suffering experienced by relatives of the victim *may be* relevant to blameworthiness decisions (*Payne v. Tennessee*, 1991). Pervis Tyrone Payne was convicted on two counts of first-degree murder and one count of assault with intent to commit murder in the first degree. Payne's victims were 28-year-old Charisse Christopher, her 2-year-old daughter (both of whom died as a result of stab wounds), and her 3-year-old son who was stabbed but survived.

The VIS in this case came from testimony given by Christopher's mother, who reported how her grandson was adjusting to the death of his mother and sister. The prosecutor in closing argument provided additional VIS information:

[The defendant's attorney] wants you to think about a good reputation, people who love the defendant and things about him. 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 day and wants to know where his best little playmate is. He doesn't have anybody to watch cartoons with him, a little one. These are the things that go into why it is especially cruel, heinous, and atrocious, the burden that the child will carry forever. (*Payne v. Tennessee*, p. 2603)

In a controversial 6–3 decision, the Supreme Court ruled that VIS are not per se inadmissible during capital sentencing proceedings and that the prejudicial effects of such testimony must be determined on a case-by-case basis. The Court noted that, historically, victim harm has been considered when assessing issues of blameworthiness and that victim impact testimony does not represent a departure from that principle. Indeed, relevant information need not be limited to *intended* harm ("criminal conduct has traditionally been categorized and penalized differently according to consequences not specifically intended"; *Payne v. Tennessee*, p. 2614). Chief Justice Rehnquist delivered the opinion of the Court:

Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities. We think the *Booth* Court was wrong in stating that this kind of evidence leads to the arbitrary imposition of the death penalty. In the majority of cases, and in this case, victim impact evidence serves entirely legitimate purposes. (*Payne v. Tennessee*, 1991, p. 2608)

The Court noted the necessity of providing all information that might aid the sentencer and reasoned that “two equally blameworthy criminal defendants may be guilty of different offenses simply because their acts cause differing amounts of harm” (p. 2597). Thus, the *Payne* decision established that the suffering experienced by relatives of victims is relevant to judgments of the blameworthiness of the defendant.

If indeed VIS are relevant to sentencing decisions and if jurors are allowed to hear them, then the degree to which they influence juror judgments (and, in particular, how they affect attributions of blame) is a question worthy of empirical investigation. The extent to which jurors’ judgments of blameworthiness are influenced by the suffering of victims’ relatives is the issue to which we turn next.

Victim Harm and Judgments of Blameworthiness

To understand the extent to which jurors may be influenced by victim impact information, we first examine social psychological research concerning victimization and attributions of blame. The bulk of this work has concerned how individuals react to the suffering of others. As we show, the severity of victim suffering apparently influences perceptions of blame in fairly predictable ways.

The degree of harm inflicted on a victim influences the amount of blame attributed to the wrongdoer (e.g., Austin, Walster, & Utne, 1976; Feigenson, Park, & Salovey, 1997; Phares & Wilson, 1972; Walster, 1966). As a general rule, the more one harms, the more one is blamed (see Lerner, 1980, for an exception). For example, Scroggs (1976) had participants read summaries of rape cases in which the damage to the victim was varied and found that participants gave harsher penalties when the victim became pregnant as a result of the rape than when she did not. Similarly, Kerr and Kurtz (1977) presented summaries of an armed robbery case. In one condition, the victim had been shot and left partially paralyzed by a bullet lodged in his spine. In another condition, the victim had been shot but not seriously injured. Participants assigned significantly longer sentences in the high-victim-suffering conditions than in the low-victim-suffering conditions. Along these lines, researchers have shown that mock jurors give greater damage awards to more severely injured plaintiffs, regardless of the defendant’s actions (e.g., Bornstein, 1998; Greene, Johns, & Smith, 2001; Wissler, Evans, Hart, Morry, & Saks, 1997).

A chief limitation of the available research concerning victim harm and attributions of blame and responsibility is that much of this work addresses only those *directly* harmed rather than those *indirectly* harmed (i.e., third-party victimization; if Person A harms Person B and the harm caused to Person B negatively affects Person C, to what extent do we hold Person A accountable for the harm caused to Person C?). An exception is a study in which blame was measured for events far removed from the actor’s sphere of influence where actors had no control over subsequent events. Alicke (1992) presented participants with stories that described actors setting into motion a chain of events that were increasingly unrelated to their initial actions; for example, a letter sent to the boss accusing another employee of being an alcoholic causes the employee to be (a) fired from his job, (b) unable to get another job within the industry, (c) forced to take a low-paying job with long hours, (d) engaged in marital discord over loss of

income, and (e) eventually divorced from his wife. Even for the more remote events in the chain, participants were willing to rate the initial action (i.e., sending the letter) as a cause of the eventual outcome. Apparently, individuals can indeed be blamed for outcomes that they did not intend, or may not have foreseen, but that were nevertheless part of a chain of events set in motion by their conduct.

This finding has important implications for VIS in capital trials. Unlike in noncapital trials, jurors in capital trials learn of the harm experienced by relatives of the crime victims rather than the harm experienced by the victims themselves.

Jury simulation research on the effects of VIS does indeed suggest that jurors are influenced by information about the suffering of the victim's relatives. For example, Luginbuhl and Burkhead (1995) asked participants to read one of four trial summaries and varied both the severity of the crime and the presence of a VIS. All of the participants read that the defendant was tried and convicted of first-degree murder, and all received a summary of aggravating and mitigating circumstances. Half of the participants read a brief VIS based on the statement in *Booth* (describing how the entire family had been affected by the murder), whereas the other half received no such information. When VIS information was present, 51% of participants voted for the death penalty, whereas only 20% did so when it was absent. This effect was more pronounced for mock jurors who were neutral toward or moderately in favor of the death penalty than for those who strongly favored it. Consistent with prior research on harm manipulations and blame judgments, the extent of suffering experienced by the victim's relatives increased the willingness of mock jurors to apply the harshest sanction possible.

Myers and Arbuthnot (1999) obtained similar findings in their videotaped trial simulation that varied the presentation of VIS based loosely on testimony in *Payne*. Here, the VIS was delivered by the victim's mother, who testified that the death of her daughter had placed emotional, physical, and financial burdens on her and led to severe emotional trauma on the part of the victim's surviving son. Looking only at the jurors who voted to convict, 67% who received victim impact evidence voted for the death penalty, as did only 30% who did not hear a VIS.

Myers, Lynn, and Arbuthnot (in press) varied the level of harm presented in the VIS. Mock jurors gave harsher sentence recommendations when the harm was severe than when the harm was comparatively mild. Moreover, those who received no victim impact testimony gave slightly longer sentencing recommendations than did those who were presented with mild harm VIS. This finding suggests that jurors may expect some degree of suffering on the part of surviving relatives and that VIS may be most influential when the level of suffering exceeds those expectations.

Social Value

Yet another issue that has fueled opposition to victim impact evidence is the concern that because VIS involve testimony by relatives of the victim, sentencing judgments may vary as a function of how valued the victim may have been to others. Individuals of greater social standing in a community may be valued more by family and nonfamily members alike. Therefore, the impact of crimes perpetrated on those regarded as socially valued may be especially powerful (Greene, Koehring, & Quiat, 1998; Logan, 1999a).

The VIS in the *Booth* case provides a good example of information regarding the victims' social value. This statement included descriptions of the victims' personal characteristics. For example, a son reported that his father and mother were both hard working, that his mother "never seemed like an old lady" and had even taught herself to play bridge in her 70s, and that they were loving parents and grandparents whose family was most important to them. In addition, he noted that their funeral was one of the largest in the town's history and that the family received over 1,000 sympathy cards.

The Court rejected this evidence, noting that it could lead to the presumption that the value of human life varies as a function of the personal qualities of the deceased: "nor is there any justification for permitting such a decision to turn on the perception that the victim was a sterling member of the community rather than someone of questionable character" (*Booth v. Maryland*, 1987, p. 2534).

In the *Payne* case, the Court also addressed the value of victim character information. Here, the Court endorsed the use of such evidence, reasoning that these descriptions allow the jury to see the victim as more than a "faceless stranger." The inclusion of this evidence was justified on the grounds of fundamental fairness—if the character of the defendant is addressed during this stage of the trial, so too should the victim's character be mentioned. Yet, the Court also noted that the information should not imply that one victim is less valued than another: "[a]s a general matter . . . victim impact evidence is not offered to encourage comparative judgments . . . for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but that the murderer of a reprobate does not" (p. 2607).

Can jurors refrain from making comparative judgments of this sort? To what extent do jurors attend to victim characteristics? Do varying qualities of the victim result in variations in the degree to which the defendant is punished? Psychologists have begun to grapple with these questions; we describe their findings below.

Social Value and Blame Judgments

Characteristics of the victim influence the extent to which perpetrators are seen as blameworthy (e.g., Dietz, Littman, & Bentley, 1984; Efran, 1974; Gerbasi, Zuckerman, & Reis, 1977; Izzett & Fishman, 1976). For example, Alicke and Davis (1989) found that participants who read case summaries attributed greater blame to defendants when their behavior resulted in the death of an innocent person than when the identical behavior resulted in the death of someone who turned out to be a dangerous criminal. Alicke (2000) suggested that these victim worth influences may occur because we evaluate the perpetrator's intentions less negatively when the victim is disliked. Indeed, variations in the social attractiveness of the victim (e.g., Jones & Aronson, 1973; Kaplan & Kemmerick, 1974) and in victim status (Shaw & Skolnick, 1996) have been shown to influence blame judgments. The less we value victims, the less we blame perpetrators for harming them.

Recall that the majority in *Booth* expressed concern that with the use of VIS, sentencing decisions would turn on the social value of the victim. Greene et al. (1998) addressed this concern in a mock jury study that used testimony from the *Booth* trial and varied the respectability of the victim. They found that variations

in the social value of the victim had an appreciable impact on mock jurors' sentiments. Mock jurors who had evidence concerning a highly respectable victim rated that victim as more likable, decent, and valuable; experienced greater compassion for the victim's family; and perceived the crime as more severe than did mock jurors who had evidence regarding a less respectable victim. Elements in VIS that address the victims' apparent social value influence sentiments relevant to sentencing judgments.

Further support for the notion that social value comparisons have an appreciable influence on sentencing-relevant judgments comes from a study by Greene (1999) that examined the relative impact of various forms of VIS. VIS come in many different varieties. Some involve lengthy descriptions of the victims' suffering, others are concise statements of victims' recommendations for sentencing. Obviously, the varying content of the VIS would be expected to influence sentencing decisions in different ways. To examine how differing content of the VIS might affect jurors' perceptions of the case, Greene varied whether VIS described (a) personal qualities of the victim, (b) the deleterious effects (i.e., physical, psychological, financial) on the victims' relatives, or (c) relatives' opinions about the crime and recommended sentence.¹ Mock jurors who had all three of these forms of victim impact evidence had more favorable impressions of the victim than did mock jurors with victim impact evidence that did not contain all of these elements. More importantly, the personal qualities of the victim had a significant impact on jurors' sentiments. Mock jurors rated the survivors' suffering as greater when the victim was portrayed as more respectable (e.g., successful, civic minded, a loyal husband and devoted father, a professional photographer) than when the victim was portrayed as less respectable (e.g., a loner and divorced biker). Jurors' perceptions of harm were also influenced by the victim's social standing: The greater that standing, the more harm jurors perceived surviving relatives to have experienced.

Blame attributions vary not only according to the degree of harm imposed but also according to whom is harmed. Thus, VIS that convey to jurors the quality of the person harmed (e.g., that the victim was a unique human being of good character) should elicit greater punitiveness toward the defendant than statements that do not convey this information. Thus, concern that victim impact evidence "could improperly divert the jury's attention away from the defendant" (*Booth v. Maryland*, 1987, p. 2530) is apparently supported by these data.

The potential for VIS to promote judgments based on irrelevant factors is not the sole concern. Another controversial issue is whether VIS are prejudicial because they are inflammatory. Does the emotional nature of the testimony produce strong emotional reactions on the part of factfinders and interfere with their capacity to produce reasoned judgments?

¹Issues surrounding the impact of VIS that characterize the crime and give recommendations for punishment are not discussed at length in this review because the Supreme Court in *Payne* declined to address that issue. Nevertheless, this sort of testimony does occur with some frequency (Logan, 1999a) and was an issue of some concern in *Booth*, in which the daughter of the victims indicated that her parents were "butchered like animals" and noted her preference for the fate of the defendant when she said: "someone like that can never be rehabilitated" (*Booth v. Maryland*, 1987, p. 500).

Victim Impact Statements as Inflammatory

The potentially inflammatory nature of VIS has been a concern expressed by critics of current sentencing policy (e.g., Brammer, 1992; Dugger, 1996; Levy, 1993). Simply stated, the inflammatory nature of this testimony may generate strong emotional responses from jurors. Logan (1999a) warned of the dangers associated with VIS because of its emotional appeal:

[VIS] is perhaps the most compelling evidence available to the state—highly emotional, frequently tearful testimony coming directly from the hearts and mouths of the survivors left behind by killings. And it arrives at the precise time when the balance is at its most delicate and the stakes are highest—when jurors are poised to make the visceral decision of whether the offender lives or dies—after the defendant has been convicted of the most horrendous crime possible. (p. 177)

Others share Logan's (1999a) concerns. A well-established belief among legal scholars and practitioners alike is that an emotional juror is an irrational juror. Feigenson (2000) suggested that this reasoning is based on assumptions that emotional responding is rapid and therefore not reflective, and that emotional arousal interferes with rational thought processes. Consequently, the introduction of emotion into the decision-making process is believed by some to undermine rationality in jury decisions. And, as we noted earlier, courts have indicated that there is a heightened duty in capital cases to avoid death sentences based on emotion: "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion" (*Booth v. Maryland*, 1987, p. 2536; citing *Gardner v. Florida*, 1977).

The potential danger of emotional testimony is one topic on which the decisions in *Booth*, *Gathers*, and *Payne* appear to agree. Indeed, in *Payne*, the Court spoke of the possible dangers of emotion-laden testimony when it noted that the grandmother's heart-rending statement was "technically irrelevant" (*Payne v. Tennessee*, 1991, p. 2604). In her concurrence, Justice O'Connor stated succinctly: "I do not doubt that the jurors were moved by this testimony—who would not have been?" (p. 2612). The degree to which these dangers warrant a per se bar on VIS during capital sentencing remains in dispute, however.

The potential emotionality of victim impact evidence arose in the sentencing hearing for Timothy McVeigh, convicted of murder in connection with the bombing of the Federal Building in Oklahoma City. Concerned that victim impact evidence would improperly play on jurors' emotions, Judge Richard Matsch limited the number of witnesses who could testify about the impact of the crime on their lives. Nonetheless, the prosecution presented several witnesses who described their feelings of grief and loss. One witness, Glen Seidl, whose wife was killed in the bombing, described how their young son was dealing with the death of his mother. "The family threw Clint a big party for his eighth birthday. . . . Clint climbed onto [my] lap and asked, 'Do you think mom loved me?' [When] assured that she loved him more than anything in the world, he asked, 'Why isn't she here?'" (Thomas, 1997, p. 8). Another witness, the mother of a 4-year-old victim, recounted a phone conversation with someone from the medical examiner's office. When asked whether she wanted to keep a portion of her daughter's hand

that was found in the rubble, she said "Of course I want it. It's part of her." Upon hearing this testimony interspersed with uncontrollable sobbing, "jurors wept openly, survivors wailed, reporters groped for hankies and sodden bits of tissue" (Logan, 1999a, p. 163). Even the judge cried.

The emotional pull of this testimony is unmistakable. What effect will it have on jurors? If we operationalize inflammatory information as that which drives judgments as a result of strong emotions rather than reason, the impact of victim impact evidence on juror sentencing judgments may be more complex than the courts believe.

Emotions and Judgments

As noted earlier, the Supreme Court has reasoned that VIS may be inflammatory and promote capricious judgments (*Booth v. Maryland*, 1987). One concern is that the jurors' need to punish may overwhelm their capacity to evaluate the evidence rationally. Thus, testimony that arouses anger or sadness in jurors is assumed to increase their motivation to sentence the defendant to death. Indeed, jurors may actively search for information that supports that conclusion. The concept of *psychological equity* suggests that individuals may distort events or facts of the case to justify punishing an individual (Lloyd-Bostock, 1983). According to this view, individuals who become angered seek an outlet for that anger in the form of a target that they can punish.²

However, the research on emotions and judgments suggests that emotional judgments need not be irrational (Bodenhausen, Sheppard, & Kramer, 1994; Feigenson, 2000). Indeed, not all emotions are so arousing as to disrupt rational thought. Many emotions (e.g., sympathy, sadness) produce low arousal and thus may not interfere with deliberate thought processes (Feigenson, 2000). Moreover, there is reason to question the notion that emotions necessarily produce quick or capricious judgments. In fact, negative emotions such as sadness are likely to be accompanied by more systematic and detail-oriented information processing (Clore, Schwartz, & Conway, 1993). These findings run counter to the perspective that emotions stifle cognitive activity.

The theory of *affect infusion* (Forgas, 1995) may provide some clues as to when emotions influence one's judgmental processes and when they do not. According to this theory, affective states will influence one's judgmental processes when one is engaged in constructive information processing rather than directed information processing. Constructive processing refers to generating information by means of open or nondirected search strategies as well as cognitive elaboration (e.g., trying to think of reasons why an individual may have committed a crime), whereas directed processing strategies have predetermined search patterns (e.g., recalling a person's name or using already existing strategies to solve a problem). The less directed the information processing, the more likely it

²Alicke (2000) referred to a similar process known as *direct spontaneous evaluation effects* whereby emotions influence blame ascriptions in the absence of any evidence of volitional control or causal control on the part of the perpetrator. According to this view, we may exaggerate the degree of causal responsibility for a driver because he has killed a child. We regard the perpetrator as more responsible when the outcome is so severe that it brings about strong affective responses.

is that emotions will influence the judgmental process (Forgas, 1992, 1995). According to this model, because trials are likely to promote constructive information-processing strategies, a trial context should elicit a tendency for emotions to influence judgments.

On the other hand, the trial process theoretically encourages careful and thorough deliberation, both with others and alone. The fact that jurors discuss the case with others requires that the rationale underlying their judgments must be justified. In addition, guidelines on sentencing proceedings are intended to encourage contemplation and rational thought.³

In addition to debate on the extent to which emotions influence judgments, there remain differing perspectives as to *why* emotions might influence judgments. One theory suggests that emotions serve a heuristic function in that they inform individuals about how they generally feel about something or someone (Schwartz, 1990; Schwartz & Clore, 1983). This view suggests that jurors will evaluate defendants negatively if negative emotions are present and positively if the reverse is true. An alternative perspective is that emotions lead to activation of concepts that are consistent with that emotion. Thus, individuals may show a tendency to generate unhappy thoughts and memories if their general mood is unhappy (Bower, 1981). These differing perspectives suggest that affective states can influence judgments either as a result of an informational process whereby the affective state itself provides information for the judgment task or as a result of an associative network process. Although both perspectives posit that affective states can influence cognitive processes, neither suggests a process as simple or straightforward as that assumed by critics of VIS.

To the contrary, some evidence suggests that emotions may even promote extended cognitive processing. For example, certain emotions (e.g., sadness) lead to increased information processing (Bodenhausen et al., 1994; Keltner, Ellsworth, & Edwards, 1993). However, the extent to which this relationship may be moderated by contextual factors (e.g., judgment task, judgment consequences) is not yet understood. Thus, empirical research on emotions and judgments does little to support the view that emotions are *necessarily* inflammatory. The conditions under which emotions impact judgments are varied and far less predictable than has been suggested.

In summary, the research on emotions and judgments suggests that emotions may indeed influence judgments to some degree, but the manner in which this influence occurs need not be irrational or capricious. Some emotions may actually promote effortful contemplation rather than interfere with it. Moreover, the influence of emotions on judgments is not independent of context. Under certain circumstances, individuals may be able to control their emotional responses. The extent to which this may occur in response to VIS is the issue to which we now turn.

³For example, jurors must weigh the aggravating and mitigating circumstances surrounding the crime to decide the appropriate punishment. And, because the trial in a capital case is bifurcated, sensational or graphic evidence relevant to guilt is, at least in theory, not expected to influence sentencing. Obviously, the extent to which these procedures are effective in focusing jurors' attention on relevant evidence is open to debate.

Victim Impact Statements and Emotions

Why might the admission of VIS prompt emotional responding in jurors? One possibility is that VIS present information in a manner that invites empathy. For example, jurors are asked to imagine how they would feel in a situation similar to that of the victim's surviving relatives. Perspective taking has been found to be an important feature of empathy (Davis, 1983). Moreover, witnesses who give VIS typically become emotional, often crying on the witness stand. These emotional displays may also provide important cues as to how jurors should feel. Indeed, substantial research supports the notion that individuals who witness strong emotional displays may become emotionally aroused themselves (e.g., Coyne, 1976; Hammen & Peters, 1978; Neumann & Strack, 2000; Sullins, 1991).

Consequently, when presented with VIS, jurors may empathize with the emotional suffering described by the witness, and this empathy may, in turn, result in harsher sentencing judgments. Alternatively, emotional behavior on the part of the witness may evoke emotional responses from jurors. But whether either of these processes lead to harsher sanctions is difficult to assess. It may be difficult to know whether jurors' sentencing judgments are the product of their emotions or the product of rational decision making and merely accompanied by emotions. According to the *Payne* ruling, harsher sanctions that arise from this latter scenario would not necessarily be prejudicial because they reflect a rational assessment of harm rather than an irrational and capricious need to punish. Furthermore, emotional witnesses may even provide important cues as to the degree of harm the perpetrator has inflicted, and jurors may respond with harsher sanctions by reasoning that greater harm merits greater punishment. Again, this decision would be more indicative of a rational thought process than an irrational one. On the other hand, emotional displays by the witness may have a more insidious effect if, consciously or not, jurors become emotional themselves and respond by punishing the defendant more harshly. According to the *Payne* Court, this process may constitute prejudice and require judicial remedies.

With these issues in mind, Myers et al. (in press) varied both the emotional demeanor of the witness and the degree of harm described in a videotaped VIS. The emotional demeanor of the witness did not influence mock juror sentencing judgments, but the severity of the harm information did. More importantly, although the VIS led to emotional responses in participants, these emotional reactions failed to mediate their sentencing judgments. In fact, sentencing judgments remained independent of the emotional ratings of participants. These findings suggest that harsher sentencing judgments may not reflect capricious decisions. Jurors may become emotionally aroused in the presence of VIS but nevertheless remain capable of rendering judgments that are not influenced by these emotions.

Methodological Concerns

Each of these aforementioned studies has shown that information routinely admitted in VIS (e.g., harm information, victim's personal qualities or social value information) influences mock juror sentencing judgments or the factors that predict sentencing judgments (i.e., juror sentiments). Nevertheless, it is important

to acknowledge the methodological limitations of these studies, based as they are on jury simulation methodology.⁴

Jury simulation research has been criticized for a number of reasons, but some issues are especially relevant to death penalty cases. Among the chief concerns are the sample of participants tested, the nature of the stimulus materials and dependent measures, and the lack of real consequences for the decision. We address each of these criticisms in turn.

Most of these studies have sampled college student populations. Although the impact of using college students rather than a more heterogeneous sample of community residents may be rather minimal in many studies (Bornstein, 1999), this choice may matter more in research on the death penalty. It may be, for example, that older, more experienced people would respond differently to the grief of victims' relatives than would younger, less "worldly" people. The extent to which the VIS would differentially affect these samples is unclear.⁵

Another concern about mock jury research is that it too often relies on brief written vignettes and dependent measures that lack external validity (e.g., Diamond, 1997; Weiten & Diamond, 1979). This issue is certainly relevant to research on VIS although it may be diffused somewhat by variations in stimuli and measurement. In fact, the influence of VIS on juror judgments has been consistently demonstrated when using both vignettes (e.g., Greene, 1999; Luginbuhl & Burkhead, 1995) and videotaped trial simulations (e.g., Greene et al., 1998; Myers & Arbuthnot, 1999; Myers et al., in press) and by using dependent measures that include sentencing judgments (Luginbuhl & Burkhead, 1995), varying degrees of sentence length (Myers & Arbuthnot, 1999; Myers et al., in press), or measures that may mediate sentencing judgments (e.g., sympathy for the victims' relatives and crime severity; Greene, 1999; Greene, et al., 1998). Still, one is struck by the incredibly powerful nature of the VIS in actual cases in which both jurors and judges are moved to tears and by the significantly more pallid versions used in laboratory studies.

The most serious criticism of this work is that the decisions of mock jurors have no real consequences. Although this concern is relevant to all mock jury research, its importance is magnified when the decisions involve life and death. Hypothetical judgments of this ultimate decision are obviously made less carefully and less thoroughly than real sentencing decisions. This is a serious concern and, as such, we urge other researchers to exercise restraint in generalizing from these studies. Jury simulation methodology, by itself, is probably not sufficient to provide a clear picture of the impact of VIS on capital sentencing decisions and should be supplemented by other kinds of research. But we wish not to dismiss it completely. It has, at least in our minds, obvious value in pointing to changes in jurors' intellectual and emotional responses in the face of VIS, and in concert with

⁴To our knowledge, no other methodologies have been used to assess the impact of VIS on jurors in capital cases. Although alternative methods have been used to evaluate their influence on judges (Davis & Smith, 1994a), that work did not examine jurors' decisions or capital cases. Thus, it is of limited usefulness for our purposes.

⁵However, Greene et al. (1998) did use a more heterogeneous sample of community residents (e.g., mean age of 45 years, with ages ranging from 19 to 71), and their findings are consistent with the other studies that used samples drawn from college student populations.

other methodologies, can help illuminate the processes by which victim impact evidence affects decisions about who lives and who dies.

General Discussion and Policy Implications

Despite the vast legal literature on the need for changes in capital sentencing policy regarding VIS (e.g., Anderson, 1997; Ashworth, 1993; Berger, 1992; Brammer, 1992; Dugger, 1996; Flamm, 1999; Hauptman, 1997; Levy, 1993; Logan, 1999a, 2000; Long, 1995; Shanker, 1999; Sullivan, 1998), empirical support for many of these ideas is nonexistent. But a few studies have recently been conducted on the impact of VIS on mock jurors, and a large social psychological literature on issues of blameworthiness, social value, and emotionality is also relevant. Thus, our review seeks to connect these psychological findings to the looming legal question of the proper role of victim impact evidence in capital sentencing proceedings.

With that perspective in mind, we offer several policy recommendations that stem from empirical studies and from our analysis. However, we offer these suggestions with some hesitation, based—as they are—on a relatively small number of studies that shared the same basic methodology. Indeed, it would be our hope that this article could serve as a wake-up call for empirical researchers, beckoning them to explore this issue using alternative means of study (e.g., archival research, posttrial interviews).

We acknowledge that this is a difficult topic to study both inside and out of the laboratory.⁶ The fact of the matter, though, is that victim impact evidence is probably here to stay (Logan, 1999a). We implore psychologists and other empirical scientists to not shy away because of the inherent difficulty in studying this topic, but rather to begin to explore its many aspects so that future commentators can offer policy suggestions with less hesitation and more certainty.

It is clear that there is a need for research that informs policy in this area.⁷ Although capital juries routinely hear victim impact evidence, there remains little control over what evidence is admitted (e.g., whether “victim characteristics” evidence is admissible), what form it can take (e.g., oral vs. written), for what purpose it can be used (e.g., to humanize the victim or to compare the victim with other members of society), and how it should be used. Several of our policy-related suggestions stem from this observation in conjunction with the research findings we have reviewed thus far.

Our first recommendation is that victim impact evidence be limited in scope and, in particular, that testimony about the victim’s shining character be restricted. There is mounting empirical evidence that the status and character of the victim have a significant effect on jurors’ decisions about life and death. This finding is supported both by jury simulation studies of VIS (Greene, 1999; Greene et al.,

⁶In using posttrial interviews, it may be difficult to isolate jurors’ cognitions about effects of VIS (W. Bowers, personal communication, May 9, 1995; see also Nisbett & Wilson, 1977).

⁷It is also true, however, that these issues cannot be resolved by data alone. The decisions about what jurors should be allowed to hear and how they should be expected to use that evidence may turn as much on values as on empirical consequences. And, until those values are clarified, there will continue to be debate about the proper role of VIS in capital sentencing. We thank an anonymous reviewer for making this point clear to us.

1998) and by a host of other studies demonstrating the increased likelihood of a death sentence when the victim is of higher social status (e.g., Baldus, Woodworth, Zuckerman, Weiner, & Broffitt, 1998; Beck & Shumsky, 1997). Yet, with regularity, courts admit victim impact evidence that, while ostensibly showing the uniqueness of the decedent, coincidentally extols that person's virtues. So, for example, the following depictions have all been held admissible: that the decedent was a "smart person" with a "higher IQ" than others in her family (*State v. Frost*, 1998); "an intelligent girl" who had a 3.8 grade point average at the College of William and Mary, acted as a guest minister, and was voted outstanding businesswoman of the year (*Bennett v. Angelone*, 1998); a nationally recognized piano player (*Whittlesey v. State*, 1994); and a person without a "hateful bone in her body" (*State v. Gray*, 1994). These are just the kinds of portrayals that concerned Justice Powell in the *Booth* case when he wrote, "Nor is there any justification for permitting such a decision to turn on the perception that the victim was a sterling member of the community" (p. 2534).

The introduction of VIS in a manner that avoids social value comparisons may be a daunting undertaking. Moreover, the chief rationale for including this information—namely, that it humanizes the victim—may not be sufficiently advanced by VIS because jurors may already hold these beliefs about the victim without reminders from witnesses or court officials. We would argue, based on the empirical research, that victim impact evidence detailing the positive character traits and impressive accomplishments of decedent be limited (e.g., by allowing a minimal number of victim character witnesses) or eliminated altogether.

There is also mounting evidence that jurors factor information about outcome severity into their judgments of blame (Kerr & Kurtz, 1977; Scroggs, 1976; Walster, 1966). Some of the research we described (e.g., Myers et al., in press) now extends these findings to persons not directly harmed by the outcome (e.g., a victim's surviving relatives) and raises questions about the appropriateness of allowing multiple survivors to share their sufferings with the jury. The influence-of-harm information may have a cumulative effect when multiple witnesses express their level of suffering. On this issue, we believe that the judge in the McVeigh trial took the correct approach by limiting the number of witnesses who were allowed to describe their losses and grief before the jury.

We also question the wisdom of allowing testimony from survivors about their opinions of the defendant and the crime and their beliefs as to the appropriate sentence.⁸ Although viewing emotional reactions in others may not automatically or necessarily lead to irrational judgments (e.g., Feigenson, 2000), it may be that viewing vindictiveness and hatred *would* have this result. As was the case in *Booth*, VIS may often provide the opportunity for the survivors to dehumanize the offender rather than humanize the victim. Terms such as "animal," "savage," and "cold-blooded" are just a few examples of the descriptors often given defendants in a VIS. The extent to which these characterizations influence jurors remains in

⁸This form of victim impact evidence was expressly proscribed in the *Booth* case, and the prohibition was seemingly left intact in the *Payne* decision. Yet it is easy to find instances of appellate courts upholding the testimony concerning survivors' personal opinions of the defendant and the crime (Logan, 1999a).

question. However, both Kelman (1973) and Bandura (1991) have noted the potential for language that characterizes individuals in subhuman terms to interfere with normal moral restraints that inhibit aggression. In any event, one wonders how such characterizations, along with a request for the jury to “show no mercy” (or worse), can assist jurors in undertaking the weighty tasks set out for them at sentencing.

Our next recommendation is that jurors be given more guidance about the purposes and functions of victim impact evidence when it *is* admitted. Unfortunately, at present, there is little consensus about what those purposes are. The *Payne* decision suggested that jurors “bear in mind” the impact evidence to remember the victim’s uniqueness while they are considering the defendant’s mitigating evidence.⁹ As we have already noted, some jurisdictions intend victim impact evidence to expose the specific harms caused by the murder. Other jurisdictions use VIS as a vehicle to allow the victim’s relatives to voice opinions about the crime and about what they believe is the appropriate punishment.

The point is this: Uncertainty reigns over the purpose of using VIS in capital cases (Logan, 1999a). Thus, while it may not be possible to achieve any kind of standardized or universally agreed-on guidance about the purposes of introducing impact evidence, it should be feasible to instruct jurors about the intent of VIS in any particular jurisdiction. At present, even these homegrown directives are largely absent.

Jurors also need guidance about the functions of impact evidence, and in particular, about how they are actually supposed to use this information. In most jurisdictions that allow VIS, jurors receive no guidance whatsoever as to how to factor the impact evidence into their decision making. Should it be weighed against, or offset by, mitigating factors? Should it be used as a supplement to statutory aggravating factors?

In *Gregg v. Georgia* (1976), the Supreme Court mandated that capital punishment decisions be closely guided. In *Walton v. Arizona* (1990), the Court offered that capital jurors should be instructed in more than “bare terms” about how they should evaluate the evidence. Yet jurors have virtually no direction regarding their use of victim impact evidence. Undoubtedly, they will interpret this evidence in a variety of different ways and combine it in varying ways with the other evidence to which they have been exposed. These lax standards hardly qualify as “guided.”

Even in jurisdictions that attempt to provide some direction about the purpose and function of victim impact evidence, that guidance can take various, sometimes confusing forms. Here is the instruction provided to capital jurors in Oklahoma:

[Victim impact evidence] is intended to remind you as the sentencer that just as the defendant should be considered as an individual, so too the victim is an individual whose death may represent a unique loss to society and the family. This

⁹The intent here was undoubtedly to counter any portrayal of the defendant as “unique” with a reminder that the victim, too, was “unique,” a notion that Justice Stevens chastised in his dissenting opinion: “[T]he fact that each of us is unique is a proposition so obvious that it surely requires no evidentiary support” (*Payne v. Tennessee*, 1991, p. 866).

evidence is simply another method of informing you about the specific harm caused by the crime in question. You may consider this evidence in determining an appropriate punishment.

Evidence supporting an aggravating circumstance is designed to provide guidance to the jury in determining whether the defendant is eligible for the death penalty; victim impact evidence informs the jury why the victim should have lived. . . . The two kinds of evidence are not similar: that a victim may have been a great person who will be missed . . . does not go toward proving . . . any aggravating circumstance the prosecution might allege. (*Cargle v. State*, 1995, pp. 828–829)

This instruction makes clear that victim impact evidence is intended to convey the harm caused by the murder and is not to be used as proof of any statutorily defined aggravating circumstances. Compare this with what capital jurors hear in Tennessee:

The prosecution has introduced what is known as victim impact evidence. This evidence has been introduced to show the financial, emotional, psychological, or physical effects of the victim's death on the members of the victim's immediate family. You may consider this evidence in determining an appropriate punishment. However, your consideration must be limited to rational inquiry into the culpability of the defendant, not an emotional response to the evidence.

Victim impact evidence is not the same as an aggravating circumstance. . . . Introduction of this victim impact evidence in no way relieves the State of its burden to prove beyond a reasonable doubt at least one aggravating circumstance which has been alleged. You may consider this victim impact evidence in determining the appropriateness of the death penalty only if you first find that the existence of one or more aggravating circumstances has been proven beyond a reasonable doubt by evidence independent from the victim impact evidence, and find that the aggravating circumstance(s) found outweigh the finding of one or more mitigating circumstances beyond a reasonable doubt. (*State v. Nesbit*, 1998, p. 891)

This instruction is so replete with legalese and unnecessarily cumbersome that it may ultimately have little effect on jurors' judgments. It purports to draw a distinction between evidence of aggravating circumstances and evidence of the harm caused by the crime, but then fuses the two by informing that victim impact evidence is to be considered only if aggravating circumstances have been proven.

So even in the rare instances in which jurors are (theoretically) instructed about the intended purpose and function of VIS, those instructions may be confusing and may require mental gymnastics that capital jurors are unable to perform.¹⁰ In the end, we are left wondering "What *is* the proper function of victim impact evidence and how *should* jurors be so informed?" Obviously, some thought needs to be given to refining and clarifying the ways in which courts use victim impact evidence and inform capital jurors about its use.

Other recommendations also stem from the uncertainty about how this evi-

¹⁰Indeed, a host of studies on the effectiveness of jury instructions in capital cases show that jurors have difficulty understanding what the instructions ask them to do and further difficulty apprehending how they are to apply those instructions (see, e.g., Eisenberg & Wells, 1993; Garvey, Johnson, & Marcus, 2000; Luginbuhl & Howe, 1995; Wiener, Pritchard, & Weston, 1995).

dence is received, understood, and used by capital jurors. In large part, these are recommendations for further empirical research to shed light on a number of critical issues about which we know nothing. The research questions are endless; here are but a few:

- Does the form of the victim impact evidence matter? How are jurors differentially affected by statements that are presented in writing versus statements that are given orally or through videotape? What happens when a witness is required to read his or her statement to the jury? What happens when an officer of the court instead reads the statement?
- Does the identity of the person who testifies about impact matter? Courts have recognized a wide variety of “victims” who are then authorized to speak to the impact of the murder (Logan, 1999a). This category has included family members, friends, neighbors, coworkers, victims by proxy (people who were not immediately affected by the killing but who testify on behalf of someone who was), and even rescue workers who did not personally know the victim or victims. Most courts disallow the testimony of a child, except under unusual circumstances. This cast of characters would seemingly influence jurors’ thoughts and emotions in different ways. What are those different ways?
- How are jurors affected by hearing multiple witnesses presenting impact evidence? Few limits are imposed on the number of people allowed to testify about the impact of a murder on survivors. In the lawsuits stemming from the bombing of the Murrah Federal Building in Oklahoma City, jurors heard from 38 victim impact witnesses in Timothy McVeigh’s trial and 55 in Terry Nichols’ trial. Obviously, these numbers are inflated by the fact that so many people were “victimized” by the bombing, but multiple witnesses have been allowed to offer impact evidence in cases with just one decedent as well.
- How do variations in the content of the VIS affect jurors’ decisions? Greene (1999) began to explore how different forms of impact evidence (e.g., evidence relating to the personal characteristics of the victim, evidence describing the emotional impact of the murder on the victim’s family) affect jurors’ judgments, but there are obviously other facets of VIS that need to be explored as well. What use do jurors make of evidence regarding financial hardships experienced by the victim’s family? Of evidence regarding unexpected and untoward medical developments? Of evidence of a more remote nature (e.g., that the murder had an impact on the decedent’s sister which led to her divorce)?

Finally, we note in passing the possibility of countering victim impact evidence with a wholly new, and highly controversial form of evidence—execution impact evidence (Logan, 1999b). This evidence informs the capital jury of the impact of the defendant’s execution on his or her surviving loved ones and is intended to level the playing field between the defendant, who has become deindividualized in the capital sentencing process, and the victim, who, in contrast, has become hyperindividualized (Logan, 1999b). Citing its lack of relevance to the circumstances of the offense, most appellate courts have concluded that execution impact evidence is not constitutionally mandated (e.g., *People v. Armstrong*, 1998; *Simon v. State*, 1997). However, the Supreme Courts of Oregon (*State v. Stevens*, 1994) and California (*People v. Ochoa*, 1998), have expressly approved the use of this evidence. Logan (1999b) argued that “execution impact evidence, in the midst of the emotional tug-of-war created by *Payne*,

is needed to restore a semblance of the procedural even-handedness historically sought in capital proceedings” (p. 5). At present, we know nothing about the ways that capital jurors react to this evidence, but we have concerns that it creates some of the same dilemmas posed by the use of victim impact evidence.

Conclusion

So what *is* the proper role of VIS in capital trials, and should their use be prohibited or welcomed? One might argue, based on the body of empirical research that we recounted, that jurors are *improperly* affected by VIS. Support for this notion comes from studies showing that mock jurors’ sentencing sentiments are influenced by the extent to which victims’ survivors have suffered, the social value of the victim, and the highly emotional content of the VIS—issues that have little *legal* relevance to the sentencing decision. Others might argue, though, that VIS are indeed relevant to the ultimate judgment precisely because jurors pay attention to them and are affected by them.¹¹ This notion, more commonsensical than legal (see, e.g., Finkel, 1995), leads to the conclusion that VIS may provide legitimate and, indeed, desired input to the sentencer.

Can we reconcile these opposing perspectives? Probably not without giving a great deal more thought to the disjunction between legal standards that define capital sentencing (inconsistent and haphazardly drawn as they are across jurisdictions) and jurors’ notions of what is important and useful information for them to have when sentencing a capital offender.

But even without that undertaking, we feel strongly that victim impact evidence that distracts jurors’ attention from considerations that are clearly relevant to the sentencing decision—namely, the circumstances of the crime and the background and character of the defendant—should be disallowed or limited. We acknowledge that the determination of when VIS are useful to jurors and when they distract may be impossible to know ahead of time. That is, judges are probably ill-equipped to forecast how juries would make use of victim impact evidence. But we already have some examples of situations in which judges have limited or regulated the extent of the VIS. We think that these were the proper decisions.

And so, in the end, we endorse Sullivan’s (1998) idea that “a means must be developed for granting the victim a voice that does not capitalize on inflammatory and emotional factors or unduly sway the jury with wrenching tales of sorrow and pain” (p. 635). Victim impact evidence will apparently continue to provide that means. But we are hopeful that empirical psycholegal research can and should have an important role to play in evaluating those means and in devising a fair and evenhanded procedure.

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