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# Silenced Stories: How Victim Impact Evidence in Capital Trials Prevents the Jury from Hearing the Constitutionally Required Story of the Defendant

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# SILENCED STORIES: HOW VICTIM IMPACT EVIDENCE IN CAPITAL TRIALS PREVENTS THE JURY FROM HEARING THE CONSTITUTIONALLY REQUIRED STORY OF THE DEFENDANT

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> The victims' son reports that his parents had been married for fifty-three years and enjoyed a very close relationship, spending each day together. He states that his father had worked hard all his life and been retired for eight years. He described his mother as a woman who was young at heart and never seemed like an old lady . . . . [The victims] were amazing people who attended the senior citizen center and made many devout friends . . . . As described by their family members, the Bronsteins were loving parents and grandparents whose family was most important to them . . . . Because of their loss, a terrible void has been put into [their] family's lives and every day is still a strain just to get through.[1]

* * *

> Four of defendant's siblings testified concerning their childhood. Larry testified that Pearl and Art beat the children, sometimes while the children were tied up, and forced them to steal . . . . Art killed Larry's sister Helen . . . by smothering her. In 1957, the children were taken by the State of Nebraska and placed in Whitehall Home for Children. Larry stated that a housemother at Whitehall taught both defendant and him about sex, instructing them that "you got to hit them in the mouth before you do anything or they don't like it." He testified that he and defendant were transferred to a state mental institution, where they were beaten and sexually abused and drugs were administered . . . . Another sibling, Steven, corroborated the foregoing testimony and also recounted that "the first sexual experiences were the girls with Art and the boys with mom." The eldest daughter, who ran away before Art joined the family, testified that her father molested her, with Pearl's knowledge, and that Pearl blamed the daughter for the molestation.[2]

* J.D. Candidate, Northwestern University School of Law, 2012. I would like to thank everyone who offered assistance and advice in the creation of this Comment. Thanks in particular to James Lupo.

[1] Booth v. Maryland, 482 U.S. 496, 510, 514–15 (1987).

[2] People v. Foster, 242 P.3d 105, 124–25 (Cal. 2010).

## I. INTRODUCTION

Compare these two quotes. The first comes from a victim impact statement at a capital sentencing trial. The second is information presented on behalf of a capital defendant at another capital sentencing trial. The victim impact statement matches more closely with most people's experience in the world. This Comment will argue that, for the typical juror, the victim impact statement is much easier to identify with, drowning out the story of the defendant, who is faced with the prospect of capital punishment. This makes the emotional story of the victim the only story given meaningful consideration by the jury.

Cognitive psychology shows that humans filter new information through existing schema.[3] This Comment will define schemas and show how, because jurors generally have different life experiences than defendants, it is easier for the juror to identify with the murdered victim's schema than with the defendant's schema. Because of this, the stories told in victim impact evidence are unduly prejudicial, overwhelming any mitigating factors in a capital sentencing trial. Thus, the defendant does not have an opportunity to present evidence of his or her moral culpability as the Constitution requires in capital sentencing trials.[4]

This argument will consist of five parts. Part II will discuss the current state of capital punishment jurisprudence in the United States. Part III will give an overview of the current state of the law on victim impact evidence, outlining how the Supreme Court initially proscribed such evidence but later reversed itself, and in doing so failed to give guidance to lower courts on what manner of victim impact evidence was acceptable. Part IV will give an overview and explanation of what are known in cognitive psychology as schemas. This will include an explanation of how schemas cause people to filter information in a predetermined way, potentially ignoring information that does not easily fit into this format.

Part V will show how the schemas of most jurors cause them to easily accept the emotionally charged stories presented in victim impact statements, thereby silencing defendants' stories. Part VI will analyze the case of *United States v. Sampson*, contrasting the story of the victim told by the victim impact evidence with the story of the defendant told by mitigating evidence.[5]

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[3] Albert J. Moore, *Trial by Schema: Cognitive Filters in the Courtroom*, 37 UCLA L. REV. 273, 279 (1989).

[4] Payne v. Tennessee, 501 U.S. 808, 825 (1991).

[5] 335 F. Supp. 2d 166 (D. Mass. 2004).

## II. THE CURRENT STATE OF CAPITAL SENTENCING LAW

To understand the argument against victim impact statements in capital trials, it is first necessary to understand the background of current capital sentencing jurisprudence. The death penalty's constitutionality is largely understood through the seminal case of *Furman v. Georgia*.[6] An overview of decisions regarding capital sentencing will show that, since *Furman*, the Supreme Court has focused its efforts on ending arbitrariness and discrimination in capital sentencing. Capital punishment is unique from other forms of punishment because it is absolutely irrevocable.[7] While law should always be fair, the irrevocability of capital punishment has led the Court to determine that it is especially imperative to be unwaveringly scrupulous and fair when meting out capital punishment.[8]

### A. *FURMAN V. GEORGIA* AND THE EIGHTH AMENDMENT'S PROHIBITIONS AGAINST CRUEL AND UNUSUAL PUNISHMENT

*Furman* and other Court decisions in the late 1970s and early 1980s developed the constitutional doctrine that death sentences are "qualitatively different" from other criminal sentences. Strict oversight of state death sentencing was needed so that states' death-sentencing systems were evenhanded and nondiscriminatory.[9]

The state has much greater power than an individual defendant. Because of this, the Eighth Amendment attempts to level the playing field between the defendant and the state by affording extra protections to defendants to counteract the greater power of the state.[10] The Supreme Court has ruled that a sentence of death must be proportionate to a particular offense; otherwise, it is cruel and unusual punishment.[11] *Furman* invoked the Eighth Amendment prohibition in the context of capital punishment by arguing that, because death sentences were imposed by juries in such a small minority of death-eligible cases and without guidelines or standards, these sentences therefore constituted cruel and unusual punishment.[12]

The Court in *Furman* found punishment to be cruel and unusual if it was too severe for the crime, was imposed arbitrarily, offended society's

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[6] 409 U.S. 902 (1972).

[7] AUSTIN SARAT, WHEN THE STATE KILLS: CAPITAL PUNISHMENT AND THE AMERICAN CONDITION 89 (2001).

[8] DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY 1–2 (1990).

[9] *Id.*

[10] Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 402 (1996).

[11] McClesky v. Kemp, 481 U.S. 279, 301 (1987).

[12] BALDUS ET AL., *supra* note 8, at 11.

sense of justice, or was not more effective than a less severe penalty.[13] This standard effectively invalidated the death penalty statutes of forty states, thereby commuting the sentences of 629 death row inmates across the country.[14] This standard also jeopardized the continuing viability of the death penalty.[15]

Since *Furman* suspended the death penalty without condemning it forever, states wishing to impose the death penalty instituted a variety of new procedures in an attempt to correct the deficiencies in their death penalty statutes.[16] The Supreme Court had condemned these statutes as standardless, discretionary, and, therefore, unconstitutional.[17] What followed was an overhaul of state statutes governing the death penalty, with most state statutes now requiring the presence of at least one aggravating circumstance before a death sentence could be sought.[18] Most state laws identify between six and twelve factors as aggravating circumstances.[19]

### B. *GREGG V. GEORGIA* SANCTIONS THE STATE'S REVISIONS TO DEATH PENALTY SENTENCING PROCEDURES, APPROVING BIFURCATED TRIALS

Following the states' overhaul of their death penalty statutes, the next important death penalty case the Supreme Court heard was *Gregg v. Georgia*, which affirmed the constitutionality of the death penalty as punishment for murder.[20] In addition to ruling that the death penalty itself was constitutional, the Court considered revised death penalty statutes from Florida, Georgia, and Texas, and held them constitutional, noting that the new Georgia statute had sufficient safeguards to prevent the risk of the arbitrary or excessive death sentences that the Court had condemned in *Furman*.[21]

Also important in *Gregg* was the Supreme Court's approval of bifurcated trials.[22] The Court recognized that the sentencer in a capital trial must have discretion to consider the particular character and record of the

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[13] *History of the Death Penalty: Part I*, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/part-i-history-death-penalty#const (last visited Mar. 11, 2010) [hereinafter DPIC, *History*].

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] BALDUS ET AL., *supra* note 8, at 22.

[18] *Id.*

[19] *Id.*

[20] 428 U.S. 153, 187 (1976).

[21] *Id.* at 226–27 (1976).

[22] *Id.* at 191–92 (1976).

offender and the circumstances of the particular offense, and that capital sentencing must be contextual and particularistic.[23] States accomplished this in their revised death penalty statutes through bifurcated trials.[24]

A bifurcated trial consists of a guilt phase and a sentencing phase. In the guilt phase, the jury hears evidence and argument relating only to the defendant's guilt. The jury's task in this phase is to determine whether or not the defendant is guilty of murder.[25] If the jury decides that the defendant is guilty of murder, the trial goes into the second phase, the sentencing phase. In the sentencing phase, the prosecution and defense present evidence relating to an appropriate sentence.[26]

### C. AN EXPLANATION OF AGGRAVATING AND MITIGATING FACTORS

As an example of a death penalty statute, 18 U.S.C. § 3593 is the federal statute requiring a separate trial for the guilt and sentencing phases of a capital trial.[27] The statute governs the sentencing phase of a capital trial, which calls on the jury to decide two things: whether the defendant is eligible for the death penalty, and, if so, whether the death penalty is justified.[28] For the defendant to be eligible for the death penalty, the jury must find that at least one aggravating factor has been proven beyond a reasonable doubt.[29] The sentencing trial must include the opportunity to present aggravating and mitigating factors.[30] Any mitigating factor is considered relevant if it has any tendency to make any fact of consequence to the determination of the action more or less likely than it would have been without the evidence.[31]

Further, 18 U.S.C. § 3592 outlines some aggravating and mitigating factors that are either permitted or required.[32] Victim impact evidence is

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[23] *Id.* at 206.

[24] BALDUS ET AL., *supra* note 8, at 23.

[25] *Id.*

[26] *Id.*

[27] 18 U.S.C. § 3593 (2006).

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] Tennard v. Dretke, 542 U.S. 274, 275 (2004). Note that this "more or less likely standard" is less stringent than the "beyond a reasonable doubt standard" needed for aggravating factors.

[32] 18 U.S.C. § 3592. Some examples of mitigating factors included in the statute are minor participation, no prior criminal record, or "other factors in the defendant's background, record, or character or any other circumstance of the offense that mitigate against imposition of the death sentence." *Id.* Examples of aggravating factors included in the statute are previous conviction of other serious offenses, grave risk of death to additional persons, substantial planning and premeditation, or a "heinous, cruel, or depraved manner of

generally considered a non-statutory aggravating factor.[33] Information is admissible regardless of its admissibility under the Federal Rules of Evidence, but the evidence may be excluded if its probative value is outweighed by the danger of creating unfair prejudice.[34] Although current law does not consider victim impact statements unfairly prejudicial, this Comment will argue that such statements do indeed cause unfair prejudice.

The government's burden of proof for aggravating factors is beyond a reasonable doubt.[35] The defendant's burden of proof for mitigating factors is preponderance of the evidence.[36] Separating the guilt and sentencing phases allows the jury to consider evidence during sentencing that was inadmissible for determining guilt but is relevant to the sentencing decision.[37] Additionally, the Supreme Court has ruled that a jury must be allowed to give *meaningful* consideration to relevant mitigating evidence.[38] Any law or instruction from the bench prohibiting the jury from considering any particular mitigating factor is unconstitutional.[39] A defendant's right to have mitigating evidence considered is meaningless if the sentencer is not permitted to consider it in imposing a sentence.[40]

*Lockett v. Ohio* emphasized the significance of mitigating factors.[41] A plurality in *Lockett* held that meaningful consideration of mitigating factors is required regardless of the severity of the crime or whether or not the defendant has potential for future dangerousness.[42] For a defendant to be sentenced to death, the jury must determine that the aggravating factors outweigh the mitigating factors enough to justify death.[43]

The bottom line of death penalty jurisprudence is that death is different from other forms of punishment.[44] The Supreme Court, in crafting its policies on capital punishment, has constructed a kind of "super due process."[45] The Court wanted to afford capital defendants an extra measure of protection against arbitrariness, impulse, or emotionalism.[46]

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committing [the] offense." *Id.*

[33] *See* § 3593.

[34] § 3593(c).

[35] *Id.*

[36] *Id.*

[37] BALDUS ET AL., *supra* note 8, at 23.

[38] Abdul-Kabir v. Quarterman, 550 U.S. 233, 264 (2007).

[39] BALDUS ET AL., *supra* note 8, at 23.

[40] Franklin v. Lynaugh, 487 U.S. 164, 185 (1988).

[41] BALDUS ET AL., *supra* note 8, at 25.

[42] Lockett v. Ohio, 438 U.S. 586, 604–05 (1978).

[43] United States v. Sampson, 335 F. Supp. 2d 166, 176 (D. Mass. 2004).

[44] BALDUS ET AL., *supra* note 8, at 1–2.

[45] SARAT, *supra* note 7, at 37.

[46] *Id.*

> In the sentencing phase of capital trials, the jury's attention was directed exclusively to the task of ascertaining the precise, personal culpability of the defendant. Did this particular murderer, given the full circumstances of his or her life, deserve to die at the hands of the state? Here the courts carried out the most exacting calculus of retribution.[47]

The allowance of victim impact statements in the sentencing phase of a capital trial frustrates this "super due process." Because death is different, the damage done by any frustration of due process is heightened. The use of victim impact statements in capital sentencing therefore warrants special consideration.

## III. CURRENT LAW ON VICTIM IMPACT STATEMENTS

Having reviewed the current state of the law on the death penalty in the United States, we next turn to the current state of the law on victim impact statements in capital trials. The Supreme Court has decided three major cases on victim impact statements in capital trials: *Booth v. Maryland*,[48] a 1987 case that proscribed victim impact evidence in capital cases; *South Carolina v. Gathers*,[49] a 1989 case that clarified part of the ruling in *Booth*; and *Payne v. Tennessee*,[50] a 1991 case that overruled *Booth* just four years after it was decided (and effectively overruled *Gathers* as well). In addition, the Supreme Court denied certiorari in *Kelly v. California*,[51] a recent capital murder case involving victim impact evidence. These decisions are considered below.

### A. *BOOTH V. MARYLAND*—THE SUPREME COURT PROHIBITS VICTIM IMPACT EVIDENCE IN CAPITAL TRIALS

*Booth v. Maryland*, the first major victim impact case in the Supreme Court, involved the brutal stabbing murder of an older couple.[52] John Booth was one of two men who invaded the couple's home to rob them.[53] Because Booth was a neighbor of the couple, he knew they would be able to recognize him.[54] As a result, the two men bound and gagged the couple and stabbed them repeatedly in their chests with a kitchen knife.[55] Two days

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[47] *Id.*
[48] 482 U.S. 496 (1987).
[49] 490 U.S. 805 (1989).
[50] 501 U.S. 808 (1991).
[51] 171 P.3d 548 (Cal. 2008), *cert. denied*, 129 S. Ct. 564 (2008).
[52] *Booth*, 482 U.S. at 497–98.
[53] *Id.* at 497–98.
[54] *Id.*
[55] *Id.* at 498.

later, their bodies were discovered by their son.[56]

At trial, Booth was found guilty on two counts of first-degree murder, and the prosecution sought the death penalty.[57] The state prepared a presentence report of Booth's background, education, employment history, and criminal record.[58] Because it was required by Maryland statute, the report also included a victim impact statement, which described the effect of the crime on the victim and his family.[59] The victim impact statement was created based on interviews with the son, daughter, son-in-law, and granddaughter of the murdered couple.[60] The statement included descriptions of the couple's "outstanding personal qualities," as well as the emotional and personal problems their family had to endure as a result of the murders.[61]

Booth's defense counsel moved to suppress the victim impact statement, arguing that it was "both irrelevant and unduly inflammatory, and therefore its use in a capital case violated the Eighth Amendment of the Federal Constitution."[62] The Maryland trial court denied the motion, and Booth received a death sentence. The Maryland Court of Appeals affirmed the sentence.[63] The United States Supreme Court granted certiorari to consider whether the Eighth Amendment prohibited the consideration of victim impact evidence by a capital sentencing jury. The Supreme Court decided that such evidence was prohibited.[64]

The Court reasoned that the information in the victim impact statement was irrelevant and created a "constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner."[65] One reason capital sentencing decisions based on victim impact statements are arbitrary is that such statements can vary greatly from case to case based on the ability of the family members to articulate their grief.[66] The Court noted that in sentencing, a capital jury must focus on the defendant as a unique human being, but that a victim impact statement instead focuses "on the character and reputation of the victim and the effect on [the victim's]

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[56] *Id.* at 498, 510.
[57] *Id.* at 498.
[58] *Id.*
[59] *Id.*
[60] *Id.* at 499.
[61] *Id.*
[62] *Id.* at 500–01.
[63] *Id.* at 501.
[64] *Id.* at 501–02.
[65] *Id.* at 502–03.
[66] *Id.* at 505.

family."[67] These factors are unlikely to be related to the blameworthiness of the defendant and could shift the "jury's attention away from the defendant's background and record, and the circumstances of the crime."[68]

### B. *SOUTH CAROLINA V. GATHERS*—THE SUPREME COURT EXTENDS *BOOTH*'S HOLDING TO PROSECUTORS' FINAL ARGUMENTS

Not long after its decision in *Booth*, the Supreme Court heard another case related to victim impact evidence, *South Carolina v. Gathers*.[69] In *Gathers*, the Court considered whether a prosecutor's closing argument, which included extensive comments on the victim's character, was admissible as victim impact evidence despite the fact that the information did not come from a family member of the victim.[70] The Supreme Court of South Carolina, in light of *Booth*, reversed the defendant's death sentence in *Gathers* and remanded for a new sentencing procedure.[71] The United States Supreme Court agreed, stating:

> While in this case it was the prosecutor rather than the victim's survivors who characterized the victim's personal qualities, the statement is indistinguishable in any relevant respect from that in *Booth*. As in *Booth*, "[a]llowing the jury to rely on [this information] . . . could result in imposing the death sentence because of factors about which the defendant was unaware, and that were irrelevant to the decision to kill."[72]

In *Gathers*, Justice Scalia penned a vigorous dissent.[73] He argued that *stare decisis* should not prevent an overruling of *Booth v. Maryland*, since it was an erroneous opinion.[74] The next major Supreme Court case involving victim impact evidence granted Justice Scalia's wish. Just four years after *Booth v. Maryland*, and two years after *South Carolina v. Gathers*, the Supreme Court took the unusual step of overruling its recent precedent.[75]

### C. *PAYNE V. TENNESSEE*—THE SUPREME COURT REVERSES ITSELF AND ALLOWS VICTIM IMPACT EVIDENCE IN CAPITAL SENTENCING

In *Payne*, the defendant, Pervis Payne, was convicted on two counts of first-degree murder and sentenced to death for both murders.[76] Payne's girlfriend lived in an apartment across the hall from the victims, Charisse

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[67] *Id.* at 504.
[68] *Id.* at 505.
[69] 490 U.S. 805 (1989).
[70] *Id.* at 810–11.
[71] *Id.* at 810.
[72] *Id.* at 811 (quoting Booth v. Maryland, 482 U.S. 496, 505 (1987)).
[73] *Id.* at 823–25 (Scalia, J., dissenting).
[74] *Id.*
[75] Payne v. Tennessee, 501 U.S. 808, 825 (1991).
[76] *Id.* at 811.

Christopher and her two-year-old daughter, Lacie.[77] Payne went into Charisse's apartment and made sexual advances towards her, becoming violent when she resisted.[78] A neighbor called the police after hearing what she described as a "blood curdling scream."[79] When the police arrived, they found Charisse and her daughter dead from numerous stabbing wounds inflicted by a butcher knife.[80] Despite severe wounds, Charisse's three-year-old son, Nicholas, survived.[81]

At the sentencing phase of trial, victim impact evidence was presented, largely centering around the effect of the murder on Nicholas.[82] Payne received the death sentence.[83] The Supreme Court of Tennessee affirmed this sentence despite the defendant's argument that the victim impact evidence violated his Eighth Amendment rights under *Booth* and *Gathers*.[84]

### *1. Majority Decision in* Payne

The Court in *Payne* gave a nod to the concern that victim impact evidence would result in juries finding defendants whose victims were an asset to the community more deserving of punishment than those whose victims were perceived as less worthy.[85] The Court, however, went on to say that victim impact evidence was not offered for the purpose of encouraging such comparisons, but rather to show that each victim was a unique human being.[86]

The *Payne* majority concluded that, within constitutional limitations, states are free to prescribe the method by which those who commit murder should be punished.[87] States remain free to develop new procedures and methods to punish, and, according to *Payne*, victim impact evidence is just another method.[88] The Court concluded that the *Booth* decision was wrong, and that victim impact evidence in the majority of cases serves legitimate purposes.

> [A] State may properly conclude that for a jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing

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[77] *Id.*
[78] *Id.* at 812.
[79] *Id.*
[80] *Id.* at 812–13.
[81] *Id.* at 812.
[82] *Id.* at 814–16.
[83] *Id.* at 816.
[84] *Id.* at 816.
[85] *Id.* at 823.
[86] *Id.*
[87] *Id.* at 824.
[88] *Id.* at 824–25.

> phase evidence of the specific harm caused by the defendant . . . . By turning the victim into a "faceless stranger at the penalty phase of a capital trial," *Booth* deprives the State of the full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment for first-degree murder.[89]

In an opinion that discounted the view that "death is different,"[90] the Court in *Payne* agreed with the Supreme Court of Tennessee. The Supreme Court of Tennessee rejected Payne's arguments regarding the unfairness of victim impact evidence at his trial. They reasoned that it is an affront to civilized humans to allow unlimited witnesses to present mitigating evidence for the defendant, but not to allow evidence on the character of or harm inflicted on the victim.[91] The Court rejected the view that the defendant should get the broadest latitude under the Eighth Amendment while not permitting the state to argue to the jury the human cost of the crime the defendant committed.[92]

### *2. Dissenting Opinions in* Payne

Two dissents were written in *Payne*. Justice Marshall's dissent argued that even if the defendant were in a position to foresee the likely impact of his crime, victim impact evidence still creates an unacceptable risk of arbitrariness in sentencing.[93] Justice Marshall reiterated the *Booth* view that victim impact evidence has an inherent capacity to draw the jury's attention away from the defendant's character and the circumstances of the crime to things that should not bear on a sentencing decision, such as the eloquence of family members in expressing their grief or the status of the victim in the community.[94] Justice Marshall reminded the Court that death is different from other punishments, and chastised the majority for using noncapital sentencing procedures to infer proper treatment of sentencing issues in capital cases.[95]

Justice Stevens noted in his dissent that, up until the majority's decision in *Payne*, a decision to impose the death penalty had to be based solely on evidence informing the jury about the character of the offense and the defendant.[96] He wrote, "evidence that serves no purpose other than to appeal to the sympathies of the jurors has never been considered

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[89] *Id.* (citations omitted).
[90] *See supra* Part II.B.
[91] *Payne*, 501 U.S. at 826.
[92] *Id.* at 826–27.
[93] *Id.* at 846 (Marshall, J., dissenting).
[94] *Id.*
[95] *Id.* at 846 n.1.
[96] *Id.* at 856 (Stevens, J., dissenting).

admissible."[97] Justice Stevens argued that since the victim's character was not on trial, it should not be used as either an aggravating or mitigating circumstance.[98] His arguments also supported the idea that death is different.[99] His dissent pointed out that the Constitution grants certain rights to the criminal defendant and imposes special limitations on the state to protect the defendant from its disproportionate power.[100] Criminal prosecution therefore does *not* require an even balance between the defendant and the state.[101] Perhaps most relevant to the idea that jurors too easily identify with victim impact statements was Justice Stevens's response to the majority's assertion that victim impact evidence shows that each victim is unique. Justice Stevens stated that "[t]he fact that each one of us is unique is a proposition so obvious that it surely requires no evidentiary support."[102]

Despite the arguments of the *Payne* dissenters, *Payne v. Tennessee* has not been overruled and stands as the current law on victim impact evidence in capital cases.[103]

### D. *KELLY V. CALIFORNIA*—THE COURT DENIES CERTIORARI ON A RECENT VICTIM IMPACT EVIDENCE CASE

The most recent Supreme Court consideration of victim impact evidence resulted in denial of certiorari in the case of *Kelly v. California*.[104] *Kelly v. California* involved two cases where victim impact evidence was presented in video format.[105]

*Kelly* involved the murder of nineteen-year-old Sara Weir, whose body was found several days after she had been stabbed to death with a pair of scissors.[106] The body was nude and wrapped in a blanket, and a plastic bag was taped over the head with a helmet over the bag.[107] Kelly's fingerprints were found on the tape and helmet.[108] Kelly, who did not present any evidence at either the guilt or the sentencing phase, was sentenced to

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[97] *Id.* at 856–57.

[98] *Id.* at 859.

[99] *Id.* at 860.

[100] *Id.*

[101] *Id*.

[102] *Id.* at 866.

[103] *Id.* at 830 (majority opinion).

[104] 129 S. Ct. 564, 564 (2008) (denying certiorari).

[105] The video used as a victim impact statement is available at http://www.supremecourt.gov/media/media.aspx.

[106] People v. Kelly, 171 P.3d 548, 555 (Cal. 2007).

[107] *Id.*

[108] *Id.*

death.[109]

At sentencing, the victim's mother presented a videotape of Sara's life set to music that was played to the jury.[110] Kelly appealed his death sentence, arguing that the videotape should not have been admitted.[111] However, the appellate court agreed with the trial court that the probative value of the tape exceeded any prejudicial value, and affirmed the sentence.[112]

Justice Stevens disagreed with the decision to deny certiorari for *Kelly v. California*.[113] Even if the Court did not want to proscribe victim impact evidence completely, Justice Stevens noted that the *Payne* decision's lack of guidance on what was permissible as victim impact evidence has resulted in a lack of clear limits on the scope, quantity, or type of victim impact evidence capital juries are permitted to consider.[114] The only guidance that *Payne* provided was that victim impact evidence relating to the victim's personal characteristics and the emotional impact of the murder on the victim's family was permissible.[115]

States have admitted a wide variety of victim impact evidence, such as evidence regarding the victim's good character, talents, intelligence, spirituality, work ethic, education, and standing in the community, to name just a few.[116] Most states do not limit the number of witnesses who can give victim impact evidence, and have allowed a wide range of evidence to be presented concerning the murder's effects on the victim's family.[117] Not only has the verbal testimony allowed been broad, but courts have allowed victim impact testimony in several other media as well.[118] These media have included "poems, videotapes, pre-death photographs, and handcrafted items made by the victim."[119]

More guidance on victim impact evidence and more limits on the types of victim impact evidence that are admissible would lower the risk that the jury will decide a capital defendant's sentence in an arbitrary and capricious

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[109] *Id.* at 556–57.

[110] *Id.* at 557.

[111] *Id.* at 567–68.

[112] *Id.*

[113] 129 S. Ct. 564, 566 (2008) (statement by Stevens, J., respecting the denial of certiorari).

[114] *Id.*

[115] John H. Blume, *Ten Years of Payne: Victim Impact Evidence in Capital Cases*, 88 CORNELL L. REV. 257, 269 (2003).

[116] *Id.* at 269–70.

[117] *Id.* at 270.

[118] *Id.* at 271.

[119] *Id.* at 271–72.

manner. The Supreme Court should have granted certiorari in the case of *Kelly v. California* to revisit the issue of victim impact evidence. Even if the Court chose not to proscribe victim impact evidence entirely, it could have offered some much-needed guidance to the lower courts on the types of victim impact evidence that may be used in capital sentencing.

## IV. EXPLANATION OF PSYCHOLOGICAL SCHEMAS

The information presented in victim impact statements has the potential to overpower the constitutionally required mitigating information presented on behalf of the capital defendant. This is in part because the victim's story is generally more recognizable and relatable to the juror's own experiences than is the story of the defendant. Cognitive psychology recognizes that people filter information in a way that focuses on what is familiar through the use of schemas.

A brief overview of some of the cognitive structures that are involved in decisionmaking is helpful in understanding this concept of filtering information. A schema is a cognitive structure that categorizes information in the mind about certain subjects.[120] This includes both general knowledge of the subject, as well as specific instances.[121] For example, a supermarket schema might contain the general information that supermarkets are often part of a shopping center. A supermarket schema may also contain the specific example of the supermarket where a particular individual usually shops.[122]

Schemas are used to assign meaning to information we receive.[123] Schemas give us a frame of reference that we can use to interpret incoming information by matching it with preexisting schemas.[124] For example, if we receive information about a store located in a shopping center that sells food items, we may filter it through our supermarket schema and realize that the store is a supermarket. Schemas also help us filter out irrelevant stimuli and focus on information that seems important.[125]

There are three main types of social schemas: person, role, and event.[126] Person schemas contain information about specific personality types (for example, what an introvert is).[127] Role schemas contain

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[120] Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CALIF. L. REV. 1103, 1131 (2004).

[121] Moore, *supra* note 3, at 279.

[122] *Id.*

[123] Chen & Hanson, *supra* note 120, at 1133.

[124] Moore, *supra* note 3, at 279–80.

[125] *Id.* at 280.

[126] *Id.* at 281.

[127] *Id.*

information about different occupations or social roles, as well as social groups (for example, parents, blacks, or women).[128] Event schemas contain information about a variety of social events (for example, football games, faculty meetings, or robberies).[129]

Schemas also contain what are known as prototypes.[130] A prototype is not a specific instance, but rather can be defined as the best or most representative example of a schema.[131] For example, an individual's prototypical football player, or her best example of a football player, may be someone who is heavyset and muscular (but not an actual football player with whom the individual is acquainted).[132] A prototype of an event schema can be referred to as a "script."[133]

## V. HOW JURIES USE SCHEMAS TO PROCESS INFORMATION

Jurors often make decisions based on likelihoods rather than on absolute certainties.[134] When placed in such situations, people often use simplifying strategies known as heuristics to make decisions, rather than using mathematical or statistical methods.[135] Jurors use a common heuristic, the representative heuristic, in conjunction with schematic information processing to make decisions.[136] This is because jurors categorize statements and stories they hear through representative heuristics, "which hold[] that the likelihood that event *A* belongs to class *X* is equal to the degree to which *A* resembles or is similar to *X*."[137] When a juror is given information about a person, the juror uses that information to determine the likelihood that the person fits within a particular social schema.[138]

Juries use schema and scripts to decide which stories are believable or true. They assess the quality of a party's story against their own schemas.[139] Professor Moore explains:

> At trial, jurors are typically presented with concrete stories about human intentions and the nature of human affairs. Whether the representativeness heuristic reflects a

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[128] *Id.*
[129] *Id.*
[130] *Id.* at 282.
[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] *Id.* at 284.
[135] *Id.*
[136] *Id.*
[137] *Id.* at 284–85.
[138] *Id.* at 285.
[139] *Id.* at 284–85.

> particular mode of thought used to interpret these stories or a shorthand strategy for dealing with concrete problems, it seems that the jury's determination of "what really happened" will often be strongly influenced by the degree to which the concrete detailed stories told by the parties at trial match the instances or prototypes in the jurors' relevant schemas.[140]

Additionally, "concrete, emotionally interesting information has greater power [than abstract information has] to capture a juror's attention."[141] This is because concrete, emotional information is more likely to call up schemas or scripts that are well-worn into the juror's mind.[142] These previously existing scripts will be familiar and easier for the juror to grasp.[143]

Research shows that individuals do not call up all available schemas when assessing information.[144] Jurors filter out some potential schematic matches and use a limited number of schemas when assessing information at trial.[145] Jurors' use of schemas at trial poses a potential problem with the jurors' ability to hear and weigh all the evidence. This problem is referred to as belief perseverance.[146]

Belief perseverance essentially keeps a juror from changing his or her mind regarding an initial assessment of an uncertain event.[147] When presented with information, individuals often use scripts and schema to fill in the background information to explain why something happened the way it did, or why something is the way it is.[148] Once a juror has constructed an explanatory theory in this way, it becomes difficult for him or her to call the theory into question or pay attention to other potential feature matches.[149] Moore explains that "[p]eople generally try to minimize cognitive dissonance, that is, inconsistencies between their actions and their attitudes and beliefs . . . . [T]hey will explain away seemingly aberrant results in a way that does not call into question the validity of their initial judgment."[150] Belief perseverance makes it difficult for jurors to change the initial impressions they form of a case. A juror's assessment of information through schemas of what is familiar to him or her may prevent

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[140] *Id.* at 292.

[141] *Id.* at 290.

[142] *Id.*

[143] *Id.*

[144] Ronald Chen & Jon Hanson, *The Illusion of Law: The Legitimating Schemas of Modern Policy and Corporate Law*, 103 MICH. L. REV. 1, 71–72 (2004).

[145] Moore, *supra* note 3, at 293.

[146] *Id.* at 300.

[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] *Id.* at 302.

consideration of other countervailing information. A juror will look for and remember information that supports his or her initial impression.[151]

In other words, much potentially useful information at trial is filtered out and attention is instead focused on information that fits stored schemas or scripts.[152] Cognitive filters prevent jurors from considering all relevant evidence at trial. Instead, they consider the evidence that is most familiar to them and best fits their schemas and scripts.[153] People distort things in the direction of the familiar, and use scripts as templates to do so.[154] People follow the path of least dissonance, and jurors are no different. As discussed earlier, the beliefs they form will persist and make it difficult for them to see evidence contradicting those beliefs.[155]

Schemas undermine the fairness of sentencing hearings that allow victim impact evidence. Deeply ingrained cultural and social storylines often subconsciously influence our sense of how truth and justice should operate in the world.[156] We see and judge through filters that affect how we hear another's story, translate it into something consistent with our own experiences, and omit or distort information to "tell a smoother tale—a tale whose prototype waits in the mind to be triggered."[157] This can have significant effect on how a juror interprets information at trial.

Cognitive psychology scientifically shows that individuals best understand information that matches their own experiences.[158] Because of this, bridging disparate types of experiences often requires emphasizing what perspectives are shared in common and downplaying perspectives that are not shared.[159] It is not hard to see how victim impact statements essentially do the opposite of this. They emphasize a story that is generally easy to understand: the pain that a murder victim's family feels. It is not hard for most people to imagine on some level the emotional pain and horror of losing a loved one so tragically. However, the defendant's story is less likely to fit into a juror's scripts, and is downplayed as a result. How many jurors realistically understand the mitigating factors that have driven a capital defendant to commit a brutal murder? Professor Bandes notes that

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[151] *Id.* at 303.

[152] *Id.* at 304–05.

[153] *Id.*

[154] Richard K. Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case*, 47 STAN. L. REV. 39, 50–51 (1994).

[155] Moore, *supra* note 3, at 300.

[156] Sherwin, *supra* note 154, at 77.

[157] *Id.* at 81.

[158] Adam Benforado, *Frames of Injustice: The Bias We Overlook*, 85 IND. L.J. 1333, 1348 (2010).

[159] Bandes, *supra* note 10, at 375.

"[w]ho we are determines what we notice, what seems important, how we react to it, what connections we draw, and what meaning we attach to things . . . . [T]he stories we hear . . . are shaped by who we are."[160] To rephrase this in light of schema theory, the stories we notice and how we react to them are shaped by the experiences we have had in life and the schemas that have resulted from those experiences.

Often, the dominant narrative drowns out the alternative story.[161] In order for the alternative story (for our purposes, the defendant's story of what factors in his life led him to kill) to be heard, the dominant narrative (the victim's story) cannot be told.[162] Victim impact statements are stories that should not be told because they block the jury's ability to hear the defendant's story.[163] If the defendant's story is not heard, the jury has not truly considered the mitigating factors. A person's ability to empathize with those from different ethnic, racial, religious, or economic backgrounds is often hindered by ingrained, preconscious assumptions about them.[164] Narrow perspectives make relating to different life experiences and values a difficult task.[165]

Aristotle recognized that to accurately judge a wrongdoer, you must be able to put yourself in his shoes to truly comprehend the obstacles he faces.[166] The jury must attempt to put itself in the shoes of the capital defendant in order to accurately judge whether the defendant is deserving of the death penalty. The schemas that the emotions behind a victim impact statement trigger deflect the jury from considering the moral culpability of the defendant.

How does this happen? How do schemas and victim impact evidence tie in with the decisions that a jury makes? As noted earlier, schemas give us a frame of reference whereby we interpret incoming information.[167] The socially instilled storylines that we carry in our heads affect our sense of truth and justice.[168]

Mark Turner said: "Story is a basic principle of mind. Most of our experience, our knowledge, and our thinking are organized as stories."[169]

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[160] *See id.* at 384.
[161] *Id.* at 386.
[162] *Id.*
[163] *Id.* at 393.
[164] *Id.* at 399.
[165] *Id.*
[166] *Id.* at 403–04.
[167] *See supra* Part III.A.
[168] Sherwin, *supra* note 154, at 77.
[169] Lorie M. Graham & Stephen M. McJohn, *Cognition, Law, Stories*, 10 MINN. J. L. SCI. & TECH. 255, 280 (2009).

Law deals with stories, and stories are never more important in law than when they are presented at a capital defendant's sentencing hearing. How well the stories are told and received in this situation can literally make the difference between life and death for the capital defendant. To be successful at trial, lawyers must tell stories that will influence jurors to call up the schemas that will be beneficial to their clients.

The stories presented as victim impact evidence are frequently emotional, capturing the jury's attention more easily than the often unfamiliar information contained in the defendant's story.[170] Once the juror's attention is captured and he or she is listening, a victim impact evidence story is usually easier for a juror to match to a preexisting schema. The persuasive value of a victim impact statement comes from its ability to evoke shared images—images such as goodness, Christian piety, the little guy, and American patriotism.[171]

The prosecution in a capital trial attempts to vividly portray the lawless violence of the defendant, while "muting racial injustice, poverty and abuse that often shape the life of killers."[172] Remember, people are prone to use schemas to fill in background information about why something happened the way it did. It stands to reason, then, that jurors who have trouble finding a schema that matches the defendant's story may view that story as implausible, and fill in the background with their own schemas. For example, a juror may reject a defendant's rough background as a valid explanation of why the defendant committed an atrocious crime, because there is no matching schema and the explanation is therefore implausible.[173]

As evidenced by a severe jury verdict in a case where the jury did not believe the defendant's story, juries evaluate the stories they hear and have strong negative reactions to stories they deem implausible.[174] Additionally, gut reactions to implausible stories can include reactions of moral outrage.[175] In the absence of an explanation, the juror may fall back on a schema already present in his or her mind, such as, 'there are no explanations for such actions,' making someone who commits such a heinous crime deserving of death.

Capital trials effectively hide and make invisible some kinds of violence.[176] A binary opposition between the angelic character of the murder victim who did not deserve to die and the evil character of the

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[170] *See supra* Part III.B.

[171] SARAT, *supra* note 7, at 58.

[172] *Id.* at 91.

[173] *See supra* Part III.B.

[174] Graham & McJohn, *supra* note 169, at 288–89.

[175] *Id.* at 290.

[176] SARAT, *supra* note 7, at 155.

perpetrator who does not deserve to live is the dominant cultural motif for representing violence and victimization. Instead of confronting complex social problems, we are invited to see them in stark and simple terms.[177]

Lawyers for capital defendants attempt to make the jury hear a story that goes "beyond evil deeds to the desperate lives that produce those deeds."[178] This is a difficult task, however, because schemas developed by jurors influence how they react to stories they hear, so the narratives told for a capital defendant must connect to commonplace, culturally recognizable themes.[179] The power of a victim impact statement's more recognizable story may easily drown out the defendant's story, blocking any chance the defendant has of actually receiving meaningful consideration of the mitigating circumstances in his case.[180]

## VI. ANALYSIS OF A VICTIM IMPACT EVIDENCE STORY

To understand the imbalance between the story told in the victim impact evidence and the story told in the defendant's mitigating factors, an analysis of those factors in a particular case is helpful. As mentioned earlier, this Comment will conduct an analysis of both the victim impact evidence and the mitigating evidence presented at the sentencing hearing in *United States v. Sampson*.[181]

### A. BACKGROUND OF *UNITED STATES V. SAMPSON*

In *United States v. Sampson*, Gary Sampson was convicted on two counts of carjacking resulting in death, and was sentenced to death for these convictions.[182]

Sampson committed several brutal murders. Sampson first killed Phillip McCloskey on July 24, 2001.[183] Sampson was hitchhiking and McCloskey picked him up. Sampson killed McCloskey by stabbing him with a knife and attempted to steal his automobile.[184] A few days later, on July 27, Sampson was again hitchhiking and was picked up by a college student, Jonathan Rizzo.[185] Sampson tied Rizzo to a tree, then stabbed him to death and stole his automobile.[186] On July 30, Sampson committed

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[177] *Id.* at 122–23.
[178] *Id.* at 162.
[179] *Id.* at 170.
[180] Bandes, *supra* note 10, at 386.
[181] 335 F. Supp. 2d 166 (D. Mass. 2004).
[182] *Id.* at 173.
[183] *Id.* at 174.
[184] *Id.*
[185] *Id.*
[186] *Id.*

another murder by tying Robert Whitney to a chair and strangling him to death.[187] Sampson then stole Whitney's automobile.[188] Finally, on July 31, Sampson was again hitchhiking and was picked up by William Gregory, on whom he pulled a knife.[189] Gregory, however, escaped and called the police to report his car stolen.[190] Not long afterwards, Sampson called the police and surrendered.[191]

Sampson offered to plead guilty and accept a federal sentence of life in prison without parole.[192] However, his plea was rejected by the Department of Justice, and, on November 19, 2002, the Attorney General filed a notice to seek the death penalty against Sampson.[193] Sampson pled guilty on both counts, and a jury was impaneled to determine the penalty, which it decided should be death.[194]

### B. THE VICTIM IMPACT EVIDENCE IN *SAMPSON*

In *Sampson*, the prosecution had six witnesses testify as victim impact witnesses: three of McCloskey's adult children, Rizzo's parents, and one of Rizzo's younger brothers.[195] The witnesses' testimony was given in a question-and-answer format and comprised about two hours of prosecution evidence.[196] The judge gave the jury a lengthy explanation of the reasons for which the jury could permissibly consider the victim impact evidence.[197] Even though he noted that the jury was not permitted to allow the "victim's families' testimony to overwhelm [its] ability to follow the law,"[198] the judge also told the jury that "I expect that the testimony that you're going to start hearing soon will be emotional. In fact, [the Deputy Clerk] has some [Kleenex] and if we discern that anybody wants or needs it, he'll give it to you."[199] Despite the acknowledgement that the testimony was likely to be emotional, the judge finished his instructions with the severe warning that "You may not base the decision on undue sympathy, passion, or

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[187] *Id.* at 175.
[188] *Id.*
[189] *Id.*
[190] *Id.*
[191] *Id.*
[192] *Id.*
[193] *Id.*
[194] *Id.*
[195] *Id.* at 189.
[196] *Id.* The total prosecution evidence was about two weeks. The transcript of the victim impact testimony was sixty-three pages of a very lengthy trial transcript.
[197] *Id.* at 189–91.
[198] *Id.* at 190.
[199] *Id.* (alteration in original).

prejudice."[200]

C. THE DEFENDANT'S MITIGATING EVIDENCE IN *SAMPSON*

In *Sampson*, the defense introduced mitigating evidence showing that Sampson was mentally ill and had been abused as a child.[201] Sampson argued that his capacity to conform his conduct to the law was significantly impaired.[202] The federal death penalty statute provides that if a person's ability to conform his conduct to the law is significantly impaired, even though not impaired enough to consider him not guilty, this can still be a mitigating factor making him less blameworthy than someone without comparable impairment.[203]

The defense in *Sampson* tried to prove mental illness and brain dysfunction.[204] Brain dysfunction occurs when a person's brain has difficulty performing certain functions such as controlling impulses.[205] Such impairment can be caused by things such as mental illness, alcohol abuse, or withdrawal from use of drugs.[206]

Testimony for the defense at Sampson's trial painted a picture of Sampson's troubled life. A social worker at Sampson's trial testified that Sampson's life began unraveling at age twelve with the use of drugs and alcohol.[207] Sampson claimed that his father beat him and verbally abused him.[208] A prison counselor testified that, while Sampson was serving time for theft and burglary, he frequently sought help for mental health and substance abuse issues.[209] A forensic neuropsychiatrist testified that Sampson knew that what he was doing when he murdered was wrong, but that he lacked the capacity to stop himself.[210] Despite the fact that the defense raised seventeen mitigating factors, the jury did not feel that the mitigating factors outweighed the aggravating factors, and they sentenced

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[200] *Id.* at 191.

[201] *Sampson Defense to Make Case*, INT'L JUST. PROJECT (Dec. 3, 2003), http://www.internationaljusticeproject.org/fedArticles.cfm?print=yes#MassSampson031203.

[202] *Sampson*, 335 F. Supp. 2d at 232.

[203] 18 U.S.C. § 3592 (2006).

[204] *Sampson*, 335 F. Supp. 2d at 232.

[205] *Id.* at 232–33.

[206] *Id.* at 233.

[207] *Killer's Parents Severed All Ties to Son*, INT'L JUST. PROJECT (Dec. 3, 2003), http://www.internationaljusticeproject.org/fedArticles.cfm?print=yes#031203-1.

[208] *Sampson Defense to Make Case*, *supra* note 201.

[209] *Sampson Pleaded for Help, Court Told*, INT'L JUST. PROJECT (Dec. 4, 2003), http://www.internationaljusticeproject.org/fedArticles.cfm?print=yes#MassSampson031204.

[210] *Doctor Says Killer Couldn't Stop Himself—Sampson Defense Calls*, INT'L JUST. PROJECT (Dec. 11, 2003), http://www.internationaljusticeproject.org/fedArticles.cfm?print=yes#MassSampson031211.

Sampson to death.[211]

### D. ANALYSIS OF AGGRAVATING VS. MITIGATING EVIDENCE IN *SAMPSON*

The two competing narratives in *United States v. Sampson* gave jurors a tough decision to make. Should they listen more closely to the story the victims told of the incredible loss suffered in the aftermath of a horrible murder, or should they listen to the story the defendant told of being driven to commit horrendous crimes in the aftermath of a tough life? This is a common choice juries must make in a capital sentencing trial.

The jurors in the *Sampson* case had to decide if the defendant's purported mental illness was real and was substantial enough to make him undeserving of the death penalty. In the end, the jury rejected Sampson's story of mental illness.[212] Interestingly, the judge in this case disagreed with the jury's finding that Sampson was not mentally ill.[213] The jury said that the proof of mental illness was lacking, but Judge Mark Wolf openly disagreed with the jury and stated that he believed Sampson was indeed mentally ill.[214]

What caused the jury to reject Sampson's story? Look at the competing storylines and consider the schemas they were likely to evoke.

The storyline of the victims is one of good citizens caught in the wrong place at the wrong time. McCloskey and Rizzo were kind, generous souls, to a fault. They gave a ride to a fellow citizen, who appeared to need assistance. Yet this kindness resulted in horrific murders, which left behind families devastated by the loss of a member of their close-knit clan.[215] A jury, hearing this information, could recognize this storyline and accept it as plausible. A good citizen who is part of a close family matches a well-recognized, socially acceptable schema.

The storyline of the defendant, on the other hand, is a story of a wild, cold-hearted individual with no self-control. The defense tried to convince the jury that Sampson lacked the ability to stop himself from acting the way he did,[216] but the jurors could not accept this. One juror noted that she rejected the mental illness claim because there was testimony in the case

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[211] *Killer Gets Rare Death Penalty in Massachusetts*, INT'L JUST. PROJECT (Dec. 24, 2003), http://www.internationaljusticeproject.org/fedArticles.cfm?print=yes#MassSampson031224.

[212] *Id.*

[213] *Judge Views Sampson as Mentally Ill*, INT'L JUST. PROJECT (Jan. 27, 2004), http://www.internationaljusticeproject.org/fedArticles.cfm?print=yes#MassSampson040127.

[214] *Id.*

[215] United States v. Sampson, 335 F. Supp. 2d 166, 174–75 (D. Mass. 2004).

[216] *Doctor Says Killer Couldn't Stop Himself—Sampson Defense Calls*, *supra* note 210.

that Sampson could tell right from wrong.[217] The jury had trouble trying to find a schema matching the information that the defense presented about how Sampson's mental disturbances drove him to commit a series of brutal murders. Mark Rizzo, father of murder victim Jonathan Rizzo, expressed his (understandable) frustration at the defense's attempt to mitigate Sampson's actions.[218] Rizzo said, "I think this is going to make us more frustrated and angry, to have to listen to people depict him as a good guy who had things go wrong in his life."[219] Although the father of a murder victim certainly cannot be faulted for his emotions at a sentencing trial, the jury is not supposed to let sentiments like this sway their reasoned decisions. However, Mark Rizzo's feelings seem to have resonated with the jurors as well. The jurors in Sampson's case could not accept the mitigating evidence that someone could have had so many severe issues and problems in his life that the death penalty was too cruel a punishment. Instead, they accepted the story that what Sampson had done was so depraved, and so unforgiveable and unexplainable, that he deserved to be excluded permanently from the human community.[220]

Sampson appealed his sentence and moved for a new trial, arguing that his lawyers at his initial sentencing trial did not give the jurors a full picture of his troubled life.[221] Sampson argued that, if the jury had received more information about his mental illness and childhood trauma, he would not have been given a unanimous death sentence.[222] On October 20, 2011, a federal judge threw out the death sentence against Sampson and ordered a new trial.[223] The judge said that Sampson is "entitled to a new trial to determine whether the death penalty is justified in his case."[224]

## VII. CONCLUSION

Although victim impact evidence may be acceptable in certain types of sentencing, capital punishment is a special situation. Because "death is different," there must be strict controls on what information is presented to a jury when a defendant's life hangs in the balance. The decision to execute

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[217] *Judge Rejects Sampson's Bid to Throw Out Death Penalty*, INT'L JUST. PROJECT (Jan. 27, 2004), http://www.internationaljusticeproject.org/fedArticles.cfm?print=yes#040127-1.

[218] *Id.*

[219] *Sampson Defense to Make Case*, *supra* note 201.

[220] *Sampson*, 335 F. Supp. 2d at 166, 175.

[221] *Taunton Man's Killer Gary Sampson Makes an Appeal from Death Row*, HERALD NEWS (Aug. 30, 2010, 10:08 AM), http://www.heraldnews.com/news/x1350691441/Gary-Sampson-makes-an-appeal-from-death-row.

[222] *Id.*

[223] *Convicted Killer Gary Sampson Gets New Trial*, BOS. HERALD (Oct. 20, 2011), http://www.bostonherald.com/news/regional/view.bg?articleid=1374767.

[224] *Id.*

a defendant is absolutely irreversible and should not be taken lightly. The Supreme Court has recognized that a sentence of capital punishment must not be decided upon arbitrarily and that meaningful consideration must be given to all mitigating factors. Yet, the Supreme Court, despite allowing victim impact evidence, nevertheless has recognized that there is a risk of passion overwhelming reason in sentencing.[225]

Where should the line be drawn on what victim impact evidence is admissible in capital sentencing? Victim impact statements tell stories that are so easily identifiable to jurors that they cause jurors to easily match them with preexisting schemas and ignore the information presented as the defendant's story.[226] This means that jurors do not give meaningful consideration to the defendant's mitigating evidence, an outcome that is constitutionally unacceptable.

Because of the danger that the story told in the victim impact evidence will silence the story of the defendant told by the mitigating evidence, the best outcome would be for the Supreme Court to return to its original ruling in *Booth v. Maryland* and prohibit victim impact evidence statements in capital trials altogether. It may, however, be unrealistic to expect the Court to overturn *Payne*, which is now a nearly twenty-year-old precedent. Short of overturning *Payne* altogether, the Court should at the very least grant certiorari on the next capital sentencing victim impact evidence case that it has the opportunity to hear. Had the Court reviewed *People v. Kelly*, it could have set limits on how much and what types of victim impact evidence were permissible. This would have at least minimized the passion and arbitrariness that such evidence injects into the required fair reasoning process of a capital sentencing verdict.

"Death is different," and the Constitution of the United States requires that no individual be deprived of his freedom, or life, without due process of law.[227] Although the actions of capital defendants are morally reprehensible, our Constitution requires that their stories should be heard. The silencing of these stories through victim impact evidence must be ended.

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[225] Payne v. Tennessee, 501 U.S. 808, 836 (1991).

[226] *See supra* Part IV.

[227] *Payne*, 501 U.S. at 825.