VICTIM IMPACT STATEMENTS CONSIDERED IN SENTENCING: CONSTITUTIONAL CONCERNS

[cite as "2 Cal. Crim. L. Rev. 3"; pincite using paragraph numbers]

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ABSTRACT

Victim Impact Statements (hereinafter referred to as "VISs") are statements read by, or on behalf of, crime victims at the sentencing phase of criminal trials. VISs have been occasionally constitutionally challenged in American courts. The challenges have typically been that VISs conflict with the Eighth Amendment's "Proportionality Doctrine", which holds that punishment must be proportional to the crime. The United States Supreme Court has considered three times in recent years whether the reading of a VIS at the sentencing phase of criminal proceedings is constitutional[1]. The present constitutional status of VISs is that the proportionality doctrine "does not erect a per se bar" to the admissibility of VISs at sentencing proceedings, but the Fourteenth Amendment may provide a door to relief[2]. This note examines the Eighth Amendment treatment of VISs by the Court, and the possibility of future Fourteenth Amendment due process challenges to the consideration of VISs during the penalty phase of criminal proceedings.

INTRODUCTION AND HISTORY

"... I am wronged. It is a shameful thing that you should mind these folks that are out of their wits." Martha Carrier, hanged, August 19, 1692, Salem, MA, Commonwealth of Massachusetts General Court of Oyez and Terminer (The Salem Witch Trials).

¶1 Victim Impact Statements ("VISs") are statements read by, or on behalf of, victims of crime at the sentencing phase of criminal proceedings. After the defendant has been found guilty by the judge or jury, the victim is afforded the opportunity to make a statement to the court regarding the impact of the crime on the victim and her family. Typically these statements are offered by the victim to encourage the maximization or enhancement of the penalty upon the defendant. The statements are often filled with emotion, and the defendant is not able to rebut the statements.

¶2 VISs are one of the legacies of English Common Law. Around the 13th Century, when civil torts and criminal actions first became distinguished in England ("Actions in Trespass" and "Actions in Trespass on the Case," respectively), VIS' were permitted, as the Crown stood in the shoes of the victim of the offense in English adversarial proceedings[3]. Victims were allowed to speak in support of the Crown in "keeping the King's peace," and as punishment of the perpetrator replaced restitution to the victim, as the government's primary objective[4].

¶3 During the early development of American colonial criminal justice, criminal prosecutions were private actions in which the victim paid public officials fees to assist in the prosecution. Constables and justices of the peace would investigate the crime, file charges against the offender, and prosecute the case in return for fees paid by the victim. The victim was sometimes even responsible for the costs of incarcerating and feeding the offender while he awaited trial.

¶4 During the eighteenth century, American prosecution of crime evolved from a private action into a state action. The states, like the Crown, realized the need to avoid private retribution for criminal wrongs in order to maintain a civilized society.

¶5 This evolution, which began as the theory that crime was a societal interest and concern, rather than an individual interest of the victim, gained momentum[5]. The state took over the lead role in prosecuting wrongdoers on behalf of society, rather than on behalf of the victim; "Victim v. Offender" was replaced with "State v. Offender" in court pleadings. To maintain a semblance of victim participation in the process, victims continued to make statements at some point in the criminal trial of the offender, although the state had already taken over the lead role in the prosecution.

¶6 The United States Supreme Court has held that the purpose of restitution is to accomplish the penal goals of the state, not to compensate victims[6]. One objective of the restitution aspects of criminal proceedings is to alleviate the financial burden of the victims in seeking the recovery of their money damages through civil process[7].

¶7 The ensuing two centuries of Anglo-American legal tradition enable and encourage victims of crimes to make or submit a statement at the sentencing phase of trials. The theory goes that the victim of a robbery, for instance, can best explain the value of the property taken; the next of kin of a murder victim is uniquely able to articulate the impact of the loss of her loved one. The ability to introduce a VIS is also viewed by many as a means for the victims to heal their wounds and to gain some closure on a horrible chapter in their lives.

MODERN USE OF THE VICTIM IMPACT STATEMENT

¶8 One constitutional conflict which arises from this practice, is that punishment may be enhanced where more articulate, or more pitiful victims make a VIS, than in cases where the victim is inarticulate or otherwise unappealing. In those instances the severity of the *statement* may have more of an impact on the sentencing authority than the severity of the *crime.* This has been one of the "proportionality" arguments against the VIS in *Booth, Gathers* and *Payne*[8]. As Justice Marshall noted, dissenting in *Payne,*

> [T]he probative value of [victim impact] evidence is always outweighed by its prejudicial effect because of its inherent capacity to draw the jury's attention away from the character of the defendant and the circumstances of the crime to such illicit considerations as the eloquence with which family members express their grief and the status of the victim in the community.[9]

THE POPULARITY OF VICTIM IMPACT STATEMENTS

¶9 The impact of felonious crime upon its victims is inherently severe and profound, and society views those convicted of these types of crimes with scorn and abhorrence. The victim of violent crimes, conversely, is viewed as vulnerable and wounded. Society wants to punish the defendant and help the victim to the greatest extent possible.

¶10 Punishing defendants, as well as aiding crime victims, are both popular notions in our society. It makes great political sense to propose a bill that protects a victim and punishes an accused: there is no risk that efforts to protect victims' rights would ever be unpopular with voters. A well-placed sound-bite on the evening news, calling for gun control in the wake of a violent crime, means votes. "Victim's Rights" initiatives are likewise risk-free political pandering for professional politicians.

¶11 American state legislatures have rushed to the aid of victims with "Victim's Rights" laws and state constitutional amendments with increasing frequency. Forty-nine of the fifty states have enacted legislation or state constitutional amendments which permit the reading of a VIS at the sentencing phase of criminal proceedings[10]. Logically, of course, a pragmatic politician would commit electoral suicide by opposing *any* "Victim's Rights" initiative.

¶12 A typical "Victim's Rights Bill" includes the opportunity for the victim to make a statement about the impact of the crime at sentencing. Michigan's victim legislation, for example, is as follows:

> MCL 780.765
>
> CRIME VICTIM'S RIGHTS ACT (Act 87 of 1985)
>
> 780.765 Oral impact statement at sentencing.
>
> Sec. 15. The victim shall have the right to appear and make an oral impact statement at the sentencing of the defendant.

¶13 The argument *for* victims' rights has popular appeal, as many believe that the only ones protected by our justice system are criminals. A common cry for victim's rights is that the Constitution only provides protection for criminals, yet provides no protection for victims. This is, of course, not only legally accurate, but constitutionally necessary and logical: the accused is the person whose rights must be protected, not the victim. The Constitution does not protect the defendant's right to commit a crime; it protects the defendant's rights when he is being tried for committing a crime.

¶14 Why question inhibiting or prohibiting the statement of the bereaved in their most profound time of loss? There would seem to be little harm to permitting the victims to make a statement about their grief. However, such a statement may, in some circumstances, encroach upon the safeguards provided by the federal constitution.

¶15 A victim of a violent crime presents a vulnerable, wounded member of our society, seeking a chance to be heard, and it is our nature to want her to heal her wounds. What harm could lie in allowing her to be heard after some one has been convicted of a crime that caused her loss, or contributed to the cause of her loss? The challenger to a VIS will likely appear to be an unfeeling ogre, and may be subject to severe "jury justice" in sentencing, despite a plausible constitutional objection.

CONSTITUTIONAL CONCERNS REGARDING VICTIM IMPACT STATEMENTS

¶16 The VIS, like much of our common legal heritage, was inherited from the laws of the Crown, but subject to the limitations which our Constitutional framers placed upon that common law. Today's VISs find their origin in the common law practice of permitting victims to exert emotionally charged influence upon the judge and jury in the consideration of sentencing. Like many other elements of the common law, the VIS has come into conflict with our federal constitution, as the Constitution has been interpreted and developed over the past two centuries. The traditional common law VIS may not comport with the Eighth Amendment's proportionality doctrine, or the Fourteenth Amendment's due process guarantee. Congress has enacted federal legislation in favor of victims several times in recent years: "The Victim And Witness Protection Act" (1982); the "Victims of Crime Act" (1984); the "Victims Rights and Restitution Act" (1990); and the "Victim's Bill of Rights" (1994). To seize the

political opportunity the Oklahoma City bombing presented, Congress enacted "The Effective Death Penalty and Anti-Terrorism Act of 1996."

¶17 Most jurisdictions permit the jury or judge to consider a VIS at some stage of the proceedings. A defense lawyer runs a great risk when challenging a complaining witness/victim regarding the trauma of violent crime in any way, as counsel will be viewed as persecuting an already weakened victim. Any attempt by defense counsel to obstruct her VIS will surely be met with disapproval, if not disgust, and possibly retaliation by the sentencing authority, particularly where a jury determines the sentence. Defense counsel risks being viewed in that situation as *opposing* the victim, rather than *representing* the accused.

¶18 Because a challenge to the introduction of a VIS is fraught with such peril, the VIS is seldom challenged on constitutional grounds. The defense attorney runs the risk that the *challenge itself* may result in a harsher sentence for the defendant. Considering the societal preference to allow the VIS, coupled with the risk inherent in challenging the VIS, why even consider denying the victim of a tragic loss the opportunity to articulate her loss in the presence of the perpetrator?

¶19 In *Booth, Gathers, and Payne,* the defendants had nothing to lose by taking their challenges all the way to the Supreme Court: all had been sentenced to death after the reading of the VIS. It is likely that any (future) successful challenge to the VISs constitutionality will come from a capital case for that reason. The likelihood of a successful challenge is so slight that a defendant sentenced has more to lose than to gain by appealing. The risks associated with challenging the VIS are probably only worth taking where the defendant is sentenced either to life imprisonment or death. The risk/reward analysis, however, is not determinative of whether the VIS, as presently applied, violates the Eighth and/or Fourteenth Amendment of the federal constitution.

THE EIGHTH AMENDEMENT CHALLENGE TO THE VICTIM IMPACT STATEMENT

A. Development of the Proportionality Doctrine

¶20 The Eighth Amendment to the federal constitution reads as follows:

> *"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."*

¶21 The scope of Eighth Amendment protection was rarely contemplated by the Supreme Court in the first century after the adoption of the constitution. It was not until the latter part of the nineteenth century's United States Supreme Court decisions that it was occasionally considered. Through the end of the nineteenth century, the Court held that the Eighth Amendment's prohibition against cruel and unusual punishment barred only those common law, corporal punishments which had been banned in England: burning, branding, and other horrific torture-style punishments.

¶22 Expansion and explanation of the cruel and unusual clause was first given consideration in 1892 by Justice Field in *O'Neil v. Vermont*[11]. O'Neil was convicted of transporting bottles of bootleg alcohol, and sentenced to 50 years at hard labor in the Vermont state prison. Justice Field wrote, dissenting, that O'Neil's punishment was not proportional to the crime for which he was convicted, and that his sentence was so disproportionate to the crime, that it violated the cruel and unusual clause of the Eighth Amendment.

¶23 Field wrote that the Eighth Amendment went further than prohibiting barbaric physical punishments. He argued that there was a further protection given: a guarantee that the sentence be proportional to the crime. The Court did not agree with Justice Field, and O'Neal served his 50 years, but Field's dissent became the genesis for the Proportionality Doctrine of the Eighth Amendment 18 years later.

¶24 In 1910, a man named Weems was convicted of falsifying some government applications in the Phillipines. His sentence was that he forfeit his passport, serve 15 years at hard labor, and be shackled in leg irons for the 15 years. The United States Supreme Court, in *Weems v. United States*[12], relied on Justice Fields's dissent in *O'Neil,* and held that the Eighth Amendment *did* contain a protection against disproportionate sentencing, and that Weems' sentence did not fit the crime and was inherently unconstitutional. The Proportionality Doctrine took hold with *Weems.*

¶25 "Proportionality" has been the tool with which the Court strikes down inherently unfair and unjust sentencing statutes and guidelines[13]. Proportionality would logically require an impartial sentencing authority to determine the sentence after a rational decision making process, limited to the defendant's culpability and the circumstances of the crime. Proportionality requires a nexus between the punishment imposed and the defendant's blame-worthiness. In addition, a defendant's punishment must be tailored to his personal responsibility and moral guilt[14].

¶26 The United States Supreme Court first applied the Proportionality Doctrine to the constitutionality of the VIS in 1987 in *Booth v. Maryland.* The *Booth* Court held that the introduction of the VIS at the penalty phase of a capital murder trial was inherently repugnant to the Eighth Amendment. The *Booth* decision gave rise to a bitter Eighth Amendment contest between opponents and proponents of the VIS.

B. The Proportionality Doctrine as Applied To Victim Impact Statements

¶27 The United States Supreme Court has equivocated in its Eighth Amendment analysis of the constitutionality of the VIS, first striking down statutes allowing VISs in its first two cases, *Booth v. Maryland* in 1987 and *South Carolina v. Gathers* in 1989, then reversing itself in 1991 by upholding the constitutionality of VISs in *Payne v. Tennessee*. The Court was sharply divided in all three cases, and the arguments pro and con were similar in all three cases[15].

¶28 The crimes committed in *Payne*, *Gathers* and *Booth* had one major similarity: all were brutal attacks against defenseless, innocent, pitiful victims with strong family ties and emotionally charged survivors who actively sought the maximum penalty available for the respective defendants. In each case, the VIS' fanned emotional flames during the penalty phase, and enhanced the possibility of enhanced penalties due to the characteristics of the homicide victims, coupled with the effective articulation of those "good character" qualities by the victims' survivors and the state. The effects of the crime on the survivors overshadowed the criminal liability of Payne, Gathers and Booth.

¶29 The introduction of "good character" evidence regarding the victims in each of these three cases was of concern to the Supreme Court, and in each case the result was a sharply divided court. The *Booth* Court noted that the introduction of this "good character" evidence would then necessitate permitting the defendant to rebut the evidence, which would then create a mini-trial on the character of the victim[16]. As *Booth's* attorney George Burns, Jr. asserted at oral argument, this aspect of the VIS places greater value on some lives than others, which would logically result in more severe sentencing for defendants convicted of murdering some citizens, compared to those who murder other citizens, despite the fact that the character of the victim seldom, if ever, is part of the defendant's decision to kill.

¶30 In *Booth,* the Supreme Court, by a 5 to 4 margin[17] determined that the reading of a VIS was *per se* unconstitutional as it violated the Eighth Amendment's Proportionality Doctrine. The narrower question presented to the Court for review in *Booth* was, "[w]hether the Constitution prohibits a jury from considering a victim impact statement during the sentencing phase of a capital murder trial."[18] The *Booth* Court held that "the admission of the family members' emotionally charged opinions and characterizations of the crimes could serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant. Such admission is therefore inconsistent with the reasoned decision making required in capital cases."[19]

¶31 The state of South Carolina afforded the Court an opportunity to reaffirm its *Booth* decision in *Gathers v. South Carolina*. There can be no more evil a defendant than Demitrius Gathers, and in a state that executes people, which South Carolina does, it would be difficult for the state to botch a death sentence with facts like these, yet South Carolina managed to do so. The reason the state failed in its effort to kill Demetrius Gathers was its insistence on reading an irrelevant VIS which directly violated a recent Supreme Court decision (*Booth*).

¶32 The facts of the *Gathers* case make as good a place as any other to debate the constitutionality and legal relevance of the VIS, because it presents the most factually compelling basis for *permitting* the consideration of the VIS. *Gathers* affords us a direct view of a conflict between good and evil. The crime was horrible, the victim was vulnerable, the evidence against the defendant included a confession, and the VIS was sought by the survivors and the state.

¶33 The evidence showed that Gathers and 3 companions encountered the victim, Richard Haynes, on a park bench in South Carolina one evening[20]. The record showed that Haynes was a lay minister, who had a series of mental problems. Haynes was in the park, carrying several bags of religious artifacts, including bibles, rosaries, and religious tracts.

¶34 He went to the park, as his mother testified, to "spread the Word". The religious tract had been written by Haynes, and was called "The Game Guy's Prayer." It extolled the virtue of sports, and the values of leading a Christian life through football and boxing metaphors. It would be difficult to create a victim who could create more sympathy among jurors than Richard Haynes. Demetrius Gathers, in contrast, was a violent thug. Gathers and three friends sat on the park bench next to Haynes, drinking beer as Haynes was reading a Bible. When Gathers attempted to engage Haynes in conversation, Haynes stated he did not wish to talk to Gathers[21].

¶35 Gathers and his friends then proceeded to brutally beat and kick Haynes. Gathers smashed his beer bottle over Haynes' head. He then beat Haynes severely with an umbrella. Before leaving the scene of the beating, as Haynes lay unconscious, Gathers inserted the umbrella in Haynes' anus and tried to open it.

¶36 After adjourning to the apartment complex where Gathers and some of his friends lived, Gathers and one friend returned to the park with a large knife. As Haynes lay partially conscious, Gathers and his friend strew his belongings along a bike pathway, looking for something to steal, but finding nothing. Gathers then stabbed Haynes repeatedly until he died. Gathers admitted to all the facts presented[22].

¶37 Despite the overwhelming evidence, including Gathers' own admission of the horrible crime, and the victim's pitiful characteristics, the prosecutor felt compelled to introduce a statement about the defendant's religious orientation and his civic nature through reintroduction of the religious tracts and

the voter card at sentencing. The Supreme Court held that the reintroduction of that evidence through the VIS "was purely fortuitous and could not provide any information relevant to [Gathers'] moral culpability…."[23]

¶38 The prosecution in Gathers' trial was inferentially asking the jury to place greater value on the lives of victims who were religious, or who were "good citizens", than those who weren't. The jury responded by sentencing Gathers to death. The Supreme Court of South Carolina reversed Gather's death sentence, in light of *Booth,* and the United States Supreme Court affirmed, holding that "allowing the jury to rely on [the prosecutor's comments about the victim] … 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."[24] The *Gathers* Court held that Gathers should not be executed because the victim was a religious citizen who voted.

¶39 *Gathers* illustrates the delicate conflict the VIS causes with the Eighth Amendment, as well as with the theory of legal relevance. The VIS in *Gathers* would place relative values on different lives. Would Gathers be less culpable if he had committed the same terrible crimes on an atheist, or a person who didn't vote? Did Haynes' character play any part in Gathers' decision to kill?

¶40 In 1991, the Supreme Court reversed its decisions in *Booth* and *Gathers* in *Payne.* In a rare instance of reversing itself in a very short period of time, the *Payne* Court stated that "although adherence to the doctrine of *stare decisis* is usually the best policy, the doctrine is not an inexorable command. This Court has never felt constrained to follow precedent when governing decisions are unworkable or badly reasoned … *Booth* and *Gathers* were decided by the narrowest of margins, over spirited dissents challenging their basic underpinnings; have been questioned by Members of this Court in later decisions; have defied consistent application by the lower courts … [citations omitted] and, for the reasons heretofore stated, were wrongly decided."[25]

THE POTENTIAL FOR FOURTEENTH AMENDMENT CHALLENGES TO THE VIS

¶41 The *Payne* Court shifted the analysis of the VIS' constitutionality from the Eighth amendment to the Fourteenth, from "cruel and unusual" to "procedural due process". In the due process context, the Court discussed the evidentiary issues raised by the VIS. While the Court reversed *Booth* and *Gathers* as to the proportionality issue, it left open the door to challenge the VIS via the Fifth and Fourteenth Amendment's Due Process clauses. The Court held that "the Eighth Amendment erects no per se bar" to the admission of victim impact evidence, which closed the door, for all practical purposes, to most Eighth Amendment challenges to the VIS[26]. The Court then announced due process as the new gateway to challenging the VIS, holding that if such evidence is prejudicial to the point that it renders a capital defendant's trial fundamentally unfair, the Fourteenth Amendment's Due Process Clause provides a basis for its exclusion.

¶42 Chief Justice Rehnquist wrote in *Payne*: "In the event that victim impact evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Fourteenth Amendment's Due Process Clause provides a mechanism for relief."[27] The *Payne* decision leaves the standard to be applied unclear, though. One logical standard would be to apply the Rule 403 "legal relevance" standard[28]. The legal relevance standard is that of Federal Rule of Evidence 403, which provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

¶43 The Rule 403 relevance standard comports neatly to the Fourteenth Amendment's due process requirement. Rule 403 is a rule of balance and fundamental fairness. The relevance balance is applied by weighing the rationale both for and against admissibility. The fundamental fairness of the rule is applied through the nature and substance of the factors which are weighed.

¶44 The due process clause of the Fourteenth Amendment is as follows:

> *Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

¶45 Fourteenth Amendment Due Process guarantees are also protected by the application of a balancing test. Due process issues are often scrutinized under the balancing test established by the Supreme Court in *Matthews v. Eldredge*[29]. The "*Matthews* Test" balances the following:

1. the private interest that will be affected by the official action;

   Plus

1. the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional procedural safeguards;

   Versus

1. the Government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail[30]

¶46 The *Matthews* test has been applied mostly to cases involving civil cases and administrative procedures, but it has also been applied where appropriate by the Court to criminal due process issues, including at least one sentencing issue. In *Ake v. Oklahoma*[31], the Court applied the test in determining whether an indigent criminal defendant had the right to a state-provided psychiatrist to prepare his insanity defense and to assist the defendant at the sentencing phase of trial.

¶47 The *Ake* Court held: 1) the liberty interest at stake in a criminal proceeding that "places an individual's life or liberty at risk is almost uniquely compelling". As to the state's interest, the same court found: 2) that "the State's interest in prevailing at trial - unlike that of a private litigant - is necessarily tempered by its interest in the fair and accurate adjudication of criminal cases."[32] Lastly, the *Ake* Court looked to the burden on the government to adopt alternative procedures, and found: 3) that

where the interests of both the individual and the state were so substantial, and where the risk of erroneous deprivation of a liberty interest was at stake, the fiscal interest of the state must yield[33].

¶48 The Fourteenth Amendment, and the *Matthews* balancing test contained within it**,** provide an adequate standard of review for the future challenge to the VIS**.** Applying the *Matthews* test to the introduction of the VIS would likely render the following result:

1. the private interest that will be affected by the official action: *the life or liberty of the Accused;*
2. the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional procedural safeguards: *the risk of erroneous deprivation (of life or liberty) is high, the probable value of additional safeguards is high;*

   Versus

   (3) the Government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail: *there would be no added fiscal nor administrative burdens incurred by the government though the elimination of the VIS.*

¶49 The application of the *Matthews* standard of due process review leads to the conclusion that many VISs would fail to comport to Fourteenth Amendment requirements. The Court may employ another due process test to determine the VIS constitutionality, though, as the Court has held that the "[d] ue process is flexible and calls for such procedural protections as the particular situation demands."[34]

¶50 Another due process consideration raised by the VIS is that the legislature has already considered the impact upon victims of violent crimes when it codifies criminal statutes, including the penalties for the committed offense(s). The decision on sentencing must be based entirely upon the parameters set by the legislature. Where the legislature has already considered the impact of the crime in codifying punishments for specific offenses, the emotional effect of the VIS, upon the rationality of the sentencing body, detracts from the reasoned establishment of the penalty guidelines established by the legislature.

¶51 A further due process problem occurs when the victim has testified during trial, particularly in cases where the accused opts not to take the stand. The sentencing body in these cases has already heard the victim's story told once, *then* the victim's version of the offense are re-stated to the fact finder at the penalty phase. This poses the obvious concern that the repetitive effect of the victim's statement upon the fact finder would undermine the defendant's fundamental right to a fair trial and fairness in sentencing.

¶52 Another concern is the introduction of the VIS at the sentencing of accessories and accomplices. Here, the full effect and impact of the crime upon the victim is considered by the fact finder, yet the defendant did not commit the principal offense which caused the impact. This poses a fundamental fairness problem, as the defendant did not fully cause the impact upon the victim, yet the full effect upon the victim is considered when sentencing the defendant. Otherwise stated, the question is whether the full weight of the impact upon the victim should be considered in sentencing some one who did not legally cause that impact.

¶53 The Framers of the Constitution purposefully created an imbalance between the rights of the accused and the rights of the victims, and they created it with favor entirely on the side of the accused.

There are compelling reasons why the Bill of Rights guarantees several rights of the accused, and none are enumerated for the victim.

¶54 The Framers sought to limit the power of the government they had just created and authorized, and freedom was never to be compromised significantly. The essential function, purpose and beauty of the civil rights the Framers created, enumerated and guaranteed, is that without limitations on the police powers of government our life, liberty and property would be at risk of gradual deprivation and eventual obliteration.

¶55 The safeguards provided by the framers of the federal constitution protect all of us. They are societal rights, as well as individual rights. The state's goal in criminal proceedings is singular: to obtain convictions. Criminal proceedings are adversarial by nature, and the constitutional protections provided by the Bill of Rights, including the Fifth and Eighth Amendments, help insure that the accused is treated fairly at all phases of the proceedings, including the sentencing phase.

¶56 The VIS in these types of cases necessarily fan the emotional flames of any listener and impair her ability for rational decision making. The introduction of a VIS causes a constitutional concern, but the concern is almost never raised. The concern in all the "proportionality" cases is that the punishment fit the crime; the concern in future Fourteenth Amendment challenges may be that the Defendant's due process rights are not violated by the VIS.

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1 *Booth v. Maryland,* 482 U.S. 496 (1987); *Gathers v. South Carolina,* 490 U.S. 805 (1989); *Payne v. Tennessee,* 501 U.S. 808 (1991).

2 *Payne v. Tennessee,* 501 U.S. 808 (1991).

3 *See* C.J. Woodbine, *The Origin of the Action of Trespass,* 33 Yale L.J. 343 (1934).

4 *See* Richard E. Laster, *Criminal Restitution: A Survey of its Past History and An Analysis of its Present Usefulness,* 5 U. Rich. L. Rev. 71 (1970).

5 *See* Cesare Beccaria, Essay on Crimes And Punishments (1764).

6 *See Kelly v. Robinson*, 479 U.S. 36 (1986).

7 *See* People v. Downing*,* 174 Cal.App.3d. 667 (1985).

8 *See supra*, note 1.

9 Payne*, supra* note 2, at 846 (Marshall, J., dissenting) (citing *Booth*, *supra* note 1, at 505-507).

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

11 144 U.S. 323, 337 (1898) (Field, J., dissenting).

12 217 U.S. 349 (1910).

13 *See* Robinson v. California*,* 370 U.S. 660 (1962) (striking down California statute that criminalized narcotics addiction).

14 See Tison v. Arizona*,* 481 U.S. 137, 149 (1987); Enmund v. Florida*,* 458 U.S. 782, 801 (1987).

15 The *Booth* Court majority (5-4) was comprised of Powell, Brennan, Marshall, Blackmun and Stevens, JJ. Dissenting were : Rehnquist, CJ., White, O'Connor, and Scalia, JJ. ; The *Gathers* majority (5-4) were: Brennan, Marshall, Blackmun, Stevens and White, JJ. Dissenting were: Rehnquist, CJ., O'Connor, Kennedy, and Scalia, JJ.; The *Payne* majority (6-3) were: Rehnquist, CJ., White, O'Connor, Scalia, Kennedy, and Souter, JJ. Dissenting were: Marshall, Blackmun, and Stevens, JJ. Note the flip-flopping of Justice White (Against *Booth,* for *Gathers,* and against *Payne*, all within four years, from 1987 to 1991). Also, see J. White's concurring opinion in *Gathers.*

16 *See Booth, supra* note 1, at 507.

17 Powell, J. delivered the opinion of the Court, with Brennan, Marshall, Blackmun and Stevens, JJ., joining. White, J. filed a dissenting opinion, in which Rehnquist, C.J., O'Connor, and Scalia joined. Scalia, J. also filed a dissenting opinion in which Rehnquist, C.J., White, and O'Connor, JJ., joined.

18 *Booth, supra* note 1, at 497.

19 *Id.*

20 *Gathers, supra* note 1, at 807

21 *See id*.

22 *See id.*

23 *Gathers, supra* note 1, at 810.

24 *Id. at 810-812.*

25 Payne, supra note 2, at 809-810.

26 *Id. at 808.*

27 *Id.* at 809 (citing Darden v. Wainwright, 477 U.S. 168, 179-183 (1986)).

28 *See* Jonathan H. Levy, *Limiting Victim Impact Evidence and Argument After Payne v. Tennessee*, 45 STAN. L. REV. 1027 (1993).

29 424 U.S. 319 (1976).

30 *Id.* at 332-335

31 470 U.S. 68 (1985).

32 *Id*. at 78-79.

33 *See id*. at 83.

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