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# REVENGE OR MERCY? SOME THOUGHTS ABOUT SURVIVOR OPINION EVIDENCE IN DEATH PENALTY CASES

Joseph L. Hoffmann†

## INTRODUCTION

In *Payne v. Tennessee*, the U.S. Supreme Court held that the Constitution does not generally prohibit the survivors of a murder victim from providing “victim impact” statements during the penalty phase of a capital trial,<sup>1</sup> reversing a decision made only a few years earlier in *Booth v. Maryland*.<sup>2</sup> The Court decided that brief descriptions of the victim’s attributes and value to society,<sup>3</sup> as well as information about the impact of the murder on the survivors and the community at large,<sup>4</sup> could be relevant to the capital sentencing decision and would not necessarily inject an inappropriate amount of emotion or vengeance into the sentencing hearing.<sup>5</sup>

The Court in *Payne* acknowledged, however, that there was a third kind of victim impact evidence, also prohibited by its earlier decision in *Booth*, that might pose a different set of concerns.<sup>6</sup> This third kind of evidence—the opinion of the survivors about what the defendant’s punishment should be<sup>7</sup>—was not at issue in *Payne*, and thus the Court did not reexamine its earlier prohibition of this evidence in *Booth*.<sup>8</sup> Since *Payne*, the Court has not revisited this issue, apparently leaving intact its earlier holding in *Booth* that such opinion evidence is inadmissible as a matter of Eighth Amendment law.<sup>9</sup>

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<sup>1</sup> 501 U.S. 808 (1991).

<sup>2</sup> 482 U.S. 496 (1987), *overruled by Payne*, 501 U.S. at 827.

<sup>3</sup> I will refer to this kind of victim impact evidence as “victim description” evidence.

<sup>4</sup> I will refer to this kind of victim impact evidence as “survivor impact” evidence.

<sup>5</sup> See *Payne*, 501 U.S. at 825–27; *id.* at 831 (O’Connor, J., concurring).

<sup>6</sup> See *id.* at 830 n.2.

<sup>7</sup> I will refer to this kind of victim impact evidence, which is the primary subject of this Article, as “survivor opinion” evidence.

<sup>8</sup> See *Payne*, 501 U.S. at 830 n.2 (“*Booth* also held that the admission of a victim’s family members’ characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment. No evidence of the latter sort was presented at the trial in this case.”).

<sup>9</sup> But see Wayne A. Logan, *Opining on Death: Witness Sentence Recommendations in Capital Trials*, 41 B.C. L. REV. 517, 528–33 (2000) (chronicling numerous post-*Payne* lower-court cases in which survivor opinion evidence was admitted, usually on the ground that *Payne* either implicitly overruled *Booth* or at least undermined the prohibition in *Booth* against survivor opinion evidence).

Many persuasive arguments suggest that the Court erred when it revived the constitutionality of the first two kinds of victim impact evidence in *Payne*.<sup>10</sup> In this Comment, I will agree with the overall view that victim description evidence and survivor impact evidence generally should be excluded from capital sentencing hearings—except, perhaps, after the sentencer has already reached its decision.

The main thrust of my Comment, however, will raise and discuss several issues relating to the third kind of victim impact evidence: survivor opinion evidence. Academic literature seldom discusses such evidence, and what little discussion there is suggests that academic opposition to its admissibility is virtually unanimous. Nevertheless, I would like to pose the controversial question of whether survivor opinion evidence should be allowed to play a more significant role in capital sentencing. Although numerous arguments can be made against the admissibility of survivor opinion evidence,<sup>11</sup> there is another side to the question, and strong arguments can also be made in support of admissibility.<sup>12</sup> At a minimum, I hope to provide provocative food for thought about this subject, and to suggest that at least in some respects, the Court's current position on the constitutionality of victim impact evidence may be backwards.

## I

### THE PROBLEMS WITH VICTIM DESCRIPTION EVIDENCE AND SURVIVOR IMPACT EVIDENCE

Numerous commentators have criticized the Court's decision in *Payne* to reopen the door to victim impact evidence and allow victim description and survivor impact testimony.<sup>13</sup> The arguments against

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<sup>10</sup> See, e.g., Sheri Lynn Johnson, *Speeding in Reverse: An Anecdotal View of Why Victim Impact Testimony Should Not Be Driving Capital Prosecutions*, 88 CORNELL L. REV. 555, 564–66 (2003); Robert P. Mosteller, *Victim Impact Statements: Hard to Find the Real Rules*, 88 CORNELL L. REV. 543, 554 (2003).

<sup>11</sup> See *infra* Part I.

<sup>12</sup> See *infra* Part II.

<sup>13</sup> See, e.g., Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361 (1996) [hereinafter *Empathy*]; Susan Bandes, *Reply to Paul Cassell: What We Know About Victim Impact Statements*, 1999 UTAH L. REV. 545; Susan Bandes, *When Victims Seek Closure: Forgiveness, Vengeance and the Role of Government*, 27 FORDHAM URB. L.J. 1599 (2000) [hereinafter *Closure*]; Vivian Berger, *Payne and Suffering: A Personal Reflection and a Victim-Centered Critique*, 20 FLA. ST. U. L. REV. 21 (1992); Teree E. Foster, *Beyond Victim Impact Evidence: A Modest Proposal*, 45 HASTINGS L.J. 1305 (1994); Angela P. Harris, *The Jurisprudence of Victimhood*, 1991 SUP. CT. REV. 77 (1992); Elizabeth E. Joh, *Narrating Pain: The Problem with Victim Impact Statements*, 10 S. CAL. INTERDISC. L.J. 17 (2000); Wayne A. Logan, *Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials*, 41 ARIZ. L. REV. 143 (1999); James Luginbuhl & Michael Burkhead, *Victim Impact Evidence in a Capital Trial: Encouraging Votes for Death*, 20 AM. J. CRIM. JUST. 1 (1995); Catherine Bendor, *Recent Development, Defendants' Wrongs and Victims' Rights: Payne v. Tennessee*, 111 S. Ct. 2597 (1991), 27 HARV. C.R.-C.L. L. REV. 219 (1992); Amy K. Phillips, Note, *Thou Shalt Not*

admission of such testimony seem to fall into several distinct categories.

First, some argue that victim impact evidence encourages capital sentencers to base their sentencing decisions on the individual characteristics of the victim, which leads to the imposition of different punishments for similar crimes, depending on the perceived value of the respective victims.<sup>14</sup> Concern over this issue likely played an important role in the Court's decision in *Booth*. Earlier in the same Term, the Court ruled in *McCleskey v. Kemp*<sup>15</sup> that the Georgia death penalty system was constitutional despite compelling statistical proof of a "race of the victim" effect in which killers of white victims were more likely to receive a death sentence than killers of black victims.<sup>16</sup> Although Justice Powell authored both the *McCleskey* and *Booth* opinions, he noted in *Booth*, without even citing *McCleskey*, that victim impact evidence *might* encourage capital sentencers to discriminate between victims.<sup>17</sup> Although I continue to be amazed at the irony that the Court would uphold a Georgia statute that was proved to operate in a discriminatory manner while striking down, in the same Term, a Maryland procedure based on unproven speculation about such discrimi-

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*Kill Any Nice People: The Problem of Victim Impact Statements in Capital Sentencing*, 35 AM. CRIM. L. REV. 93 (1997).

For rarer opposing views, see, for example, Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment*, 1999 UTAH L. REV. 479; Edna Erez, *Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice*, 1999 CRIM. L. REV. 545; David D. Friedman, *Should the Characteristics of Victims and Criminals Count?: Payne v. Tennessee and Two Views of Efficient Punishment*, 34 B.C. L. REV. 731 (1993).

<sup>14</sup> See, e.g., Bandes, *Empathy*, *supra* note 13, at 405–08 (noting that "[v]ictim impact statements permit, and indeed encourage, invidious distinctions about the personal worth of victims" and that "[i]n this capacity, they are at odds with the principle that every person's life is equally precious, and that the criminal law will value each life equally when punishing those who grievously assault human dignity"); Cecil A. Rhodes, *The Victim Impact Statement and Capital Crimes: Trial by Jury and Death by Character*, 21 S.U. L. REV. 1, 27 (1994) (noting that "[t]he arbitrary and capricious manner in the imposition of the death penalty could be easily exacerbated based on whether the victim was a person of high esteem and character" and explaining that "the imposition of death will be determined by the character of the victim, and not the moral guilt, blameworthiness, and the individual character of the defendant and the circumstances of the crime").

<sup>15</sup> 481 U.S. 279 (1987).

<sup>16</sup> See *id.* at 312–13. The *McCleskey* litigation was based on the so-called Baldus Study, in which Professor David C. Baldus discovered a statistically significant race-of-the-victim effect in Georgia death penalty cases. DAVID C. BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* (1990). The *McCleskey* Court stated that it "assume[d] the [Baldus] study is valid statistically," and based its decision on that assumption. 481 U.S. at 291 n.7.

<sup>17</sup> See *Booth v. Maryland*, 482 U.S. 496, 506 n.8 (1987) ("We are troubled by the implication that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy. Of course, our system of justice does not tolerate such distinctions."), *overruled by* *Payne v. Tennessee*, 501 U.S. 808 (1991).

nation, it seems clear that the two cases were related in the Court's collective (or at least in Justice Powell's individual) mind.

A second argument against admitting victim impact evidence is that it allows for disparate treatment of defendants based on the relative articulateness and persuasiveness of the survivors.<sup>18</sup> Some survivors can tell a compelling story about the victim and the effect of the crime, while others—perhaps less educated or simply more reticent—cannot. In at least a few cases, well-to-do survivors have even hired lawyers to tell their stories for them at capital sentencing hearings, further exacerbating the disparities created by *Payne*.<sup>19</sup>

A third criticism of *Payne*'s holding on the admissibility of victim impact evidence is that such evidence often does not relate to the legitimate reasons for which society chooses to punish a defendant.<sup>20</sup> In many capital cases, the defendant knows little about the individual victim at the time of the murder.<sup>21</sup> Although all defendants should

<sup>18</sup> See, e.g., *id.* at 505–06 (“Certainly the degree to which a family is willing and able to express its grief is irrelevant to the decision whether a defendant, who may merit the death penalty, should live or die.”); Bandes, *Empathy*, *supra* note 13, at 398 (“[W]hen our society is choosing which heinous murderers to kill and which to spare, its gaze ought to be carefully fixed on the harm they have caused and their moral culpability for that harm, not on irrelevant fortuities such as the . . . articulateness . . . of their victims or their victims’ families.” (emphasis omitted)); Rhodes, *supra* note 14, at 27 (“The arbitrary and capricious manner in the imposition of the death penalty could be easily exacerbated based on . . . whether the victim’s survivors were articulate and able to emote with conviction.”).

<sup>19</sup> See William Hauptman, Note, *Lethal Reflection: New York’s New Death Penalty and Victim Impact Statements*, 13 N.Y.L. SCH. J. HUM. RTS. 439, 476 (1997).

<sup>20</sup> See, e.g., *Booth*, 482 U.S. at 504–05; Ashley Paige Dugger, Note, *Victim Impact Evidence in Capital Sentencing: A History of Incompatibility*, 23 AM. J. CRIM. L. 375, 399–400 (1996).

<sup>21</sup> Most murders are committed by persons well known to their victims. See U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, HOMICIDE TRENDS IN THE UNITED STATES, INTIMATE HOMICIDE, <http://www.ojp.usdoj.gov/bjs/homicide/intimates.htm> (last visited Oct. 26, 2002). But so-called “stranger murders” are relatively more likely than most other kinds of murders to lead to the imposition of the death penalty, precisely because such murders are more shocking and engender greater fear among law-abiding members of society. See SAMUEL R. GROSS & ROBERT MAURO, DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING 45 (1989) (noting three non-racial characteristics most likely to lead to death sentences: (1) multiple victims, (2) felony murder, and (3) stranger murder); Raymond Paternoster, *Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 J. CRIM. L. & CRIMINOLOGY 754, 769 (1983) (“[M]urders involving strangers are more likely to be death penalty cases than murders among acquaintances or primary relations.”). Phyllis Crocker notes:

Studies of those on death row show that three primary features distinguish the murders for which a defendant is likely to be sentenced to death. The predominant categories are felony-murder, murder by a stranger, and interracial murders where the defendant is African-American and the victim is white. In each category, the percentage of individuals on death row is disproportionately large compared to the corresponding percentage of murders in that group overall. The common ground these characteristics share is a fear of the stranger, in a non-intimate setting. . . . [These statistics] show that the death penalty is reserved for that which we fear most—felony-murders by strangers—and not that which actually happens most often and presents the greatest threat.

assume that their victims are worthy human beings and that their crimes will leave bereaved survivors, victim impact evidence—to the extent that it individualizes the victim based on characteristics about which the defendant was unaware at the time of the crime—leads to capital sentencing based on factors “wholly unrelated to the blameworthiness of a particular defendant.”<sup>22</sup> This, in turn, undermines both the deterrent and the “just deserts” retributive purposes of punishment.<sup>23</sup>

Fourth among the litany of objections to *Payne* is the likelihood that such evidence, especially if presented directly by survivors on the witness stand, will lead to capital sentencing decisions based on emotions and vengeance.<sup>24</sup> Although such feelings probably cannot be eliminated from capital trials, *Furman v. Georgia*,<sup>25</sup> *Gregg v. Georgia*,<sup>26</sup> and the entire Eighth Amendment body of jurisprudence developed by the Court in the twenty-five years since those two decisions, stand for the proposition that the imposition of the death penalty should be rational and even-handed.<sup>27</sup> *Payne* has arguably taken us a step backward in this respect.

Finally, some critics have suggested that *Payne* would lead to an unseemly, and perhaps even damaging, battle when defendants seek to rebut the victim impact evidence introduced by the prosecution.<sup>28</sup> The spectre of widespread “mini trials” on the character and value of the victim, or, relatedly, the problem of self-inflicted wounds by defendants who seek to rebut such evidence and thereby alienate the jury, may or may not have materialized in the years since *Payne* was

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Phyllis L. Crocker, *Crossing the Line: Rape-Murder and the Death Penalty*, 26 OHIO N.U. L. REV. 689, 695, 702 (2000) (footnote omitted).

<sup>22</sup> *Booth*, 482 U.S. at 504.

<sup>23</sup> Neither the deterrence theory nor the “just deserts” retributive theory of punishment generally would support the idea of allowing a defendant to be sentenced to death (or, for that matter, to a longer term of imprisonment) on the basis of factors about which the defendant was not aware. An exception might be a case in which the defendant should have been, but was not, aware of some aggravating factor. In addition, theories of punishment that focus more directly on the harm to society caused by the defendant’s crime would support the imposition of the death penalty for factors about which the defendant was not aware.

<sup>24</sup> See, e.g., *Booth*, 482 U.S. at 508–09; Bandes, *Empathy*, *supra* note 13, at 393–402; Katie Long, Note, *Community Input at Sentencing: Victim’s Right or Victim’s Revenge?*, 75 B.U. L. REV. 187, 222–23 (1995).

<sup>25</sup> 408 U.S. 238 (1972).

<sup>26</sup> 428 U.S. 153 (1976) (plurality opinion).

<sup>27</sup> See *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (plurality opinion) (“It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.”); see also *Lankford v. Idaho*, 500 U.S. 110, 126 (1991) (same); *California v. Brown*, 475 U.S. 1301, 1304 (1986) (same).

<sup>28</sup> See, e.g., *Booth*, 482 U.S. at 506–07; Rhodes, *supra* note 14, at 28; Long, *supra* note 24, at 223 & n.220.

decided.<sup>29</sup> However, these troubling scenarios have undoubtedly occurred in at least some capital trials, and the potential for them remains a substantial concern.

Based on all of these arguments, I find compelling the case for overturning *Payne* and returning to the situation in which more-than-de-minimis victim description and survivor impact evidence is constitutionally inadmissible.<sup>30</sup> If survivors have a sufficiently strong psychological need to deliver such testimony, as a number of studies and commentators suggest,<sup>31</sup> then survivors should have the right to address the defendant *after* his or her sentence has been determined.<sup>32</sup> At this time, the survivors can say whatever they wish concerning the victim, the crime, and the impact of the crime on their lives. This alternative could serve the same cathartic purpose, but without creating any of the serious adverse effects described above.

## II

### A HYPOTHETICAL PROPOSAL

What about the one category of victim impact evidence that remains constitutionally inadmissible even after *Payne*? Despite a few glaring instances in which state courts have allowed this kind of victim impact evidence, notwithstanding the undisturbed holding of *Booth*,<sup>33</sup> courts generally exclude from capital sentencing hearings the opinions of a murder victim's survivors about exactly what punishment the defendant should receive.<sup>34</sup> Moreover, academic literature rarely discusses the topic of survivor opinion evidence, and the tone of any such

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<sup>29</sup> See Erez, *supra* note 13, at 549.

<sup>30</sup> Even during the brief period when victim description and survivor impact evidence was constitutionally inadmissible under *Booth*, it was generally understood that a limited amount of such evidence could be introduced into a capital trial, as part of the *res gestae* of the crime, without necessarily creating a constitutional problem. See *Booth*, 482 U.S. at 507 n.10 ("Similar types of information may well be admissible because they relate directly to the circumstances of the crime.").

<sup>31</sup> See Erez, *supra* note 13, at 550–53 (citing studies and articles that support the proposition that survivors have a psychological need to present survivor impact evidence).

<sup>32</sup> At least some states have recently revised their capital sentencing systems to delay the introduction of victim impact evidence until after the sentencer has already reached its sentencing decision. See, e.g., IND. CODE ANN. § 35-50-2-9(e)(2) (2002) ("After a court pronounces sentence, a representative of the victim's family and friends may present a statement regarding the impact of the crime on family and friends. The impact statement may be submitted in writing or given orally by the representative. The statement shall be given in the presence of the defendant.").

<sup>33</sup> See, e.g., Logan, *supra* note 9, at 528–33 (citing various cases in which evidence of victims' survivors' opinions regarding sentencing has been introduced).

<sup>34</sup> See *id.* at 519 ("In the capital sentencing realm . . . the courts have been considerably less willing to permit the sentencing authority to consider sentence opinion testimony from victims (or, more commonly, their survivors).").

discussion usually suggests that no reasonable arguments support admitting such evidence.<sup>35</sup>

I believe, however, that we have given insufficient thought to this third kind of victim impact evidence, and that upon further reflection, reasonable and persuasive arguments exist in favor of allowing the introduction of at least some form of such evidence. What I would like to suggest, as a starting point for further discussion, is the following entirely hypothetical proposal.

At or near the conclusion of the sentencing hearing in any capital case, the trial judge should be required to ask each of the victim's surviving immediate family members about his or her opinion as to the sentence that the defendant should receive.<sup>36</sup> Based on each survivor's answers, the trial judge should then ensure that the sentencer gives these survivor opinions appropriate consideration.<sup>37</sup> Assuming that the sentencer is a jury, the trial judge should proceed to give the jury one of the following three alternative instructions, depending on each survivor's expressed opinion about the appropriate sentence for the defendant:

(1) At the conclusion of the sentencing hearing, the victim's \_\_\_\_\_, Mr./Ms. \_\_\_\_\_, was given the opportunity to make a gesture of mercy toward the defendant by asking that you, the jury, not sentence the defendant to death. Mr./Ms. \_\_\_\_\_ chose not to make such a gesture of mercy, and instead expressed support for sentencing the defendant to death. You may take the opinion of Mr./Ms. \_\_\_\_\_ into consideration in reaching your sentencing decision. Ultimately, however, the final decision concerning the defendant's punishment is up to you, the jury, and you must make whatever sentencing decision you believe is correct.

(2) At the conclusion of the sentencing hearing, the victim's \_\_\_\_\_, Mr./Ms. \_\_\_\_\_, chose to make a gesture of mercy toward the defendant by asking that you, the jury, not sentence the defendant to death. In reaching your sentencing decision, you may take into consideration the opinion of Mr./Ms. \_\_\_\_\_ that the defendant should be treated mercifully and should not be sentenced to death. Ultimately, however, the final decision concerning the defendant's punishment is up to you, the jury, and you must make whatever sentencing decision you believe is correct.

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<sup>35</sup> See sources cited *supra* note 13.

<sup>36</sup> I would suggest a very narrow definition of "survivors" to include only the father, mother, siblings, children, and spouse or life partner of the victim. Ideally the survivors should observe the entire proceedings, during which they would learn not only of the horrible facts of the crime but also of the defendant's mitigation case. But courts probably cannot and should not require this.

<sup>37</sup> If one or more survivors did not observe the entire proceedings, including the defendant's mitigation case, then perhaps the sentencer should be informed of that fact so that the sentencer can appropriately discount the weight of the survivor opinion evidence.

(3) At the conclusion of the sentencing hearing, the victim's \_\_\_\_\_, Mr./Ms. \_\_\_\_\_, was given the opportunity to make a gesture of mercy toward the defendant by asking that you, the jury, not sentence the defendant to death. Mr./Ms. \_\_\_\_\_ chose to express no view whatsoever about whether the defendant should be sentenced to death. This means that the final decision concerning the defendant's punishment is entirely up to you, the jury, and you must make whatever sentencing decision you believe is correct.

The judge should give instructions to the jury only after the jury has already determined that the defendant is legally eligible for the death penalty, but before it has rendered its final discretionary decision about whether to impose the death penalty. Using the terminology common to most capital sentencing systems, this means that the judge should not allow the survivor opinion evidence to influence the jury's required factual finding of the existence of one or more aggravating circumstances, but instead should only allow it to influence the jury's weighing of those aggravating circumstances against any possible mitigating circumstances.<sup>38</sup>

Only after sentencing should the survivors be able to describe the victim and the impact of the crime on them and on the community. If they wish, the survivors should be allowed to address the defendant directly; if they do not wish to address the defendant directly, they should be allowed to provide written statements that the trial judge would read into the record in the defendant's presence.<sup>39</sup>

### III

#### ARGUMENTS FOR AND AGAINST THE ADMISSIBILITY OF SURVIVOR OPINION EVIDENCE

The best argument in favor of allowing a limited form of survivor opinion evidence to be admitted in capital cases is the potential therapeutic effect on the survivors. We must examine studies of victimization and its aftermath with a critical eye, because to assume that all victims are the same, or that all victims would benefit from the same kind of post-crime treatment would be a grievous mistake.<sup>40</sup> However,

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<sup>38</sup> Cf. Patrick E. Higginbotham, *Juries and the Death Penalty*, 41 CASE W. RES. L. REV. 1047, 1057-58, 1060, 1065 (1991) (favorably discussing case law which has divided capital sentencing into two distinct phases: the determination of death eligibility, which arguably the trial judge should make, and the discretionary decision whether to impose the death penalty, which the jury should make).

<sup>39</sup> See, e.g., IND. CODE ANN. § 35-50-2-9(e)(2) (2002) (allowing the victim's family and friends to present impact statements in writing or orally in the presence of the defendant).

<sup>40</sup> In support of the notion that victims and their responses are unique, Robert Mottler states:

Victims are not monolithic. For some, healing and even reconciliation are attainable. However, for others, particularly the victims of the most serious crimes, nothing can give them what they want—to be victims no longer.

one clearly common, and potentially debilitating, aspect of victimization is the severe and ongoing loss of control that many victims experience.<sup>41</sup> This loss of control is most salient, of course, for the actual victims of the crimes themselves. Nonetheless, survivors of murder victims also seem likely to suffer from similar feelings of powerlessness, and society should do whatever it reasonably can to help them.

Allowing survivors to play a more active role in determining a defendant's sentence might be seen in this way as a form of "psychic restitution," in which the defendant gives something back—in this case, a certain measure of predictability concerning his or her sentencing determination—in order to compensate for the loss that has been sustained by the victim and, derivatively, by the victim's survivors.<sup>42</sup> By providing survivors with even a small degree of control over the defendant's fate, it may be possible to help them regain their sense of agency in general.<sup>43</sup> This approach will not help all survivors, but it may help some of them, and it therefore warrants society's serious consideration.

A related, but generally overlooked, argument in favor of admitting survivor opinion evidence is that such admissibility would enhance the ability of at least some survivors to extend mercy and even forgiveness to the defendants who killed their loved ones.<sup>44</sup> This enhanced ability could be beneficial in two different ways. First, it could

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Each new chance to exert control or to affect punishment becomes virtually an obligation to seek justice for a lost loved one or to continue a quest for wholeness.

Robert P. Mosteller, *Popular Justice*, 109 HARV. L. REV. 487, 494 (1995) (reviewing GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS (1995)). For a thoughtful analysis of victimization and the process of victim healing, see generally Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937 (1985). Professor Henderson also emphasizes the fact that victims do not necessarily react uniformly to their situation. *Id.* at 964 ("Answers to the questions of death, meaning, responsibility, and isolation vary from individual to individual, just as behavioral and psychological manifestations of these existential issues differ from victim to victim.").

<sup>41</sup> See Henderson, *supra* note 40, at 958 ("[F]ear of revictimization, feelings of helplessness, loss of a sense of control over one's destiny, and lack of security become 'typical' reactions to an intrusive confrontation with death." (footnotes omitted)).

<sup>42</sup> See David A. Starkweather, *The Retributive Theory of "Just Deserts" and Victim Participation in Plea Bargaining*, 67 IND. L.J. 853, 864-67 (1992) (discussing the theory of "psychic restitution").

<sup>43</sup> See Erez, *supra* note 13, at 551-53 ("With proper safeguards, the overall experience of providing input can be positive and empowering. . . . One of the major aims of the victim movement, and the driving force behind it, was to help victims overcome their sense of powerlessness and reduce their feelings that the system is uncaring.").

<sup>44</sup> I use the term "mercy" to describe leniency that is offered to defendants, notwithstanding the fact that they may not deserve it. I use the term "forgiveness" to describe the internal process by which people let go of the anger and feelings of vengeance held against someone who has wronged them. It is possible, therefore, for a victim (or a survivor) to be merciful to a defendant without actually forgiving that defendant. See generally JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* (1988) (exploring the meaning of forgiveness and mercy in the criminal justice system).

provide a very practical benefit for defendants in particular capital cases, because the survivors' desire to extend mercy, forgiveness, or both seems very likely to influence the jury's sentencing decision in favor of life instead of the death penalty.

Admitting survivor opinion evidence could also provide a second important benefit. It has often been suggested that responding mercifully or forgivingly might be more conducive to the crime victim's psychological recovery than continuing to harbor feelings of vengeance and anger.<sup>45</sup> If this is true, then it may be important to validate the victim's (or, in this case, the victim's survivor's) choice by giving it at least some weight in the sentencing process. Without such weight, the choice to extend mercy—or to forgive the defendant—is essentially costless (in real-world terms) and thus may be lacking in true moral significance.<sup>46</sup> Stated differently, in order for the "choice to be merciful" to be meaningful, the alternative—which is *not* to be merciful—must also be meaningful. This means that the choice must be communicated to the sentencer at a time when it still might make a difference in the sentence.

Finally, admitting survivor opinion evidence would avoid the current hypocrisy that allows many survivors to deliver victim impact statements that are thinly disguised efforts to sway the jury's sentence without violating the letter of *Payne*.<sup>47</sup> The current situation encour-

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<sup>45</sup> On the subject of forgiveness and vengeance, Hannah Arendt states: [F]orgiveness is the exact opposite of vengeance, which acts in the form of re-acting against an original trespassing, whereby far from putting an end to the consequences of the first misdeed, everybody remains bound to the process . . . . In contrast to revenge, . . . [f]orgiving . . . is the only reaction which does not merely re-act but acts anew and unexpectedly, unconditioned by the act which provoked it and therefore freeing from its consequences both the one who forgives and the one who is forgiven.

HANNAH ARENDT, *THE HUMAN CONDITION* 240–41 (1958); see also MURPHY & HAMPTON, *supra* note 44, at 36–43 (defining forgiveness); Starkweather, *supra* note 42, at 865 (illustrating that Arendt's notion of forgiveness enables crime victims "to be restored emotionally").

<sup>46</sup> See LLOYD L. WEINREB, *NATURAL LAW AND JUSTICE* 6 (1987) (stating that in order for individuals to be morally responsible for their actions, those actions must be "*both free and determinate*"); see also MURPHY & HAMPTON, *supra* note 44, at 36–37 (arguing that true, morally significant forgiveness requires an external effect on the "forgiver's relationship to the wrongdoer").

<sup>47</sup> See, for example, the prosecutor's closing argument in *Payne*, in which he commented on the lifelong effects on Nicholas, the three-year-old survivor of the two murder victims (who were his mother and younger sister):

There is nothing you can do to ease the pain of any of the families involved in this case. . . . But there is something that you can do for Nicholas. Somewhere down the road Nicholas is going to grow up, hopefully. He's going to want to know what happened. And he is going to know what happened to his baby sister and his mother. He is going to want to know what type of justice was done. He is going to want to know what happened. With your verdict, you will provide the answer.

*Payne v. Tennessee*, 501 U.S. 808, 815 (1991).

ages survivors to conflate two separate goals: achieving personal catharsis by expressing their feelings about the victim and the crime to the defendant, and exercising some control over the defendant's fate by seeking to influence the jury. It would be preferable to keep these two goals truly separate by allowing the second one to be pursued directly, and in a less emotionally charged manner, while delaying pursuit of the first (if such pursuit is desirable at all) to a time when it would not produce the serious negative effects described above. Moreover, even if the practical benefits are small, intellectual honesty about such matters would seem to be an inherently worthwhile goal.

At the same time, any proposal to allow the introduction of survivor opinion evidence undoubtedly would trigger numerous objections. The primary argument is that allowing such evidence might overwhelm the jury's capability to make a reasoned and independent capital sentencing determination, no matter how carefully such evidence is presented to the jury.<sup>48</sup> Although this is indeed a serious concern, it should be evaluated in light of the current situation, in which juries are generally free to assume<sup>49</sup> that the survivors would prefer to see the defendant sentenced to death.<sup>50</sup>

If most, or even many, capital sentencing juries currently speculate in this way about survivor opinion, then the proposed change may actually improve the current situation. If the survivors would prefer to see the defendant sentenced to death, then the proposed survivor-opinion jury instructions would merely confirm the jury's speculations.<sup>51</sup> If the survivors would prefer to extend mercy to the defendant, however, then the proposed instructions would serve to correct a serious misapprehension on the part of the jury.<sup>52</sup> If the survivors are divided as to their preferred sentence, then the proposed instructions, which would have the net effect of juxtaposing one survivor's

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<sup>48</sup> See, e.g., Logan, *supra* note 9, at 540-43 (arguing that sentence opinion testimony should be barred because it makes sentencing decisions arbitrary and capricious).

<sup>49</sup> The only current exception to this is a capital case in which the jury is allowed to receive evidence that the survivors do *not* wish to see the defendant sentenced to death. Such cases occur, see, e.g., Frank Green, *Mercy for Killer Is Urged*, RICHMOND TIMES-DISPATCH, July 1, 2001, at A-1, LEXIS, News Library, Richmond File, but they are relatively rare.

<sup>50</sup> Whether true or not as an empirical fact, this is the assumption that most juries are likely to make, if they even think about survivor opinion. Some commentators believe that such assumptions may be common among juries. See, e.g., Logan, *supra* note 9, at 545.

<sup>51</sup> Moreover, requiring survivor opinions in favor of the death penalty to be presented to the jury by the trial judge in dry and unemotional legal language might actually diminish the impact of such opinions on the jury's sentencing decision, especially when compared to the jury's likely speculations about the vengeful feelings of the survivors.

<sup>52</sup> Cf. Wayne A. Logan, *Declaring Life at the Crossroads of Death: Victims' Anti-Death Penalty Views and Prosecutors' Charging Decisions*, 18 CRIM. JUST. ETHICS, Summer/Fall 1999, at 41, 41 (arguing that when deciding whether to seek the death penalty, prosecutors should respect the views of murder victims who had previously executed a "declaration of life" in which they ask for mercy in case they are murdered in the future).

opinion against another's, would likely eliminate the issue from the jury's consideration altogether. In any event, the proposed instructions would explicitly inform the jury that survivor opinion evidence is only one of many considerations pertinent to the sentencing decision, and that the ultimate decision must be made by the jury, not by the survivors.<sup>53</sup>

A second objection to admitting survivor opinion evidence is that such evidence is improper at the capital sentencing stage because the criminal justice system is designed to serve the interests of society as a whole, not the interests of victims or survivors.<sup>54</sup> At one time this was a virtual truism, but it no longer is. Over the past two decades, the victims' rights movement has reminded us that crime victims are not like the rest of us; instead, they rightfully occupy a special place within the criminal justice system. Their opinions about such fundamental issues as discretionary charging decisions, plea bargains, and sentences should matter to the system, even if similar opinions expressed by the rest of us do not. The voices of crime victims (or their survivors) should perhaps be muted, in order to prevent arbitrary or irrational decisions, but those voices should not be completely silenced.

A third and perhaps more subtle argument is that allowing survivor opinion evidence might further victimize the survivors. This victimization could occur if the survivors were to express a consensus opinion about the defendant's sentence, only to see the jury ignore that opinion. Although this prospect would be both possible and potentially hurtful to the survivors, the victimization could be partially mitigated by requiring the trial judge to inform the survivors—both before and after they express their opinions about the sentence—that even if their opinions do not produce the desired sentencing outcome, they have nevertheless played an important role in the sentencing process by contributing their unique perspectives to that process.<sup>55</sup>

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<sup>53</sup> See, e.g., Joseph L. Hoffmann, *Where's the Buck?—Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 IND. L.J. 1137, 1157–58 (1995) (arguing that a trial judge has “a positive duty to try to impress upon death penalty jurors the responsibility they bear for the sentencing decision”).

<sup>54</sup> See, e.g., Bandes, *Closure*, *supra* note 13, at 1605–06 (asserting that although victims sometimes obtain closure from the legal system, the legal system has goals and purposes necessarily distinct from meeting the needs of the victim); Logan, *supra* note 9, at 540 (stating that sentence opinion testimony is irrelevant to reaching a “constitutionally valid, ‘reasoned moral response’”).

<sup>55</sup> On this subject Edna Erez has stated:

Although some of those who thought their input was ignored showed a lower level of satisfaction with justice because of raised expectations, this issue need not be used as an argument against the proposition that [victim impact statements] can increase victim satisfaction with justice. First, the potential problem of heightening victim expectations can be resolved by

Survivors might be further victimized if they disagreed about the preferred sentence, because it could lead to intrafamilial fighting.<sup>56</sup> Although these family arguments would be an unfortunate consequence, such disagreements might occur whether or not the survivors are allowed to express their opinions as part of the sentencing process.

Finally, granting the survivors an opportunity to express their opinions about the defendant's sentence might provide a motive for the defendant (or a friend, family member, or the defendant's lawyer) to contact the survivors, either before or during the trial, in an effort to influence their opinions. Such contact, if for purposes other than those legitimately related to the gathering of evidence for trial, would likely have to be prohibited.

### CONCLUSION

The current victim impact debate focuses almost exclusively on two categories of victim impact evidence—victim description evidence and survivor impact evidence—that were originally prohibited by *Booth*, but later constitutionally revived by *Payne*. Even in that context, several state legislatures and state courts have recently declined the U.S. Supreme Court's invitation in *Payne* to reauthorize the introduction of such evidence.<sup>57</sup> Survivor opinion evidence, on the other hand, has generally been either ignored completely or dismissed out of hand. No serious proposal to allow the introduction of such evidence is presently on the horizon, and no state legislature or state court is likely, at least in the near future, to take the ideas expressed in this Comment seriously.

Nevertheless, survivor opinion evidence deserves a more honorable burial than it has received to date. Sincere concern for the survivors of a murder victim, the recognition that at least some survivors might wish to oppose the imposition of the death penalty, and simple intellectual honesty about the reasons why many survivors seek to play a larger role in capital sentencing all suggest that survivor opinion evidence may have more legitimate value than we have generally been willing to acknowledge.

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explaining to victims that the [victim impact statement] is only *one* of the factors judges use to determine the type and severity of penalties.

Erez, *supra* note 13, at 552–53 (footnote omitted).

<sup>56</sup> Cf. Foster, *supra* note 13, at 1318–19 (satirically proposing that victim survivors be awarded the right to participate in the execution of the defendant, but noting that “conflicts among family members and loved ones” might arise).

<sup>57</sup> See Brian J. Johnson, Note, *The Response to Payne v. Tennessee: Giving the Victim's Family a Voice in the Capital Sentencing Process*, 30 IND. L. REV. 795, 803–07 (1997) (canvassing state-law responses to *Payne*).