

Victims' Rights: Justice or Revenge?

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Human Rights

The U.S. Constitution does not guarantee rights to victims of violent crime. No such guarantee was drafted by the framers in 1787 nor has any such guarantee been added as an amendment for the more than two centuries of the country's existence; although this latter remark may soon be subject to correction.

Beginning in the 1960s amidst concerns over domestic violence, child abuse, and sexual assault and with the formation of such organizations as Mothers Against Drunk Driving and Parents of Murdered Children, there has been an increased interest in victim's rights. At first the movement sought compensation for victims of violent crime; now it aims at improving the role of the victim in the judicial process.

Today more than 29 states have amended their constitutions to include a Victim's Bill of Rights. And in July of 1998 Senate Joint Resolution 44, enumerating the rights to be reflected in a new Amendment to the U.S. Constitution, was sent to the full Senate. Two years earlier President Clinton announced his support for an amendment, thereby "signing on" to a Victim's Rights Movement that has been gaining momentum for the last three decades. Already in 1982 Congress was prompted to establish an Office of Victims of Crime in the Justice Department as well as to propose that a clause be added to the Sixth Amendment that guaranteed victims "the right to be present and to be heard at all critical stages of judicial proceedings."

I. A Brief History of the Victim's Rights Movement

The Victim's Rights Movement surfaced during a period in which liberal theories of crime prevention that focused on rehabilitation, open-ended sentencing, and the constitutional rights of the accused began to be replaced by a punitive approach that focused on harsher sentences, fewer chances of parole and an increased use of the death penalty. This shift from the preventative approaches of the 1950s and 1960s to the "tough" talk on crime today has helped to fuel the Victim's Rights Movement. Indeed the rise of the movement was sparked by the widespread perception that the criminal justice system placed too heavy an emphasis on defendant's rights. "How is it," many victims of violent crime wondered, "that a defendant has the right to parade any number of witnesses ready to testify to the defendant's good character without an equal opportunity given to a victim's relatives and friends to introduce testimony regarding the victim's worth and impact of his or her loss on loved ones and the community?"

It is not without irony that "tough" talk on crime has escalated as rates of reported crime are coming down. Indeed, crime rates have been falling since 1973. Still American fear of violent crime has remained steady throughout this period. One out of every four Americans has installed security systems in their homes and one out of five has purchased a weapon for self-protection. One hundred thousand students carry guns to school every day and 160,000 miss class because they are afraid of physical harm. "Of course," as Orlando Patterson recently commented in an Op-Ed column in *The New York Times*, "our liberties have to be protected from criminals among us. But there are two complementary ways of going about this: we can take preventative measures. . .to reduce the incidence of crime before it happens, and we can punish those who do commit crimes, giving the police and courts strong powers of enforcement and incarceration." The latter approach now dominates the rhetoric of the leading Presidential candidates

II. "Mourning Becomes Electric"

One reason that proponents of victim's rights have sought a greater voice for victims in the criminal process has been motivated by a desire to help victims and their relatives regain a sense of control over their lives or, to achieve "closure." But there is often another motivation that accompanies the desire for healing—that is a desire to ensure that the perpetrator receive a harsh sentence. In capital cases, the effect of a relative's testimony may be life or death for the defendant. In this light prosecutors have welcomed such testimony since it helps juries identify more personally with the victim and hence be more willing to impose a sentence of death. The question then becomes whether the needs and interests of crime victims can be accommodated during the sentencing phase of death penalty cases without—at the same time—infringing upon the rights of a defendant, in particular a defendant's right to a fair trial.

Indeed the psychological and emotional nature of victim testimony raises the question: Does the admissibility of victim impact evidence during the sentencing phase of capital trials bring justice or revenge?
What do you think?

III. "Taking a Bite Out of Crime"

The Admissibility of Victim Impact Evidence in Capital Trials

Payne v. Tennessee (1991)

Here are the facts: Pervis Tyrone Payne spent the morning of the murders drinking beer and injecting cocaine waiting for his girl friend, Bobbie Thomas, to come home to her apartment in Millington, Tennessee, from a trip to visit her mother in Arkansas. At 3:00 PM when Bobbie still had not returned, Payne forced his way into the apartment across the hall where 28-year-old Charisse Christopher lived with her 2-year-old daughter, Lacie, and her 3-year-old son, Nicholas. Payne made sexual advances towards Charisse, was rebuffed and responded by stabbing her and her two young children repeatedly with a butcher knife. Payne escaped but was apprehended later that same day. At trial Payne was found guilty on two counts of first-degree murder and one count of assault.

During the sentencing phase of the trial, the prosecution asked for the death penalty for the murders of Charisse and Lacie. The prosecutor called Nicholas's grandmother to the witness stand to give victim impact evidence on how Nicholas was taking the loss of his mother and little sister. When asked how Nicholas had been affected, the grandmother said: "He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie.

In an impassioned plea, the prosecutor implored the jury to put Payne to death for Nicholas's sake, pointing out that he had to watch as his mother and baby sister were stabbed over and over again. "He's going to want to know what happened. He is going to want to know what type of justice was done."

In his rebuttal to Payne's closing argument, the prosecutor also said: "[Payne's attorney] doesn't want you to think about ...the brother who mourns for [his sister] every single day and wants to know where his best little playmate is. He doesn't have anybody to watch cartoons with him . . . These are the things that go into why it is especially cruel, heinous, and atrocious, the burden that that child will carry forever."

On appeal Payne and his attorney argued that the admission of the grandmother's testimony and the prosecutor's closing argument constituted prejudicial violations of Payne's right to a fair trial.

If a defendant has the right to offer evidence about his own good character during the sentencing phase, why shouldn't victims and their relatives be allowed to provide evidence about the value of a loved one, in this case the value of two loved ones, murdered in cold blood?

Payne's attorney argued that the Eighth Amendment, which forbids "cruel and unusual" punishments, demands that sentencing by juries reflect "a reasoned moral response to the crime" and the victim impact evidence given by the grandmother and the final remarks by the prosecutor were not just "irrelevant," they distracted the jury from a proper focus upon the "blameworthiness" of the defendant, making them more sympathetic to the plight of the victim and more likely to support the death penalty. Hence, he argued, both the testimony and in making his argument before the Tennessee Supreme Court in 1990, Payne's attorney had precedent on his side. Two cases that had been decided recently by the U.S. Supreme Court, one in 1987, *Booth v. Maryland* and one just a year before *South Carolina v. Gathers* (1989), both of which seemed to support his position.

IV. Booth v. Maryland (1987)*

The U.S. Supreme Court's First Look at Victim Impact Evidence in a Capital Case

The Court first weighed the constitutional appropriateness of victim impact statements during the sentencing phase of a capital trial in *Booth v. Maryland*. In May of 1983 John Booth and an accomplice broke into the West Baltimore home of Rose and Irvin Bronstein. They bound and gagged the Bronsteins and stabbed them with a kitchen knife. The jury convicted Booth on two counts of first-degree murder, two counts of robbery, and conspiracy to commit robbery. The prosecutor intended to seek the death penalty. Maryland law required the State Division of Parole and Probation to put together a pre-sentence report that included a victim impact statement describing the effect of the crime on the victim's family. At sentencing, the prosecutor read the victim impact statement to the jury.

The victims' son reported "that his parents had been married for 53 years and enjoyed a very close relationship, spending each day together. [that] his father had worked hard all his life and had been retired for eight years." He describes his mother as "a woman who was young at heart and never seemed like an old lady." The son also talked about how "he was unable to sleep as well as drive on the streets near his parents' home." And the granddaughter "described the impact of the tragedy [as] completely devastating and life-altering experience. . . "

The report also included the family's opinion about the crime: "The son felt "that his parents were not killed, but were butchered like animals," adding that he not think "anyone should be able to do something like that and get away with it." The daughter stated "that her parents were stabbed repeatedly with viciousness and she could never forgive anyone for killing them that way. . ." adding that she did not feel "that the people who could do this could ever be rehabilitated."

Booth's attorney objected to the admission of the victim impact evidence arguing that it was "unduly inflammatory and irrelevant." The trial court overruled the objection, and Booth was sentenced to death. The Maryland Court of Appeals upheld the conviction. But the U.S. Supreme Court reversed Booth's death sentence, arguing that the introduction of victim impact evidence in a capital sentencing violated the Eighth Amendment.

The Court, through Justice Powell who wrote the majority opinion, raised several constitutional objections to the admission of victim impact testimony. Powell argued first that such statements are unconstitutional because they are not in keeping with the requirement that the jury focus on the defendant “as an individual” and was more than likely to result in the imposition of the death penalty based on factors unknown to the defendant at the time of the crime. As a result, Powell argued, such statements were “wholly unrelated to the blameworthiness of a particular defendant.”

Second, Powell believed victim impact evidence should be inadmissible since “its only purpose [was] to inflame the jury and divert it from deciding a sentence based on the relevant evidence concerning the crime and the defendant,” ruling that “emotionally charged” victim impact evidence is inconsistent with the “reasoned” decision-making that the Constitution demands in death penalty cases. Indeed since 1976 the Court has made it clear that “any decision to impose the death sentence must be . . . based on reason rather than caprice or emotion.”

Powell then went on to express four more concerns that influenced the Court’s decision to bar victim impact statements from the sentencing phase of capital trials: first, he observed that a particular victim’s family may be more articulate than another victim’s family resulting in arbitrary decisions to impose the death penalty; second, he argued that a jury should base its decision to impose the death penalty on its own rather than other people’s perceptions of the victim’s character; third, he expressed the Court’s concern that any attempt by a defendant to rebut the victim impact testimony was likely to result in a “mini-trial” on the victim’s character, distracting the jury from its constitutionally required duty to determine an appropriate sentence for the defendant; and fourth, that “some victims may leave behind no family at all,” making it more likely that the death penalty was imposed in those cases where the victims of a capital crime happened to be blessed with large families.

V. South Carolina v. Gathers (1989)**

The Court Extends its Opinion to Cover Victim Impact Evidence Offered by the Prosecution

Two years after Booth, the Supreme Court clarified its opinion in South Carolina v. Gathers. Gathers was found guilty of murder and sentenced to death. His victim was a self-proclaimed minister who—at the time of the murder—had “several bags containing religious items” in his possession (“Bibles, rosary beads, plastic statues, olive oil, and a religious tract titled The Game Guy’s Prayer.”). At sentencing, the prosecution offered no new evidence, but included a characterization of the victim as a religious person, based on these items he had with him. To bring his point about the victim’s deep religious convictions home to the jury, the prosecutor read The Game Guy’s Prayer out loud to the jury. No evidence was presented at the trial to show that the defendant had read the prayer or seen the religious articles. The Court made it clear that the admission of victim impact evidence during the sentencing phase of a capital trial, would create “a constitutionally unacceptable risk that the jury [would] impose the death penalty in an arbitrary, and capricious manner, “reiterating what the Court had concluded in Booth that most capital defendants had no prior knowledge of “the information about the victim and the victim’s family typically contained in victim impact statements,” nor do most capital murderers “select their victims based on whether the murder will have an effect on anyone other than the person murdered.” Such information is “wholly unrelated” to the capital sentencing jury’s proper and constitutionally required focus upon the defendant’s “background and record, and the circumstances of the crime.”

The arguments presented by the Supreme Court in Booth and Gathers seem to fit Payne’s situation perfectly. If victim impact statements were unconstitutional in Booth

and Gathers, should they not be unconstitutional in Payne as well? If you were the judge, how would you decide?

VI. . Payne v. Tennessee(1991)***

The Court Reverses Itself

Chief Justice Rehnquist, who wrote for the majority, took issue with the assumption, implicit in Booth, that the only evidence that is relevant for a jury to consider during the sentencing phase of a capital trial is the evidence that directly relates to the blameworthiness of the defendant. The harm, Rehnquist argued, that a defendant brings about is equally relevant to a determination of a defendant's blameworthiness or as Rehnquist put it, "the assessment of harm caused by the defendant as a result of the crime charged has understandably been an important concern of the criminal law, both in determining the elements of the offense and in determining the appropriate punishment."

To bring his point home, Rehnquist observed that "two equally blameworthy criminal defendants may be guilty of different offenses solely because their acts cause differing amounts of harm. " So, borrowing an example from Justice Scalia, Rehnquist noted "if a bank robber aims his gun at a guard, pulls the trigger, and kills his target, he may be put to death. If the gun unexpectedly misfires [or jams], he may not. His moral guilt in both cases is identical, but his responsibility in the former is greater." Rehnquist concluded that victim impact evidence should be admissible as "simply another form or method of informing [the jury] about the specific harm caused by the crime in question."

Rehnquist also stressed that a jury cannot truly grasp what a defendant convicted of first-degree murder has done and the affect on the victims' family and the community unless it is also shown by means of victim impact evidence. "We are now of the view," he wrote, "that a state may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant."

The Chief Justice ended his opinion with a call for fairness in capital sentencing. If a jury is required to hear evidence that reveals the defendant in his or her capacity as a unique human being, it is unfair not to allow the prosecution to counter the defendant's mitigating evidence with evidence designed to give the jury a picture of the victim's individuality. Barring the prosecution "from either offering 'a glimpse of the life' that a defendant 'chose to extinguish,' or demonstrating the loss to the victim's family and to society [caused by] the defendant's homicide," Rehnquist wrote in closing, "unfairly weighted the scales in a capital trial," quoting the Supreme Court of Tennessee when it said:

"It is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of Defendant (as was done in this case), without limitation as to relevancy, but nothing may be said that bears upon the character of, or the harm imposed, upon the victims."

VII. You Be the Judge

So despite the prior opinions of the court in Booth and Gathers, the court is now arguing, through that just as the amount of harm one causes bears on the extent of one's "personal" responsibility, the grandmother's statement and prosecutor's remarks in Payne's case bear on the magnitude of harm that Payne caused and so ought to be admissible. What do you think? If you were a Judge in this case how would rule?

VIII. Rehnquist's Harm Argument

At first glance Rehnquist's "harm argument" seems reasonable. In criminal law it has always been true that to hold an individual responsible for committing a crime, it must be shown that the he or she committed a wrongful act and had a guilty mind. But the harms that are usually included in victim impact statements are not the sorts of harm that the criminal law identifies as grounds for finding a defendant guilty of a specific offense. To be found guilty of murder, it is necessary for a defendant to have killed someone. The mental suffering or anguish endured by a member of the victim's family is not traditionally among the harms contained within the definition of murder, so such harm has been irrelevant to the murder sentencing decision.

Nonetheless, a central problem in the theory of punishment has been to explain why we distinguish between the following scenarios:

(1) Alice comes home from work and discovers that John has left her. She drinks a few beers, loads John's shotgun, the one he used to use to go duck hunting, steps out onto the back porch, and fires the gun repeatedly until she feels less angry. She does damage to a bunch of trees, but nothing else.

(2) John comes home from work and discovers that Alice has left him. He drinks a few beers, loads his shotgun, the one he usually takes with him to go duck-hunting, steps out onto the back porch, and fires several rounds until he stops crying. The following day, the body of a homeless man, call him Henry, is discovered at the base of a tree. His shooting spree has damaged a bunch of trees and killed someone. Why do we punish John more severely than we punish Alice?

There is a sense, as Chief Justice Rehnquist suggests, in which Alice's and John's actions are the same, even though the consequences are different. Both behave recklessly and neither intend to kill another human being. The penal codes of most states, however, would permit John to be prosecuted for manslaughter and Alice to be charged at most with reckless conduct. Despite conventional wisdom that John "intended" much the same thing as Alice, he will face a more serious punishment. Judge Rehnquist appears to think punishment in these cases is assigned on the basis of the relative harm inflicted. But Rehnquist fails to note that two defendants, such as John and Alice or Rehnquist's bank robbers, receive different punishments because they have committed entirely different offenses. The person who commits the more severe offense (manslaughter in John's case or murder in Rehnquist's example) is punished more severely than the person who commits the lesser offense (reckless endangerment in Alice's case, attempted murder in Rehnquist's example). But now consider scenario (3).

(3) The facts are the same as in scenario (2), but instead of Henry, John kills Rabbi Ben Ezra Gold, a highly respected entomologist who was searching for a rare beetle in the wooded area behind John's house.

Is it also appropriate to draw a distinction by focusing on the identity of the person whom John inadvertently kills? Does the tenability of the distinction between scenarios (1) and (2) also support a distinction between scenarios (2) and (3)? Judge Rehnquist thinks so. But surely a human life whether it be the life of a great rabbi and world-renowned entomologist or that of a homeless person is still a human life. Those prosecuted and convicted of murder are punished for taking a human life, and not more or less severely based on the quality of that life. Is it less wrong, less bad, to kill

someone of lesser social standing? To believe so would seem to commit us to the view that one person's life was worth more than another's. But that cannot be right? Or can it? What do you think?

IX. Rehnquist's Fairness Argument

Rehnquist also argued that due to the fact that a defendant has the right to introduce evidence designed to inform juries of his unique individuality, it is only fair that the relatives and state prosecutors be able to counter such evidence with victim impact testimony.

In assessing Rehnquist's argument, it is helpful to recall why the Court has come around to the position that defendants in capital trials are permitted to introduce evidence of mitigating factors about their own good character unconstrained by the ordinary rules of evidence. Since 1977 the Supreme Court has held that a decision as serious as life or death for a defendant ought to be made only after an "exhaustive assessment of the defendant's character" and that the "fundamental respect for humanity underlying the Eighth Amendment" requires "that a capital defendant be free to introduce any aspect of his character or record as a basis for a sentence less than death." In making his argument, Rehnquist fails to identify which section of the U.S. Constitution requires that relatives and state prosecutors be permitted to introduce similar evidence about the murder victim. All he seems to say is that "basic fairness" requires some such quid pro quo.

X. Conclusion

The Victim's Rights Movement has gained in momentum in the last decade. By successfully lobbying for the use of victim impact statements in the judicial process the movement has ensured that victim harm is taken into account by juries in determining a defendant's sentence. Nearly every state and the District of Columbia, as well as the federal government, has provided for the inclusion of victim impact testimony in criminal proceedings. As Justice Scalia acknowledged in his dissent in Booth "recent years have seen an outpouring of popular concern for what has come to be known as "victims' rights"—a phrase that describes what its proponents feel is the failure of courts of justice to take into account in their sentencing decisions not only the factors mitigating the defendant's moral guilt, but also the amount of harm he has caused to innocent members of society."

It certainly takes no great leap of the imagination to see the value of finding ways for victims and their families to play a greater role in the process. Too often too narrow a focus on justice alone glosses over the equally important need for healing, reconciliation, and forgiveness. But while letting relatives of a murder victim to testify during the sentencing phase of a capital trial may help to bring "closure" to family members, it may also infringe upon the constitutional rights of the defendant.

Following Payne, the state with the help of families of murder victims, through victim impact testimony, are more likely to be able to exact the death penalty. If it is true that victims of crime cannot be said to have rights in the same way that the accused have rights, victim's "rights" may be a misnomer and the reputed "right" of a victim's family member to testify during the sentencing phase may be an all-too-thinly-disguised opportunity to visit personal revenge upon the accused. This last conclusion is a cause for some alarm, raising the disturbing question, embodied in the title of this essay: "Did the U.S. Supreme Court in Payne, put its imprimatur on justice or revenge?"

Notes

* Booth was a 5-4 decision with Justice Powell writing for the majority.

** Gathers was a 5-4 decision, with Justice Brennan delivering the opinion for the majority.

*** Payne was a 6-3 decision with Chief Justice Rehnquist writing the opinion for the majority.

Three Questions:

A. How would you propose to include the victims of crime more meaningfully in the judicial process without infringing upon the rights of defendants?

B. Under current procedure a defendant convicted of a capital crime is brought to a second hearing in which a separate jury considers whether to impose the death penalty based on a list of "aggravating circumstances" weighed against any mitigating factors that the defendant might introduce. The fact that a defendant acted under duress or was charged with his "first offense" might count as mitigating factors. The fact that he acted as a "hit man" or was already serving a sentence of life for a previous murder might count as an aggravating circumstance. It is widely accepted in many states to list the murder of a "police officer" as an aggravating circumstance which, if proven, would justify the imposition of the death penalty. If a jury is allowed to hear evidence pertaining to whether the victim was a police officer, why shouldn't death penalty juries also be permitted to hear evidence relating to the "value" of the victim to the community and the victim's family?

C. Why not let juries consider the age, sex, occupation, celebrity or notoriety of the victim during the sentencing phase of a death-penalty case?